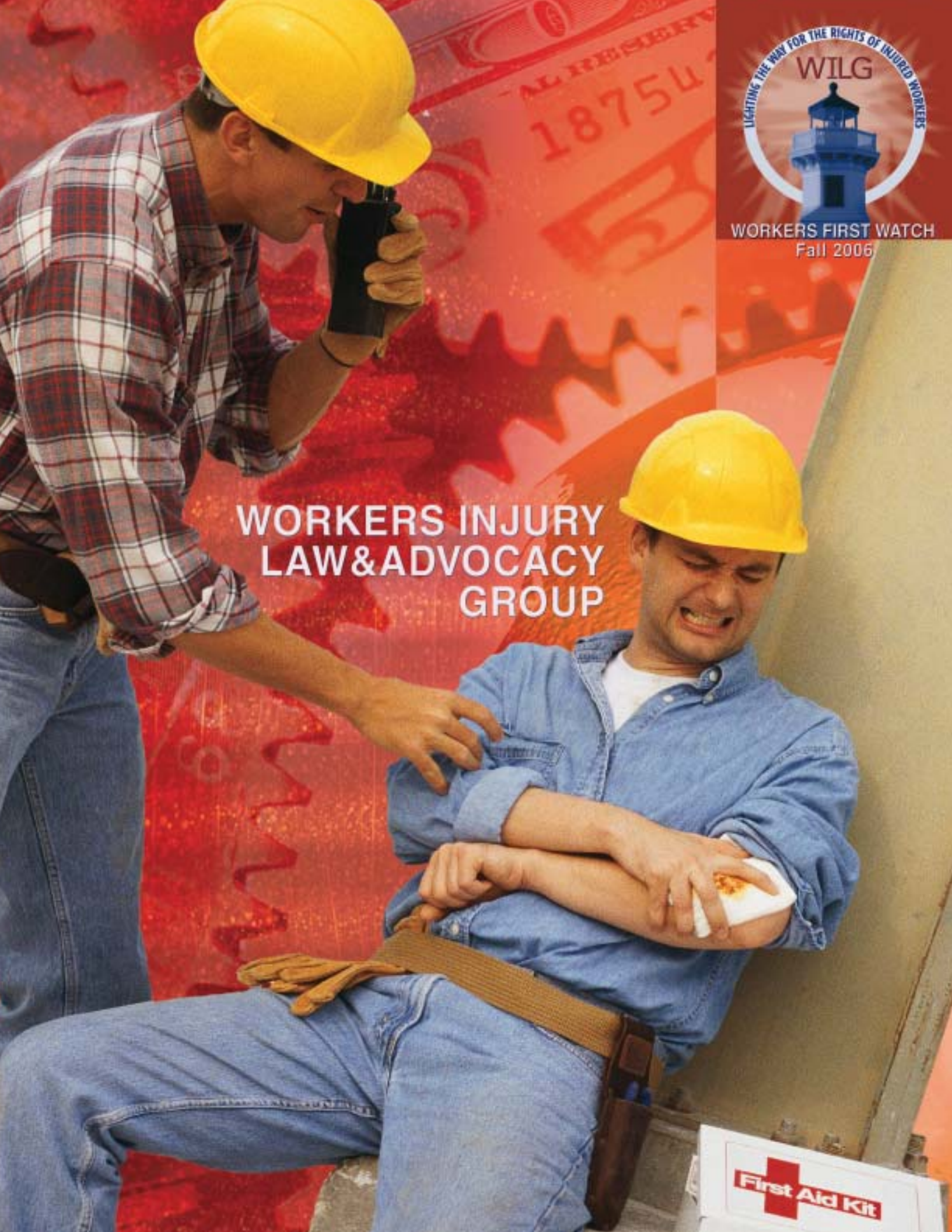

LIGHTING THE WAY FOR THE RIGHTS OF INJURED WORKERS
WILG
WORKERS FIRST WATCH
Fall 2006
WORKERS INJURY
LAW&ADVOCACY
GROUP
First Aid Kit

Past President's Message

by Deborah G. Kohl, Esq.

After a year serving as WILG president, I have to honestly say that I have enjoyed every moment of my tenure. While there is a considerable amount of daily grind, there is also the ability to interact with some of the brightest, ablest workers' compensation minds in the business - representing states throughout the nation. The organization's purpose is deceptively simple: provide a forum for the advancement of the interests of injured workers. The devil is, as they say, in the details.

We are blessed to have willing volunteers able to donate countless hours to strategy, thought, and work on issues affecting our clients individually and the injured worker in general.

I want to thank everyone who has helped during the past year to grow this body, both in numbers as well as in intellect. We have reached out to the membership through the ListServ, the WILG Fax Bulletins, and the *Workers First Watch*. We have produced extraordinary educational programs. We have developed strategies on key issues of the day. In all, we have done the work that we were created for.

But, all of these functions require members to donate their time, whether it is an hour or multiples of hours. I ask each and every one of you to do that in the coming years. Be a part of WILG. Attend meetings, volunteer for committees, create a local chapter. Without each of you, there is no US.

I thank you all for allowing me the opportunity to serve as your President, and I look forward to serving with all of you in this organization into the future.

Sincerely,

Deb Kohl

Deborah Kohl, Esq.
Immediate Past President

President's Message

by Todd. J. O'Malley, Esq.

Sixty years ago this past August, a group of 11 visionary lawyers involved in workers' compensation litigation founded NACA-National Association of Compensation Attorneys (a few years later it became NACCA-National Association of Claimants' Compensation Attorneys). This organization would ultimately evolve into ATLA-Association of Trial Lawyers of America.

In 1995, under the umbrella of ATLA, a small group of workers' compensation attorneys would found WILG-Workplace Injury Litigation Group (in 2004, renamed as the Workers Injury Law&Advocacy Group).

During the first half of the twentieth century, workers' compensation in America was codified in a number of states after the tragic Triangle Shirtwaist Factory fire in New York City on March 25, 1911. The keystone of this social contract was that an employer would be immune from personal injury lawsuits in return for participating in a no-fault system, providing wage replacement and medical coverage for all injuries sustained on the job.

By the mid 1940s, unfortunately, that contract had been broken in state after state.

> "We walk in the footsteps of giants..."

The system for compensating injured workers left those individuals far below the poverty level, and provided very little medical treatment.

The 11 revolutionary men who gathered in Portland over six decades ago –led by Ben Marcus and Sam Horowitz– sought to educate the American people and American lawyers about the injustice of our compensation system for injured workers. Their proactive approach was successful and by 1948, every state in the union had "workmen's" compensation laws.

> ...it is our responsibility to regain the initiative, educate the American people, and repair a broken system.

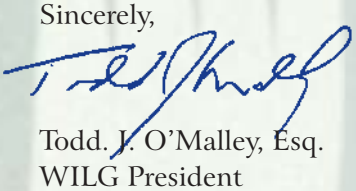
Remarkably, it was the administration of Richard Nixon that empaneled a commission to study the minimum standards that should be available in each state to provide for individuals hurt on the job. In July 1972, the National Commission on State Workmen's Compensation Laws issued its report. (*See page 7.*) Subsequently, across the nation state legislatures began passing laws that provided safety nets for American workers.

Since the mid 1970s, those true reforms have been severely mangled. American workers are, once again, left with a situation that offers only "third-world" level protections in the event of injury.

If we are truly able to walk in the footsteps of giants such as Mr. Marcus and Mr. Horowitz, it is our responsibility to regain the initiative, educate the American people, and repair a broken system. It is time for us to begin playing offense.

I have faith in each of you and your commitment to upholding the rights of America's injured workers. I look forward to working with you over the coming year.

Sincerely,



Todd. J. O'Malley, Esq.
WILG President

WFW FALL 2006 ISSUE

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August 3, 2006

The Honorable Larry Craig, Chairman
Committee on Veterans' Affairs
412 Russell Senate Office Building
Washington, DC 205106375

Dear Mr. Chairman:

In my capacity as national President of the Workers Injury Law&Advocacy Group (WILG), I am writing to express our association's full support of the concepts contained in S.2694 and the House companion bill H.R.5549. WILG is the national nonprofit organization dedicated to representing workers and their families who suffer the consequences of work related injuries and occupational diseases, and who need expert assistance with their state and federal claims. *See* www.WILG.org

WILG believes that our country's veterans should have the choice to hire counsel to assist them with their claims before the Department of Veterans Affairs. The bill, if enacted, would provide veterans with the choice to hire counsel earlier in the adjudication process.

Currently, a veteran cannot retain counsel until after the Board of Veterans' Appeals (BVA) denies the claim. This is too late in the process for counsel to be truly effective. By the time the BVA makes a decision on the claim, the record is effectively closed.

Attorneys would also be helpful in obtaining, organizing, and presenting records on behalf of veterans and in helping assure that the VA processes the claim in a more timely and accurate manner. As you know, several judges of the U.S. Court of Appeals for Veterans Claims (formerly, the U.S. Court of Veterans Appeals) have pointed out that expert assistence, which attorneys could provide, would be a more advisable course to follow.

WILG member-attorneys know from experience that the people who file claims are disabled, either physically or mentally, or both. Likewise, veterans often suffer from brain injuries, post traumatic stress disorder, or mental disabilities that can interfere with their ability to adequately file, follow, and properly pursue their claims. In addition, both veterans and survivors may be quite unsophisticated, and their claims may take years to resolve. All of these are people who genuinely deserve, and need, help.

The American Bar Association along with the state bar associations of Arizona, Maryland, New Jersey, Oklahoma, Pennsylvania, Rhode Island , Washington, and West Virginia have all supported a repeal of the attorney fee limitations in 38 U.S.C. §5904. (Within reason, fee restrictions can be acceptable, such as those involved for claimants in Social Security cases.)

It is interesting, but disheartening, to note that the statutory provisions put into effect over 140 years ago, in the wake of the Civil War, were fairer then than they are now. In effect, our veterans are being denied reasonable access to justice under current law.

It is fundamentally unfair to continue to effectively deny veterans the right to hire counsel to represent them in a timely and effective manner. For all of the above reasons, WILG strongly supports S.2694 and H.R.5549 and urges adoption.

If WILG or I may provide further assistance to the Committee, please call upon me at 570-344-2667 (or, in my absence from the country August 6-20, your staff may call our Executive Director, Randall Scott, at 202-349-7150).

Sincerely,

Todd O'Malley
President of WILG

cc Members of the U.S. Senate Committee on Veterans' Affairs Committee Staff

Hon. Steve Buyer, Chairman Committee on Veterans' Affairs U.S. House of Representatives

Hon. Jeff Miller, Chairman Subcommittee on Disability Assistance and Memorial Affairs U.S. House of Representatives

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National organizations including the ABA and Veterans' groups, Executive Directors of all State Bars / State Bar Associations, Executive Directors of all State Trial Lawyers Associations

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At Our Roots:

The Beginnings of Organized Plaintiff Lawyer Advocacy in the U.S.

by Jay Causey, Esq.

Jay Causey has practiced in Seattle for over 27 years in workers' compensation and other forms of disability law. He served as WILG president for a two-year term, from 1999 to 2001, and has been a Board member since the group's inception in 1995. He is past chair of the workers' compensation sections of both Washington State Trial Lawyers' Association and ATLA, and is a Charter member of the National Organization of Social Security Claimants' Representatives. From 2001 to 2004, he was the editor and publisher of WILG's periodic magazine, *Workers First Watch*, and continues to serve as Executive Editor of WFW. In 2003, he received the WILG Service Award for his outstanding service in his various roles in the organization.

He may be contacted at 206-292-8627 or *jay@causeylaw.com*

As it approached its 60th year, the Association of Trial Lawyers of America (ATLA) directed substantial energy and resources into its search for a new name in efforts to improve the image of its members in the eyes of the general public. It now remains to be seen whether the new name, *American Association for Justice* (AAJ), will resonate with the citizenry and help trial lawyers combat the perceptions of an increasingly anti-plaintiff's lawyer jury pool. Advocates for the injured face a daunting challenge in overcoming the effects of the cynical, decades-old campaign by corporate America and its enablers in the media which has steadily diminished the rights of the average citizen to seek redress under the 7th Amendment.

> Labor unions regularly traded injured worker rights for better fringe benefits in collective bargaining.

The role workers' compensation lawyers will play in the overall scheme of this new organization is, at present, far from clear. Leaders of the Workers Injury Law&Advocacy Group (WILG) will be working with the new leadership of AAJ to find a better fit for workers' comp attorneys in an organization that owes its existence to those practitioners. As part of that process, perhaps AAJ will rediscover some parts of its roots in injured worker advocacy that will help burnish its image as its lawyers pursue justice in the jury trial arena.

Within just a few years of the formation of the National Association of Compensation Attorneys (NACA, later becoming NACCA) in 1946, the center of gravity in the organization was moving from workers' comp lawyers to tort lawyers. This resulted almost exclusively from the rise to prominence of the charismatic Melvin Belli, who talked NACCA co-founder Sam Horovitz into accepting tort lawyers into the organization at the convention of 1948.[1] Largely from the infusion of tort lawyers, NACCA's membership grew from 300 in 1948 to 8300 in 1956.[2] Horovitz apparently saw, and was concerned by, the energy gravitating away from the representation of workers in an essentially no-fault administrative system toward the defense of a system premised on the "fault principle" and organized around the role of the jury.

Writers Jacobson and White recount – in *David v. Goliath: ATLA and the Fight for Everyday Justice* – the tension within NACCA in the early days. This was rooted in Sam Horovitz's "somewhat abstract idealism" of compassion and justice for the American worker to be found in a mandatory insurance program that processed thousands of cases anonymously, against the drama and excitement of the civil jury system which was beginning to capture the attention of the public and the media. Today, as then, workers' compensation dwarfs tort law as the primary safety net for the American worker, yet the tensions between the two systems are largely unchanged in sixty years.

Workers' comp dwarfs tort law, yet the tensions between the two systems are largely unchanged.

As workers' comp lawyers increasingly go their own way within plaintiff advocacy, it may be instructive – and certainly an interesting process for this history-buff author – to reflect back on the formative years of NACCA: our heritage. (There is no original research here; most of the following highlights of the early years come from Jacobson's and White's first chapter.)

