Workers First Watch

JANUARY 2005

WORKERS INJURY
WILG
LAW&ADVOCACY GROUP

WILG President's Message

WILG has much to be proud of, given all of our combined efforts over the last year. I would like to review here a few of WILG's accomplishments, look at our promising future, and enlist your advice and assistance.

Please feel free to contact me at any time. My law firm phone number and my personal email address are listed at the end of this article. (*See* page 3)

10th Anniversary, Labor, and Coalitions

Len Jernigan, Past President (NC) and Mike Rucka, Past Chair (CA) are doing a great job organizing our 10th Anniversary Conference set for April 8-12, 2005 in Washington, DC.

John Boyd, Past President (MO) and the Labor Committee continue to build on three successful WILG "Labor Summits". Previous sessions brought together state and national labor leaders, as well as academics, with WILG's directors. Continued dialogue and mutual initiatives with labor around workers' compensation issues are essential. Our next joint summit is tentatively scheduled to be held in conjunction with the April 2005 conference in DC.

Bob DeRose, Secretary (OH) is expanding our coalition-building efforts through his work with IWJ-Interfaith Worker Justice (formerly the National Interfaith Committee for Worker Justice). This group and its multiple affiliates in many States link with attorneys on political and legal issues. (*See* story on p.17)

Speaking of coalition building, Deb Kohl, President-Elect (MA) and I attended a symposium in September on immigrant workers' health and safety, which was co-sponsored by NIOSH and the University of Massachusetts at Lowell. Over fifty organizations were present, representing the health and safety movement, labor, academics, and attorneys. "Immigrant Worker Rights Centers" is an important and growing movement in the U.S. (*See* story in the April 2005 issue of WFW.)

In October, President-Elect Kohl went to Utah and addressed the injured workers bar there. Deb renewed a number of old contacts and inspired some new interest in WILG. Her efforts immediately

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is the national non-profit membership organization dedicated to representing the interests of millions of workers and their families who, each year, suffer the consequences of workplace injuries and illnesses.

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inspired several new members to join our cause.

AMA Guides, Medicare, and Education

A new AMA Guides Committee has been formed, along with a new ListServe dedicated to questions and comments about the AMA Guides. Rick Wooley (CA) will chair the committee and the ListServe began on 12/1/04. This development is a direct result of the joint WILG-CAAA effort in holding the AMA Guides Seminars in Oakland and Los Angeles in October 2004.

Steve Embry, Past President (CT); Sue Ann Howard, State Affairs Chair (WV); Ched Jennings, Vice President for Media (KY); and Peggy Sugarman, CAAA Consultant (CA) provided some relief to CAAA's best and brightest facing the AMA Guides for the first time. The critical approach to the Guides was presented with wisdom and skill, and was very well received by CAAA members. (*See* story on p.18.)

The Medicare Task Force, through the leadership of Kathleen Glancy (NC), Bob Taren (CA), and Bob DeRose (OH) remains vigilant and involved in the drafting of any new legislation/regulation. Ed Romano, Vice President (NY) is bringing new ideas to Membership Development. Paul McAndrew, Vice President for Education (IA) and Lisa Tumminelli, Chair of the Workers' Comp Section at ATLA (NY) continue to organize first-rate educational events.

WILG Works On Future Challenges

Even as WILG grows and matures as an organization, the challenges continue to mount.

- From a relatively strong position in the 1950's, the trade union movement today has been structurally weakened.
- Near corporate hegemony and increasing pressure from globalization create a social environment that seeks to ratchet down labor costs while demeaning workers and destroying Labor's hard-fought gains.
- Attacks on attorneys are part and parcel of the attacks on workers.
- Attempts to eliminate the adversarial process in workers' compensation are often, in fact, attempts to eliminate the worker's right to fair and adequate representation.

As always, we are fighting back– only now, more than before. From assisting each of us in our daily struggles on behalf of workers –at Boards and Courts across the country– to effective coalition-building efforts and the production of seminars and publications, the Workers Injury Law&Advocacy Group (WILG) marches forward into its second decade: proud and strong.

Be a Part of Us at Workers First Watch

Workers First Watch has always been WILG's main vehicle for getting our message out to our members, friends, and allies. Under the extraordinary editorship of Jay Causey, Past President (WA), over the years WFW has become a unique voice for injured workers' rights in America.

WFW will continue under the sage direction of a talented group. Beginning with the next issue – April 2005– WILG will have completed formation of a WFW Editorial Board. Tom Domer (WI) now serves as Chair of the new Board and will bring his considerable talents (Ph.D. in History, legal practitioner, and law school faculty member at Marquette) to the position. Jay, most deserving of his well-earned respite, now assists us on the new WFW Editorial Board as Executive Editor. Several additional Members will be asked to join the Editorial Board in the near future.

If you are interested in making a very real contribution to the workers' comp field, are willing to make suggestions as to future articles and authors, and are able to contribute an article or review twice a year, please contact me directly (*see* the information below.)

New Executive Director & WILG Horizons

Randall Scott, our new WILG Executive Director as of August 1st, is now serving as the managing editor of WFW. Scott has also solidified the administrative and financial aspects of our operation in Washington, DC. The enhanced website and the Eclips/TrialSmith service are just a sampling of what his broad experience with trade associations and his legal training bring to WILG. (*See* story on page 21.)

I am confident that WILG–*your* non-profit association, the **W**orkers **I**njury **L**aw&Advocacy **G**roup–and WFW will continue the tradition of insightful analysis, quality writing, educational contributions, and forceful and well-reasoned representation of your interests in the struggle for injured workers–in the law, in the political and regulatory arenas, and with our coalition partners.

Todd McFarren, Esq.*
President of WILG

**Mr. McFarren took office as President of WILG on July 3, 2004. He is the editor of "Workplace Injury Litigation Book", published by Lawyers & Judges, Inc. and is a partner at Rucka, O'Boyle, Lombardo & McKenna. He may be reached in Watsonville, CA —a city he served for two terms as its Mayor— at 831-728-4200 or tmcfarren@rolmlaw.com.*

Commentary

After Eight Decades, Are The Original Purposes of WC Insurance Still Served?

by John B. Boyd, Esq.*

Introduction

Over the first two decades of the Twentieth Century, the States individually adopted separate workers' compensation insurance programs designed to supplant the common law remedies and provide medical care and wage loss replacement benefits without regard to fault. Employers were granted immunity from civil liability, where juries could determine the amount of damages to award for unsafe workplaces that caused injury or death. Employees were promised prompt and timely benefits so as to be capable of sustaining themselves and their families while recuperating from accidental injuries.

The true cost of occupational injuries would be spread amongst industry. No longer would employees or their families be faced with the prospect of withstanding the costs of such accidental injuries.

Since the early 1980's, efforts took root to systematically change this fundamental balance of promises so as to create political power in employers, insurers, and their trade associations. Leaders for these special interest groups seized the opportunity to develop their power through a number of methods. By exploiting the concepts of fraud, abuse, and the ever-increasing costs of insurance, they soon convinced their memberships with cries of "crisis".

Workers were often blamed for the perceived crisis, and television 'news' programs aided those groups by broadcasting stories of actual employee fraud, wholly avoiding the lack of evidence that such fraud was endemic, rather than incidental and anecdotal. Employees were intimidated and were placed on the defensive. The injured workers were failing to report occupational injuries and thus were avoiding obtaining necessary medical treatment. If they had health insurance, they were subsidizing the cost of their occupational injury with deductibles, co-pays, and lost time from work without pay.

The changing political landscape created by term limits on the length of time an assemblyman, representative, or senator could serve in a State's legislature had the unintended consequences of further empowering the industry trade associations and causing a further shift in this balance of promises. The perpetuation of the imbalance of power created by the last two decades of industry-driven reform has resulted in a need for the United States to consider implementation of minimum standards of coverage for workers who fall ill or are injured as a consequence of their employment.

The perpetuation of the imbalance of power created by the last two decades of industry-driven reform has resulted in a need for the United States to consider implementation of minimum standards of coverage for workers who fall ill or are injured as a consequence of their employment.

Such minimum standards should not supplant a federal system for

that of a State program, but instead, should provide safeguards to workers in keeping with the original intention of workers' compensation legislation. By requiring States to adhere to such standards, America's industry would again be fully responsible for the costs of occupational injury and disease. Transfer of the costs of those injuries to other State and federal programs, such as Medicare and Medicaid, would be minimized.

Recent System Failure and Abuse

A Texas meat processing plant worker pulled brains out of cow carcasses for a living. While engaged in this occupation, she lacerated her hand. Medical treatment to stop the bleeding and avoid infection was denied until she signed a waiver promising not to sue her employer for the work-related injury: a release that her company's nurse required her to sign with her opposite hand. She had signed four similar waivers previously. The employer then authorized and paid for the medical treatment, but avoided all further compensation benefits for the occupational accident.[1]

Texas law does not force companies to carry workers' compensation insurance, but those that do are shielded from nearly all negligence lawsuits. The significant number of companies without such insurance have instead relied upon post-injury waivers, such as this example, in order to avoid traditional compensation benefits.

Despite this apparent one-sided system, companies are calling for more legislative changes designed to further reduce employer costs. Doctors are refusing to treat injured workers because of miserly medical fee schedules, yet insurance premiums are continuing to rise.[2]

Insurance companies are fighting for significant rate hikes in premiums, such as in North Carolina where total claims are continuing to drop, medical costs are stable, and indemnity payments continue to fall. North Carolina is the 10th largest workers' compensation system in the United States, and has coverage for over 3.5 million workers. Annual claims have fallen each year, from a bit over 86,000 in 1995 to 60,458 in 2003, and the number is expected to decline to 58,000 in 2004.[3]

California elected a movie actor as its governor after firing another in a now famous initiative vote in early 2004, based in part upon the high cost of workers' compensation coverage, which was made a central campaign issue. Significant legislative changes have been enacted to either eliminate or reduce access to the traditional coverage of workers' compensation, and to cap historically uncapped benefits once access has been gained.

"Injured workers are losing their homes, their life savings, their dignity, and in many cases their lives.The ultimate insult added to their injuries is that insurance

companies are pocketing the billions of dollars in savings from the medical care and disability compensation that has been taken from injured workers on the belief it would lower premiums for California businesses."[4]

The widow of an injured worker who was refused medical treatment has placed the blame for her husband's death squarely on the shoulders of California's workers' compensation system. Jamie Tracey, widow of David Michael Tracey, wrote to Governor Schwarzenegger and legislators on August 2, 2004: "My husband deserved respect, treatment and understanding. He got none of the above. Numerous letters were written by our attorneys at the urging of my husband's doctors for immediate approval of David's deteriorating condition. I made call after call. We had to wait, wait, wait. We were continuously ignored."

A father of four children, Tracey had worked for the same employer for 17 years prior to his occupational injury. "The [company's] attorneys never gave credence to the urgency of attention posed by our doctors and attorneys. As a matter of fact, we were completely ignored," Ms. Tracey wrote. "The [governor's April] guarantee of not needing a lawyer to get a doctor was a lie. David felt his future was hopeless, and with the pain getting worse, his future looked hopeless." David Tracey took his own life to end his pain.[5]

The Florida Legislature passed sweeping 'reforms' in 2003, fueled by increased employer cost of insurance coverage. Insurers stopped writing policies, small businesses couldn't find coverage, yet premiums continued to "shoot through the roof" while Florida's workers received unusually meager benefits. Critics of these reforms point to reliance upon flawed data from National Council of Compensation Insurance, an entity that provides statistical rating data for 38 states and over 900 insurance companies.[6]

The effect of the flawed data in Florida resulted in legislation reducing access and coverage to workers' compensation for the injured and their survivors, but no significant regulation or accountability of what may be the most significant cost driver of higher premiums.

Federal System versus States' System

Why have workers' compensation programs in the United States remained the province of State governments, when since 1935, national welfare related programs became popular? The Social Security Act became law in 1935, with the concept of total disability being added in 1956. Under President Richard Nixon, the Occupational Safety and Health Act and the National Commission on State Workmen's Compensation Laws came into being in the 1970's. This notion of a national method of insuring workplace safety and a security system for totally disabled citizens, was given life under Nixon.

The National Commission issued its bi-partisan report in July, 1972, and called for the States to evaluate their programs and implement sixteen essential recommendations in order for the States to achieve a modern program that provided coverage for work-related injuries and diseases.[7] In the years that have followed, no States have met all of these recommendations permanently. Many States that implemented some of the essential recommendations have seen these rescinded.[8]

Christopher Howard[9] studied this very issue of why the States have continued to wrestle with the maze of different laws, instead of one federalized system. His research led him to conclude that: "workers' compensation was not left at the state level because it was functioning well or because policy makers wanted to encourage flexibility and innovation. Instead, the program became entrenched politically and riddled with problems. . . . In effect, workers' compensation laws in the states created a 'preempted policy space,' one that remained unusually resilient to national involvement."[10]

This lack of national involvement noted by Howard was the epilogue, if not the epitaph, on the efforts of the National Commission. Although the commission members were unanimous in recognizing that "congressional intervention may be necessary to bring about the reforms essential to survival of the state workmen's compensation system", they also believed that the "threat of or, if necessary, the enactment of Federal mandates will remove from each State the main barrier to effective workmen's compensation reform: the fear that compensation costs may drive employers to move away to markets where protection for disabled workers is inadequate but less expensive."[11]

Despite these warnings, no significant or appreciable efforts have been undertaken over the past 32 years to make good on the threat of federal intervention.

Criteria for Benefits Turned from Adequacy to Cost

The focus over three decades ago was to find methods to ensure that the States' workers' compensation

programs were enhanced so as to provide American workers with adequate and equitable coverages in order for the programs to fulfill their potential. There was uniform agreement by the National Commission's members that the States' systems were inadequately providing the benefits as originally intended when the laws were first written at the turn of the 20th Century.

Along the way, beginning with the 1980's, the emphasis shifted to employer costs and employee abuses, whether real or perceived. Lost along the way was the appreciation of the impact of the work-related injury and disease on the employees and their families.

In the 1980's and early 1990's, cost-reduction reform had touched nearly all of the States. The fuel that gave rise to this wildfire was the meteoric rise in premiums charged by insurers during this era. Employees' remedies were abrogated or reduced; benefits were, in a phrase, 'cut to the bone.'

In the past few years, further benefit cuts have been attempted – some successfully– under the aegis of job creation and retention. A competition quickly evolved between the States' legislatures to keep businesses from closing or moving across state lines. This was largely evidenced by the driving down of traditional benefits through elimination or reduction.

Criticism of this spiraling trend has surfaced. Professor Martha T. McCluskey analyzed the evolution of workplace injuries, occupational disease, cumulative trauma, soft-tissue, and mental stress claims. She argued that restricting compensation for impairments from these claims simply redistributes the cost of these occupationally-caused conditions from industry to society, and to the worker.

The competing needs of jobs and appropriate benefits seem to be the focused debate, yet McCluskey argues that it should never be the question. Rather, the debate over costs should instead focus upon moral and political questions about whether the system is working as designed, and whether the original bargain's balance of power between the workers and employers is appropriate.[12]

> **It is time to study, reconsider, and fix the problems facing both employers and employees. It is time to revisit the 1972 essential recommendations, update them, and then, to secure their implementation in the States.**

Northeastern University School of Law Dean Emily Spieler observed in 1994 that a second National Commission may need to be convened in order "to explore exploding costs, increasing interstate viability, persistent high injury rates, and the political quagmire of federal-state relations."[13] Yet despite Spieler's and McCluskey's insightful writings, the focus has never returned to the social analysis called for by both.