The workers' compensation scene at the end of World War II begged for change. 18,000 workers died, and two million were injured, each year. The casualty insurance business was paying only a third of premiums collected back to workers or their dependents, and was aided by an organized defense bar of about 5,000 lawyers who had access to an industry-wide research unit. The medical profession had been nearly completely co-opted by the defense. Hearing examiners and commissioners who decided contested cases had a revolving-door relationship with the insurance industry. NACCA co-founder, Ben Marcus (then counsel for the UAW in Detroit) said that labor unions regularly traded injured worker rights for better fringe benefits in collective bargaining.

Pitted against this formidable array of power were what legendary Professor Tom Lambert has called "shirtsleeve lawyers" – those with working class backgrounds, from Depression era families, graduates of non-elite law schools, and who in significant numbers were Jewish, Catholic, or otherwise deemed "ethnic", and thereby disqualified from entry into "blueblood" firms. Far from being welcomed by the legal establishment, the "shirtsleeve lawyers" were regularly badgered and harassed by the "elite" bar with such tactics as informing the IRS that an injured worker's attorney was not reporting his or her full income. The only viable method of practice was "seat of the pants." Discovery was non-existent, and the worker's attorney was often still learning about the client's case as it unfolded before the tribunal.

Shirtsleeve lawyers were regularly badgered and harrassed by the "elite" bar.

In the mid-1940s, groups of plaintiff lawyers were meeting in small venues in places like Oklahoma City, Boston, Detroit and Portland, Oregon. One of the largest of these was the Blackstone Club in Portland, with about fifty members. That club had disbanded by the time of the annual meeting of the International Association of Industrial Accident Boards and Commissions (IAIABC) in Portland in the summer of 1946, but many of its leaders were still active.

Sam Horovitz, by then author of a major treatise on workers' compensation and a law school professor, had met Ben Marcus at the 1945 IAIABC meeting in Winston-Salem, North Carolina. They kept in touch during the following year. Horovitz made a stirring presentation to a Detroit compensation attorney group, which served as the impetus to launch a new national association at the 1946 IAIABC meeting.

With their respective lists of potential recruits, Horovitz and Marcus lined up nine other lawyers, some from the Blackstone Club, to meet at the Heathman Hotel in Portland on August 16, 1946.[3]

See BEGINNINGS, page 30

WILG Past Board Chairman, N. Michael Rucka, at the Heathman Hotel in Portland, Oregon on "our" 60th anniversay.

Essential Recommendations of the 1972 Report of the National Commission on State Workmen's Compensation Laws

R2.1 Coverage by workmen's compensation laws be compulsory and that no waivers be permitted.

R2.1(a) Coverage is compulsory for private employments generally.

R2.1(b) No waivers are permitted.

R2.2 Employers not be exempted from workmen's compensation coverage because of the number of their employees.

R2.4 A two-stage approach to the coverage of farmworkers. First, as of July 1, 1973, each agriculture employer who has an annual payroll that in total exceeds $1,000 be required to provide workmen's compensation coverage to all of his employees. As a second stage, as of July 1, 1975, farmworkers be covered on the same basis as all other employees.

R2.5 As of July 1, 1975, household workers and all casual workers be covered under workmen's compensation at least to the extent they are covered by Social Security.

R2.6 Workmen's compensation coverage be mandatory for all government employees.

R2.7 There be no exemptions for any class of employees, such as professional athletes or employees of charitable organizations.

R2.11 An employer or his survivor be given the choice of filing a workmen's compensation claim in the State where the injury or death occurred, or where the employment was principally localized, or where the employee was hired.

R2.13 All States provide full coverage for work-related diseases.

R3.7 Subject to the State's maximum weekly benefit, temporary total disability benefits be at least 66 2/3 percent of the worker's gross weekly wage.

R3.8 As of July 1, 1973, the maximum weekly benefit for temporary total disability be at least 66 2/3 percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be at least 100 percent of the State's average weekly wage.

R3.11 The definition of permanent total disability used in most States be retained. However, in those few States which permit the payment of permanent total disability benefits to workers who retain substantial earning capacity, the benefit proposals are applicable only to those cases which meet the test of permanent total disability used in most States.

R3.12 Subject to the State's maximum weekly benefit, permanent total disability benefits be at least 66 2/3 percent of the worker's gross weekly wage.

R3.15 As of July 1, 1973, the maximum weekly benefit for permanent total disability be at least 66 2/3 percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be at least 100 percent of the State's average weekly wage.

R3.17 Total disability benefits be paid for the duration of the worker's disability, or for life, without any limitations as to dollar amount or time.

R3.21 Subject to the State's maximum weekly benefit, death benefits be at least 66 2/3 percent of the worker's gross weekly wage.

R3.23 As of July 1, 1973, the maximum weekly death benefit be at least 66 2/3 percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be at least 100 percent of the State's average weekly wage.

R3.25 (a) Death benefits be paid to a widow or widower for life or until remarriage, and

(b) in the event of remarriage, two years' benefits be paid in a lump sum to the widow or widower.

(c) Benefits for a dependent child be continued at least until the child reaches 18, or beyond such age if actually dependent, or

(d) at least until age 25 if enrolled as a full-time student in any accredited educational institution.

R4.2 There be no statutory limits of time or dollar amount for medical care or physical rehabilitation services for any work-related impairment.

R4.4 The right to medical and physical rehabilitation benefits not terminate by the mere passage of time.

SOURCE: *Report of the National Commission on State Workmen's Compensation Laws*, U.S. Government Printing Office, 1972.

Letter to the Editor

Proud To Be Called a "Trial Lawyer" (and a Champion of Workers' Comp)

Dear Editors,

I have been watching the American Association for Justice name change project in a state of amazement for a while now. The early succession of ATLA's names — NACA and NACCA— identified the group as a **workmens' (now workers') compensation** attorneys' organization: one which had only a few tort lawyers in its ranks. Those historical name changes, eventually culminating in the name "ATLA", were not as vigorously studied, debated, or subjected to expert media consultations as with the most recent change.

Ironically, lawyers who represented injured workers were castigated 50 or 60 years ago. *Defense* lawyers were "respectable" members of the bar, and plaintiff lawyers were members of "Dens of Thieves." Such "respectable lawyers" even informed the IRS that the plaintiff attorneys were not reporting their full income, and thus they were subjected to harassment.

When our ancestors in the trial bar first started meeting, few were exclusively tort lawyers. The workers' comp lawyers met at night, arrived one by one, and carefully slipped into back rooms to talk about organizing for the purpose of educating our peers to better represent these victims of occupational injury, disease, and negligence. It wasn't popular being a trial lawyer. One was vilified.

On August 16, 1946 at the Heathman Hotel in Portland, Oregon, the association was born. The National Association of Compensation Attorneys (NACA) initially charged $1 a year in dues. It soon changed its name to National Association of Claimants' Compensation Attorneys.*

Some of those ancestral legal giants later became federal judges and state supreme court jurists. Sixty years ago, they knew and warned of the dangers that existed then as now: "the growing strength and domination of the insurance companies over consumers and over the whole field of personal injury and workmen's compensation" were recounted. The ABA Insurance Section was known for being controlled by lawyers for insurance companies. Black lawyers and Jewish lawyers fought to gain access to those organizations without significant success, or if they did get in, were not allowed to set policy or lead.

Over time, other name changes occurred after the admiralty and railroad lawyers joined and as tort law picked up speed as a career path for success. Fewer workers' comp lawyers were seen in policy-making positions within ATLA. Perhaps I am mistaken, but Gary Gober, one of WILG's preeminent members, was the last practicing workers' comp attorney who held office on the Executive Committee of ATLA, although he never served as its president.

Our ancestors weathered the name changes, but continued to "do right," to educate each other, and to seek changes where injustice was found. Then, following a meeting with ATLA's executive director, its president, and its president-elect, WILG was created in 1995 in clear recognition that ATLA could not provide the resources to adequately allow us to continue the traditions of Sam Horowitz, Ben Marcus, Frank Pozzi, and a host of other giants to whom we all owe more than we can repay.

Our colleagues in AAJ (nee ATLA) have seen other groups and interests reframe the issues away from consideration of the adequacy of remedies and protection from losses people endure from defective products and the fault of others. Now and for some time, the focus has been upon vilification of trial lawyers. These "politics of power" have channeled untold millions of dollars into campaigns designed to perpetuate the "demonization" of trial lawyers.

AAJ's leadership had to have had an epiphany. ("It makes no matter if we are right in our cause or purpose; our messages are overshadowed by this successful negative campaign.") "Lawsuit Abuse", "Businesses Going Under", "Doctors leaving the State." What's next? In large measure the name change from ATLA to AAJ is designed to take the issue off of us as lawyers, and to refocus the question on the impact of unnecessary losses and needless suffering.

See LETTER TO THE EDITOR, page 41

Lessons of the Sago Tragedy

by Sue Anne Howard, Esq.

History

Coal now generates 52 percent of our nation's electricity. The extraction of this resource does not come without unimaginable human costs, and since the Sago mine explosion on January 2, 2006, Americans have been confronted with that reality. Coal mine communities have known the heartbreak for generations. The 20th century brought nearly 105,000 recorded fatalities in the coal mine industry.

Sue Anne Howard is an attorney in Wheeling, WV; her practice is limited to claimants in workers' compensation and social security disability cases. She was formerly counsel for District #6 of the United Mine Workers of America. Ms. Howard is a frequent lecturer on disability law. She is a member of the WV State Bar Workers' Compensation Committee and is the WILG Board of Directors. In 2000, she was appointed by the WV Supreme Court of Appeals to serve on the WV Board of Law Examiners. Ms. Howard is the daughter of a disabled coal miner. She may be contacted at 304-223-8860 or *wvcomplaw@aol.com*

According to statistics in the 1920 *Annual Report of the West Virginia Department of Mines*, there were 12.24 deaths for every 1,000 underground coal miners in the state in 1903. Between 1883-1920, in mines where fatalities occurred, an average of one life was lost for every 89,891 gross tons of coal produced. These figures did not include death due to occupational disease.

The 20th century brought nearly 105,000 recorded fatalities in the coal mine industry.

In 1907, the worst mine disaster in U.S. history occurred at Monongah, WV when 362 coal miners were killed in an explosion. This disaster spurred Congress to create the U.S. Bureau of Mines, which it charged with undertaking research on mine safety.

It would be four more decades and another mine disaster on March 25, 1947, when 111 miners lost their lives in an explosion at the No. 5 Mine in Centralia, IL before national safety standards were mandated and the Bureau was authorized to perform inspections. Prior to that time, inspections were performed by state agencies, and even coal-producing states failed to provide meaningful safety enforcement at underground coal mines prior to the mid-twentieth century. At the time of the 1920 *Annual Report*, for example, West Virginia had 1,440 operating underground coal mines with a state inspection force of 19.

On November 20, 1968, an explosion killed 78 miners at the Consol No. 9 Mine near Farmington, WV where the bodies of 19 men remain entombed after the mine was sealed to starve the uncontrolled fire of oxygen. This disaster prompted Congress to enact the Federal Coal Mine Health and Safety Act, signed by President Richard M. Nixon on December 30, 1969. That legislation required that all coal mines be inspected not less than four times per year, and that violations were to carry mandatory fines.

In 1913, West Virginia enacted the Workers' Compensation Act, and for the first time, the families of the victims of workplace fatalities were provided a remedy beyond the charity of their communities. It is not known whether any correlation exists between increased mine safety and

See LESSONS, page 44

Annual Longshore Seminar – 2006 and 2007

GREAT SUCCESS WITH THE FIRST ANNUAL LONGSHORE CLAIMANTS' ATTORNEYS SEMINAR

by Steven M. Birnbaum, Esq.
Longshore Section Chair
Contact: 415-459-0565

Having organized the first claimants' attorneys committee in 20 years to address practice under the Longshore and Harbor Workers' Compensation Act, WILG brought some of the best minds in the field to San Francisco on February 16 and 17, 2006 both to educate and introduce colleagues to each other. At the Fort Mason Conference Center with the San Francisco Bay in the background, over 40 practitioners from 16 states and the District of Columbia spent two days meeting, listening, learning from each other, and socializing.

The seminar topics began with a review of the latest Longshore Act cases by Connie Bastian, an editor of the *Benefit Review Board Reports*. Ralph Lorberbaum from Savannah, GA taught us about the plight of injured civilian employees on military bases and how to represent them. We had experts review the latest in law office technology. Lew Fleishman of Houston gave us his standardized approach to obtaining victory in Longshore litigation. Long Beach's Mark Baker presented on law office technology. In addition, three former WILG presidents – Jay Causey of Seattle, WA; Steve Embry of Groton, CT; and Todd McFarren of Watsonville, CA – attended.

The WILG members present took the opportunity to have a closed-door policy meeting where numerous practice issues were discussed, and planning was started for next year's conference, scheduled for May 3-4, 2007 in Washington DC. Many of the attendees then gathered the first night for a sumptuous seafood dinner at San Francisco's Waterfront Restaurant, and everyone seemed to make it safely back to their rooms.

The program for February 17 began with Eric Dupree of San Diego sharing his latest approach to "Maximizing Attorney's Fees," and all listened with rapt attention and one eye on their bank accounts. Next, we had the honor of listening to former Assistant U.S. Solicitor Joshua Gillelan instruct us on using the appellate process as a sword rather than only as a shield.

A panel addressed approaches to alternative dispute resolution of Longshore cases. It consisted of: retired Longshore judge, the Hon. Henry Lasky of San Francisco (now a private mediator); the Hon. Paul Mapes, a sitting judge in the San Francisco office of OALJ; our past president, Jay Causey, Longshore practitioner and occasional private mediator; and, Todd Bruinicks, Deputy Director, OWCP, San Francisco.

Bill Hochberg of Edmonds, WA and Mr. Bruinicks gave us the latest update on rehab and its advantages, as well as the new cases that have come down from the appellate courts and argued by Mr. Hochberg. A widely-respected expert on the Defense Base Act, Mark Schaeffer of Washington, DC. He summarized the DBA, how the steadily increasing numbers of injured military contractor cases are being handled, and how we should be responding as workers' compensation lawyers.

Finally, our own past president, Steve Embry, and the eminent occupational medicine guru, Dr. Robert Harrison of University of California San Francisco, teamed to present their take on cutting-edge occupational health issues and to comment on all the cases we could be missing.

The Friday night extravaganza included dinner and the consistently fun play, Beach Blanket Babylon.

Can it get any better next year in DC? We think so, and we'll see you there in May of 2007. WILG

Mark Your Calendar Now

Second Annual Longshore Claimants' Attorneys Seminar: May 3-4, 2007 in Washington, DC.

You will automatically receive a Longshore Seminar brochure in January 2007, if you are current in your 2007 dues as a WILG member…or by request sent to *WILG@WILG.org*. Attendance is limited to claimants' attorneys only, not those representing the defense, employers, or insurers. A portion of the seminar time will be limited to WILG members, for policy-making and litigation issue purposes.

Stephen Embry is a founding member of WILG, and served as its president from 2002-2003. He graduated from the American University in 1971 and the University of Connecticut Schoolof Law in 1975. He is a past Chairman of ATLA Workers' Compensation Section. He is editor of the *Longshore Textbook*, and is national speaker on issues of workplace safety and workers' compensation. He practices in Groton, Connecticut with the firm of Embry and Neusner. He may be contacted at 860-449-0341 or *sembry@embryneuser.com*

A version of this article previously appeared in the "BRBS Commentary" (Lexis/Nexis).

Occupational Disease Under the Longshore Act

by Stephen C. Embry, Esq.

Introduction

Occupational diseases are maladies typically arising from cumulative exposure to injurious stimuli in the workplace, not susceptible of identity by specific date, time, and place. Such exposures increase the risk of developing a medical condition beyond that experienced in the general population. Occupational disease cases are, therefore, subject to special rules for extending the statute of limitations, for determining employers' liability, and for calculating the average weekly wage and compensation rate.

The Longshore Act's definition of "injury" includes not only accidental injury, which can be identified as to time and place, but also diseases that can be traced to an increased risk of developing the condition due to exposures at work. Occupational diseases are defined as "any disease arising out of exposure to harmful conditions of employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally." Larson, *The Law of Workers' Compensation*, Sec. 41.

Occupational diseases usually involve three elements:

- First, the worker must have developed a disease or abnormal pathology.
- Second, the condition must arise from conditions of employment.
- Finally, the risk of developing the condition must have been increased by the employment to a higher rate than occurring in employment in general. *Grain Handlers Co. v. Sweeney*, 102 F. 2d 464. (2d. Cir. 1939), *Director,*

> Injury also includes diseases traced to an increased risk…due to exposures at work.

OWCP v. General Dynamics Corp. 769 F. 2d 66, (2d Cir. 1985)

Under the Longshore Act, the initial inquiry focuses on whether the work in general increased the risk of developing the disease, rather than upon the name or nature of the illness itself. It is the *risk* of causation that is important. If exposure to asbestos at work increases the risk of lung cancer, lung cancer arising among exposed workers will be deemed an occupational disease, even though lung cancer is also a disease of the general population.

A condition need not be peculiar to the occupation to be an occupational disease, although such peculiarity would suffice to meet the definition. All that is needed is for the exposure to increase the risk and incidence of the disease beyond

that occurring in the general population.

The Longshore Act does not have a prescriptive list of occupational diseases; it relies instead on the concept of general causation to define the disease. The term "occupational disease" also refers to the general concept of occupation rather than to the specific occupation of the worker. If a machinist works along side an asbestos lagger and both develop mesothelioma, that condition is an occupational disease for both workers even though only one worker's occupation was installing asbestos. The issue is whether the working conditions in general, rather than the specific occupation of the worker, increased the risk of developing the disease.

Last Employer Doctrine

The Last Employer Doctrine further expands the concept of general causation. Under this rule. the last employer coming under the jurisdiction of the Longshore Act who exposed the worker to injurious stimuli prior to the date of manifestation of the condition is responsible for paying benefits. *Travelers Insurance Co. v. Cardillo* 225 F, 2d 137 (2d Cir.), cert denied 350 U.S. 913 (1955). This rule, when combined with the presumption of 33 USC 920(a) that the claim comes within the Act, means that as a practical matter the actual injurious condition need not factually arise from exposure at the liable employer. If a worker has had sufficient employment exposure to have *caused* the overall disease, either with the last employer or in combination with exposures with prior employers, or to have *increased the risk* of developing the disease, it will be deemed an occupational disease has developed.

It is therefore important to identify all exposures the claimant suffered to injurious stimuli at all sites, and not simply to focus on the specific employer's contribution. The issue is not whether the last employer caused the injury but rather whether it was the last to expose the claimant to injurious stimuli. Indeed, it is not necessary to show that the last exposure was injurious, but only that there was exposure to "injurious stimuli." In *Profitt v. E.J. Bartells Co.* 10 BRBS 435 (1979), the Board held that two days of exposure just before manifestation of the condition was sufficient to invoke the last employer rule, even though it was unlikely that the minimal exposure was a significant factual cause of the condition. It is not necessary to prove actual aggravation, only exposure to injurious stimuli.

Under the Last Employer Doctrine, the last one who exposed the worker is responsible for paying benefits.

The claimant does not bear the burden of proving the identity of the last employer since the Act's Section 20 presumption is that the claimed employer is indeed the last. The burden is on the employer to prove that there was a subsequent employer who exposed the claimant; however, the employer need not prove subsequent causation, only exposure. *Susseof v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986). The claimant should thus, for a variety of reasons, endeavor to identify –and bring claim against– the last employer. And since occupational diseases often involve long latency periods from the date of first exposure to the development of the disease, the last employer is often defunct or out of business. In such a case, the claimant may claim benefits from the Special Fund under Section 18 of the Act.

The claimant need only make out a prima facie case…the burden shifts to the employer.

A recent case from the Second Circuit suggests that if the liable employer cannot fulfill his liability, the claimant may seek satisfaction from a prior employer or carrier. *New Haven Terminal v. Lake, 01-4005 (2d. Cir 2003).* In light of the decision in *Lake*, perhaps *Cardillo* should be restated to hold liable the last *viable* employer to have exposed the claimant to injurious stimuli before disease manifested.

Specific Causation

As to specific causation, the claimant is initially assisted by the Section 20 presumption that the exposure to injurious substances was, in fact, the cause of the injury. The claimant need only make out a *prima facie* case that: (1) he or she was exposed to a substance that was capable of causing the condition; and, (2) that he or she developed a condition that the exposure was capable of causing.

Once this proof is offered, the burden shifts to the employer to offer substantial evidence that the employment exposures were not a contributing cause. This evidence must be based on facts in the record and not mere hypothetical possibilities. Thus, the trier of fact must test the underlying facts and

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Challenges Facing Immigrant Workers for Obtaining WC Benefits

After *Hoffman Plastics*

by Jose M. Rivero, Esq.

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Access to the benefits available to injured workers is fundamental to the workers' compensation system. The remedial purposes of workers' compensation laws would be undermined if the remedies, provisions, and benefits contained therein were compromised. Unfortunately, the rights of undocumented workers to seek benefits under workers' compensation have come under attack in the wake of the U.S. Supreme Court's recent decision in *Hoffman Plastics Compound v. NLRB*.[1] *Hoffman Plastics* has subsequently inspired employers to use their employees' immigration status, or lack thereof, to defend against the usual benefits sought in theses types of cases.

A. Hoffman Plastics

The Immigration Reform and Control Act (IRCA) was enacted in 1986, establishing a mechanisms of sanctions on employers who knowingly hire workers who are not authorized to work in the U.S.[2] Employers now have an *affirmative duty* to ascertain the immigration status of all its employees. Once the employer has determined that an employee is unauthorized to work in the U.S., the employee must be discharged, or the employer will be subject to criminal and monetary penalties.[3] It is clear that the purpose of IRCA was to deter employers from hiring undocumented workers.

Once the employer has determined that an employee is unauthorized to work in the U.S., the employee must be discharged, or the employer will be subject to criminal and monetary penalties.

Under the National Labor Relations Act (NLRA), employees may not be fired for union organizing.[4] If the National Labor Relations Board (NLRB) determines that the employer committed an unfair labor practice, it may compel the reinstatement of the discharged employee.[5] It also is empowered to seek on behalf of the employee back pay for the wages the employee would have earned but for the discharge.[6]

In *Sure-Tan, Inc.* v. *NLRB,* [7] the U.S Supreme Court determined that although the NLRA applied to undocumented and documented worker alike, the remedy of reinstatement was unavailable to undocumented workers, since compelling an employer to provide

employment to an undocumented alien would contravene federal immigration policy of deterring unauthorized immigration.[8]

Until 2002, there existed conflicting opinions from the U.S. Court of Appeals regarding the issue of whether the National Labor Relation Board could award back pay to an undocumented worker – that is, whether a worker could recover the wages the employee would have earned but for the unfair labor practice. In 1992, the Seventh Circuit Court of Appeals decided that indeed they could not.[9] It determined that back pay was unavailable to an undocumented employee.[10]

In 1997, the Second Circuit Court of Appeals decided that discharged undocumented employees were entitled to the wages they would have earned but for unfair labor practice until such time that they were unable to produce immigration documents demonstrating their authorization to work in the U.S.[11] The Court noted that the employer hired the workers knowing they were unauthorized to work in the U.S.[12]

In *Hoffman Plastics Compound v. NLRB,*[13] an employer had fired an undocumented employee for union organizing. After determining that the employer had committed an unfair labor practice, the NLRB ordered the reinstatement of the employee and awarded him back pay for the work he would have done but for the discharge.[14] The U.S. Supreme Court reversed the NLRB's order and held that the remedies available to undocumented workers were limited by federal immigration policy. It noted that the employee in that case had produced false documentation to his employer, and the employer did not knowingly hire an unauthorized worker.[15] The Court went on to hold that reinstatement and back pay for work not actually performed, or expectation damages, were unavailable to undocumented workers.[16] The Court reasoned that to allow otherwise would defeat the immigration policy of deterring employment of unauthorized aliens.[17]

The U.S. Supreme Court reversed the NLRB's order and held that the remedies available to undocumented workers were limited by federal immigration policy.

Expansion of Hoffman Plastics to Other Areas

Almost immediately following *Hoffman Plastics*, employers began invoking the rationale regarding back pay in that case to employment discrimination cases and wage claims. The issue of whether *Hoffman Plastics* extends to Title VII suits has primarily arisen in the discovery stage where the defendant-employer is inquiring into the immigration status of the employee-plaintiffs.

In *De La Rosa v. Northern Harvest Furniture,*[18] the employer was subject to a discrimination suit by its discharged undocumented workers. The employer submitted discovery requests inquiring into the immigration status of the plaintiffs. The U.S. District Court of Central Illinois granted the plaintiffs' request for a protective order against the discovery requests. In doing so, the court addressed the employer's contention that given the holding in *Hoffman Plastics*, the immigration status of the employees is relevant to the issue of whether the employees are entitled to back pay. The Court stated that *Hoffman Plastics* was distinguishable since the goals of the NLRA differ from the objectives of Title VII.[19]

The Court stated that **Hoffman Plastics** was distinguishable since the goals of the NLRA differ from the objectives of Title VII.

It noted that "back pay is presumptively appropriate in a Title VII case" and that it "may only be denied for reasons which "if applied generally, would not frustrate the central statutory purposes of eradicating discrimination . . . and making persons whole."[20]

Immediately following the decision in *Hoffman Plastics*, the employer-defendant in *Rivera v. Nibco*[21] filed a motion to reconsider the U.S. district court's protective order preventing the employer from inquiring into the employees' immigration status. The Ninth Circuit upheld the district court's order in April of 2004. The employer had argued that in light of the *Hoffman Plastics* decision, the immigration status of the plaintiffs was relevant to whether back pay was an appropriate remedy.[22]

The Ninth Circuit rejected this logic, noting that *Hoffman Plastics* applied to cases brought under the NLRA.[23] It went on to state that while the NLRA is enforced by the NLRB, Title VII actions are enforced through private suit, with an array of available remedies

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Salus Populi Est Lex Supreme: The People's Safety Is the Highest Law

by N. Michael Rucka, Esq.

An Ancient and Continuing Problem

How to treat workers is a subject that has been addressed since ancient times. There are references in the *Code of Hamurabi*. The *Book of Exodus* says, "Those who mistreat the helpers will be punished by God and those help the helpless will be blessed." *Exodus 22:20-23*. Mention is also made in *Deuteronomy* 15:7-*11* and *Leviticus 19:13*, which emphasizes "…you shall not oppress your fellow and shall not rob…"

Is there anything new under the sun in the realm of workers' health, safety and rights?

Yet with unchanging human nature, the same condemned behavior of thousands of years ago is occurring today. The writer of the *Exodus* passage could easily have been a professor of agency law, since the theory behind the tenet is that dysfunctional behavior can be controlled by designing a system of punishment and reward. We know that when activities and outcomes cannot be observed, positive results are problematic – in other words, if we can get away with it, we will.

Yes, we always seem to be reinventing the wheel concerning issues of workplace safety and health. In my research, I have often found 50 and 60 year-old cases that give authority for the principle I am seeking. Today, we have the discovery process to try to connect certain activity with its outcome. As lawyers, we subpoena records, obtain testimony, etc.. But these 20th century methods of inquiry only originated after centuries of maiming and killing workers whose injuries or deaths cast their families into poverty.

Because many injuries and illnesses occurred in isolated settings, information did not coalesce to create a coherent picture of causation. The glassmaker in 19th century Bohemia poisoned by noxious lead, the hat maker in Connecticut suffering brain and neurological damage from mercury exposure, are examples of workers whose illnesses, while observable, were not well understood.

When industrialization brought workers together, they talked to each other, knew who was getting sick and injured, and from this communication they were able to identify causation. As a result, they saw that by improving general working conditions they could improve health and safety. They sought to do this through organizing or unionizing, and demanding higher wages, better

working conditions, and the right to be compensated for injury. To accomplish these improvements, workers accessed the legal system through socially-directed, activist attorneys.

Filene and Wal-Mart Models

In response to this activity, some businesses presented alternatives to unionization or simply attempted to thwart it. There were, however, some employers with progressive labor-management relationships. One of the most prominent was the wealthy retailer, Edward Filene, who championed a national consumer league in the belief that requiring higher wages would result in better worker training, safety, and productivity. And in the early 1900s, famed crusader Mother Jones demanded better wages for women workers so they could escape conditions that essentially bound them to servitude.

> The Wal-Mart approach: preventing worker organization and generally keeping workers powerless.

Filene, and others like him, were clearly in the minority, and even today stand in stark contrast to the Wal-Mart approach. And just what is the Wal-Mart approach? It is the deconstruction and outsourcing of production and sales whenever possible, helping to enable the corporate goal of preventing worker organization and generally keeping workers powerless.