Why hasn't the debate returned to an examination of whether the system is working as designed? A recent effort has been undertaken by The National Academy of Social Insurance (NASI).[14] NASI reviewed studies undertaken in several states, and reported: "we have a social policy interest in preventing workers and their families from falling into destitution as a result of work injuries. When the National Commission on State Workmen's Compensation Laws issued its report in 1972, maximum weekly benefits in many states were so low that full-time workers who had earned reasonable wages could fall into poverty while receiving workers' compensation benefits.... [T]he average worker's compensation weekly benefit for temporary total disability (TTD) rose from about 80 percent of the poverty level for a family of four in 1972 to around 110 percent in 1998. However, substantial interstate variation remains; and, average TTD benefits in 16 states still were below the poverty level in 1998."[15]

Although released nearly eleven months prior to this article, NASI's call to further analyze and, where necessary, improve benefit levels to avoid perpetuation of poverty or worse, has gained no appreciable traction.

One significant dynamic that impedes this analysis and debate as framed by Spieler, McCluskey, and NASI are the political realities that confront the States. The economic downturn in 2000, the effect of terrorism on the United States' economy post-September 11, 2001, and the inability of its economy to significantly rebound during the first three and one-half years of the George W. Bush presidency, have forced the States to compete with one another to attract and retain businesses within their boundaries. The loss or threat of loss of jobs to other countries has resulted in legislation to promote the rights of corporations over those who can least afford to underwrite the cost of the nation's economic recovery.

Conclusion

Term limits on the length of time that State officials can serve are another significant factor in perpetuating the idea that cost reductions are necessary and must come at the expense of workers' benefits. To grasp and retain institutional memory of the forces that have shaped the first 80 years of workers' compensation history requires an incredible investment of time by an elected official. Prior to term limits, such knowledge was acquired over a career of public service.

Today, the education must come quickly, so the natural consequence has been that trade associations and political action groups have become the fountain of self-perpetuating, issue-specific knowledge for their supported candidates. More reliance is thus placed upon the lobbyist, who in turn has become more powerful. Whichever group retains control of the State legislature can set its agenda much more easily than before term limits were implemented.

Solving problems facing business and labor has become a disincentive; instead, there is a vested interest in maintaining a "crisis" to retain membership in the associations, and to perpetuate that power and influence.

To respond to these counter-intuitive impediments, it is time to revisit the concept of the adequacy of workers' compensation. It is time to study, reconsider, and fix the problems facing both employers and employees. **It is time to revisit the 1972 essential recommendations, update them, and then, to secure their implementation in the States.** The solution is not a federal program to supplant each State's programs.

One method to return the focus to where it should be, is to threaten the loss of immunity from civil liability for workplace injuries. If the updated recommendations are not implemented by a State within a reasonable time limit, then an action in federal court –for which the immunity is unavailable– may be the impetus to stimulate the enactment and/or implementation of minimum standards.

In other words, if the newer national recommendations become standards to be incorporated into a State-specific program, then employers are protected and they maintain their immunity from civil litigation. This protection stems from the homogenization of costs for businesses in Maine to New Mexico. If all businesses are required to offer similar coverages, the States' competition for businesses may focus upon more appropriate issues, rather than reduction in benefits to injured workers.

Workers and their surviving family members cannot continue to underwrite the economic recovery of a State or the nation through reduction in basic benefits that were contemplated over eighty years ago. We need to refocus the debate from the "politics of power" to the social science that analyzes the efficacy of the system. Otherwise, it may be time to decide whether the concept of workers' compensation still operates to serve the purposes that were originally intended.

**Mr. Boyd is the Immediate Past President of WILG, and this article is an adaption of his paper presented to the Work Congress 6 in Rome, Italy, in December 2004. He may be reached at Boyd & Kenter, PC in Kansas City, MO at 816-471-4511 or jbboyd@boydkenterlaw.com.*

1. The Houston Chronicle http://www.houstonchronicle.com, L.M. Sixel, "Companies forcing injured workers to sign waivers before treatment", November 1, 2003.

2. San Antonio Express-News, Aissatou Sidime, "Lawmakers to revisit workers' comp issue", January 17, 2004.

3. Triangle Business Journal, Lee Weisbecker, "Workers' comp ignites fight", October 31, 2003.

4. California Applicant Attorneys Association, Injured Worker Horror Stories, http://www.caaa.org

5. California Applicant Attorneys Association, Injured Worker Horror Stories http://www.caaa.org

6. Orlando Business Journal, Noelle Haner-Dorr, "Study: Flawed numbers used in comp law," June 16, 2003.

7. National Commission on State Workmen's Compensation Laws, John F. Burton, Jr., Chairman, July 31, 1972, Library of Congress Card Catalog No. 72-600195, U.S. Government Printing Office, Washington, DC 20402.

8. The essential recommendations are: 1) Workers' compensation coverage becomes compulsory rather than elective; 2) Employers not be exempted from workers' compensation because of the number of their employees; 3) Farm workers, casual and domestic workers, and all government workers be subject to coverage; 4) Employee should be given the choice of filing a claim in the state where hired, where employment was principally localized, or where the injury occurred; 5) "Accident" requirement be dropped as a test for compensability, and that the states provide full coverage for work-related diseases; 6) Waiting periods for temporary-total disability compensation be no more than 3 days, and retroactively paid in no more than 14 days; 7) By 1981, the maximum weekly compensation rate for temporary-total disability would be at least 200 percent of the state's average weekly wage; 8) Cash benefits for temporary-total disability be at least two-thirds of the worker's gross weekly wage, transitioning to 80% of the spendable weekly earnings; 9) Permanent total disability be defined as is used in most states, without a cap upon the duration or dollar amount; 10) Social Security benefits for total disability and death be reduced in the presence of workers' compensation benefits; 11) Death benefits should be at a minimum of 50% of the state's average weekly wage; should equal two-thirds of the gross weekly wage, transitioning over time to 80% of the spendable earnings, up to a

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A Practicum

WC Ethics: New and Revised Rules

by Thomas M. Domer, Esq.*

Workers' compensation lawyers on both sides of the aisle face difficult ethical issues daily. For lawyers representing injured workers, regulated diminished attorney fees compel a volume practice with attendant pressures on diligence, communication with clients, and even competence. For lawyers representing insurance carriers and employers, the compressed hourly rates from competition require a substantial annual hourly output to earn a living. As succinctly stated in the Preamble to the Model Rules of Professional Conduct, which outline a lawyer's responsibilities,

"Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."

The new and revised rules and comments provide some guidance on how to walk this tightrope.

The American Bar Association adopted new rules at meetings in Summer 2002. The proposed changes clarify some of the old rules and include substantive changes and completely new rules. For five years from 1997 until 2002, the ABA Commission on Evaluation of the Rules of Professional Conduct (the "Ethics 2000" Commission) studied and developed proposed changes to the model rules, which had been adopted nearly 20 years earlier by the ABA. Most States formed committees to evaluate the new rules, and most of the new rules will shortly become part of the law governing the practice of law in most States. Some States will doubtless modify some of the rules as they have in the past.

Many of the changes are intended as clarification of the current rules and, for workers' compensation practitioners, the changes are both instructive and persuasive the way we currently practice.

In general, the new rules reflect a continued expansion of the consumer-orientation that has marked the development of attorney disciplinary matters for decades. Most of the changes are useful in navigating the morass of regulations within which lawyers practice. Some recurring practical problems are addressed and confusing language is improved.

I. NEW RULES

A. Preamble

Language was added to the Preamble regarding the duty of attorneys to assist those without economic means to gain access to the legal system. This language is to be read in conjunction with Rule 6.1 of Pro Bono, discussed later.

Workers' Compensation Practice Implication: Call from indigent client whose compensation claim is denied and only issue is unpaid medicals in jurisdiction where attorneys receive no contingent fee on payment of medical expenses. Lawyer's duty?

B. Scope

Language in this section was changed to recognize that the rules are generally admissible in order to show malpractice, although "not necessarily" in every situation.

Workers' Compensation Practice Implication: Violation of the rules may be admissible in your jurisdiction as an indication of malpractice if a client claims you violated the Model Rules of Professional Conduct.

C. Terminology

The definitions were moved from the Preamble to a new rule (1.0). Some definitions were altered and some were added, including "Confirmed in writing", "informed consent", and "screened", all of which relate to substantive changes on the rules regarding resolving conflicts.

Workers' Compensation Practice Implication: Review and modify your firm's conflict prevention system and waiver forms to reflect added definitions. Although the comments to the Rules do not add obligations to the Rule, they provide guidance for practicing in compliance with the rules. Specifically with regard to the requirement that a lawyer obtain the "Informed Consent" of a client before pursuing a particular course of conduct, the comments indicate:

"The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives".

In a busy practice, the likelihood of adhering to the advisory comment in every circumstance is remote at best. Telling each client the material advantages and disadvantages of attending or not attending a doctor's appointment, of accepting or refusing a job offer, or a medical treatment regimen — much less the impact of the client's decisions in other arenas (Social Security Disability, Unemployment Compensation, EEOC claims, union and pension disputes, conflicts from the group health insurance carriers, COBRA, etc.)— is difficult, indeed.

However, if a lawyer does not provide information adequate for the client to reach informed consent, the comments also suggest, "A lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved…".

Certainly most workers' compensation clients on the injured worker's side are inexperienced in legal matters generally, which would require the attorney's explanation of risks and benefits for each substantial decision in the case.

This informed consent requirement is especially crucial at the time of settlement or compromise of a claim. Many clients do not understand the complete implications of a compromise:

- foreclosing future medical expenses;
- future claims for medical treatment;
- temporary total and permanent partial disability;
- loss of earning capacity;
- vocational rehabilitation, etc.

Since in many cases the discussion occurs on the courthouse steps or actually in the hearing room, the requirement to take additional time to provide informed consent is burdensome, but it must be met.

D. New Rule 1.18 – Regarding Duties to Prospective Clients

Describes the duties to maintain confidentiality of information obtained from *prospective* clients and circumstances where such contacts create conflicts. The rule discusses the means of avoiding and the means of remedying these conflicts.

Workers' Compensation Practice Implication: Control and keep records of initial intake discussions with prospective clients. Take and distribute only the information necessary prior to declining work, in order to avoid a later disqualification.

The comments suggest that a lawyer's discussions with a prospective client usually are limited in time and depth and therefore prospective clients receive *some* but not all the protection afforded clients. Sometimes it is necessary for a prospective client to reveal information to the lawyer during an initial consultation before the decision about forming a client-lawyer relationship is made. The lawyer cannot use that information in a related matter in which that person's interests are materially adverse unless the dismissed prospective client gives informed consent confirmed in writing.

Therefore, the comments suggest that the initial interview should be limited to obtain only such information as reasonably appears necessary. (For example, in a dependent's death benefits case where the decedent has two ex-wives, each of whom had children, where the dependents are competing for a limited pot of money: Information obtained from one or both during an innocent

"intake" call could disqualify the lawyer from the whole case.)

E. ABA Rule 4.4 – Respect for Rights of Third Persons

The new subsection (B) addresses an old problem: what do you do when you get information from the other side that the other side did not intend to send to you? The new rule and the comments instruct the lawyer to "promptly notify the sender". However, some unanswered questions remain. Can the lawyer tell the client about the mis-sent information? Can the lawyer use the information to advantage? How about returning the document, or even keeping a copy?

Workers' Compensation Practice Implication: From time to time, a "bps" sent from respondent's counsel, or injured worker's counsel, to the client is conveyed to the other side erroneously (whether by e-mail, fax, or U.S. Postal Service). If either party addresses the case value or the downside risks of particular testimony and the other side receives this information, it obviously has a substantial impact on the way in which the case is tried or compromised.

This rule simply requires the lawyer receiving the information to contact the sender, but provides no instruction on what to do with the information obtained. Some lawyers, preferring to take the high road, will discontinue reading the document or transmission upon learning of its origin. It would appear that the provisions of 1.4 (Communication with Client) are also triggered for the errant sender, requiring a lawyer to contact his own client indicating that he or she has erroneously provided confidential information to the other side.

The rule and the comments are a substantial departure from the old rule. Formerly, ABA Formal Opinion 92-368 provides that an attorney who receives information mistakenly has an ethical duty to return the information to opposing counsel. Moreover, the receiving attorney should attempt to return the information unopened and without revealing the information.

The Opinion further notes that the law of good sense supports the conclusion that receiving-counsel's obligations are to avoid reviewing the materials, notify the sending counsel, and abide by sending counsel's wishes as to how to treat the disposition of the confidential materials. No such requirement exists in the new rules and comments. The rule simply requires the lawyer to "promptly notify the sender" in order to permit that person to take protective measures. Note that "document" includes e-mail or other electronic modes of transmission. While the comments indicate that some lawyers may choose to return a document unread, it further notes that the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer.

F. ABA Rule 6.5 – Non-Profit and Court-Annexed Limited Legal Services Programs

The Rule indicates that a lawyer under the auspices of non-profit organization —who provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continued representation— is subject to the conflict of interest rules and duties to former clients rules only if the lawyer knows the representation of the client will involve a conflict of interest (and the same applies to lawyers in the same firm).

Workers' Compensation Practice Implication: This potentially affects lawyers who do workers' compensation claims through union and other group and pre-paid legal services programs and provides conflict protection and duties to former clients' protection for the lawyer. The comments contemplate programs such as legal advice hotlines, "advice only" clinic, and other circumstances where it is not feasible for a lawyer to systematically screen for conflicts of interest. The comments note that after commencing a short-term limited representation if the lawyer undertakes to represent the client in the matter on an ongoing basis, then the rules involving conflict, duties to former clients, and imputation of conflict to firm members apply.

II. SELECTED CHANGED RULES

ABA Rule 1.2 – Scope of Representation and Allocation Between Client and Lawyer

This section was renamed. The prior comment distinguished between objectives of the representation and means to accomplish them, which was confusing and conflicting and suggested a required consultation regarding both objectives and means, and that the lawyer was in control regarding the means. Now the rule includes a recognition of implied authority for the attorney to act on the client's behalf (without consultation if authorized at the outset) and also cross-references §1.4 Communication with Client. Note that the rule states: "A lawyer shall abide by a client's decision whether to settle a matter".

Workers' Compensation Practice Implication: The Retainer Agreement should provide with specificity what the lawyer will do and will not do, what the client will do and pay, and when representation will end if there will be a forewarning regarding withdrawal. See also Rule 1.16 Declining or Terminating Representation.

Since many workers' compensation claims involve severance agreements, discrimination claims, and employment waivers, the Retainer Agreement should specifically address whether or not the worker's compensation attorney will be representing a client in any of the severance issues, including:

- disability discrimination claims;
- Americans With Disabilities Act; and,
- the panoply of issues surrounding termination from employment (eligibility for Unemployment Compensation, pension entitlement, OSHA violations, and NRLA violations).

Additionally, many initial administrative hearings contain appeal procedures as a matter of right. Discussing up front when and under what work conditions the lawyer will discontinue representation is significant.

The comments note that although the rule affords a lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. For example, perhaps the lawyer specifically indicates that no advice will be given regarding other peripheral areas of representation (ADA, FMLA, OSHA, NLRA, ADEA, Title 7, ERISA, etc.) and that the representation can be limited to the workers' compensation aspects of the injury.

The commentary to the scope of representation notes that the agreements must accord with the Rules of Professional Conduct such that the client may not be asked to agree to representation so limited in scope as to violate Rule 1.5, which is the competency requirement. If competent workers' compensation representation would require basic knowledge of the other areas, and the lawyer has inadequate knowledge about those other areas, a retainer specifically excluding other legal remedies may not avoid an ethical problem. As suggested in the comments: "Although an agreement for a limited representation does not exempt from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, and thoroughness in preparation reasonably necessary for the representation under Rule 1.1 (Competency)".

ABA Rule 1.4 – Communication With Client

The changes to the rules emphasize promptness in a proactive attempt to anticipate communication problems. Communication regarding the "means" by which client's objectives are to be achieved is also required.

Workers' Compensation Practice Implication: The burdens of a busy workers' compensation practice place a premium on supplying the client with sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued. Keeping the client informed about why the attorney is obtaining materials (personnel files, medical records, accident reports, medical treatises) is a necessary component of this ethical requirement.