Proponents of the Wal-Mart approach adhere to the school of thought that the goals of health and safety are the driving forces for higher wages. They reason that the greater the value of the worker's skills, the higher the wages that can be demanded; the greater the wages paid, the greater the investment needed by the employer to maintain a safer workplace.

Forces of Change

I believe the above school of thought may be partially correct, since change often will occur when the employer's financial interests are at greater potential risk than that of the employees'. Changes in industrial safety laws, and the development of workers' compensation, came about in response to pressure by unions and through public outrage at particularly disastrous events, such as the Triangle Shirtwaist Fire, or other continuous egregious corporate misconduct.

Sometimes progress occurs because of fear by the establishment. In the 1860s, German Chancellor Bismarck, who represented the militaristic Prussian aristocracy known as the Junker class, loathed and feared the incipient Socialist movement agitating for possible unionization and changes in the industrial order. To get ahead of the curve, Bismarck felt it was necessary to embrace widespread industrial reform, including a workers' compensation scheme. In doing so, he sought to prevent the socio-economic upheaval championed by Marx and Engels.

> We still see the ongoing deceit by corporations that continue to put profits before industrial safety.

From the post-Civil War era to the present, our nation's history has been marked by episodic labor unrest marked by, or culminating in, such events as the Chicago Hay Market trial, the Pullman Strike, Bloody Homestead, the previously-mentioned Triangle Shirtwaist Fire, the Colorado Ludlow Massacre, the Molly Maguires, and even the Port Chicago Naval Arsenal catastrophe of 1943.

All these events were major forces in bringing about industrial change in their time, yet we still see the ongoing deceit by corporations that continue to put profits before industrial safety. This is all too graphically illustrated by the recent coal mining deaths in West Virginia and Mexico. The Tasco Refinery fire of the late 1990s in Martinez, California, could have been avoided for less than $5,000 in necessary repairs. That event resulted in the death of three workers and severe injuries to another (who has endured 49 major surgeries to this date).

> Our goals remain safety rules, economic fairness, and compensation commensurate with the injury and the times.

Yes, it requires a significant disaster for legislators and the public to direct their attention, however briefly, to the issues of industrial safety and fair compensation. Absent a willing legislature, and leadership from unions and government, these disasters do not become a catalyst for change, but are merely an exclamation point to emphasize the dimension of the problem.

Our Current and Future Tasks

While we can learn from historical antecedents, our current and future tasks are to assure that our goals remain safety rules, economic fairness, and compensation commensurate with the injury and the times. Experience shows that if workers are not organized, do not have a cohesive message, and have not

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Dr. Teaf presented this paper on May 6, 2006 at the WILG 11th Annual Convention & CLE in Lake Buena Vista, Florida. Dr. Teaf holds the position of Associate Director of the Center for Biomedical & Toxicological Research at Florida State University in Tallahassee. He also is President & Director of Toxicology with Hazardous Substance & Waste Management Research (HSWMR), a firm specializing in toxicology and risk assessment activities for occupational and environmental applications. He has practiced in the field of human and environmental toxicology for over 20 years. His experience includes projects for the private and public sectors at the local, state, federal, and international levels. Dr. Teaf's contact information is as follows: Dr. Christopher M. Teaf, Associate Director; Center for Biomedical & Toxicological Research; Florida State University; 2035 East Dirac Drive; Tallahassee, FL 32310. (850) 644-3453 or *cteaf@mailer.fsu.edu*

A Toxicologist's Perspective on Industrial Exposures

by Dr. Christopher M. Teaf

What is Toxicology and How is Exposure Important to Toxicological Conclusions?

In its simplest form, toxicology is the study of adverse effects of chemicals on organisms, in this case human beings. The field of toxicology is rapidly expanding as a result of our increasing recognition of chemicals in our daily lives, improvements in analytical techniques, and a growing knowledge base about the effects that these chemicals may (or may not) cause. Many subdisciplines of toxicology have been developed, including: industrial toxicology, mechanistic toxicology, analytical toxicology, and forensic toxicology, not to mention specialties in specific organ system toxicology (e.g., respiratory, reproductive, neurological).

Another colloquial definition of toxicology is "the science of poisons". However, the question of whether a substance may or may not exert its potentially dangerous characteristics is strongly dependent upon what the *exposure* characteristics are. Those characteristics include such elements as the route of contact, and the magnitude, duration, and frequency of that contact, as well as the circumstances surrounding the contact, including aspects such as coexposure to other substances, environmental conditions, existing health status, and workplace activity level of an exposed individual.

When a toxicologist reviews occupational information to render scientific conclusions regarding the likelihood that a chemical or specific exposure event caused or contributed to chemical injury, site-specific or individual-specific exposure information are important, as discussed in this paper. Some of those considerations are critical to the outcome of the evaluation.

Elements of Exposure Evaluation

Inhalation, dermal, or oral routes of exposure are common in industrial or occupational circumstances. It is interesting to note that even with an equal quantity of the same chemical, the route of exposure alone may result in different effects. Inhalation typically is of primary importance in an occupational context (*see Figure 1 on following page*), followed by dermal and oral exposure. As an example, on a gram-for-gram basis, exposure to benzene via inhalation is of greater toxicological concern that skin contact or oral intake. This is because absorption is much more efficient through the lungs than through skin or gastrointestinal tract, and distribution is different: inhalation sends materials to arterial circulation, while dermal and oral exposure leads to the venous

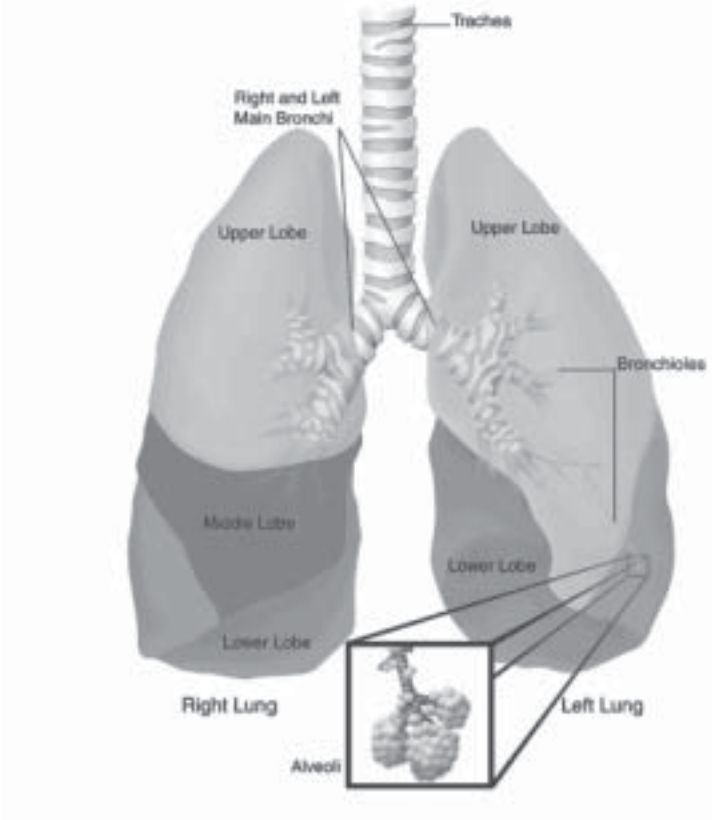


Figure 1 – Characteristics of the Lung

circulation, and increases the likelihood of initial breakdown in the liver.

This presentation focuses on the issue of exposure; however, for a toxicologist the exposure is of interest primarily because it influences the *dose*, defined as the amount of a chemical which gets into the body or reaches the target organ of interest. While exposure represents a range of information about environmental contact with a chemical, and seeks to address conditions of that exposure, the dose is the quantity of real interest (*see Figure 2*).

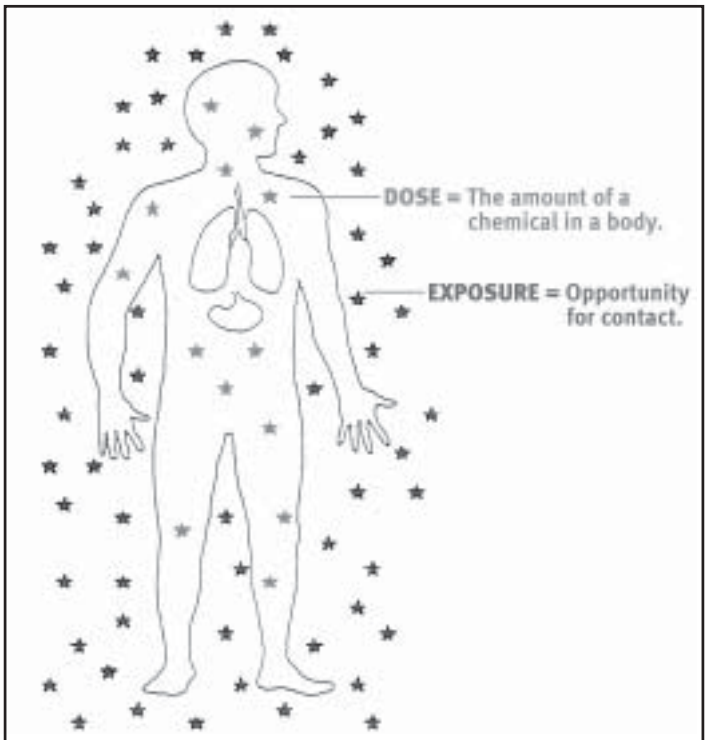


Figure 2 – Exposure vs. Dose

In most of the states, workers' compensation regulations typically do not require an offering of absolute proof of causation in presentation of the case. The operational standard is more closely related to a reasonable demonstration that exposure has occurred, demonstration of biological/chemical plausibility for the observed effect, and reasonable inference as to causation. Assessing occupational exposure to the degree that one knows the actual dose, or that quantity actually absorbed into the body for *distribution*, *metabolism,* and *excretion* (*see Figure 3*), is a worthy objective.

However, due to inherent uncertainties regarding individual employee work habits, industrial chemical usage patterns, individual sensitivities, or concurrent/ sequential exposure to multiple chemicals, it is the more common situation that a precise dose can not be determined in retrospect. In those circumstances, at least the following three components are required for a reasonable assessment of the putative exposure:

- clear demonstration that the chemical or chemicals were present in the employee's work area;
- medical information and toxicological data showing that the effect of interest is consistent with the reported exposures; and,
- demonstration that the theoretical exposure, if not precisely known, is adequately understood so that it can be concluded reasonably that the magnitude of the exposure, having been estimated or measured based on concentration, time and frequency, were sufficient to explain the reported conditions.

This paper is intended to provide insight into not only how a toxicologist evaluates the extent of

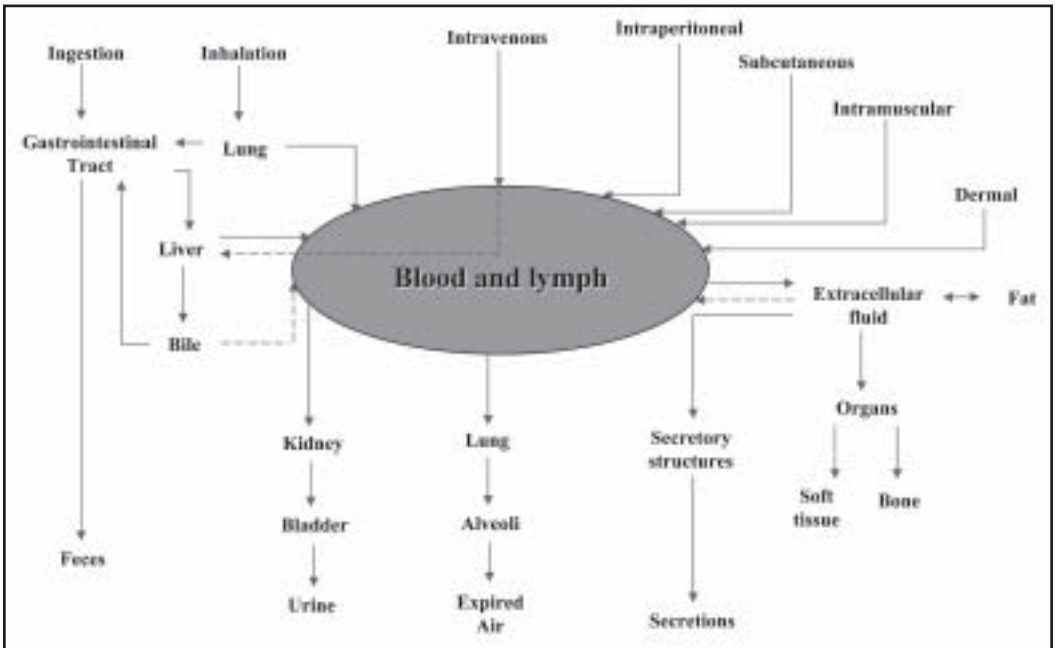


Figure 3 – Distribution, Metabolism And Excretion

exposure, but also how an analysis is made concerning whether the type and degree of exposure are likely to be of health significance. A discussion is presented to illustrate treatment of several relevant and frequently discussed aspects of exposure evaluation, as viewed from the disciplines of toxicology and occupational exposure assessment. At the conclusion of the paper, a number of selected supplementary reference materials are included for the reader.

Potential Exposure Conditions vs Reported Effects – Do They Fit?

One principal question to ask in a case of injury from a presumed chemical exposure is: *could the chemical cause that effect?* Equally important is the question: *are there other potential competing explanations?*

The interpretation of chemical and biological plausibility for observed and reported medical conditions, as well as the reconciliation of these conclusions with knowledge regarding potential or actual exposure circumstances, is a critical element of any occupational toxicological analysis. The issue may be complicated by the presence of multiple potential medical explanations for an observed condition, or by documentation that multiple sources of exposure to a chemical or chemicals exists for an individual as a result of his/her lifestyle or other occupational history (e.g. smoking, alcohol consumption, drug use, hobbies). These factors often are best assessed by interactive joint consultation by several scientific experts (e.g., toxicologist, physician, industrial hygienist, nurse).

One standard recognition by toxicologists is that virtually all chemicals exert a range of potential adverse effects, depending upon the exposure concentration or duration of exposure, and perhaps the route of exposure. Any workers' compensation analysis, or any other toxicological assessment, must start with consideration of whether the medical complaints or conditions are consistent with what hazards the chemical may cause.

In the simplest theoretical case, if there is no exposure (e.g., the employee worked in an area distant from that where a chemical spill or industrial process occurred), an effect is unlikely. In the next case, if exposure to Chemical Z is sufficiently great and Chemical Z is a hepatotoxin, then adverse effects in the liver of a worker may reasonably be associated with exposure (assuming that the relevant section of the liver is affected). In a third example, if Chemical Q is a neurotoxin, and the medical complaint from the worker is cause or exacerbation of occupational asthma, then the case may have considerable difficulty in sustaining its scientific and legal burden.

Simultaneous or sequential exposure to multiple chemicals, as opposed to a one single chemical at a time, is the norm in occupational circumstances rather than the exception. A variety of possible chemical interactions are possible from multiple exposures, including:

- *additivity* – in which the observed effect is equal to the sum of the multiple individual exposures (e.g., several chlorinated solvents);
- *potentiation/synergism* – in which the observed chemical effects are greater than expected from the sum of the individual effects (e.g., some alcohols and chlorinated solvents); or
- *antagonistism* – in which the mechanism of action for one chemical interferes with the mechanism of action for another and reduces the observed effects (e.g., toluene and benzene).

There is no generally applicable rule concerning the effects induced by simultaneous or sequential

exposures to multiple chemicals. They must be evaluated on a case-by-case basis in light of the conditions for the situation at hand.

Factors Influencing Exposure Considerations in the Workplace

Qualitative and quantitative assessment of occupational exposure both rely upon information concerning physical and/or chemical aspects of a chemical which in whole or in part relate to characterizing the intensity, duration, frequency of contact with that chemical substance. When data from workplace air sampling are available, it may be possible to use this information, in conjunction with knowledge of job duties and work schedule, to estimate intake for an individual or group of individuals.

Air concentrations typically are variable over time, even in closely collocated work areas as a result of ventilation patterns, chemical use patterns, process variability and even environmental or chemical-specific factors such as the following:

- molecular size
- physical state (solid, particulate, liquid, gas)
- air temperature
- vapor pressure of the chemical
- vapor density of the chemical
- solubility of the chemical in water or fats

Thus, some information must be available with which to describe exposure conditions in a workplace environment, or to measure exposure concentrations and how those concentrations vary in time and space. *Figure 4* shows how airborne exposures may be significant for inhalation and dermal aspects, and why chemical protective equipment may be appropriate.

For a variety of reasons, and as previously noted, the simple presence of a chemical in the workplace does not necessarily equate always to toxicological significance. As our chemistry and analytical techniques become increasingly sensitive, it is possible to detect substances in air at part per trillion (ppt) or even part per quadrillion (ppq) levels, which for most chemicals are of no health consequence.

Further, if a chemical is present only sporadically in the workplace, its presence on that basis may be of no toxicological concern.

Third, if proper protective equipment is available, is correctly fitted, and is properly worn, then the air concentrations may be high, yet pose no health concern for those individuals. It is worth emphasizing that available protective equipment which is not used represents no benefit, and improper use of equipment may cause individuals to enter situations which are unsafe. Through *exposure assessment* may be possible to draw conclusions regarding whether or not a specific set of occupational conditions over time may have resulted in an adverse effect.

Figure 4 – Airborne Exposure

When assessing the significance of airborne chemical concentrations, it is essential that the issue of appropriate measurement units be explored. Air data frequently is expressed in volume units of parts per million or parts per billion (ppm or ppb), as well as in mass units of milligrams (or micrograms) per cubic meter (or per liter). As long as the measurement units remain constant, comparisons readily can be made between the observed/measured levels and available health-based guidance values or standards.

However, more frequently than we would wish, it is common to see the measurement

units become mixed during evaluations, opening the possibility for serious errors in interpretation. In the case of gases and vapors, it is straightforward to convert one set of units to another, but in the case of particulates (e.g., dusts or mists) such a conversion is *not* possible.

To illustrate the importance of this issue, it is worth noting that a concentration of 1 ppm of toluene is equal to approximately 3.8 milligrams per cubic meter (mg/m^3). Similarly 1 ppm of trichlorothylene is equal to approximately 5.4 mg/m^3. Very few chemicals exhibit a ratio of 1:1 in their units conversion, and these TCE/toluene examples illustrate that the differences can be quite dramatic.

The expression for conversion of units from parts per million to mg/m^3 in the case of gases and vapors is as follows. This same expression can be used in rearranged form to convert from mg/m^3 to ppm as well.

> It is common to see the measurement units become mixed during evaluations, opening the possibility for serious errors in interpretation.

$$y\ ppm = (x\ mg/m^3 \times 24.45\ L/mol) / (MW\ g/mol)$$

where 24.45 L/mol represents the gas constant expressed in units of liters per mole and MW represents the molecular weight of the chemical substance expressed in units of grams per mole.

Occupational Exposure Standards: Benefits & Limitations

Occupational chemical exposure guidelines and related regulatory air quality standards historically have been developed by a number of health organizations as a means to address the significant issue of workplace air quality. In the United States, these organizations include:

- National Institute for Occupational Safety & Heath (NIOSH) Recommended Exposure Levels (RELs; guideline);
- American Conference of Governmental Industrial Hygienists (ACGIH) Threshold Limit Values (TLVs; guideline); and,
- Occupational Safety & Health Administration (OSHA) Permissible Exposure Limits (PELs; standards).

> Occupational guidelines and standards represent useful benchmarks for hazard evaluation, and may also represent the legally applicable criteria.

Certainly, occupational guidelines and standards represent useful benchmarks for hazard evaluation, and may also represent the legally applicable criteria, as in the case of the OSHA PELs). Still, it is important to understand the limitations of these criteria as well as their strengths.

First, they explicitly are *not* designed to protect every occupational worker at all times. The technical documentation which accompanies workplace exposure limits typically notes from the outset that the values are established to protect most workers under nearly all conditions, but exceptions in the form of sensitive individuals and oddities in occupational exposure history can and do occur. While these limits generally represent a good barometer regarding acceptable conditions, even if met they represent an imperfect shield against subsequent criticism.

Historical Progression of Occupational Exposure Limits for Selected Chemicals

Chemical	First TLV/MAC[a] (mg/m^3)	2006 TLV[b] (mg/m^3)	Historical Reduction[c]	"Skin" Notation[d]
beryllium (*and compounds*)	0.002 (*1957*)	0.00005 (NIC)[e]	40x	Yes (2005)
2-butanone (*MEK*)	590 (*1946*)	590	-	No
carbon disulfide	62 (1946)	3.13	20x	Yes (1961)
dichloromethane (*methylene chloride*)	1,740 (*1946*)	174	10x	No
1,4-dioxane	1,800 (1946)	72	25x	Yes (1965)
epichlorohydrin	18.9 (*1962*)	1.9	10x	Yes (*1963*)
formaldehyde	12.3 (*1946*)	0.37 (C)	33.2x	No
hydrofluoric acid (*as F*)	2.5 (*1946*)	0.4	6x	Yes (2005)
hydrogen sulfide	28 (1946)	1.4 (NIC)[e]	20x	No
lead (*and compounds*)	0.15 (*1946*)	0.05	3x	No
perchloroethylene (*PCE or Perc*)	1,360 (*1946*)	170	8x	Yes (*1975-1982*)
2-propanone (*acetone*)	1187 (*1946*)	1188	-	No
Stoddard Solvent	2,625 (*1946*)	525	5x	No
styrene	1,700 (*1946*)	85	20x	Yes (*1981-1996*)
toluene	752 (*1946*)	75 (NIC)[e]	4x	Yes (*1974*)
toluene-2,4-diisocyanate	0.72 (*1959*)	0.007(NIC)[e]	100x	Yes (2006)
trichloroethylene (*TCE*)	1,074 (1946)	54 (NIC)[e]	20x	No
triethylamine	103 (*1959*)	4.4	25x	Yes (*1995*)
xylenes	868 (*1946*)	434	2x	Yes (*1974-1983*)
zinc chromate (*as Cr*)	0.1 (*1975*)	0.01	10x	No

[a] MAC = Maximum Allowable Concentration (ACGIH, 1991-1996)
[b] TLV = Threshold Limit Value ; C represents Ceiling (ACGIH, 2006)
[c] Defined as [(Earliest TLV/MAC)/ (2006 TLV)]
[d] Skin Notation = potential significance to overall exposure by cutaneous route, incl. mucous membranes or eyes, by contact with vapors or liquid
[e] Notice of Intended Change

Table 1

Second, these guidelines and standards have evolved on a regular basis as more information has become available. Thus, protective conditions as they presently are understood may not have been the norm years or decades ago. *Table 1* illustrates selected examples of this phenomenon of evolution with time for some workplace exposure limits. You should note that, while most have become more restrictive as additional toxicological and workplace information has become available, there are many substances for which the initial decisions concerning safe levels have remained the same for decades (e.g., MEK and acetone).

As another example of the limitations of workplace exposure guidelines and standards, it is useful to recognize that they do not explicitly take cancer into consideration in the establishment of applicable values. While there are tables constructed and classification schemes applied to conclude that chemicals fall into one or another cancer category, the numerical value does not include a factor which is expressly direct to the subject of carcinogenicity. It often is left to the toxicologist or industrial hygienist to draw appropriate conclusions as to the significance of any particular exposure in the case of an identified carcinogen.

None of these airborne chemical exposure guidelines or standards address incidental ingestion as a factor in the workplace, which was certainly an unacknowledged route of contact in many historical workplaces where eating, drinking and smoking were occurring at or near the workspace. Similarly, dermal (skin) exposure is addressed only in an indirect way, given for example the "Skin" notation in the ACGIH TLVs which cites the possibility that airborne concentrations may result in the absorption of significant amounts of a chemical through the skin surface. This approach also does not explicitly take into account the potential significance of direct skin contact with particulates (e.g., mists, dusts) or liquids to which a worker may be exposed. Depending upon the circumstances of a particular workplace in question, these issues may represent significant but unrecognized components of a total exposure profile.

> The guidelines and standards do not explicitly take cancer into consideration.

One last issue related to the derivation of occupational exposure guidelines is that they often do not distinguish between serious adverse toxicological organ effects and measures of irritation when setting the limits. That is, many guidelines are set on a basis of avoiding respiratory, eye, or skin irritation at low levels, when much higher concentrations would be required to cause effects that more commonly would be classified as adverse toxic effects. This does not mean that such irritant effects are biologically unimportant, but rather illustrates that it is critical to understand the basis for any particular workplace air guideline, as opposed to assuming that all numerical limits have a similar basis and are equally protective.

> Ingestion and dermal exposure are unacknowledged or addressed only indirectly.

Summary and Conclusions

Chemical effects in the workplace can be direct, as where inhalation of occupational allergens can cause respiratory disease. These effects also can be indirect, such as where the subtle neurological effects of a chemical may cause worker inattention or carelessness which in turn results in related physical injury. Occupational risk evaluation, coupled with the documented conclusion that an individual or group exposure or experiences in the workplace support (or refute) a workers' compensation claim, provide the foundation for careful analysis of the likelihood that the reported exposure and the observed health effects are related.

It is important for both counsel and the affected party to understand the strengths and limitations of any particular exposure case, given the uncertainties that often accompany workplace claims (i.e., historical nature of reported exposures or variability of an individual's work history over time). The documented details of an individual's occupational history may fill important gaps that otherwise would preclude a precise numerical assessment of the exposure. In contrast, it is not sufficient to conclude that the mere presence of an individual in an environment where chemicals were used is adequate to ascribe causation to observed disease or a reported health condition.

See PERSPECTIVE, page 40

Data Surprises in the News

by Jay Causey, Esq., WFW Executive Editor

U.S. Government Under-reports Number of Occupational Injuries and Diseases

A recently published study in the *Journal of Occupational and Environmental Medicine* estimates that the U.S. Bureau of Labor Statistics (BLS) underreports the number of injured and diseased workers by *two-thirds*, meaning that the 2003 reported total of 4.4 million workers was really 13.2 million. Researchers from Michigan State University used a person-to-person and company-to-company matching process in five databases surveyed, rather than the sampling method used by BLS. Agency figures for Michigan in1999-2001 showed an annual average of 281,567 injuries and illnesses, while the *Journal* estimated an annual average to be 869,034.

In 2005, the AFL-CIO had reported in its annual survey —entitled *Death on the Job: The Toll of Neglect*— that BLS relies too much on employer reporting, with its built-in bias toward underreporting, and that the figures are skewed because of insufficient tracking of workers not covered by federal and state Occupational Safety and Health Act(s). In turn, the BLS has advised that the methodology used by the *Journal* article researchers would be "prohibitively expensive."

Source: AFL-CIO Weblog, 4/21/06.

NCCI Posts Great Stats for WC Insurers in 2005 – Still Worried About the Future

At its recent symposium in May, NCCI reported favorable numbers across the board in workers' comp insurance for 2005, the third consecutive year of underwriting profits. The combined ratio for both 2004 and 2005 accident years is down to 90% from a peak of 140% in 1999. Workers' comp was, in fact, the *only* major line of insurance with an improved combined ratio in 2005.

The loss reserve deficiency shrunk from a peak of $21 billion in 2001 to $3 billion when the value of lifetime pension cases is discounted: the best position for the industry in a decade. Net premiums for private carriers increased about 9%; the overall premium increase was 2.5% when state funds are included. Profitability was enhanced by the continuation of a decade-long decrease in lost-time claims, down another 4.5% in 2005. NCCI credited "reforms" in several states – notably Florida and California – for having resulted in substantial rate reductions. In Florida, there were consecutive reductions for CY 2003, 2005, and 2006 of 14%, 5.2% and 13.5%, respectively.

Recent rosy financial results notwithstanding, NCCI identified several areas of concern for the industry. Unlike short-term interest rates, long-term rates have remained relatively steady, limiting yields on the industry's investment portfolios. The so-called residual markets for workers' comp, which expanded dramatically in 2000, are now shrinking but remain too high in some states. While medical cost inflation has abated somewhat from double-digit increases of the past few years, medical costs now comprise nearly 60% of total workers' comp losses for NCCI states. A final concern was what will happen when the Terrorism Risk Extension Act of 2005 expires at the end of 2007.

Future challenges to the profitability of the line were cited as:

- compensation systems in disarray in several states;
- challenges to recently enacted reforms in some states; and
- the fact that the current underwriting cycle is likely at or near its cyclical peak.