The adequacy of communication is most significant when a demand to resolve is to be made by the applicant or offer made by the respondent. A lawyer who receives from opposing counsel an offer of settlement *must* promptly inform the client of the offer or demand unless the client has previously indicated that the proposal will be acceptable or unacceptable. The comments note that the duty of a lawyer is to routinely require consultation prior to taking action to the extent necessary for the client to be reasonably informed.

Returning Telephone Calls: The comments note that when a client makes a reasonable request for information, the Rule requires prompt compliance with the request and if a prompt response is not feasible, the lawyer or a staff member acknowledge receipt of the request and advise the client when a response may be expected. The comment is straightforward "Client telephone calls should be promptly returned or acknowledged". ("He never returns my telephone calls" is likely the number one complaint to lawyer regulation boards.)

ABA Rule 1.5 – Fees

Charging an excessive fee is subject to discipline. The degree of risk assumed by the lawyer and the relative degree of sophistication of the lawyer and the client was considered by the Ethics 2000 Commission but rejected. The reasonableness rule applies to contingency fees, but alternative fee proposals are not required (e.g., hourly alternatives). An attack on a percentage of fees as excessive is a likely future concern. Charges for costs such as copies, fax, telephone, postage, mileage, etc. must reflect the actual costs incurred and not estimates.

"Referred Cases": Remember the need for client disclosure and authorization for referral fee divisions. Fee divisions under 1.5(e)(1) requires "joint responsibility" when there is a shared contingency fee. This joint responsibility is defined in the comment to mean "financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to another lawyer whom the referring lawyer believes is competent to handle the matter".

Workers' Compensation Practice Implication: Many lawyers representing injured workers take workers' compensation referrals and provide a fee division with the referring attorney. The changed rule suggests that more than a mere casual acquaintance with the referral source should be required. Note also their estimated costs (faxes, copies, long distance telephone, etc.) without actual substantiation can be challenged.

ABA Rule 1.6 – Confidentiality of Information

The revised rule permits revealing information reasonably necessary to prevent reasonably certain death or substantial bodily harm. Some states have a mandatory disclosure requirement. The new rule suggests that it is all right to consult an ethics advisor. Note that the lawyer's requirement of candor to the tribunal (Rule 3.3) still trumps Rule 1.6. Eighteen paragraphs of comments suggest the sanctity and delicacy of preserving client confidential information.

Workers' Compensation Practice Implication: Some jurisdictions require administrative law judge approval for a compromise settlement. Where the paper documents do not reveal any bona fide dispute, but the lawyer may be in possession of some confidential information, the duty of the candor to the tribunal may trump client confidentiality (criminal record, sexual assault, DUI, etc.) as a potential basis to compromise the claim, requiring disclosure to the ALJ in order to obtain ALJ approval of a compromise settlement. Note also: Client's threat to "kill that adjuster" may prompt your warning to adversary.

ABA Rule 1.7 – Conflict of Interest: Current Client

This section is completely reorganized and renamed with a revised commentary. The revised rule defines conflict based on "direct adversity" (client vs. client in litigation or transaction) distinguished from those conflicts based upon "material limitations" (the lawyer's own interests are limited by responsibilities to other clients). "Informed consent" is substituted for the prior language "consent upon consultation". The requirement of a written instrument is satisfied by a letter confirming the oral agreement rather than the required signed waiver.

Workers' Compensation Practice Implication: Some lawyers who continue to practice workers' compensation on both sides (insurance companies, employers, *and* injured workers) routinely ran into material limitation conflicts because the positions they took in one case could adversely affect their other clients in other cases. This rule seems to narrow the scope of that conflict, allowing the lawyer to represent a potentially conflicted client and only declining representation where there is a direct adversity.

The comments discuss "positional conflicts" and describe that some inconsistent positions still may pose trouble (for example, a worker's compensation lawyer arguing that a certain job requires an elevated wage rate while in another case the same lawyer representing the insurance company would take an adverse position).

The comments indicate "ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients." The mere fact that advocating a legal position on behalf of a client might create precedent adverse to the interest of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a "significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case."

The comments suggest disqualification of adverse lawyers who are close family members (unless client gives informed consent). The prohibition is not imputed to other lawyers in the firm.

The comments define three non-consentable conflicts:

- first, no multiple clients without a reasonable belief in the lawyer's ability to afford diligent representation to each;
- second, no representation that is prohibited by law; and,
- third, no adverse parties in litigation.

Comments discuss the prospective waiver of future conflicts and the extent to which the client reasonably understands the material risk that a waiver entails.

Comments also discuss withdrawal procedures needed to remedy a failed joint representation.

Workers' Compensation Implication: The still thorny issue of whether a lawyer can represent an injured worker and the group carrier maintaining a medical expense lien remains. The implications of dual representation requires a thorough explanation of the risks and rewards of the dual representation.

The comments note that a common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. (In workers' compensation, for example, an applicant and a subrogated group insurance carrier seeking to recover monies paid from the worker's compensation carrier in a denied claim.)

The dangers are significant, however, and the comments note this minefield: "A lawyer should be mindful that if the common representation fails because the potentially adverse interest cannot be reconciled, the result can be additional costs, embarrassment, and recrimination. Ordinarily the lawyer will be forced to withdraw from representing all of the clients if the common representation fails."

ABA Rule 1.8 – Conflict of Interests; Current Client: Specific Rules

The rule discusses that informed consent requires an explanation of the essential terms and the lawyer's role. The rule notes that the dual representation is particularly dangerous. An advanced waiver of malpractice is permitted if the client is independently represented and the comments discuss methods for resolving malpractice claims.

A lawyer/client sex prohibition applies to constituents of an organizational client who regularly directs the attorney. Thankfully, the prohibition on advancements to the client has been retained, distinct from "costs of litigation".

Workers' Compensation Practice Implication: The specific prohibitions are self-explanatory. Injured workers hard-pressed for money regularly ask for loans from workers' compensation lawyers. Loaning money and giving living expense money is entirely outside the rules no matter how compassionate the lawyer may feel for the claimant. (See Rule1.8(e) which prohibits a lawyer from providing financial assistance to clients.)

An interesting twist on "no good deed goes unpunished" is reflected in *Florida v Rue* 646 S 2d 108 (1984), *In Re Farmer* 950 P 2d 713 (Kansas 1997) and *In Re Olson* 577 NW 2d 218 (Minnesota 1998) where lawyers were reprimanded and disbarred for advancing living expenses to clients. Courts have drawn a distinct line between living expenses and costs of litigation. Medical treatment expenses are in the former category and not to be advanced by the lawyer.

A problem arises when a doctor's office refuses to provide a needed medical report until medical expenses are paid. This may be inappropriate for the doctor under many State intra-professional codes. The continued prohibition advancing loans to clients is mercifully kept – a lawyer can indicate in a straightforward fashion that any such arrangement is prohibited.

ABA Rule 1.9 – Conflict of Interest: Former Clients

The comment properly directs the focus of analysis on the protection of confidential information. The new comment explains "substantial relationship" as a dispute or transaction where confidential information would normally be imparted in the prior relationship, which would materially advance the subsequent client's position. Whether or not actual information is provided, retained or remembered is not the controlling factor. Information that is obsolete or disclosed to the public is not disqualifying.

Workers' Compensation Practice Implication: A lawyer representing an injured worker could not later represent the insurance company in its claim against the injured worker if confidential information that would normally be imparted by the injured worker would materially advance the insurance company's position in a later claim.

ABA Rule 1.10 – Imputation of Conflicts: General Rule

"Personal Interest Conflicts" are not imputed to the firm members (sex, family, financial interest in the opposing entity, or negotiation for employment) and do not necessarily disqualify other lawyers in the firm. Conflicts of secretaries, paralegals, and other non-lawyers or work as a law student clerk are not imputed but a screen must be imposed. Screening without a consent for lawyer conflict is only allowed for former government lawyers, judges, third party neutrals, or lawyers who interview prospective clients. The comments note that a "firm" may include lawyers who share a space.

ABA Rule 1.13 – Organization as Client

The rule change requires lawyers to explain their role when dealing with organizational constituents "when the lawyer knows or

reasonably should know" (changed from "when it is apparent") that the organization's interests are adverse to the constituent.

Workers' Compensation Implication: Attorneys representing insurance companies and employers should clarify whom they represent and whether or not they can represent both clients adequately. For example, where a lawyer representing an insurance carrier settles a case against an injured worker, leaving open a potential penalty against employer, that conflict may arise.

ABA Rule 1.14 – Client with Diminished Capacity

This section is re-named and a normal relationship is still encouraged wherein the client is afforded the benefit of the doubt regarding communication, decisions, etc. The rule approves "reasonably necessary protective action including consulting with individuals and entities that have the ability to take action to protect the client. The comment approves the consultation with other people such as family to effectuate the representation without violating the confidentiality provisions of §1.6 (only to the extent necessary to protect client's interest").

Workers' Compensation Practice Implication: Some injured workers have diminished capacity as a result of the work injury and special care should be exercised by the lawyer representing injured worker to ensure that the injured worker is competent to understand the implications of the claim and that representation.

ABA Rule 1.16 – Declining or Terminating Representation

Minor changes in the rule make it clearer that an attorney can withdraw for **any** reason if the withdrawal has no material adverse effect on the client. If it does, the withdrawal is less permissive and requires that client's insistence upon a course of conduct a lawyer considers "repugnant" or with which the attorney has "fundamental disagreement" rather than one seen as "imprudent." Unreasonableness of the financial burden includes analysis of foreseeability and representation is complete when the agreed upon assistance has been rendered.

Workers' Compensation Practice Implication: The requirement of a forewarning of withdrawal in the event of non-payment of the fee suggests the inclusion of such a warning in the fee agreement. A disengagement letter sent when the work is completed is also a good idea. In jurisdictions where the administrative agency requires approval of an attorney fee, withdrawing because the client refuses to accept what the lawyer believes is a reasonable settlement, and yet insisting upon a protected fee, places the client in an untenable position and may violate the rule. Client's chances of obtaining future competent counsel where the fee has not been waived are substantially diminished.

The comments note that a lawyer may withdraw from representation in some circumstances. If it can be accomplished without material adverse effect on the client's interest, the lawyer may withdraw where the client insists on taking action that the lawyer considers "repugnant or with which the lawyer has a fundamental disagreement." Whether the dollar amount in a proposed settlement is such a fundamental disagreement is arguable, and whether withdrawal with the assistance of the fee protection would have a material adverse effect on the client's interest is also arguable.

ABA Rule 1.18 – Duties to Prospective Clients

Again, this is a new rule that recognizes and addresses day-to-day problems created by "atrium discussions" with persons where no representation agreement follows. These are not regarded as clients but are afforded special treatment as *prospective* clients through the extension of protections of the confidentiality provisions of Rule 1.6 and Rule 1.9.

The rule limits precluding future representation to situations where the information obtained would be "significantly harmful to a prospective client and the conflict can be cured by waiver." There is no imputation of conflict to colleague lawyers if the interviewing lawyer obtains no more potentially harmful information than necessary to decide whether or not to take the representation and the interviewing lawyer is screened from participation in a fee, and notice is afforded to the prospective client.

Workers' Compensation Practice Implication: These calls occur dozens of times weekly for most busy workers' compensation lawyers. Prospective client interviews must be controlled by the lawyer and the interviews are not conversations. Lawyers should keep notes and look for disqualifying features in any matter being evaluated in a routine order. The identity of the contacts should be circulated for conflict purposes but not information obtain from

the prospective client. This rule will likely affect those lawyers who from time to time represent "both sides" in workers' compensation proceedings.

The new rules on prospective clients reflect the newer technology and methods by which clients are contacting attorneys. Some prospective "wannabe" clients who send significant information to lawyers by e-mail or fax pose new problems. The rule states that a person who discusses with a lawyer the possibility of forming a client-lawyer relationship may be a prospective client, but the comment clarifies that a person who communicates unilaterally with a lawyer must have a reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship to qualify as a prospective client.

In order to avoid incurring unwanted obligations to prospective clients, lawyers should either discourage unilateral e-mails and faxes or urge prospective clients to avoid communicating sensitive information until the lawyer has done a conflicts check. These precautions should be taken both in general advertising and on the lawyer's website.

ABA Rule 4.2 – Communication With Person Represented By Counsel

The "no contact" rule does not preclude a lawyer from talking with a client seeking a second opinion. Attorneys cannot engage in prohibited communication through the acts of another including the client who initiates contact. The revised comment contains a useful clarification regarding organizational opponents. Contact is now prohibited with the constituent of the organization who "supervises, directs, or regularly consults with the organization's lawyer with respect to the matter, or whose act or omission in the matter may be imputed to the organization for purposes of civil or criminal liability".

The comment deletes reference to those "whose statements may constitute an admission on the part of the organization." Former constituents (ex-employees) are still not off limits, but the comments contain a warning that a lawyer should not solicit or assist the breach of any duty of confidentiality by a former constituent (ex-employee).

Workers' Compensation Practice Implication: Often lawyers representing injured workers find statements by co-employees useful for corroborating the incidents of injury, safety violations, etc. Where the old rule talked about a lawyer being prohibited from contact with a representative of the employer who could "bind" the employer, the new comment suggests that such contact with co-employees is only improper if the employee supervises, directs, or regularly consults with the organization's lawyer or if his/her act or omission may be imputed for purposes of civil or criminal liability. Contact with ex-employees is also permitted, and is especially helpful in penalty claims against the employer (safety violations, refusal to rehire, etc.).

ABA Rule 4.4 – Respect For Rights of Third Persons

(Discussed previously – the misdirected letter, etc.)

ABA Rule 6.1 – Voluntary Pro Bono Service

The issue of voluntary compliance was debated and preserved, but the ABA rule changes the lawyer's obligation from "should" provide pro bono services to "have a professional responsibility to" provide free services for those unable to pay, for at least 50 hours per year. The ABA Ethics 2000 Committee considered a mandatory reporting requirement but rejected it. The fact finding of the Committee suggested that less pro bono work is done at large firms and that lack of governmental support requires more emphasis on pro bono. Disciplinary enforcement, however, was rejected as a means of forcing compliance.

Summary

Workers' compensation attorneys will be affected by the rules adopted by the ABA in 2002 as the result of the "Ethics 2000" Commission. Rules related to:

- prospective clients;
- scope of representation;
- reasonableness of fees;
- substantiating costs;
- clarifying conflicts;
- withdrawing from representation; and,
- communicating with represented parties, will affect the day-to-day practice.

The model rules are now being reviewed in the States. Forty-two States adopted some version of the former model rules. It is likely that a similar number will adopt most of the provisions of the proposed rules. Conformity between States will benefit lawyers seeking guidance because it broadens the base of case law upon which lawyers can draw.

**Mr. Domer is a member of the WILG Board of Directors. He is an adjunct faculty member at Marquette University School of Law and is the Chair of the WFW Editorial Board. He may be reached at Domer Law in Milwaukee, WI at 414-967-5656 or tom@domerlaw.com.*

Kim Bobo – Founder and Executive Director

Rabbi Robert Marx – President of the Board of Directors

The National Interfaith Committee For Worker Justice Has Become "Interfaith Worker Justice"

This past spring, Kim Bobo, founder and executive director of the National Interfaith Committee for Worker Justice (NICWJ), spoke at the WILG Summit in St. Louis. The work of her organization offers an exciting opportunity for partnership with WILG members. Kim will be a featured speaker at our April 2005 meeting.

Starting this month, NICWJ has a new name: Interfaith Worker Justice (IWJ). Its mission and programs will remain the same…dedicated to supporting the rights of workers in the U.S.

Interfaith Worker Justice was founded in 1996 and has become the leading national organization committed to strengthening the religious community's involvement in issues of workplace justice. Its mission is to educate, organize, and mobilize the U.S. religious community on issues and campaigns to improve wages, benefits, and working conditions for workers, especially low-wage workers.