Source: *www.insurancejournal.com/news/national/2006/05/12/68261.htm*

Fact is Stranger than Fiction

Michael in Worker's Comp Neverland

by Thomas Domer, Esq.
Chair,
WFW Editorial Board

Strange but true: The State of California has fined Michael Jackson $69,000 for allowing his workers' compensation insurance, covering his employees at his Neverland Ranch, to lapse. One of his employees apparently sustained an on-the-job injury after the comp coverage had lapsed.

Also, it appears that the King of Pop has not paid 30 of his employees at least $306,000 in back wages since relocating to Bahrain, and he has been fined more than $100,000 for that as well.

See http://www.cnn.com/2006/US/03/10/jackson.ranch/index.html

It's Great to be a Liberal vs. a Whiny Conservative

As kids, we all had classmates who constantly complained about almost everything. These "whiners," according to a recent study, are likely to be *conservatives* as adults. On the other hand, the study suggests that confident, self-reliant kids, more likely grew up to be liberals.

The study,* published in the *Journal of Research Into Personality*, tracked for 20 years about one hundred kids from Berkeley, California (admittedly, more left-leaning than, say, Crawford, TX). Professors Jack and Jeanne Block studied children whose personalities were rated by teachers who knew them.

Decades later, Block followed up with more surveys into personality and also politics. The result: whiny kids tended to grow up conservative. They became rigid adults, uncomfortable with ambiguity, and stuck closely to traditional gender roles.

Block figures that insecure kids look for the reassurance that tradition and authority provide. Conservative politics satisfies this need. Liberal policies, however, are a better fit for confident kids eager to explore alternatives to the status quo. (The study provides some welcome ammunition for progressives, battling a stereotype of wimpy liberals and strong conservatives.)

The study reinforces earlier research by Stanford psychologist John T. Jost, whose review of over four decades of studying the psychology of conservatism concluded that people who are dogmatic, fearful, intolerant of authority, and crave order and structure are more likely to gravitate to conservatism. Right-wing critics lambasted Jost's "conservatives are crazy" study.

Predictably, Block's study has been criticized as well. One pundit says that insecure, defensive, rigid people can as easily gravitate to left wing ideologies (i.e. become party members in communist China). Critics also equate conservatives' "rigidity" with moral certainty, and suggest that liberals who are introspective and acknowledge complexity are really self-indulgent and ineffectual.

The study reveals that personality and emotions loom larger in our political leanings than we think. We may rationalize that we reach our political opinions by carefully weighing the evidence, but that "careful reasoning" could be after-the-fact self justification.

If personality, rather than reason, really does form our political viewpoint, beware the next generation of nursery school whiners.

*This study was reported by Kurt Kliener in the March 19, 2006 edition of the *Toronto Star.* See *http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&c=Article&cid=1142722231554&call_pageid=97.* WIG

Thinking Out of the Box (or, How I Learned to Stop Worrying and to Love Workers' Comp)

by Mark L. Zientz, Esq.

Mr. Zientz presented this paper on May 5, 2006 at WILG's Annual Conference & CLE in Lake Buena Vista, Florida. Mark is currently Chair-Elect designate of the Workers' Compensation Section of the Florida Bar. He is a current member and Past Secretary of the Executive Council of the Workers' Compensation Section of the Florida Bar, a former Vice-Chairman of the Worker's Compensation Rules Committee of the Florida Bar, an arbitrator for the National Football League Players Association/Management Council and the Arena Football League, as well as a member of the faculty of the Workers' Compensation Trial Advocacy Seminar since the inception of the program. Mr. Zientz is a member of the Board of Directors of WILG and of the Florida Workers Advocates (FWA). He may be reached at 305-670-6275, by e-mail at *mark.zientz@mzlaw.com*

Introduction

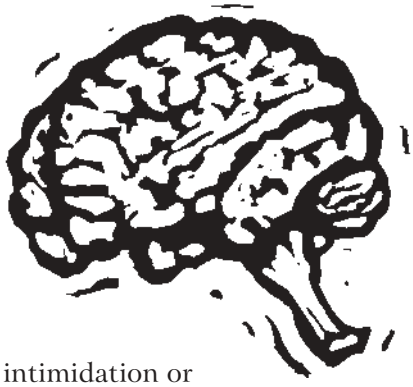
This article should be considered food for thought. Your clients deserve to have their situations looked at from every angle and have each possible avenue of recovery for an injury (or suspected injury) on the job evaluated.

Some areas of recovery will not be addressed, such as ADA, EEOC, Title VII actions, and other actions arising out of the employment relationship. Nevertheless, adverse employment action by the employer following an industrial injury may very well provide another avenue of recovery; these should be evaluated by competent counsel. Actions which are based upon rights granted by other laws may co-exist with workers' compensation remedies as long as the damages can be separated.[1]

The theme behind this article is that anytime an employee has the right to face an employer in an action before a jury, the likelihood of a good result is heavily weighted in favor of the plaintiff employee. **Remember, the real reason that workers' compensation laws exist** is to protect business from facing juries. It was the employers who sought the passage of compensation laws, not employees.

Retaliatory Discharge

A growing number of jurisdictions have created causes of action for retaliatory discharge (or



intimidation or coercion) related to a claim for compensation benefits. If your state statute contains language prohibiting certain employment activity following an injury on the job or the filing of a claim for benefits, what is the remedy? In Florida, the compensation law (Fla. Stat. §440.205) did not provide a remedy for a violation, so the Florida Supreme Court held that the remedy was in the courts of general jurisdiction.[2] Intimidation and coercion are specifically actionable as well.[3]

In recent years, a question has arisen in those states that recognize a cause of action for retaliation for filing a compensation claim. Even in right-to-work states, some protection is afforded those who

file compensation claims, or serve on juries, or serve in the military.[4] But, may a *subsequent employer* be liable for retaliation against an employee who filed a compensation claim against a *former employer*?

Between 1983 and 2005, seven states with laws similar to Florida's §440.205 have considered the issue. Six have held there is a cause of action against subsequent employers who discriminate against an employee who has a history of a prior compensation claim.[5]

Of course, proof of the reason for retaliation may be difficult. The *Bruner* case is a distinct departure from the norm. Bruner had a compensation claim pending when he was hired by a subsequent employer. After a short period of time, the subsequent employer discovered the pending claim and terminated the employee's services. Bruner filed for unemployment compensation. The subsequent employer denied U.C. benefits on the ground that the termination was because the employee had a propensity for filing compensation claims! Bruner filed a retaliation action which was dismissed in the trial court but reinstated in the appellate court.

Employees' Third Party Action

Virtually all workers' compensation laws provide that the employer who provides compensation benefits may have a lien against a recovery by the employee in an action arising from the industrial accident filed against an outside third party. The theory is that the employer is liable for benefits if the employer was negligent in causing the injury, or if the employee was negligent in causing his own injury, but not if the injury was caused by an outside entity.

The employer may have a lien against a recovery by the employee.

In Florida, the statute[6] not only allows for the lien, it also requires that the employer/carrier cooperate and assist the employee with the investigation of third party possibilities. This requirement sometimes causes friction between the employer and the employer's customers, which in turn works to the detriment of the employee seeking a third party recovery from an entity doing business with the employer. These situations give rise to causes of action for non-cooperation, or at the very least, form a basis to quash the lien[7].

A cause of action for "spoliation of evidence" has also come into vogue. The employer may be liable for destroying the evidence the employee needs to prosecute a third party action. This is particularly true in products liability situations[8].

Actions Against the Employer/Carrier: Avoiding Exclusive Liability

Which entities may not enjoy the same immunity from suit that the employer enjoys?

First, the employer itself may lose its immunity from suit for various reasons. The obvious is for not keeping workers' compensation insurance or self insurance in effect, unless of course there is an uninsured employer fund from which to recover. The problem with these uninsureds is that if they do not have the resources to pay for compensation insurance, what resources will they have to pay a judgment?

A cause of action for "spoliation of evidence" has also come into vogue.

Other ways to avoid the exclusive remedy [bar] include suits against employers for intentional acts causing injury. In some states, gross negligence is enough to avoid exclusivity; in others, proof of acts that would intentionally cause injury or death is required. Once again, there may be no coverage for these types of actions due to the general public policy of not allowing a person to insure against one's own deliberate, injurious acts.

Which entities may not enjoy immunity from suit?

But there are actions against employers for which there likely is coverage. Not only does an employer have to provide coverage for injuries on the job to avoid tort liability, the employer also has to accept that the injury arose out of and in the course and scope of the employment. A denial of compensability may very well trigger the loss of immunity from suit.[9]

In *Byerley*, the employer stood prepared to pay compensation benefits, but the carrier denied the accident arose out of the employment. Byerley was injured in the employer's parking lot after clocking out at the end of her shift. The lot had an unsafe condition which caused her to fall. The Florida district court of appeal discussed the worker's "Hobson's Choice:" whether to proceed to try to prove entitlement to compensation benefits or to sue in tort. The court also concluded that

the carrier had the power to bind the employer to a "denial of compensability" position.

Beyerly shows that under some circumstances "Coverage B" (or Part II) of the compensation policy may really have some value, notwithstanding the difficulty the Iowa Supreme Court had in articulating what value that coverage has and under what circumstances it may be tapped.[10]

There are also some very interesting and potentially valuable conflicts which arise when a carrier denies compensation benefits and the employer is faced with a tort suit. Ordinarily, compensation coverage (Part I) has no dollar limits on the recovery, while Part II has dollar limits of liability. The carrier that exposes the policyholder employer to excess liability may very well be on the hook for all the excess judgment.

Many states allow the employee plaintiff to accept an assignment of the employer's bad faith rights as part of a settlement with the employer. Those are the rights held by the employer to recover against its own carrier for the bad faith denial of the compensation claim which led to the excess judgment. Many of those same states also have laws providing for attorney fees for the successful prosecution of a bad faith action against an insurer by an insured.

When the employee chooses the tort remedy, the employer is hard pressed to complain of carrier bad faith.

In some cases, it is the employer that demands that the carrier defend and deny the compensation claim. In those cases, when the employee chooses the tort remedy, the employer is hard pressed to complain of carrier bad faith. In Florida, employers can open themselves up to tort suits merely by telling the employee that he or she is not entitled to full compensation benefits or that there is coverage at all.[11]

The decision is worth reading, especially the citations to the Magna Carta!

Oregon passed legislation requiring that the industrial injury be the major contributing cause (MCC) of the need for medical care or disability. Florida followed suit. In *Smothers v. Gresham Transfer,*[12] the Oregon Supreme Court held that the employee whose claim is denied based upon MCC may sue in tort. The decision is worth reading, especially the citations to the Magna Carta!

The erosion of benefits by legislative "deform" may also be the source for tort actions. In 1990, Florida passed one of a long series of compensation reform acts to limit the scope of coverage and the benefits available to covered claims. A test of the constitutionality of the law resulted in approval by the Florida Supreme Court, but the opinion contained the following language:[13]

"Although ch.90-201 undoubtedly reduces benefits to eligible workers, the workers' compensation law remains a reasonable alternative to tort litigation. It continues to provide injured workers with full medical care and wage-loss payments for total or partial disability regardless of fault and without the delay and uncertainty of tort litigation. Furthermore, while there are situations where an employee would be eligible for benefits under pre-1990 workers' compensation law and now, as a result of ch. 90-201, is no longer eligible, that employee is not without a remedy. There still may remain the viable alternative of tort litigation in these instances." *Martinez,* fn. 4.

Most state constitutions require a tort replacement remedy to be **adequate**.

In Louisiana, the legislature passed an occupational disease law that created a presumption that occupational diseases contracted by an employee employed less than 12 months were not work-related unless the employee overcame the presumption by an "overwhelming preponderance of the evidence," The Louisiana high court allowed a tort suit under these circumstances due to the failure of the legislature to guarantee an adequate compensation remedy in place of the tort remedy that was replaced by the compensation law.[14] The Louisiana legislature amended the law in 2001 and now the worker only need prove his occupational disease claim by a "preponderance of the evidence." As a result, the occupational disease claims of short-term employees are no longer presumptively tort actions.[15] Most state constitutions require a tort replacement remedy to be *adequate*.

Hawaii has amended its exclusive remedy provision to read:

"Tort liability is not abolished as to the following persons, their personal representatives, or their legal guardians in either of the following

circumstances: ...(2) An injured employee has reached Maximum Medical Improvement, as defined in section 386-1, and the payment of all benefits authorized under this chapter has been terminated."[16]

Rhode Island's Supreme Court has held that the exclusive remedy for injuries on the job does not protect the employer from actions for *defamation*. The court found the true gist of a defamation claim is not personal injury.[17]

There are limits to what carriers (and employers) can do with regard to "handling" a workers' comp matter.

Actions Arising Out of Laws Protecting Vulnerable Adults

Many states have laws that are designed to protect "vulnerable persons" such as children, the mentally ill, and "vulnerable adults." One can easily recognize some clients as meeting the definition of a vulnerable adult. In Florida, the law defines *vulnerable adult* as a person over the age of 18 whose ability to perform the normal activities of daily living, or to provide for his or her own care or protection, is impaired due to: (1) a mental, emotional, long-term physical, or developmental disability; (2) or dysfunctioning; (3) brain damage; or (4) the infirmities of aging.

Parties who may violate a vulnerable adult's rights include "caregivers." This term is defined broadly enough to include adjusters, managed care nurses, and others who are responsible for the authorization of reasonable and necessary medical care. "Neglect" is prohibited. A caregiver violates the law by neglecting the physical and mental needs of the vulnerable adult.

Civil actions are permitted against the violator. Recovery of actual and punitive damages is allowed, plus attorney fees and costs. The law further states that "the remedies provided in this section are in addition to and cumulative with other legal and administrative remedies available to the vulnerable adult."[18]

A Quick Primer On "Master-Servant" Responsibility

The Master owes a very high degree of care to the Servant. The duties include but are not limited to:

(A) To provide a safe place to work. (If an accident happens, could the workplace have been safe?);

(B) To provide adequate training;

(C) To provide adequate equipment;

(D) To provide the appropriate number of qualified workers to do the job safely;

(E) To provide competent supervision;

(F) To avoid hiring known dangerous co-employees.[19]

The Tort of Outrage aka Intentional Infliction of Emotional Distress

The Florida Supreme Court has recognized that there are limits to what the compensation carriers (and employers) can do with regard to "handling" a workers' compensation matter.

What I am suggesting is consideration of an action for **Malicious Defense**...

Some actions which would offend any rational member of society are considered outrageous and will not be tolerated by a civilized community.

Those boundaries were exceeded when the compensation carrier and its managed care coordinator allowed an injured worker to urinate feces for 10 months following a crushing injury while they sent him from doctor to doctor to try to find who would not recommend surgery! The opinion of the court recounts a number of other outrageous acts and omissions that the court agreed were actionable: outside the workers' compensation immunity afforded the carrier.[20]

...outrageous acts and omissions that the court agreed were actionable: outside the workers' comp immunity afforded the carrier.

Actions Against Opposing Counsel

Never popular, but sometimes in the background, are thoughts of suing opposing counsel. We are all aware of the sanctions that can be imposed for discovery violations and other violations of the rules. What I am suggesting is consideration of an action for *Malicious Defense*, under the proper circumstances, of course. The New Hampshire courts have fashioned a cause of action for Malicious Defense, making it a tort akin to malicious prosecution. The New Hampshire Supreme Court said that in appropriate

circumstances, there may be ample reason to extend the reach of sanctions to counsel for fostering of unfounded defense or pursuit of a defense for improper purposes.[21]

Another action was filed in Florida against an attorney hired by the carrier to put an end to an injured worker's long-term palliative care. That lawyer engaged in tactics described by the Judge of Compensation Claims (JCC) as threatening the doctor, causing the doctor to withdraw from the case.

The carrier had hired this particular attorney, who "specializes" in "overutilization." That attorney typically performs a cursory review of the medical care and advises the authorized doctor that he or she has overtreated, will be reported to the Agency for Health Care Administration (ACHA-Florida), will have to repay all the money received for treating the injured worker, and may be barred from ever treating a workers' compensation patient again, and probably be fined. The doctor likely will have to hire a lawyer and attend a hearing in Orlando related to the charges that will be filed if he does not resign from treatment of the patient.

Think about the wrongs that may have been perpetrated against your injured worker client. Explore all avenues of recovery.

The attorney involved has been sued for, among other things, tortious interference [with the doctor/patient relationship] and civil RICO violations.

The attorney involved has been sued for tortious interference and civil RICO violations.

Another Quick Primer – Qui Tam Actions

Qui Tam actions are brought on behalf of the state against entities that have managed to cheat the state out of money. The Federal False Claims Act (as *Qui Tam* laws are called) was first enacted to allow private citizens to police those doing business with and cheating the North during the Civil War. The law became known as "Lincoln Laws." A number of states have passed similar laws.[22] Similar statutory provisions should be considered in those states with state funds that pay compensation benefits.

Conclusion

Having now eaten this food for thought, start digesting! Think about the wrongs that may have been perpetrated against your injured worker client. Explore all avenues of recovery. Maybe the injured worker's right to privacy has been invaded, maybe...you get the idea.

Footnotes

1. *Moniz v. Reitano Enterprises*, 709 So. 2d 150 (Fla. 4 DCA 1998)

2. *Smith v. Piezo Technology*, 427 So. 2d 182 (Fla. 1983)

3. *Chase v. Wallgreen Co.*, 750 So. 2d 93 (Fla. 5 DCA 2000)

4. *Jones v. The Toro Co.*, El Paso County Court of Law, Number 3, Case # 2000-2429, November 1, 2001 (30.48 million dollar verdict for firing employee who then managed to get a new job in 2 weeks).

5. *Nelson Steel Co. v. McDaniel*, 898 S.W. 2d 66 (Ky.1995), *Bruner v. GCGW, Inc.*, 880 So. 2d 1244 (Fla. 1 DCA 2004), *Darnell v. Impact Industries, Inc.* 457 N.E 2d 125 (Ill. 1983), *Goins v. Ford Motor Co.*, 347 N.W. 2d 184 (1983), *Gonzalez-Centeno v. North Central Kansas Regional*, 101 P. 3d 1170 (Kansas Sup. Ct. 2004), *Hayes v. Computer Sciences Corp.*, 2003 WL 113457 (Tenn. Ct. App), *Nelson Steel Corp. v. McDaniel*, 898 S.W. 2d 66 (Ky. 1995), *Taylor v. Cache Creek Nursing Center*, 891 P. 2d 607 (Okla. 1994).

6. §440.39(7) Fla. Stat.

7. *General Cinema Beverages v. Mortimer*, 689 So. 2d 276 (Fla. 3 DCA 1995)

8. *Yates v. Publix Supermarkets,* __So. 2d__ (2006), 31 Fla. L. Weekly D749 (Fla. 1 DCA 2006), *Schusse v. Pace Suburban Bus Div.*, 2002 WL 1832230 (Ill. App. Ct.)

9. *Beyerly v. Citrus Publications*, 725 So. 2d 1230 (Fla. 5 DCA 1999)

10. *Selkirk Seed Co. v. State Insurance Fund*, 135 Id 434, 18 P. 2d 956 (Idaho 2000)

11. *Francoeur v. Pipers, Inc. d/b/a Club Pink Pussycat*, 560 So. 2d. 244 (Fla. 3 DCA 1990), *Quality Shell Homes v. Roley*, 186 So. 2d 837 (Fla. 1 DCA 1966)

12. 332 Or. 83, 23 P. 2d 333 (Or. 2001)

13. *Martinez v. Scanlan*, 582 So. 2d 1167, 1171 (Fla. 1991)

14. *O'Regan v. Preferred Enterprises, Inc*. 758 So. 2d 124 (La. 2000)

15. *Hardy v. Ducote*, 246 F. Supp. 2d 509 (W.D.La. 2003)

16. H.B. 1776 (amending Haw. Rev. Stat. §386-5)

17. *Nassa v. Hook-SupeRx, Inc.*, 790 A. 2d 368 (R.I. 2002)

18. Fl. Stat. §415.101 et. seq.

19. *Prisock v. International Agricultural Co.*, 144 S.E. 579 (Sup. Ct. S.C. 1928)xx. *Aguilera v. InServices, et. al,*905 So. 2d 84 (Fla. 2005), Magruder, *Mental and Emotional Distress in the Law of Torts,* 49 Harv. L. Rev. 1033 (1936)

21. *Aranson v. Schroeder*, 671 A. 2d 1023 (N.H. 1995)

22. Florida False Claims Act, Fla. Stat. §68.081 et. seq., California False Claims Act, Calif Govt. Code §§ 12650-12655 (1992), Illinois Whistleblower Reward and Protection Act, §175 et. seq., Tenn. Health Care False Claims Act, §56-26-401 et seq. WIG

BEGINNINGS, continued from page 6

Long story short, the eleven lawyers convened in Sam Horovitz's hotel room, and just four hours later, the meeting spawned the first national association of workers' compensation plaintiffs' attorneys: the *National Association of Compensation Attorneys*.[4] Dues were $1 per year, and the group, headed by Marcus and Horovitz, began with an $11 treasury. The two leaders "specially assessed" themselves an additional $500 each (a practice well-known to WILG founders and Board members over the years).

The founders included: the most famous labor lawyer in Oregon, who had defended the IWW (the "Wobblies"); a protégé of Senator Wayne Morse and future NACCA president; the chairman of the Progressive Party, who had followed Henry Wallace out of the Democratic Party a few years before; and a labor lawyer for the CIO who was the son of a former governor of Oregon.

But it was Sam Horovitz's show. The galvanizing issue Sam presented was the threat of an insurance industry proposal to limit physician testimony to "demonstrable" injuries, i.e. verified by observation or on x-rays, thereby precluding evidence of "subjective symptoms." (Author's note: "Plus ca change, plus c'est la meme chose.")

> Ignorance favors the defense and by ignorance the innocent worker suffers.

Horovitz then vividly described how lawyers for the insurance industry and state funds had been organized and controlled by the ABA Insurance Section, which in turn controlled the rules of the IAIABC for administrative proceedings. He noted that entry to the ABA section was, essentially, closed to black or Jewish lawyers. He described in riveting fashion his plan for a broad-based organization and his expectation that such an entity could recruit at least half of the 2500 plaintiff lawyers then practicing in the United States.

Sam's vision, as recounted by Jacobson and White, included local and national meetings, a central library, a journal digesting comp decisions nationally and suggesting legislative changes, and workers' comp curricula at law schools. At the close of the first NACA/NACCA meeting, the founders learned that because of their plan to organize claimants' attorneys, the insurance industry representatives to the IAIABC had moved to expel representatives of the AFL and CIO from membership, i.e. Horovitz and Marcus. Through deft political maneuvering, the motion was later defeated – an event called by Marcus as "the first political action victory" for NACA/NACCA.

In the years before the emergence of Melvin Belli and the shift of emphasis to tort law, Sam Horovitz continued to be the driving force of NACCA. He ran the organization at his own expense, including publication of the *NACCA Law Journal*. He hired the first professional employee, a 29 year-old Harvard Law grad and corporate lawyer named Laurence Locke, who stayed with NACCA / ATLA for 30 years. Locke handled the administration of NACCA, lobbied the Massachusetts legislature for workers' comp reform, helped compile the first issues of the *Law Journal*, and served as the first Treasurer and Secretary.

In 1949, Sam toured 24 states and covered nearly 11,000 miles in three months, hauling his family in an Airstream trailer he called the "Silver Bullet." He addressed 32 groups in that period, attracting hundreds of new members with his own special style of workers' comp "evangelism" never before seen or heard. In 1950, he gave the keynote address to the NACCA convention in Oklahoma City, focusing on the absence of coverage for farm workers, who at that time were sustaining nearly half the worker deaths nationally. He also called for jury trials, then only available in eight states, to review decisions by increasingly conservative industrial boards and commissions.

> The workers' comp lawyer is working to help a worker who has built our country.

In the early 1950s, NACCA lawyers, led by Ben Marcus, won decisions recognizing heart failure and workplace stress as occupational diseases. NAACA spearheaded a national campaign bringing attention to how workers' compensation benefits were lagging behind the cost of living and escalating medical expenses.

Sam was responsible for creating the guiding principles of NACCA. In a 1949 *Law Journal* article entitled "What I Saw," following one of his whirlwind speaking tours, he wrote:

> "Ignorance favors the defense and by ignorance the innocent worker suffers. NACCA's central mission therefore is to educate lawyers regarding the rights of

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Ahlborn Memo Is Available; Looking for Other Cases

by the Center for Constitutional Litigation at ATLA (aka AAJ)

In a significant victory for injured plaintiffs, the Supreme Court of the United States ruled unanimously on May 1, 2006 that state Medicaid agencies' claims for reimbursement out of tort settlements must be restricted to that portion of the settlement attributable to past medical expenses; the agencies cannot legitimately lay claim to any portion of a plaintiff's recovery unrelated to medical expenses – such as for lost wages, permanent disability, or pain and suffering – even if the state agency is not completely reimbursed for its expenditures. *Arkansas Dept. of Health and Human Services v. Ahlborn*, U.S. , 126 S.Ct. 1752 (2006). The Court's statutory construction analysis closely tracked that in the *amicus* brief of the Center for Constitutional Litigation (CCL).

Significantly, Medicaid is not the only federal health care program that typically asserts a right to priority repayment – and complete reimbursement – out of tort settlements. Indeed, many ATLA members report similar claims by agencies charged with recovering Medicare payments to tort victims.

CCL believes that *Ahlborn's* logic limits repayment claims by other federal programs, such as those asserted under the Medical Care Recovery Act and the Medicare Secondary Payer Act, despite differences in the language of each statute, because the basic structure of the repayment obligation is the same under all three federal statutes and because all three acts share a common congressional purpose. CCL is interested in identifying appropriate cases in which we might seek to extend the ruling in *Ahlborn* to these other contexts.

CCL has completed a brief memorandum that analyzes the *Ahlborn* ruling and its possible extension to other federally-funded health care programs. If you would like to receive a copy of the memorandum, or if you believe that you may have an appropriate case for extending *Ahlborn* to settlements involving Medicare, please contact us at the Center for Constitutional Litigation at *infoccl@cclfirm.com*.

CCL was established in 2001 with a national practice largely limited to constitutional cases and a concentration on access to justice issues. CCL brings challenges to state tort "reform" measures and administers ATLA's amicus curiae program.

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Editor's Note: you can find the memorandum also by copying the following into your internet browser: *www.kentuckyinjurylawblog.com/Opinion%20Letter%20from%20CCL%20following%20Ahlborn.pdf*

John J. Campbell, Esq. of Denver has the following information posted on the Internet: *see http://www.jjcelderlaw.com/ahlborniiimsabull.htm* (the May 8, 2006 Issue #30 of the *Medicare Set Aside Bulletin*):

"By the time Ms. Ahlborn settled her third party tort claim, Medicaid had made payments totaling $215,645.30 for her care. The net amount of Ms. Ahlborn's settlement was $550,000, of which $35,581.47 represented settlement of her claim for past medical expenses. Based upon state law and the required assignment, ADHS attempted to assert its $215,645.30 Medicaid lien against the entire settlement.

[On the basis of the Supreme Court's decision in *Ahlborn*] States are now limited in their ability to reach settlement proceeds to satisfy state Medicaid liens. However, the Court cautioned that states retain the right to challenge the reasonableness of the settlement allocation to past medical expenses, either by participating in the settlement negotiations or by seeking relief in state court to modify or approve the settlement allocations.

This groundbreaking decision will be helpful to Medicaid beneficiaries who receive settlements in all states. For large settlements where a state Medicaid agency may attempt to assert a lien significantly greater than the portion of the settlement reasonably allocated to past medical expenses, the *Ahlborn* case will be an effective tool to ensure that the greatest possible portion of settlement proceeds will remain available to the plaintiff."

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theories of the employer's witnesses and cannot accept a mere bald statement that the condition was not work-related. Nor can the employer succeed merely by showing that there was another potential cause; rather, the employer must establish that the work-related exposures were not a cause.

Statute of Limitations

The statute of limitations is extended for occupational disease cases. Since the disease usually develops long after exposure and often is similar to those with other causes, the law has developed a special definition for the date of injury in these cases. There are several such definitions that may apply to the various theories of the case, and care must be taken to use the term correctly in the proper setting.

For example, the date of injury for knowledge triggering the notice and claim provisions of the Act may be different from that for the date of injury for calculating onset of benefits, and different again from that used to calculate the average weekly wage. The statute provides that the claim must be filed in occupational disease cases within "two years after the date after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by way of medical advice should have been aware, of the relationship between the employment, and the death or disability, or within one year of the date of the last payment of compensation whichever is latter." 33 USC 913(b)(2).