From its national office in Chicago and through 60 local interfaith committees and eight workers' centers around the country, IWJ is the only nationwide organization building religion-labor alliances to support workers struggling to exercise their rights. Each year, IWJ helps over 30,000 low-wage workers secure contracts that raise wages and improve benefits.

Interfaith Worker Justice programs include:

- Organizing local interfaith committees that reach out to religious groups to create religion-labor coalitions to work on specific worker justice issues.
- Developing workers' centers, which provide safe havens where workers can gather, learn about their rights, and plan ways to improve their working conditions.
- Sponsoring "Labor in the Pulpits" - organizing labor union leaders to speak at religious congregations across the U.S. over Labor Day weekend to promote support of worker justice issues as a way of putting faith into action.
- Creating and maintaining working relationships with the U.S. Department of Labor to improve processing of worker abuse complaints and to educate the DOL about industry-wide worker abuses.
- Supporting public policy initiatives that promote worker justice (e.g., minimum wage increase legislation) and promoting civic participation through voter registration and get-out-the-vote activities.

- Coordinating internships for college-age students, seminarians and rabbinical students to train future leaders about worker justice issues. "Seminary Summer" is co-sponsored by the AFL-CIO and places seminarians and rabbinical students in internships with unions. College-

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The AMA Guides

New Directions: Seminar Series & New AMA ListServe

by Todd McFarren, Esq.*

On October 16 and 23, 2004 WILG and CAAA (California Applicants' Attorneys Association) put on seminars in Oakland and Los Angeles entitled "AMA Guides: A Critical Approach". Steve Embry (CN), Sue Ann Howard (WV), Ched Jennings (KY), and Peggy Sugarman (CAAA consultant) shared their insights and experience with the CAAA intelligentsia who now face the AMA Guides for the first time.

Embry gave his definitive presentation on upper extremities and lungs as well as his general criticisms of the Guides. I have seen Steve give fine presentations on numerous occasions, but he was at his most engaging in California.

Howard gave an object lesson in challenging the Guides by chapter. Her participation in the amicus brief in the *Repass* case in WV, which resulted in significant changes in the AMA Guides' spine chapter, was a topic of great interest. Sue Ann has the rare ability to combine rigorous legal analysis with the fighting spirit of a coal miner's daughter.

Jennings provided a bevy of practical tips for surviving the Guides as well as materials for working up a lower extremity case. As always, Ched imparted his knowledge and experience with bluegrass wit and charm.

Sugarman analyzed the role the Guides are likely to play in California's new permanent disability schema. As the former assistant administrative director, Peggy brought a unique perspective and encyclopedic knowledge to the discussion.

To follow up on this work, WILG has formed a new AMA Guides Committee chaired by Rick Wooley (CA) and an AMA Guides ListServe dedicated to AMA Guides' questions and commentary. The ListServe went into service on December 1, 2004. We are also planning to use this "Critical Approach to the Guides" seminar as the foundation for future WILG programs that can be given in any State facing the Guides.

**In July 2004 Todd McFarren, President of WILG, began the task of arranging this new cooperative effort with CAAA. He then superintended the planning and execution of WILG's half-day sessions on the AMA Guides.*

INTERFAITH, continued from page 17

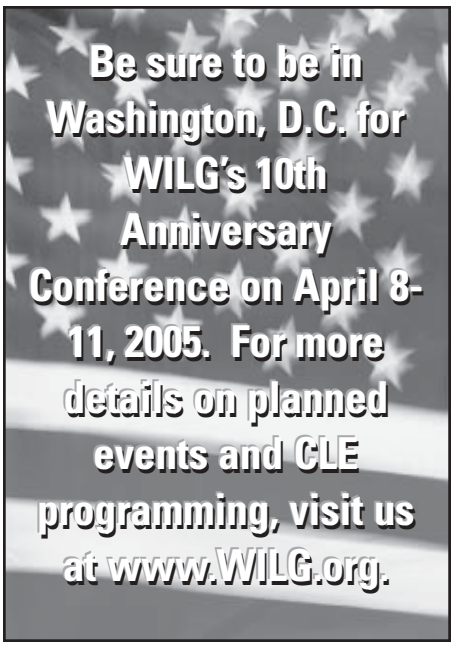
age interns are placed with local interfaith committees.

- Facilitating the "Religious Perspectives on Work Project" to develop worker justice curriculum in religious training institutions. These classes will train future religious leaders about their faith's teachings about workers' rights and the role they can play in promoting these values.

In addition to its bi-monthly newsletter, IWJ publishes resource materials for faith communities and worker rights' trainings.

Interfaith Worker Justice is convening a national conference in Chicago, May 22-24, 2005. Labor and faith leaders as well as worker justice advocates from around the country will gather to learn about each other's efforts on behalf of workers and build a basis for future work together.

For additional information or to join their mailing list, visit IWJ at www.interfaithworkerjustice.org or call 773-728-8400.



Commentary

Injured Workers: Treated Worse than Prison Convicts? by Steve Hopcraft*

Connie Cardinalli, the widow of John Cardinalli, Jr., an injured electrician who committed suicide in despair after fighting unsuccessfully to get the care needed to recover from his work injuries, told a California conference in October 2004 that "the [California] workers' comp system treats injured workers worse than convicts in prison."

Ms. Cardinalli blamed her husband's suicide on "a never-ending battle with a system that was never on his side." She charged that "company doctors want to overmedicate and not treat the injured workers."

John's Story

John Cardinalli is the second injured worker to commit suicide since the latest round of cuts in care and benefits passed in April 2004. Ms Cardinalli charged that the workers' compensation system failed to provide effective psychiatric care, rehabilitation, or hope to her husband. "My husband did not take his own life. He was murdered by a system that ignores, delays and avoids the needs of the injured worker."

John Cardinalli was 43 years old. He had worked as a production worker and electrician for many years, and developed back injuries while on the job; he had intractable back pain. After years of dealing with disabling pain, and after a request for psychiatric care was not approved, John killed himself on August 15th by overdosing on pain medications.

Connie Cardinalli blasted the cuts in workers' comp benefits and the failure to provide timely treatment: "The only thing my husband wanted was relief from his pain and to return to work. For three years he did everything asked of him, followed all the rules, but still never received all of the help or medical attention needed and requested by his doctor …including psychiatric counseling for the depression resulting from all the pain and problems he was going through."

Ms. Cardinalli criticized California's governor for the most recent cuts in injured workers' care and benefits. "The new reform Schwarzenegger speaks about will not improve the system or help the injured worker. His words are lies. They carry no weight."

Connie added, "Injured workers live with the reality of a system that has no respect, care, understanding or human feeling towards the injured worker. The system ignores, delays and avoids the needs of the injured worker."

On the day of his injury, John was earning $40 per hour, plus benefits. After his injury, the Cardinalli family suffered severe financial hardship as a result of the failures of the workers' compensation system.

Failure to Provide Assistance, Payments, and Treatment

Due to recent cuts in vocational rehabilitation for injured workers, John reached the $16,000 cap in November of 2003. Then, he was referred to State Disability Insurance (SDI). But due to delays in the workers' compensation system and their failure to respond to SDI, John did not receive any payments from SDI for months.

That failure to provide needed disability payments forced Connie Cardinalli to find and work a second job to keep the family's home. "In the last three years, we've lost over $75,000 per year," she said. "We lost our vehicles and were forced to file bankruptcy. This destroyed our perfect credit, which we worked very hard to establish."

Connie mentioned, "At the end, John couldn't even afford the gas to get to school to retrain for another job."

John's treating physician had requested psychiatric treatment, but the care was not approved. Like so many other requests to meet the legitimate needs of injured workers, it was simply "ignored."

The Attorneys Talk to the Media

John's attorney, Sharon Kelly, told the news conference that John's case is typical of the ways the workers' compensation system fails tens of thousands of injured workers. "In vocational rehabilitation, John was attempting to get his certification in construction inspection, but there was not enough money under the recently-imposed cap to complete his schoolwork. Now, there is no rehabilitation for injured workers."

Ms. Kelly also noted that John had been dissatisfied with the doctor the company had provided, and that he had requested to change doctors, which was denied. In January 2005, all injured workers will be forced to see only the company doctor. Workers like John would even be forced to leave the doctor currently treating them.

The attorney said, "John was receiving injections and a variety of medications. Although it was chronic pain and the associated depression which led to his death, pain will not be considered in the new Permanent Disability schedule that the governor is currently developing as part of the most recent cuts."

"John Cardinalli's demise at the hands of the workers' compensation system is just one of thousands of horror stories currently taking place across our state," said David Rockwell, president-elect of the California Applicants Attorneys Association, whose members represent injured workers.

Rockwell added, "The Governor has broken his promise to make sure medical care is available to injured workers. How many more deaths will it take to get the policymakers in the Legislature and the governor's office to recognize that the system that is supposed to care for injured workers is broken?"

He added, "Injured workers are paying the price for the greed of insurance carriers that is forcing injured workers to give up their doctors, give up their homes and financial assets, and eventually give up hope altogether. This is a crisis, and there will be more deaths."

Rockwell indicated that, "Responsibility for those deaths should be laid precisely where it belongs: at the governor's office door, and the doors of the insurance carriers who are refusing to meet their obligations."

**Steve Hopcraft owns Hopcraft Communications, which handles government and media relations as well as campaign management. He may be reached at (916) 457-5546 or www.hopcraft.com*

Book Review

Perhaps We Need Another Teddy Roosevelt

Reviewed by Leonard T. Jernigan, Jr., Esq.*

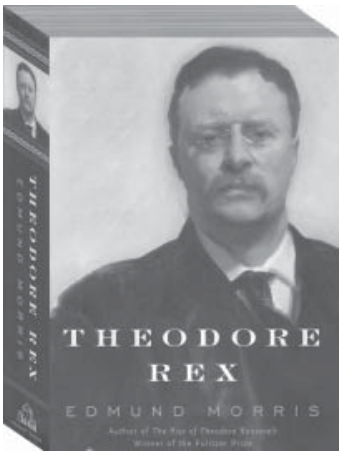
On September 14, 1901 at 2:15 a.m. President William McKinley took his last breath and became the second President (after Lincoln) to die from an assassin's bullet. To the horror of many New York politicians, Theodore Roosevelt, the former activist governor of New York who had been shuffled into the vice-presidency to keep him from further meddling in New York politics, became President of the United States.

In Edmund Morris' excellent book, **Theodore Rex** (2001, Random House, 555 pages), the grim reality of a worker's plight in the world of big corporations is disclosed through the author's exhaustive research and a bird's eye view of what was happening then.

When Roosevelt reviewed Standard Oil Company's kickback contract with the Pennsylvania Railroad (the railroad company got rebates from Standard Oil when transporting that company's oil, but got "drawbacks" when they transported oil from other companies), he began to see "a new and dark power" that shadowed every aspect of life in America. This new concept of privilege in commerce went against the grain of free enterprise, and to some, was un-American.

As Standard Oil swallowed up smaller rival companies, John D. Rockefeller (who owned 90% of the oil-refining business in the United States) was unrepentant. In his view, interdependent industries needed less competition and "more cooperation." Andrew Carnegie created U.S. Steel when he merged his company with nine others, and J. P. Morgan controlled several banks, Western Union, the Pullman Car Company, Aetna Life Insurance Company, General Electric, and 21 railroad companies. Businessmen like these preferred to operate in private, and believed that "combinations" were best put together quietly.

Although President McKinley saw this development as merely an economic trend, ordinary Americans began to see the effects of this unchecked power. Morris describes it succinctly:



"…whatever corporate executives might say about increased efficiency and reduced waste, the historic inclination of Monopoly was to raise prices and lower wages."

Roosevelt agreed. He asserted that the nation had to respond to these new conditions. He argued that: "The United States has got to possess the right of supervision and control in regard to the great corporations which are its creatures."

J.P. Morgan's response was simple: "I owe the public nothing."

Although the Sherman Anti-Trust Act had been passed in 1890, the Supreme Court of the United States decision in *U.S. v. E. C. Knight Co.* (1895) rendered the law ineffective. That decision held that a trust controlling 98% of the national sugar-refining business did not violate the anti-trust provisions of the law, since refining was not itself an interstate activity, and therefore such companies were exempt from regulation.

As corporate wealth grew, working conditions deteriorated. This was the case particularly in the coal fields of Pennsylvania, where men worked in the mines for ten hours a day, six days a week, and

were lucky if they made $500.00 in a year. By age 40 or 45, most were disabled from black lung disease and were reduced to menial jobs like picking up slate with their grandchildren.

Union membership had doubled over the past five years, and the United Mine Workers (UMW) had its first strike in 1900. William Jennings Bryan, during his last run for the presidency in 1900, had reminded his audiences that "the extremes of society are being driven further and further apart."

Roosevelt realized that "…today's contempt for the unskilled worker was tomorrow's likely revolution." He knew his history, and was aware of the vulnerability of republics that failed to preserve a social balance:

"The death-knell of the republic had rung as soon as the active power became lodged in the hands of those who sought, not to do justice to all citizens, rich and poor alike, but to stand for one special class and for its interest as opposed to the interest of others."

Roosevelt began to evaluate a course of action until he was able to consolidate his power and run as the Republican Party candidate in 1904. Morris summarizes this as follows:

"How, in the meantime, to care for those millions of Americans out there in the twilight? How to articulate their vague feelings that despite general peace and prosperity, something deep down was wrong with the United States? Here was his challenge as President: To put into speech, and political action, what they felt in their hearts, but could not express."

In Roosevelt's first message to Congress, he acknowledged the abounding prosperity of the country and gave credit to the captains of industry who, on the whole, had done great good for the people. But he then stated:

"It is no limitation upon property rights or freedom of contract to require that when men receive from government the privilege of doing business under corporate form…they shall do so upon absolutely truthful representations. … Great corporations exist only because they are created and safeguarded by our institutions; and it is therefore our right and duty to see they work in harmony with these institutions. … The first essential in determining how to deal with the great industrial corporations is knowledge of the facts – publicity."

Roosevelt also argued that the United States should conserve its natural resources for the protection of future generations. He documented the irresponsibility with which Americans had abused water, mineral, and forest resources, leading to the loss of more than half the nation's original timber. He also identified other signs of the exhaustion of natural resources.

As President, he argued that the Bureau of Forestry should be given total control over forest reserves; that arid public lands should be reclaimed; and, that interstate irrigation systems should be developed by the national government.

He concluded that "...the doctrine of private ownership of water apart from land cannot prevail without causing enduring wrong."

Roosevelt began his trust-busting by instructing his Attorney General, Philander Chase Knox (described by Roosevelt as "the best attorney general this government has ever had"), to file a lawsuit against the Northern Security Company for violating the Sherman Anti-Trust Act in creating a railroad monopoly in the Northwest. According to Knox, the monopoly was "infinite in scope, perpetual in character." J. P. Morgan was one of the named defendants. The public was roused.

On December 14, 1903, Knox masterfully argued before the Supreme Court that any obstruction to commerce should be removed by the government and that the Northern Security Company, as it currently existed, was not subject to control by the individual states. On March 14, 1904, in a 5-4 decision, the Court affirmed a lower court ruling that the Sherman Act had been violated. Justice Oliver Wendell Holmes, a friend of Roosevelt, voted with the minority.

The President's popularity soared as he approached the upcoming election in November 1904, and millionaires "stood in line" to make contributions to his campaign as soon as they realized how easily he would be elected. He became increasingly repulsed by men who abused the privilege of wealth. He said, "It tired me to talk to rich men. You expect a man of millions, the head of a great industry, to be a man worth hearing; but as a rule they don't know anything outside their own businesses."

Roosevelt had been born to wealth and sincerely believed it must be repaid with service, not money-seeking power.

In 1905-1906, Roosevelt began looking at employer liability and called for a comprehensive Congressional study of the subject. In addition, he:

- sought an investigation into child-labor abuses;
- wanted legislation to maintain sanitary standards in the food industry; and,
- advocated governmental supervision of insurance corporations.

Eventually he led the nation in the passage of three new laws in these areas:

- a re-enacted Federal Employers' Liability Act;
- the Workman's Compensation Act for Federal Employees; and,
- the Child Labor Act for the District of Columbia.

Roosevelt was a voracious reader (even as President) and a student of history, culture, and science. His moral compass was secure. He held strong convictions about a "square-deal" for all parties and he also knew how to lead the nation, in both politics and rhetoric.

Roosevelt's well-known mantra, "Speak softly but carry a big stick," was a West African proverb that he explained, on one occasion, in a speech: "If a man continually blusters, if he lacks civility, a big stick will not save him from trouble; but neither will speaking softly avail, if back of the softness there does not lie strength, power."

The book *Theodore Rex* helps us remember the lessons of the past, and it should be required reading for all who seek an understanding of the dynamics between corporate wealth, labor, and politics. It also provides the reader with a perspective on the power of the Presidency to achieve fairness and justice, *if* the President chooses to act.

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Editor's Note: WILG readers can easily find the book by signing on to: *www.half.com* (click on the "Books" tab at the top, then in the first blank field enter the book's title and click on "Go"). This excellent website is a place to buy books at discounts greater than virtually anywhere else on the Internet.

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maximum of 200% of the state's average weekly wage; and, not be capped. Minor children benefits should be continued until at least 25 if a full-time student; 12) Injured Worker should be permitted the initial selection of his physician, either from among all licensed physicians in the state or from a panel approved by the state's workers' compensation agency; 13) No limit on the length of time or dollar amount for medical care or physical rehabilitation services; 14) The state's workers' compensation agency should establish a medical rehabilitation division, with authority to effectively supervise medical care and rehabilitation services; 15) In this supervising division just mentioned, it should be given the specific responsibility of assuring that every worker who could benefit from vocational rehabiliation services be offered those services; 16) Second Injury Funds be established to cover a broad range of pre-existing impairments, to be interpreted liberally in order to encourage employment of the physically handicapped.

National Commission on State Workmen's Compensation Laws, John F. Burton, Jr., Chairman, July 31, 1972, Library of Congress Card Catalog No. 72-600195, U.S. Government Printing Office, Washington, DC 20402.

[9.] Department of Government, College of William & Mary, cdhowa@wm.edu

[10.] Howard, Christopher: "Workers' Compensation, Federalism and the Heavy Hand of History", Wiener Inequality & Social Policy Seminar Series, John F. Kennedy School of Government, Harvard University, March 19, 2001.

[11.] National Commission on State Workmen's Compensation Laws, John F. Burton, Jr., Chairman, July 31, 1972, Library of Congress Card Catalog No. 72-600195, U.S. Government Printing Office, Washington, DC 20402, at 27.

[12.] McCluskey, Martha T.; "The Illusion of Efficiency in Workers' Compensation Reform", 50 Rutgers Law Review 3, Spring, 1998.

[13.] Spieler, Emily A.; "Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries", 31 Houston Law Review 119, 1994.

[14.] National Academy of Social Insurance; "Adequacy of Earnings Replacement in Workers' Compensation Programs"; A report of the Benefit Adequacy Study Panel of the Workers' Compensation Steering Committee; November, 2003.

[15.] National Academy of Social Insurance; "Adequacy of Earnings Replacement in Workers' Compensation Programs"; A report of the Benefit Adequacy Study Panel of the Workers' Compensation Steering Committee; November, 2003, p.6-3.

To join WILG or for further information, log on to www.WILG.org or call our Executive Director (Randall Scott, Esq.) at 202-349-7150. Scott was Executive Director of the voluntary Bar Association of DC for ten years, and directed two special national projects of the American Bar Association's Division of Public Service Activities in Washington, DC. He is a graduate of Harvard Law. Maggie, his spouse, serves with the Community Interfaith Liaison Office for the Fairfax County Government in Virginia. Randall replaces Marla Bennett who was recently married and is now in Thailand (for the next three years with her husband, on assignment with the U.S. Department of State).

A State's Lesson In Point

Workers' Comp "Deform" Strikes Iowa

by Paul J. McAndrew, Jr., Esq.*

Long before 2003, the Iowa Courts had uniformly interpreted the Iowa workers' compensation code as providing a "full-responsibility rule" in dealing with successive body-as-a-whole work injuries. The Iowa Supreme Court explained why in **Celotex v. Auten**, 541 N.W.2d 252 (Iowa 1995):

"Apart from statute, in a situation of two successive work-related injuries, 'the employer is generally held liable for the entire disability resulting from the combination of the prior disability and the present injury.'" (Citing Larson)

Larson gives this reason for not crediting the employer for the disability award on the prior disability:

"The capacities of a human being cannot be arbitrarily and finally divided and written off by percentages. The fact that a man has once received compensation as for 50 percent of total disability does not mean that ever after he is in the eyes of compensation law but half a man, so that he can never again receive a compensation award going beyond the other 50 percent of total. After having received his prior payments, he may, in future years, be able to resume gainful employment. In the words of the Colorado court, he may have resumed employment as a "working unit." If so, there is no reason why a disability which would bring anyone else total permanent disability benefits should yield him only half as much. A similar principle may be applied to an individual member that has been restored in whole or in part.' (Citing Larson and various non-Iowa cases) According to Larson, '[t]he successive-injury problem arises from the obvious fact that the combined effect of two physical disabilities is often far greater than would be reflected by merely adding together the schedule allowances for each injury existing separately. The loss of a leg, which would ordinarily mean only partial disability to a normal person, results in total disability to the man who has already, from whatever cause, lost the other leg. There are three approaches to the resulting dilemma: first, the "full responsibility" rule, imposing liability for the entire resulting disability upon the employer; second, apportionment statutes, under which the employer pays only for the single member lost in his employment; and, third, second injury funds, which ensure that the employee receives the full disability benefits but reimburses the employer for the difference between this sum and what he would pay under an apportionment statute." (Citing Larson)

The problem of apportionment of a compensable loss is encountered in three situations: between successive employers or carriers, when the final disability is traceable to exposures or incidents under two or more of them; between an employer and a Second Injury Fund, when a preexisting condition covered by the Fund is involved; and, between an employer and the employee himself, when a prior personal disability contributes to the final disability result. (Citing Larson)

In the first two situations, the employee is assured of full benefits from someone. The only question is who will pay. In the third situation, "the injured worker faces the possibility of having to bear a substantial portion of the final loss himself." (Citing Larson)

The problem in the third situation does not arise in a majority of states because those states have no apportionment statutes covering successive work-related injuries. States having such

apportionment statutes allow an employee with a prior disability to recover for subsequent disability only what the employee would have been entitled to for the latter disability considered alone. (Citing Larson)

As Larson notes, "[t]he apparent harshness of this rule has been softened in most of the principal states having such statutes by an exception for cases coming within Second Injury Fund provisions." (citing Larson) But, for example, in a state having both an apportionment statute and no Second Injury Fund, an employee losing a second eye will receive only the scheduled value of a single eye. *Id.*. In this example the employee, rather than the employer, bears a substantial portion of the final loss.

According to Larson, courts "have generally tempered the harshness of apportionment statutes whenever a doubt could be resolved in the direction of constricting their scope." *Id.* Even where states have no apportionment statutes, courts have tried to limit the impact of apportionment on employees:

"Apart from special statute, apportionable "disability" does not include a prior non-disabling defect or disease that contributes to the end result. **Nothing is better established in compensation law than the rule that** when industrial injury precipitates disability from a latent prior condition, such as heart disease, cancer, back weakness, and the like, the entire disability is compensable..."

"The essential distinction at stake here is between a preexisting disability that independently produces all or part of the final disability, and a preexisting condition that in some way combines with or is acted upon by the industrial injury." (Citing Larson)

The Court in *Celotex* continued: "In *Varied Enterprises, Inc.,* we relied on the above quote from Larson in formulating our apportionment rule that limits apportionment to those situations where a prior injury or illness, *unrelated to the employment,* independently produces some ascertainable portion of the ultimate industrial disability which exists following the employment - related aggravation. *Varied Enterprises, Inc. v. Sumner*, 353 N.W.2d 407, 411 (Iowa 1984) (emphasis added)."

"Implicit in our qualifying language 'unrelated to the employment' is our recognition of the following general rule: Apart from statute, in a situation of two successive work-related injuries, the employer is generally held liable for the entire disability resulting from the **combination** of the prior disability and the present injury."

"Our workers' compensation law does allow the employer credit in certain situations not relevant here. *See, e.g.,* Iowa Code Secs. 85.34 (employer entitled to credit for weekly healing period benefits for the same injury producing permanent partial disability); 85.34(3) (employer entitled to credit for permanent partial disability payments made where employee sustains permanent partial disability and permanent total disability arising from same injury); 85.34(4) (employer entitled to credit for specific benefit amounts paid in excess of amounts required by workers' compensation statutes)."

"However, our workers' compensation law does not expressly provide for apportionment in the case of successive injuries sustained by an employee in the same employment, regardless of whether or not the employee receives compensation for the prior injury. Moreover, neither party, for good reason, claims that our second injury provisions apply. The injuries here do not involve the loss or loss of use of a hand, arm, foot, leg, or eye. *See* Iowa Code § 85.64 (second injury fund provisions apply only if employee has (1) either lost, or lost use of a hand, arm, foot, leg, or eye; (2) employee sustained loss, or loss of use of another such member or an organ through a work-related injury; and (3) there must be some permanent disability from the injuries)."

"That leaves us with this question: should we here, by judicial fiat, allow apportionment with respect to successive work-related injuries and thereby give the employer a credit for the prior disability award? We decline to do so for the reasons that follow."

"The legislature stopped short of allowing apportionment as to all successive work-related injuries...Section 85.36(10)(c) allows apportionment as to any employee who is disabled and receiving workers' compensation benefits when the employee is again injured on the job. Those are not the facts here..."

"So had the legislature intended to allow apportionment as to *all* successive work-related injuries, it could easily have said so. Because it did not, we think the legislature did not intend to allow apportionment under the facts of this case. The result we reach is in keeping with our fundamental rule of construing our workers' compensation law in favor of the employee and compensability." (Citations omitted, including to NC and TN cases). *Celotex* at 254-56 (emphasis added)

The Iowa Workers' Compensation Commissioner (at that time a Republican appointee) continued to partially ignore the Iowa courts' line of rulings. The Commissioner applied the general rule – that in a situation of two successive work-related injuries, the employer is generally held liable for the entire disability resulting from the **combination** of the prior disability and the present injury - only in settings in which the successive work injuries occurred while the employee remained in the employ of one employer. Then, the Commissioner's non-acquiescence came before the Supreme Court in *Venegas v. IBP, Inc.*, 638 N.W.2d 699 (Iowa 2002).

In *Venegas,* Jose Venegas was awarded 35% body as a whole disability in California in 1991. He moved to Iowa and worked for meat-packing giant, IBP, full-time from 1993 until 1996, when he re-injured his back. MRI showed a herniated lumbar disc. Mr. Venegas was not back to work at time of trial. The Commissioner determined that Mr. Venegas was due 55% industrial disability benefits under Iowa law. Instead of awarding that amount, however, the Venegas Commissioner subtracted 35% from 55% and awarded only 20% to Mr. Venegas.

In a two-page opinion the *Venegas* Court directed the Commissioner to acquiesce in the previously-stated law. As articulated by the Court: "[T]he employer liable for the current injury is also liable for any persisting industrial disability caused by a work-related injury ***when that disability combines with industrial caused by a later injury.*** *Venegas* at 701.

The Iowa Association of Business and Industry ("ABI"), an umbrella group for the insurance industry and the Chamber, used *Venegas* as an excuse to militate for "reform." They incorrectly asserted that *Venegas* was a new holding. They argued the Iowa rule outlined above allowed for "double-dipping" by employees. ABI said that this hindered "economic development" in Iowa. Interestingly, ABI's position was at that time supposed to be based on principle: that the subsequent employer should not have to pay for disability caused by a prior employer's injury. We shall see below that principle had little to do with the sought-after "reform."

In the 2002-03 session, ABI joined its apportionment provision with a provision that would have changed the causation standard in workers' compensation (from substantial cause to "the major contributing cause"). Notwithstanding that insurance industry interests controlled both houses of the legislature, the "reforms" failed.

Iowa's entire Workers' Compensation system had just been completely evaluated by the Workers' Compensation Research Institute ("WCRI"). WCRI found that Iowa's system paid high indemnity benefits with very low premiums. WCRI, *Workers' Compensation in Iowa: Administrative Inventory* 74-78, 92-93. Although this Inventory was formally published 5/10/2004, the first draft was issued for comment in 11/03. The findings above remained the same from 11/03 on. WCRI is a research institute that is not biased toward workers' rights. On the contrary, it is an institute that is directed and funded by insurance companies and large self-insured corporations. The facts did not stop ABI, however.

ABI continued to use its Republican control of the Iowa legislature to seek "reform" in 2003-04. It gave Governor Tom Vilsack a choice between yielding on Public Employee rights, civil-justice system rights and injured workers' rights under the workers' compensation laws. Eventually, the Republicans decided to focus on injured workers' rights under the workers' compensation laws.

The Republicans did this by holding Democrat Governor Tom Vilsack's Vision Iowa Fund allocations hostage during the 2003-04 legislative session. This was carried off by the Republican majority drafting a bill that inextricably tied Governor Vilsack's Fund allocation to apportionment language. By this time the "principle" of "not requiring one employer to pay for the disability caused by an injury with another employer" had given way to more loosely defined concepts of "economic development." The apportionment language in the 2003-04 bill (House File 692) applied to both single-employer and multiple-employer settings.

Governor Vilsack item-vetoed the apportionment language. The Republicans spent about $1M of Iowa general-fund monies, appealing the item veto to the Iowa Supreme Court. The Supreme Court overturned the item veto. The Court also determined, however, that Vilsack's action was, in effect, a pocket veto of the entire bill. As a result, the apportionment bill was vetoed. This also had the effect of nullifying the Iowa Values Fund allocations months after those allocations had already been made and action taken in reliance on them. *Rants v. Vilsack*, 684 N.W.2d 193 (Iowa 6/16/04)

There was fairly immediate and intense political pressure to bring

about a proper allocation of the millions of dollars in Vision Iowa Funds that had already been deemed allocated. The author was appointed to a five-person committee as claimants' counsel representative. The other representatives were from organized labor, the insurance industry, defense counsel, and self-insured employers. The moderator was the Commissioner. The special panel met five times for a total of thirty (30) hours. Notwithstanding dicta in one case (*Excel Corp. v. Smithart*, 654 N.W.2d 891, 897 (Iowa 2002)), no reported Iowa case was presented to the committee showing any instance in which an employee received a double recovery. Instead, as the general rule of law provided up to that time, the cases showed that in a situation of two successive work-related injuries, the employer is generally held liable for the entire disability resulting from the **combination** of the prior disability and the present injury. No proof of any type of double-dipping was made.

Insurance and self-insured representatives asserted that employers had incentive to terminate an employee who had sustained an injury in a setting in which the full-responsibility rule applied. No proof that such terminations had occurred was presented. Labor's representative and the author said that the proposed apportionment language was ultimately crude and unfair to the worker because it merely "subtracted disability from Injury No. 1 from disability from Injury No. 2." We said the apportionment language did not account in any way for many ultimately important facts, including: (1) the length of time between the first and second injury, (2) whether there is any relationship between the disability caused by the first injury and the second injury, (3) whether the employee has moved from one type of work to another between the successive injuries These and other worker-friendly arguments were ignored in the committee meetings. No consensus was reached by the five-person committee.

Unfortunately, the Commissioner was called upon at the last meeting of the special panel on August 20, 2004, to give his sense of the most "fair and balanced" apportionment bill. Commissioner Michael Trier, appointed by Gov. Vilsack, authored the initial draft of the bill that became law.

The Iowa Legislature was rushed into special session on September 7, 2004, largely to ensure the Vision Iowa Fund allocation was kept intact. House File 2581 passed in one day. There was little debate because the Republicans held a significant majority in both houses. That majority stuck to a strict party line. The author repeatedly talked to Republic legislators that day to attempt to discuss the bill. Repeatedly the author was told that "Governor Vilsack accepted 2581 as a compromise measure in return for the Vision Iowa Fund." The legislators did not acknowledge the GOP had held that funding hostage for 2581. HF 2581 passed on a straight party-line vote.

House File 2581 provides in pertinent part:

"a. *...An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment."*

"b. If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employee ...[and the injury is compensable], the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. *In this instance the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.* If, however, an employer is liable to an employee for a combined disability that is payable...and the employee has a preexisting disability that causes the employee's earnings to be less at the time of the present injury than if the prior injury had not occurred, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer minus the percentage that the employee's earnings are less at the time of the present injury than if the prior injury had not occurred." House File 2581 (to be codified at *Iowa Code* § 85.34(7) (2004)(emphasis added).

The Republicans saw the apportionment provision as so important that it was selected out for special treatment and made effective to all work injuries occurring on and after September 7.

The Iowa Federation of Labor estimates the new apportionment provision will reduce workers' benefits by at least $10 million per year, which is a huge reduction in Iowa. The ABI estimated the amount at $13 million. Had Governor Vilsack and

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The California Story

Governor No Friend To Working People ...Injured or Not

by Dirk Stemerman, Esq.*

Christmas came early this year for the California Chamber of Commerce. Of the 1265 bills sent to Gov. Arnold Schwarzenegger during his first year in office by the California legislature, he signed 954 bills into law. This set a modern record for the fewest bills signed first-year California governor. Among the 954 bills, ten were on the California Chamber of Commerce's list of top "job killer" bills. Schwarzenegger terminated all ten.

Among the bills that would have helped California workers were the following:

- A bill that would have increased California's minimum wage. Adjusted for inflation, California's minimum wage is 22 percent below what it was in 1969.
- A bill aimed at preventing outsourcing of California jobs to foreign countries. Schwarzenegger claimed the measures would erect artificial barriers to economic growth. Assembly Speaker Fabian Nunez said, "The governor had a choice: Protect hardworking Californians or protect multinational corporations. He chose wrongly…now the people's tax dollars will continue to support jobs in India and Mexico."
- A bill that would have required employers to tell their employees if they monitor their emails and Internet use. Schwarzenegger contended the bill's notice requirements were too broad, but the measure would have only required a one-time notice.
- A bill that would have attempted to protect non-supervisory farmworkers from pesticide exposure by barring their employers from requiring them to taste-test table grapes before processing.
- A bill designed to force the agricultural industry to offer direct deposit to its employees.
- A bill designed to prohibit gender pay equity violations by significantly increasing financial penalties for employers who pay women less for comparable work.
- A bill requiring that hotel room attendants get longer rest breaks.

The Foundation for Taxpayer and Consumer Rights, a Santa Monica advocacy group, calculated that Schwarzenegger took more money from drug companies over the last year than any elected American official except President Bush, collecting more than $337,000. Beholden or not to the pharmaceutical companies, Schwarzenegger vetoed legislation that would have helped Californians find cheaper prescription drugs in Canada.

Further, Schwarzenegger vetoed legislation that would have let doctors sue HMOs in court in certain situations for failing to pay them. The health care industry is a seven-figure donor to Schwarzenegger's campaign committees.

Other pro-business vetoes include a bill that would have provided additional consumer protections for used-car buyers, a bill that would have created new air pollution standards on the ports of Los Angeles and Long Beach and a bill that would have required cities and counties to prepare economic impact reports on the building of giant superstores such as Wal-Mart.

According to Art Pulaski of the California Labor Federation, AFL-CIO, "The governor and the Chamber of Commerce seem indistinguishable." Two of the Schwarzenegger's top aides are former California Chamber of Commerce employees.

Yes indeed, Christmas did come very early this year for the California Chamber of Commerce. However, while most of the Schwarzenegger vetoes occurred most recently in September, the

Chamber had already celebrated "Christmas in April." That was when California turned back the clock by rolling back many injured worker benefits that had stood for decades.

Schwarzenegger's Attack on Injured Workers

On April 19, 2004, Gov. Schwarzenegger signed Senate Bill 899 (SB899) into law. What resulted was "reform" that severely reduced injured worker benefits, offered employers no guarantee of lower workers' compensation premiums, and left insurance carriers unscathed. Under SB899:

- Injured workers must see only company doctors. They must see three company doctors and a fourth state-approved medical reviewer who determines if the worker can see a doctor outside the company pool. The medical reviewer's decision is final and the worker never sees the report.
- Job-retraining benefits were eliminated for injured workers who cannot return to work because of their work injury and benefits were reduced for those workers who do return.
- Temporary disability payments were capped at two years. This impacts seriously injured workers including those requiring multiple surgeries. It shifts the burden to taxpayers, as injured workers who lose disability payments will turn to social security, state disability, or welfare benefits.
- The American Medical Association Guidelines were implemented for rating disability despite the AMA's own admonition that they should not be used for such purposes. The AMA Guidelines will reduce benefits for injured workers who suffer pain that cannot be identified by diagnostic testing.
- Penalties against insurance carriers for medical or disability payment delays were reduced. State audit data has consistently showed widespread delays indicating that penalties were too low to deter carrier misconduct.
- Injured workers are required to *prove* work caused their disability. This reduces benefits to workers with non-work-disabling underlying conditions such as birth defects, arthritis, pregnancy, obesity, osteoporosis, hypertension, and many others, requiring injured workers prove these underlying conditions were not responsible. It inserts fault into a no-fault system.
- The disability standard that considered one's "diminished capacity to compete in the labor market" was replaced with a standard that considers only "future earning capacity". Simply put, if an injured worker returns to work at the same job, but her earning capacity remains the same, she is penalized. The lifetime consequences of the worker are discounted. For example, if a person can continue to work as an accountant, she receives no increased benefits just because she's paralyzed from the waist down because accountants work sitting down.

Where Are All the Savings?

Schwarzenegger sold all of these injured worker benefit rollbacks to the public with a promise that California businesses would see a 25-30 percent workers' compensation premium reduction, instead of his initial 50 percent demand, and that "truly injured workers" would not be harmed. This legislation was supposed to yield immediate reductions for business owners. It didn't.

Instead, workers' comp insurance rates dropped an average of 10.38 percent, according to the California Department of Insurance, hardly making a difference to California businesses that have seen premium increases of an average of 149 percent, between 2000 and 2003.

Then recently, the unthinkable happened. At a Department of Insurance rate hearing in San Francisco on Sept. 15, 2004, the Workers Compensation Insurance Rating Bureau (WCIRB), an insurance-industry funded group, recommended that insurers *increase* worker's comp rates by 3.5 percent in January 2005.

Some have wondered how anyone could be calling for an increase in insurance premiums after two consecutive years of massive multi-billion dollar cuts to injured workers' benefits and care. Indeed, many were dumbfounded this past March, before SB899 became law on April 19, when the WCIRB spokesman Jack Hannan announced that although workers' comp costs would be $7 billion less than previous projections because of the prior year's cuts, the $7 billion savings would not affect insurance rates. As the saying goes, to understand the present, one need only look to the past.

Prior to SB899, Insurance Commissioner John Garamendi projected that the previous year's reforms would produce premium reductions of 14.9 percent. The average rate reduction was 3.6 percent. Insurance carriers pocketed the savings. In fact, Garamendi sued market behemoth State Compensation Insurance Fund to ensure the $7 billion savings from the previous year's reforms were passed on to employers via lower premiums, because while the average rate

reduction was 3.6 percent, State Fund lowered their premiums by only 2.9 percent. They control almost 60 percent of the California workers' comp insurance market.

But if one needs proof that insurance carriers pocketed the savings, here it is: after SB899 became law, Garamendi again recommended, via his advisory rate, that carriers reduce premiums. His post-SB899 recommendation was that carriers lower rates by 20.9 percent. Nevertheless, in response to SB899, State Fund lowered their rates by only seven percent. Again, injured workers had their benefits cut and again, insurance companies pocketed the savings, boosting profits on the backs of injured workers

Some may say that the current situation is being manufactured by the Chamber of Commerce and the large insurance carriers so as to protract the workers' comp crisis, thereby allowing them to return to their friends in the state legislature and push for further cuts to injured worker benefits. They need to convince the public that the reforms did not go far enough. President Clinton said in his speech at the Democratic Convention that Republicans *"need"* a divided America to achieve their goals. Similarly, the Chamber of Commerce and insurance carriers *"need"* a climate of fear regarding the statewide employment situation as it relates to jobs leaving the state, workers' comp premiums, injured workers, attorneys, doctors, and the like.

Don't Bother Me with the Facts?

There are so many fallacies regarding workers compensation in California that when one points them out, the only wholly truthful counter would be "don't bother me with facts." In California, how would an advocate of workers' comp "reform" (which really means to slash injured workers' benefits and care even further) respond when confronted with the facts:

- that claim frequency in California has dropped almost every year since 1990;
- that the increase in medical costs in workers' comp mirrors the increases in group health medical insurance costs;
- that after September 11, carrier reluctance to reduce rates despite billions in cost-saving legislation, rising healthcare costs, and the stock market decline all played a role in increasing workers' comp costs;
- that less that one-half of one percent of workers' comp claims are even alleged to be fraudulent;
- that the reason California has one of the highest workers' comp costs in the nation is because it has the largest workforce, with the highest payroll, and covers more workers such as farmworkers, and more types of injuries such as carpal tunnel, than most other states;
- that workers' comp attorneys in California are paid less that in the majority of other states with fees of between 12 and 15 percent of a worker's award;
- that after deregulation a decade ago, carriers dropped rates forcing many into bankruptcy leaving State Fund with a disproportionate market share of nearly 60 percent, causing rates to skyrocket because they measuring stick other carriers look to when determining premiums;
- and on and on…

Terminating Injured Workers' Rights

Now injured workers must brace for insurance company letters advising them that they can no longer treat with their own doctor. Beginning on January 1, 2005, injured workers must see a doctor chosen by his or her employer's workers' compensation carrier. The care that the company doctor can provide has been curtailed because of California's adoption of the conservative American College of Occupational and Environmental Medicine Guidelines which are now presumptively correct.

Should that worker require surgery disabling them for over two years, temporary disability payments have been terminated.

Should that worker be unable to return to the job because the injury or disability precludes the primary activities of that job, vocational retraining benefits have been terminated.

Should that worker be a few pounds overweight or have possessed an asymptomatic condition prior to the industrial injury, the benefits are reduced because the truly no-fault system has been terminated.

Should the insurance company fail to provide any of these "benefits" in a timely manner, meaningful penalties against insurance carriers for such delays have been terminated.

But for an injured worker, it is difficult to think of matters getting worse in January when things are already dismal right now. That's because 91,101 cases have been delayed by administrative law judges since the governor signed SB899 into law in April, a 19.2 percent increase from the same

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U.S. Businesses File 4x More Lawsuits; Sanctioned More Often for Frivolous Suits

by "Public Citizen"

American businesses file four times as many lawsuits as do individuals represented by trial attorneys, and are penalized by judges much more often for pursuing frivolous litigation, according to a report issued recently by *Public Citizen*.

The survey of case filings in two states (Arkansas and Mississippi) and two local jurisdictions (Cook County, IL, and Philadelphia, PA) in 2001 found that businesses were 3.3 to 5.8 times more likely to file lawsuits than were individuals. This comes as businesses and politicians are campaigning to limit citizens' rights to sue over everything from medical malpractice damages to defective products. By way of comparison, the number of American consumers (281 million) outnumbers the number of businesses in America (7 million) by 40 times.

The report also finds that businesses and their attorneys were 69% more likely than individual tort plaintiffs and their attorneys to be sanctioned by federal judges for filing frivolous claims or defenses. "Corporations think America is too litigious only when they are on the receiving end of a lawsuit," said Joan Claybrook, president of Public Citizen. "But when they feel aggrieved, businesses are far more likely to take their beef to court than are consumers."

The four court systems surveyed, which are geographically diverse and represent urban and rural areas of the nation, appear to be the only

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period one year ago, according to the Department of Industrial Relations. The cause for such delays rests solely on the governor's shoulders.

So as to avoid scrutiny, Schwarzenegger fast-tracked poor legislation without any transitional planning as the legislation took effect months before regulations would be prepared to effectuate the changes. He would comment "why would we hang here for the next two years and negotiate and debate over this issue," completely oblivious to how laws are supposed to be enacted—with just such public debate.

Fast-Tracking, Fund-Raising, and Smiling

There are noticeable parallels between the logic of Schwarzenegger and the logic of President Bush, who also fast-tracked his war plan to avoid international scrutiny. Like our troops in Iraq, injured workers are paying the price for their leader's lack of planning. No wonder Republicans were quick to propose a constitutional amendment to allow Schwarzenegger to run for president only months after he became governor of California with absolutely no experience.

The governor, while accepting massive cash contributions from workers compensation insurance companies, blocked Democratic efforts to re-regulate insurance rates so that the savings would be passed on to businesses. Now, after two consecutive years of multi-billion dollars cuts to injured workers' benefits and care, it appears that workers' comp premiums may actually increase.

Schwarzenegger, in his best dramatic role featuring style over substance, has again begun talking about taking on the special interests. "The key thing is that we make sure that the politicians cannot be bought by special interests — we see it all the time," he told a select group of Silicon Valley business leaders on October 7. Unfortunately, Schwarzenegger has raised more money from special interests than anyone in the history of the state according to Doug Heller, executive director of the Foundation for Taxpayer and Consumer Rights.

Maybe Californians ought to think twice before electing a movie star governor again. Charisma is no substitute for substance. Just because promises that "truly" injured workers would receive proper care after SB899 were charismatically made with a smile did not make those promises genuine or sincere because in the end, it is those "truly" injured workers who have really lost.

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jurisdictions that require attorneys to provide sufficient detail to distinguish business-initiated suits from trial attorney-initiated suits. State-specific findings for 2001 include:

- Mississippi: In this state that the U.S. Chamber of Commerce has labeled a "judicial hell hole," businesses were 5.8 times more likely to file suit than were individuals; there were 45,891 business lawsuits filed that year compared to 7,959 individuals lawsuits.
- Philadelphia, PA: Businesses there filed cases at a 3.3-to-1 ratio compared to individuals; there were 64,698 business lawsuits compared with 19,751 individual lawsuits brought by trial attorneys.
- Arkansas: Businesses filed four lawsuits for every one lawsuit filed by trial attorneys on behalf of individuals with 20,868 vs. 4,786 (a ratio of 4.4 to 1).
- Cook County, IL: Businesses went to the courthouse 5.8x more often than trial attorneys representing individuals; the number of business lawsuits filed was 137,890 compared with just 26,938 by individuals.

Public Citizen also found that federal judges punish businesses far more often than trial attorneys representing plaintiffs in tort claims for tying up the court with frivolous claims or defenses. Under Rule 11 of the Federal Rule of Civil Procedures, judges can impose sanctions that range from reprimands and denial of fees to fines, dismissal of claims and injunction from further litigation.

In a separate survey of the 100 most recent cases of federal judges imposing Rule 11 sanctions throughout the country, 27 were against businesses or their attorneys while only 16 were against plaintiffs who brought tort cases or their attorneys. Only individuals representing themselves without counsel were sanctioned more often than businesses (35 cases). The 100 sanctions occurred between 2001 and 2004.

Some of the loudest voices for restricting the legal rights of consumers and patients also are the biggest users of the court system. For example, claiming that it is inundated with class action lawsuits, the insurance industry has led the charge for federal legislation that would restrict the rights of consumers to bring such cases.

Yet in Cook County, IL, insurance companies filed about 8,000 lawsuits in 2002: 35x the number of class actions filed there by individuals that year, Public Citizen found. In fact, insurers file so many suits --mostly "subrogation" suits designed to recover the expense of covering their own policy holders-- that last year they asked to be exempted from a model lawsuit "reform" law that would limit citizen access to the courts and that they otherwise support.

"We see nothing wrong with anyone, whether an individual or a business, taking a genuine dispute to court when it can't be resolved amicably," said Jackson Williams, the Public Citizen attorney who authored the study. "We simply ask that corporations stop demonizing a perfectly good legal system that they regularly utilize."

The huge corporate campaign against consumer access to the courts is approaching its 25th year. This campaign has targeted trial lawyers who represent consumers in fraud, medical negligence, and personal injury cases on a contingency basis, being paid only if they win and paying up front for all the costs. This allows any consumers, poor or rich, to secure an attorney if they have a good case because they do not have to pay hourly fees.

The harshly negative corporate campaign includes:

- the creation of new trade associations of companies pushing for state as well as federal legislation to limit consumer rights;
- hundreds of lobbyists pressuring congressional and state lawmakers;
- the creation of front groups across the country called Citizens Against Lawsuit Abuse (whose members are actually businesses);
- new think tanks such as at the Manhattan Institute to hire authors to write books and reports attacking the civil justice system; and,
- strategic television and radio advertising at the state and national level.

For more information about Public Citizen, go to www.citizen.org. The report, "Frequent Filers: Corporate Hypocrisy in Accessing the Courts," is available at http://www.citizen.org/congress/civjus/tort/myths/articles.cfm?ID=12369 .

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Commissioner Trier not conceded this fight after the item veto, the apportionment bill would not have passed. The lesson? **Even with Democrats in office, we all have to be aware and on guard for "reform."** ABI made cutting injured workers' benefits its aim for two sessions. Sadly for workers and their families, ABI got its way.

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Medical Analysis for Lawyers

All You Need To Know About "Work-Related Asthma"

by Jessica S. Scott, MD*

Introduction

As we enter the 21st century, work-related asthma (WRA) has emerged as the most frequently reported occupational lung disease in the industrialized world. Yet it still remains under-recognized and under-reported.[1]

Over the past ten years, much research has contributed toward our understanding and awareness of WRA. The broad heading of WRA is now used to encompass both occupational asthma (OA) and work-aggravated asthma (WAA). This article will detail efforts being made to use a more standard set of definitions and diagnostic criteria for WRA, and will highlight recent findings in this field.

A careful history with knowledge of the potentially hazardous exposures can point to a diagnosis, which must then be confirmed by objective testing. To control WRA and prevent long-term medical problems, workplace exposures need to be addressed. The socioeconomic impact on affected workers and their employers thus could be significantly lessened.

Recent research supports the proposition that approximately 10% of adult-onset asthma is attributable to workplace-related factors. It also indicates that the risk of developing OA is more dependent on the level of exposure to the causative agent than to an individual's susceptibility due to such factors as allergies in general, cigarette smoking, or genetic predisposition.[2]

Definitions

Occupational Asthma (OA) - The generally accepted definition of OA is a variable airflow limitation or airway hyper-responsiveness due to causes and conditions attributable to a specific workplace environment, and not to stimuli encountered outside of the workplace.[3] OA includes asthma that is caused by irritants through a non-sensitizing exposure (approx. 7%) and asthma that is caused by a specific agent-inducing immunologic sensitization (over 90% of OA)[4].

Typically, in the irritant induced cases – also known as **Reactive Airways Dysfunction Syndrome (RADS)** – a latency period (generally, weeks to years) between the irritant exposure and the onset of airflow obstruction symptomatology does not exist, in contrast to sensitization type cases. RADS is a well-recognized reaction to an inhaled irritant, such as fumes from a chemical spill, which causes direct irritation of the bronchial tubes. Symptoms peak in the first 24 hours and usually require medical care. Pulmonary dysfunction often persists long after the exposure ceases. Severe exposures can cause Adult Respiratory Distress Syndrome (ARDS), acutely.

RADS is most often discussed in the literature as a single high-level inhalation exposure to a toxic agent; the asthmatic symptoms must originate with the exposure, and there must be no history of pre-existing asthma, even during childhood. Individuals with pre-existing asthma (or bronchial hyper-responsiveness) who experience high-level irritant

exposure would be considered to have had an exacerbation of their existing asthmatic condition.[5] In other words, **WAA.**

Originally defined in 1985 by Brooks and Lockey, RADS continues to have unclear causative mechanisms on the cellular level, and the reasons why some individuals develop it after an exposure while others do not is also unclear. More recent research has begun to demonstrate RADS can also be a consequence of subacute, or chronic low-level, exposure to irritants.[6,7] These can be in the form of gases, fumes, vapor, or dust. Examples of specific chemicals that have been associated with OA and RADS are ammonia, chlorine, formaldehyde, ozone, and nitrous oxide.

In OA attributable to sensitizing agents, the latency period is present and it allows an individual time to develop sensitivity/allergy to a particular agent. The mechanisms are better understood in this type since it more closely flows the immune reaction found with non-occupationally related asthma. The immune reaction is mediated through an antibody produced by the body's immune system called immunoglobulinE (IgE).

The body's reaction to an agent to which it has become sensitized results in the release of chemicals causing bronchial inflammation, airway narrowing, and symptomatic asthma. **Over 250-300 substances have been identified in the workplace** that can elicit an allergic response and cause OA. They are often categorized as **high molecular weight (HMW)** and **low molecular weight (LMW)** agents.

HMW (greater than 5 KiloDaltons) agents consist mostly of animal and plant proteins. Some examples include:

- animal dander (animal handlers)
- insect scales (laboratory workers, entomologists);
- egg white proteins (egg producers);
- grain dust (farmers, grain store workers);
- wood dust (sawmill workers, carpenters); and,
- latex (health care workers).

LMW (less than 5 KiloDaltons) agents are mostly chemicals. These include:

- diisocyanates, a leading cause of OA;
- anhydrides (plastic and drug industry);
- metallic salts (tool and dye workers; and,
- antibiotics (pharmaceutical workers).[8]

Once sensitization has occurred, a HMW agent may produce an early or immediate symptom response with associated decreased lung function (within one hour) with or without a late-phase response occurring at 4-12 hours later.

LMW agents produce solely a late-phase response that may occur after the patient has left work. As exposure continues over time, however, abnormal lung function and symptoms may become more persistent, making this differentiation less apparent.

Also, typical of asthma is airway "twitchiness" (medical term is bronchial hyper-responsiveness) which produces asthmatic symptoms in response to nonspecific irritants at or away from work. Irritants, for instance, include such things as:

- smoke;
- fumes;
- cold air;
- exercise; and,
- environmental allergens (found indoors or outdoors).

Work-Aggravated Asthma (WAA) - WAA is defined as a pre-existing or concurrent asthma that was *not* initiated by workplace exposures, but is worsened by an agent/agents in the work environment. A recent study found that **workplace aggravation of pre-existing asthma occurred in 21% of workers**. Exposures correlating with worsening symptoms were:

- dust (either through self-report or expert evaluated exposure);
- abnormal air temperature;
- poor indoor air quality;
- physically demanding work; and,
- chemicals.

In a well-done study on WAA, the frequency of asthma symptoms was not increased among tobacco users; however, definitive conclusions cannot yet be drawn as to the effect of tobacco use.[9,10] Studies vary as to whether or not tobacco users are more likely to develop OA or WAA.

Diagnosis

History and Research Highlights of Potential Workplace Exposures.

After the generic diagnosis of asthma is made, establishing work-relatedness necessitates a detailed history of the worker's illness with emphasis on:

- the temporal relationship between job exposures;
- symptoms;
- on-going medical problems; and,
- current medications.

The above then requires documentation of the worker's job and work environment, and correlation with the nature and timing of all symptoms (noting that

symptoms can occur almost immediately with exposure, or hours later when the worker is in bed at night). In most cases, it is the temporal relationship that helps focus the investigation, though objective testing will be necessary to definitively diagnose WRA.

In any individual with asthma, the symptoms or the "attack" may develop in response to one or several asthma triggers. The **known asthma triggers** are:

- respiratory viral infection (including the common cold);
- allergies (pollen, animal fur, dust mite excreta, shell-fish);
- irritants (smoke, fumes, gases, other non-specific air pollutants);
- climate changes;
- exercise (especially in cold air);
- sinus infections;
- drug reactions (aspirin, beta-blockers); AND,
- stomach acid (from gastroesophogeal reflux).

Though these triggers act through different mechanisms, the end result is the production of mucus and constriction of the bronchial tubes, causing airflow obstruction. Symptoms of all types of asthma are:

- wheezing, chest tightness;
- cough; and,
- shortness of breath.

A wheeze is a high-pitched sound caused by air traveling through a constricted passage. Shortness of breath (dyspnea) is often described in relation to physical exertion; however, it can occur at rest in more severe cases. When asthma is very mild, symptoms can resolve spontaneously without any medications. In most cases, it is a *reversible* condition in that symptoms and airflow obstruction significantly improve with treatment.

In cases of repetitive severe attacks in which airway obstruction doesn't reverse –often involving inadequate treatment or a prolonged disease course– a worker's condition is properly categorized as **chronic obstructive pulmonary disease (COPD)** that is not due to tobacco abuse. (Smoking will worsen any asthmatic condition, although it is not generally thought of as a cause of new-onset adult asthma.)

All cases of new-onset adult asthma in a working individual should be evaluated for potential OA. COPD is a fixed, and for the most part irreversible, obstruction that includes the three distinct pathological processes:

- emphysema;
- chronic bronchitis; and,
- chronic bronchiolitis.

The diagnosis of **occupational COPD** is difficult, and therefore rarely made. This is largely because COPD is so slow to develop and the obstruction is chronic and irreversible even when exposure is eliminated, making causality harder to prove.

When COPD is diagnosed, it is based either on the progression of occupational asthma to occupational COPD, or on the specific types of occupational exposures known to have a much higher chance of resulting in occupational COPD. The latter determination is, in turn, based on epidemiologic studies demonstrating the following as particularly likely to result in COPD compared to other exposures:[11]

- minerals (coal, oil mist, Portland Cement, silica);
- metals (welding fumes, vanadium, osmium);
- organic dusts (cotton, wood, grain); and,
- smoke (engine exhaust, fire smoke **and environmental tobacco smoke [ETS]).**

ETS, interestingly, has >400 constituents and is analogous to a mixed inhalation exposure at the workplace. The exposure consists of particles and gases with known chemical irritants and known sensitizing/immunologically mediated agents (including some demonstrating increased IgE levels in the blood) which play a role in the development of obstructive lung disease, reversible and irreversible (asthma and COPD, respectively).

Eisner, after review of the literature, concluded that there is evidence of a causal relationship between ETS exposure and adult asthma onset and exacerbations.[12] In an excellent recent population-based incident control study done in Finland, Jaakhola, *et al*. found that both cumulative lifetime and recent (past year) ETS exposure increase the risk of adult-onset asthma. A significant dose response pattern was seen, as well, making the case for causality even stronger. The fraction of asthma attributable to ETS exposure within the past year was remarkable at 49% compared to an attributable risk of 8% among the working age population as a whole.[13]

Another significant study by Flodin *et al*. supports an association between exposure to nonspecific air pollution at the workplace for three or more years and the development of adult onset asthma.[14] (The risks of active and passive tobacco smoke are not completely clear, as discussed above.) In this study, there was similar risk for asthma development among smokers and non-smokers exposed to non-specific air pollution. However, the study found that active smoking in a worker nearly doubled the risk for

development of asthma among both exposed and non-exposed groups. When both risk factors are present –active smoking and exposure to non-specific air pollution– a multiplicative effect is suggested.

When it comes to **mold** at the workplace, smokers and women were found to be at increased risk for new-onset adult asthma, but only in the presence of visible mold and/or mold odor at the work place. Water stains and a mere history of water damage, in and of themselves, did not correlate with asthma development. The attributable fraction of asthma due to this visible mold exposure and old mold odor was 35% according to a recent Finnish study. The causative agents were not identified as to type of mold, bacteria, dust mites, or enhanced emissions from chemicals, though some or all of these elements may have contributed.[15]

The **evaluation of patients** suspected of having WRA continues with a detailed history of:

- does individual clean his/her own home, hobbies, home renovation projects, pets
- previous work environments
- a worker's description of his/her work activities.

The last item above includes information as to:

- the process flow:
- where the steps take place (in relation to each other and to the individual's location); and,
- the possibilities of unexpected or infrequent events.

For any given job/title, a series of "unit operations" can very often be used to thoroughly describe the procedures required, and thus shed significant insight as to the potential exposures that may be encountered.[16]

One can review industrial hygiene texts[17,18,19] and Pub Med using the unit operation, then the "hazard" as a search term, and the OSHA and NIOSH websites (www.osha.gov and www.coal.gove/niosh/hompage.html respectively) for hazards due to specific unit operations. For example, spray painting can result in hazardous exposures through pigment aerosols and solvent vapors. A hazardous chemical can come into contact with the workers body through:

- Inhalation;
- ingestion; or,
- dermal absorption.

In the case of spray painting, for example, exposure may be through both inhalation and dermal absorption.

The dose and duration of exposure to potential hazards (chemical, biological, and physical) correlate to the degree of lung damage done. Pertinent questions include:

- how long was the exposure;
- how often;
- how high a level (what physical form of the agent and what concentration); and,
- were there any protective measures?

Exposure information is necessary (in addition to the information provided directly by the worker); ways to obtain further information include:

- occupational health records;
- Material Safety Data Sheets (MSDS);
- industrial hygiene reports;
- printed job descriptions; and,
- co-worker affidavits.

The MSDS may vary in quality and are often not complete, especially, in addressing chronic, reproductive, or carcinogenic effects. However, the chemical identification information and acute health effects are certainly a good starting place.

Those chemicals listed as "trade-secrets" or "proprietary" must be disclosed to the treating physician by the manufacturer, if medically necessary for the care of a patient once confidentiality is established between the physician and the manufacturer. Bracker's research supports that a worker is rarely exposed to a single chemical in isolation and consideration should be given to multi-chemical exposures.[20]

Physical Examination

Once a thorough history is obtained, a physical exam emphasizing the cardiorespiratory system is performed on the worker. Physical findings of:

- rhinitis;
- conjunctivitis;
- wheezing;
- barrel-chestedness;
- clubbing; and,
- rash can relate to the diagnosis of WRA.

Upper and lower airway disease may co-exist and it can be due either to irritant or immune-mediated mechanism.

As in the case of asthma, workplace irritation of nasal and eye mucus membranes (rhinoconjunctivitis), sensitization may be secondary to:

- common inhalant allergens encountered at work (dust, animal dander, pollen);
- allergens more common at work (latex, flower); and,
- unusual agents found only in industry.

It is *not* unusual for sensitized individuals to have allergy induced occupational asthma *and* rhinitis.[21]

Particle size and water solubility affect how and where an agent might cause symptoms, as does an agent's physical form. Ammonia, sulfur dioxide, and hydrogen chloride gases will cause acute irritation to mucous membranes in upper airway (eyes, nose) and, unless in sufficiently high doses, will usually spare lower airways. The sparing effect is aided by the fact that most individuals will leave an area of exposure if unpleasant symptoms develop.

Less soluble gases like phosgene, ozone, and nitrogen oxide may not cause the more immediate upper airway symptoms. The exposed individual may stay in the area for a longer time period, and thus have an increased risk for severe outcome.[22,23]

Objective Studies

Finally, the objective tests complete the evaluation of the worker with WRA. A **chest x-ray** is performed. It is often normal in asthmatic individuals, though it may reveal such findings as:

- hyperinflation;
- bronchial wall thickening;
- flattened diaphragms;
- atelectasis; and,
- other positive or negative findings to help rule in or out other diagnoses.

Spirometry is an objective test to measure the degree of airway constriction, and therefore the severity of the asthmatic episode. Usually, asthmatics have normal spirometry when *not* having an asthma exacerbation *and* when adequately treated: which represents the reversible nature of asthma as compared to COPD where abnormal spirometry persists.

This **Pulmonary Function Test (PFT)** requires a cooperative patient, preferably off medication for 8-24 hrs before testing. The individual takes a deep breath, and then exhales as quickly and forcibly as possible through a plastic tube to a spirometer to measure the amount and rate of air expelled. The forced vital capacity (FVC) is the total amount of air expelled (usually over 3-4 seconds). For a healthy adult, this is usually 4-5 liters.

The forced expiratory volume exhaled in the first second (FEV-1) is often used as a ratio (FEV-1/FVC) that reflects the severity of airway function and is normally 75-80%. In other words, healthy adults *without* an asthma exacerbation can blow out 75-90% of their FVC in the first second, and levels <75% signify airway obstruction and the degree to which it exists.

The rate of airflow is another aspect of spirometry and can be measured by a very simple, portable, safe, and inexpensive device called the **peak flow meter**. Patients can use the meter themselves at home and in the workplace with only brief instructions.

The ***AMA Guides*** recommend the **Dco**, which is the **diffusion capacity** for carbon monoxide single breath test, which measures the amount of carbon monoxide per unit of time, diffusing across the blood lung membrane. A decrease in Dco, expressed as a percent of predicted values, indicates impaired gas permeability attributable to a variety of conditions. The test is low in "specificity" though it does have good "sensitivity" in identifying the presence of an abnormality.

Many studies have looked at serial peak flow measurements (by the worker) and their usefulness in aiding in diagnosis of OA. Daily measurements performed at work and at home for two weeks, and comparison of these readings and readings obtained during a holiday period, can yield objective information for the confirmation of OA.[24,25,26] There are no uniformly accepted criteria for the interpretation of serial peak expiratory flow (**PEF**) monitoring, and the motoring depends on the individual's compliance and honesty.[27]

Pulse oximetry can give some added information as to the oxygenation of the individual. Though arterial blood gases are more revealing, they are not routinely done due to the invasive nature and potential risks involved in arterial blood sticks. A build-up of carbon dioxide occurs before the oxygen in the blood decreases because the obstructive component in obstructive lung disease more predominantly affects exhalation than inhalation. Thus carbon dioxide builds up because it cannot be blown out of the lungs as effectively.

In patients whose symptoms suggest OA, but whose baseline spirometry is normal, the **non-specific bronchial hyper-responsiveness** (NSBA) test is useful. For example, this test is useful when a worker is no longer exposed to a specific agent, either through change of job or lack of further toxic exposure at current work place.

Methacholine is the most commonly used agent to provoke airway narrowing because of the lower risk of side effects compared to histamine, and the lower expense compared to cold air-induced provocation. When trying to differentiate between OA and WAA, a **methacholine challenge test** upon completion of a work week, then again at the end of a

holiday period, can be very helpful. This is the case since a three-fold or greater increase in PC20 (the provocation concentration of methacholine causing a 20% drop in FEV-1; i.e., it takes more to provoke bronchioles) supports OA rather than WAA, whereas serial peak flow readings and symptom diaries may not be sufficiently different to distinguish the two.

This comparison presumes that OA significantly improved away from the workplace, whereas WAA has continued lung function abnormalities outside the workplace due to triggers that are non-work related. However, in both OA and WAA, bronchial hyper-responsiveness may persist for several months to years after work exposure has ceased, making comparisons between the bronchial provocation studies more difficult to use definitively for or against occupational causality.

Immunological tests can identify sensitization in the individual. This can be done through scratching the skin with an allergen present at the workplace for support of the diagnosis of OA, if appropriate PFT changes are present as well. The **RAST and ImmunoCap** tests are used to test the blood for specific IgE antibodies, and thus allergic sensitization, for diagnostic assistance in much the same way. However, a lack of commercially available or standardized preparation for both types of immunological tests leaves these methods mostly to a small number of research institutions.[28]

***Specific* bronchoprovacation testing**, considered by many to be the "**gold-standard**", uses the precise agent in question to induce bronchial hyper-responsiveness. The relatively few agents that are available are not readily accessible in the majority of clinical settings, and thus it remains more of a research tool at present.[29]

New techniques for evaluating airway inflammation which are non-invasive have great potential for clinical applications in the diagnosis of WRA in general, and in clarifying the specific mechanisms involved. The techniques are **exhaled nitrous oxide** and **induced sputum** analysis. Both are being researched further and will hopefully gain clinical usefulness in the future.

Treatment

The treatment for OA is the same, in terms of medications, as for non-occupational asthma. If it is a one-time irritant-induced RADS, then the worker should be able to return to the same work environment. The mainstays of treatment are **bronchodilators** (Beta-agonists such as albuteral, Ventolin, Proventil, Serevent) to reverse the bronchoconstrion, and **corticosteroids**, inhaled preferably although oral may be needed in more severe situations.

In a patient having an asthma attack, treatment with inhaled bronchodilators may result, for example, in a 30% increase in FVC and a 48% increase in FEV-1, with peak flow improvements of about 45%. These partial improvements mean that the patient's bronchial tubes responded well to the medication, confirming the diagnosis of asthma. However, it will take more medication (corticosteroids) and several more days, along with removal of exposure/triggers, for lung function to return to normal baseline values.

Management

Effective clinical management next involves reduced exposure to the sensitizer or subacute irritant. The high level irritant would theoretically not occur again. However, due to possible persistent hyper-responsive bronchioles, a worker may have symptoms that continue or worsen as a result of other irritant exposures.

In decreasing order of effectiveness, the following have been recommended as a guideline for reducing exposures to irritants:[30]

- substitution of offending agent with different agent (hopefully less risk, though may be found to be hazardous in the future);
- engineering controls (exhaust, ventilation, process enclosure);
- administrative controls (transfer job, change work practice); and,
- personal protective gear (not much data to support this as viable option).

If the patient has sensitizer-induced OA, he/she should not return to the workplace since only very small amounts are necessary upon re-exposure to trigger a severe reaction. Also, it is estimated that **60%-90% of workers will not return to their baseline lung function** even after exposure is eliminated.[31]

In attempt to reduce chemical exposures, there are three sets of chemical exposure limits to consider, in order of least to most stringent:

- **OSHA** has Permissible Exposure Levels (PEL) (these levels are 8 hour and short-term exposure levels);
- the **American Conference of Governmental Industrial Hygienists (ACGIH)** has its Threshold Limit Values (TLV) (to protect most workers under ordinary working conditions); and,
- **NIOSH** of the CDC has its Recommended Exposure Levels.

Generally, the latter two provide the best information for guiding

management of an individual worker and, although not legally bound to these levels, employers should respond with exposure controls.[32] **Recommended exposure limits may not be applicable to a given worker** for a number of reasons, including the fact that asthma can be induced by varying amounts of exposure, even at levels below those recommended.

There are also frequent multi-agent exposures that may act additively or synergistically. There may be intermediate or degradation products that have not yet been studied but are the cause of further reaction. Furthermore, most studies to date are of Caucasian males with inferences as to a similar effect across gender/race and ethnicity. Finally, the basis of the criteria used to determine exposure limits may not be based on that in which an individual worker might develop asthmatic symptoms.

When interpreting information gathered by an industrial hygienist for evaluating exposure levels and comparing them to recommended exposure limits, care must be taken to understand the context in which the information was gathered. For instance, was the data collected in the time period of concern for a patient, and was it truly representative of the worker's job activities and exposures? Were there any changes subsequent to the report?

Bracker, *et al*. cautions that the data rarely proves useful, though patients may present to their physician with the information for clinical use, since it rarely reflects the actual exposure experience of the patient[33]. However, when determining if a patient can return to a workplace, particular job safety exposure data can be extremely helpful if collected appropriately, especially if collected from patients' breathing zone ("personal area"). Attention as to whether it should be collected as a "full shift continuous sample" or a "peak/ incident sample" (which would be diluted if collection period is too long) is critical to usefulness of data.

Recovery often plateaus after two years beyond the last exposure. Therefore, a temporary impairment rating is often used initially and then permanent after the two years have elapsed.[34] There is evidence that in addition to early diagnosis and complete removal from exposure to sensitizer (in immunologic OA), initial treatment with a high dose inhaled steroid reduces non-specific bronchial hyperresponsiveness (NSBH). Even so, **full recovery is limited to the minority of patients**. Over time, the NSBH becomes unresponsive to inhaled steroids, possibly due to chronic disregulation.[35]

Conclusion

In conclusion, WRA, as the most common occupational lung disease, needs attention from medical and legal professionals to assist workers who have been exposed to hazardous materials at their workplaces. A worker is more likely to have permanent disease with an increased degree of morbidity the longer the duration of exposure before symptoms develop and the longer duration before OA is diagnosed. The severity of OA at the time of diagnosis also correlates with worsened outcome. Through use of current diagnostic methodologies and the evidence that has accumulated over the past 10 years of research, WRA can very often be distinguished successfully from non-work-related asthma, resulting in healthier workers.

Additional Resources

Treating physicians lacking the resources to undertake the evaluations involved in diagnosing WRA as compared to asthma in general, should **refer the worker** to an academic "Occupational Medicine Clinic" having experience with WRA. The Association of Occupational and Environmental Clinics in Washington, DC (202-347-4976) has over 50 clinics nationally. The New York State Department of Health has a network of 8 occupational medicine clinics within the state.

For workplace evaluations specifically, NIOSH will perform a Health Hazard Evaluation by request (800-35-NIOSH). Also, NIOSH provides online information listing agents/irritants and guidelines for recognition and management of OA through NIOSHTIC-2.

Additional online information is available at www.asmanet.com. Click on "occupational asthma" for a large database of books and over 300 scientific papers supporting evidence-based OA. For each hazardous agent, the website lists incidences, symptoms, and diagnostic tests that may be helpful, as well as references to supportive articles (with PMID numbers). Key references include the American College Chest Physicians (ACCP) consensus statement[36], the AMA guides,[37] and textbooks[38,39,40] which will provide detailed information on definitions, diagnoses, and management.

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[1] Taiwo OA, Cain HC. Pulmonary Impairment & Disability. Clin Chest Med 2002; 23:841-851.

[2] Gautrin D, Newman-Tayor AJ, Nordman H, Malo J-L. Controversies in Epidemiology of Occupational Asthma. Eur Respir J 2003; 22:551-559.

[3] Armaiz NO, Jaufman JD. New Developments in Work-Related Asthma. Clin Chest Med 2002; 23:737-747.

[4] Tarlo SM, Liss GM. Occupational Asthma: An Approach to Diagnosis & Management. CMAJ 2003;168(7):867-871.

[5] Alberts WM, Guillermo A. Reactive Airways Dysfuncion. Chest 1996; 109:1618-26.

[6] Paggiaro PL, Vagaggini E, Bacci L, *et al*. Prognosis of Occupational Asthma. Eur Resp J 1994; 7:761-767.

[7] Balmes JR. Occupational Airways Diseases from Chronic Low-Level Exposures to Irritants. Clin Chest Med 2002; 23:727-735.

[8] Zacharisen MC. Occupational Asthma. Med Clin N Am 2002; 86:951-971.

[9] Saarinen K, Karjalainen A, *et al*. Prevalence of Work-Aggravated Symptoms in Clinically Established Asthma. Eur Respir J 2003; 22:305-309

[10] *Id.*

[11] Balmes JR. *Ibid.*

[12] Eisner MD. Environmental Tobacco Smoke & Adult Asthma. Clin Chest Med 2002; 23:749-761.

[13] Jaakkola MS, Piipari R. *et al*. Environmental Tobacco Smoke & Adult-Onset Asthma: A Population-Based Incident Case-Control Study. Am J of Pub Health 2003; 93(12):2055-2060.

[14] Flodin U, Ziegler J, *et al*. Bronchial Asthma & Air Pollution at Workplaces. Sc & J Work Environ Health 1996; 22:451-6.

[15] Jaakola MS, Nordman H, Piipari R, *et al*. Indoor Dampness & Molds & Development of Adult-Onset Asthma: A Population-Based Incident Case-Control Study. Environmental Health Perspectives 110:543-547.

[16] Bracker A, Storey. Assessing Occupational & Environmental Exposures That Cause Lung Disease. Clinics in Chest Medicine 2002; 23:695-705.

[17] Burgess WA. Recognition of Health Hazards in Industry: A Review of Materials & Processes. 2nd ed. New York: John Wiley and Sons; 1995.

[18] Cralley LV, Cralley LJ. Industrial Hygiene Aspects of Plant Operations, 2 vols. New York: Macmillan Publishing Co, Inc.; 1982.

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The guide is available at **www.kff.orgtalkingaboutmedicare** and can be easily downloaded and printed.

[19] Plog B, Quinlan P, eds. Fundamentals of Industrial Hygiene. 5th ed. Itasca (IL): National Safety Council; 2002.

[20] Bracker A, Storey. *Ibid*.

[21] BalKissoon R. Occupational Upper Airway Disease. Clin Chest Med 2002; 23:717-725.

[22] *Id.*

[23] Rabinowitz PM, Siegel MD. Acute Inhalation Injury. Clin Chest Med 2002; 23:707-715.

[24] Moscato G, Godnic-Cvar J, Maestrelli P, Malo JL, Burge PS, Coifman R. Statement on Self-Monitoring of Peak Expiratory Flows in the Investigation of Occupational Asthma. J Allergy Clin Immunol 1995; 96:295-301.

[25] Burge PS, Moscato G. Physiologic Assessment: Serial Measurements of Lung Function, in Bernstein IL, Chan-Yeung M, Malo JL, Bernstein DI, eds. Asthma in the Workplace. 2nd ed. New York: Marcel Dekker Inc; 1999, pp. 193-210.

[26] Leroyer C, Perfetti L, *et al*. Comparison of Serial Monitoring of Peak Expiratory Flow & FEV_1 in the Diagnosis of Occupational Asthma. Am J Respir Care Med 1998;158:827-832.

[27] *Id.*

[28] Friedman-Jiménez G, Beckett WS, *et al*. Clinical Evaluation, Management & Prevention of Work-Related Asthma. Am J Ind Med 2000; 37:121-141

[29] Ortega HG, Wesisman DN, *et al*. Use of Specific Inhalation Challenge in Evaluation of Workers at Risk for Occupational Asthma: A Survey of Pulmonary, Allergy & Occupational Medicine Residency Training Programs in the United States & Canada. Cardiopulmonary & Crit Care J 2002; 121(4):1323-1328.

[30] Balmes JR. *Ibid.*

[31] Taiwo OA, Cain HC. *Ibid.*

[32] Bracker A, Storey. *Ibid.*

[33] Bracker A, Storey. *Ibid*.

[34] Taiwo OA, Cain HC. *Ibid.*

[35] Paggiaro PL, Vagaggini E, Bacci L, *et. al*. Prognosis of Occupational Asthma. Eur Resp J 1994; 7:761-767.

[36] Chan-Yeung M. 1995. Assessment of Asthma in the Workplace: ACCP Consensus Statement-American College of Chest Physicians. Chest 108: 1084-1117.

[37] Cocchiarella L, Anderson GBJ. 2002. AMA Guides to the Evaluation of Permanent Impairment, 5th ed. USA: AMA Press.

[38] Bernstein IL, Chan-Yeung M, Malo J-L, Bernstein D. 1993. Asthma in the Workplace. New York: Marcel Dekker.

[39] Chan-Yeung, Malo JL. 1997 Occupational Asthma, ch. 145 in Barnes PJ, Grunstein MM, Leff AR, Woolcock AJ, eds. Asthma. Philadephia, PA: Lippincott-Raven, pp. 2143-2155.

[40] Balmes JR. 1996 Asthma, in Harber P, Schenker M, Balmes J, eds. Occupational & Environmental Respiratory Disease. St. Louis: Mosby, pp. 189-200.

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