The statute of limitations does not begin to run until a three-pronged test is met.

Therefore, the statute does not begin to run until a three-pronged test is met. The claimant must in fact develop pathology, must become aware of the relationship between the pathology and work, and must develop disability from the pathology. For example, the date of injury in an asbestos case for Section 13 purposes does not begin to run until the claimant develops asbestosis, recognizes that it is work-related, and begins to miss time from work. As a practice tip, however, it is better to file the claim upon diagnosis than to wait until disability occurs.

Disability

It is also important to remember that it is the *disability* resulting from occupationally-induced pathology that triggers the statute, not *exposure* to the substance. Thus, if exposure results in the development of a second disease, such as asbestosis and lung cancer, a claim must be filed for the second condition. The development of second pathology will not be time-barred by failure to file a prior claim for an earlier condition even if both resulted from the same exposure.

It is the disability that triggers the staute, not exposure.

If the occupational disease causes death, a new cause of action arises in favor of the spouse or dependents and they must file their own claims in their own right. The failure of the decedent to have filed in his or her case will not defeat the widow's / widower's claim, nor will the fact that the decedent did file save that claim if she (or he) fails to take action in her or his own right. Even if the claim is late, the worker can still seek medical care since that remedy is never time-barred.

Congress chose a two-tier test for retirees.

Date of Injury

The date of injury for calculating average weekly wage is the date of disability, or in the case of retirees, the date of manifestation of impairment as measured by the AMA *Guides to the Evaluation of Permanent Impairment*. For a current worker, this will generally be the date he or she begins to lose time from work due to the condition; it is not the date of last exposure to the causative agent.

For retirees, the date of injury is a little more complicated. The 1984 amendments took note of the fact that occupational diseases frequently gestate for years and often do not result in physical impairment until after the worker removes himself or herself from the labor market, such as with retirees.

Since the worker may not have an actual wage at that time, Congress chose a two-tier test for defining average weekly wage for retirees. If the impairment manifests itself within the first year after retirement, the wages earned by the claimant in his last year of employment are divided by 52 and that figure is used. If the impairment manifests itself more than one year after retirement, the national average weekly wage is employed. 33 USC 910(d)(2).

Occasionally the claimant will continue to work after retirement to supplement his or her income. An argument can be made that such supplemental wages do not defeat the claim for retirement, particularly if the wages are below the Social Security offset level.

Compensation Rate

The compensation rate also is affected by the timing of the disease. If it occurs during the work life of the claimant, he or she is compensated based on 2/3 of the lost wages up to the maximum, and if the condition is permanent and total the claimant receives annual of living adjustments up to 5%. For retirees, the compensation is based on the percent of impairment caused by the disease, as determined by the AMA Guides, times 2/3 of the national average weekly wage if the impairment occurs more than in year *after* retirement. If it occurs *during* the first year of retirement, compensation is 2/3 of 1/52 of the actual yearly wage.

Since an injury does not occur until there is disability and/or impairment, retirement may trigger the definition. For example, a worker with mild documented disease resulting in a 10% whole person impairment, but not affecting his wage earning capacity, may not have a claim for compensation while working, but will be entitled to an award that vests on the date of retirement.

Death benefits are based on 50% of the decedent's wages, and for the widow of a retiree, 50% of the national average weekly wage at the time of death. If there are surviving minor dependents, an additional 16% may be due, bringing the total to 2/3 of the wages. Widow's benefits continue until remarriage or death followed by a dowry equal to two years of benefits, being paid at the time of remarriage.

Tort Remedy

Since occupational disease results from exposures at work and not normally the work itself, there will often be an opportunity to seek a tort remedy against one or more "third parties." The Act does not require that an election be made, but there are pitfalls in Section 33 of the Act. Normally, permission must be obtained from the employer prior to settlement, and this must be obtained on a Form 33, which then must be filed with the Department of Labor. Failure to obtain such approval may result in a forfeiture of the right to compensation. 33 USC 933.

There will often be an opportunity to seek a tort remedy against one or more "third parties."

The Act does not provide a specific formula for determining the employer's rights to the proceeds of settlement, leaving that instead to the negotiations of the parties. There is, however, no procedure to force the employer to approve the third party settlement; if the employer refuses to accede to the settlement, the claimant has only two options: he or she can accept the offer and forfeit the right to compensation and medical care, or proceed to verdict.

Other Issues

In analyzing the Section 33 issues, one must consider the definition of who must get the approval and what is a settlement. The statute provides that the "person entitled to compensation" must obtain approval, which raises the issue of *when* one becomes entitled. In the *Estate of Cowart v Nicholas Drilling,* 505 U.S. 469 (1992), the Court held that it is not necessary that the claimant actually have *perfected* his or her claim and be in receipt of benefits to risk a Section 33 forfeiture, rather only that he or she be *entitled* to benefits. This lead to a subsequent holding that since the widow is not entitled to benefits until the death, a pre-mortem settlement would not result in a forfeiture of subsequent widows benefits. *Mabile v. Swiftships,* 38 BRBS 19 (2004)

Keep in mind that an employee may have two or more injuries, and this may affect the employer's Section 33 right. In *Chavez v. Director, OWCP*, 961 F. 2d 1409, (9th Cir.1992), the Ninth Circuit held that where the claimant had two separate injuries –asbestosis and hypertension– either of which alone would render him totally disabled, it would be a windfall for the employer to allow a set-off for asbestosis settlement, since if the claim had been pursued solely on the hypertension claim the claimant would have been equally disabled.

An employee need not obtain permission from the employer where the payment is judicially determined. Thus, the Board has held that where the Bankruptcy court sets non-negotiable payments to asbestos victims, such payments are not settlements. WILG

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including back pay: "[t]his full complement of remedies accords with the long-standing notion that Title VII requires courts to remedy instances of discrimination by sending strong messages to would-be discriminators."[24] Lastly, the Court distinguished *Hoffman Plastics* from Title VII cases, stating that while in enforcing the NLRA, the NLRB was constrained by Congress's policy set forth in the IRCA, "[t]his limitation on the Board's authority says nothing regarding a *federal court's power* to balance IRCA against *Title VII* if the two statutes conflict."[25] Subsequently, Nibco sought a rehearing of this matter with the Ninth Circuit which was denied on September 20, 2004.[26]

In the context of claims brought under the Fair Labor Standards Act, it is clear that employees may recover unpaid minimum wage and overtime compensation for work actually performed, regardless of their immigration status.[27] Therefore, if the only remedy sought is back pay for work actually worked, the employer will likely be prevented from inquiring into the immigration status of the plaintiffs during the discovery stage.

In *Singh v. Jultla*[28], the employee-plaintiff sought not only back pay for unpaid wages for work actually worked, but also sought compensatory damages for having been retaliated against when he approached his employer about the FLSA violations. In that case, the employer had reported his employee to the immigration authorities. The court permitted the claim for compensatory damages to proceed, noting that the employee was not seeking reinstatement or back pay for work not performed.[29]

This logic was also applied by the U.S. District Court for the Northern District of Illinois in *Renteria v. Italia Foods*.[30] There, the employee was seeking compensatory damages for having been discharged in retaliation for filing the FLSA suit against his employer. The court held that *Hoffman Plastics* prohibited the employee from seeking back pay for work not performed.[31] However, the workers could seek compensatory damages for the retaliation claim since this remedy, unlike back pay for work not worked and reinstatement, "does not assume the undocumented worker's continued employment by the employer."[32] Naturally, to require otherwise would contravene the federal immigration policy of deterring employment of unauthorized workers.

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Remedies in the Workers' Compensation Context

Not surprisingly, *Hoffman Plastics* has been utilized by employers to limit, if not altogether eliminate, injured undocumented workers' access to benefits under workers compensation laws.

Typically, under workers' compensation, an employee injured by an accident arising out of and in the course of the employment is entitled to three general benefits:

- medical benefits,
- temporary total disability, and
- permanent impairment.[33]

Temporary total disability benefits (TTD) are the compensation paid to an employee while he or she is unable to work but whose medical condition has not yet stabilized.[34] TTD benefits resemble the expectation damages awarded in discrimination and retaliation cases discussed above, in that they provide the employee with compensation that he or she should have earned but for the injury.

Every state provides that an employer must provide for hospital and medical benefits to cure an injured employee's condition.[35] Many states now have within the medical benefits provision in their respective acts a component that provides that the employer must provide rehabilitative services usually in the form of a training or reeducation program.[36] Typically, an employer must continue maintenance benefits during the period of rehabilitation.[37]

Hoffman Plastics has been utilized to limit undocumented workers' access to benefits under workers' comp laws.

The first question is whether the IRCA is even applicable.

1. Statutory Application

When dealing with an undocumented worker's rights under workers' compensation laws, the first question is whether the IRCA is even applicable. Coverage has been dealt with in a number of ways. First, some states have explicitly stated that their statute covers undocumented or "illegal" aliens. Others have interpreted

the term "alien" in their statutes to include both undocumented and authorized aliens. Still others have interpreted the definition of such terms as "every person" to include all workers, even those not authorized to work in the United States. In any case, most jurisdictions allow for coverage of an undocumented alien under their workers' compensation law per the following decisions:

Most jurisdictions allow for coverage of an undocumented alien under their workers' comp law...

Dowling v. Slotnik, 712 A.2d 396 (1998). The Supreme Court of Connecticut held that IRCA does not preempt either expressly or implicitly authority of states to award benefits to undocumented aliens on the basis that an employment contract of service is not invalid as a matter of law because of the employee's immigration status.

***Granados v. Windson Development Corp,* 509 S.E.2d 290 (1999).** The Supreme Court of Virginia determined that the claimant was not in the service of his employer within the definition of "employee" because under the IRCA the an illegal alien cannot be employed lawfully in the United States and therefore he was not eligible to receive workers' compensation benefits. This decision was overturned by the Virginia legislature, which redefined employee to include an "illegal alien."

***Reinforced Earth Company v. Workers' Compensation Appeal Board,* 749 A.2d 1036 (Pa. Cmwlth. 2000).** Without citing any authority, the employer asked the court to declare public policy and make a blanket ruling that would prohibit unauthorized aliens from receiving workers' compensation benefits. The court refused to do so and stated that it may only discern public policy where there is an absence of legislation, and to do so where the Pennsylvania legislature has enacted a comprehensive statutory scheme, such as the workers' compensation act, would be judicial legislation.

***DDP Contracting v. Workers' Compensation Appeal Board*, 808 A.2d 592 (Pa. Cmwlth.2002).** The court cited *Reinforced Earth* in finding that IRCA does not preempt the Pennsylvania Workers' Compensation Act. It indicated that claimant's status, as an illegal alien, does not preclude receipt of workers' compensation benefits, including partial disability benefits or total disability benefits.

***Ruiz v. Belk Masonry,* 559** S.E.2d 249 (2002). The court determined that IRCA does not prevent illegal aliens from being included in the definition of "employee" under North Carolina's act, nor does IRCA prevent illegal aliens from receiving workers' compensation benefits.

***Safeharbor Employer Services v. Cinto Velazquez*, 860 So.2d 984 (Fla. 1st DCA 2003).** The court noted that IRCA does not contain express preemption language nor does it so thoroughly occupy the field as to require a reasonable inference that Congress left no room for states to act. Workers' compensation is an area where states have authority to regulate under their police powers. Therefore, the Florida workers' compensation law applies to undocumented aliens.

***Sanchez v. Eagle Alloy*, 658 N.W.2d 510 (2003).** The court determined that undocumented aliens are "employees" within the Michigan Workers' Disability Compensation Act.

***Continental Pet Technologies v. Palacias*, 604 S.E.2d 627 (2004).** The employer argued that IRCA preempts receipt of workers' compensation benefits. The Georgia act provided that an employee includes "every person in the service of another under contract of hire or apprenticeship." Ga.Code Ann. §34-9-1(2). The court held that "although the IRCA and accompanying regulations address in detail the hiring of undocumented aliens, they do not purport to intrude into the area of what protections a State may afford these aliens." Id. at 631.

***Cherokee Industries v. Alvarez,* 2004 OK CIV APP 15, 84 P.3d 798.** The Oklahoma appeals court determined that being authorized to work in the country has no bearing on whether an employee is entitled to benefits under the workers' compensation act and awarded the claimant temporary total disability benefits sought.

See also *Fernandez-Lopez v. Cervino*, 671 A.2d 1051; *Artiga v. M.A. Patout and Son*, 671 So.2d 1138; *Lang v. Landeros*, 918 P.2d 404; *Commerial Standard Fire & Marine Co. v. Galindo*, 484 S.W.2d 635; *In re Compensation of Hernandez*, 2001 WL 1429183; *Earth First Grading & Builders Ins. Group/Ass'n Services Inc. v. Gutierrez,* 606 S.E.2d 332; *Rajeh v. Steel City Corp*, 2004-Ohio-3211 Ohio. App.7.Dist. Mahoning, 2004.

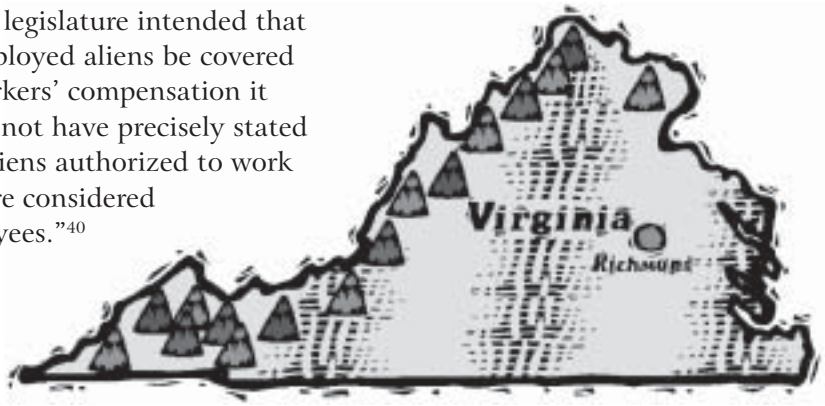
Note: The only state that continues to exclude outright all undocumented aliens from coverage under its workers' compensation act is Wyoming. This determination was made in the case of *Felix v. Wyoming* [38] where it was held that the claimant in that case was not "employee" for workers' compensation purposes because he was not authorized to work in the United States. It should be noted that the Wyoming statutes expressly states that an "'employee" means any person engaged in any extra-hazardous employment under any appointment, contract of hire or apprenticeship, express or implied, oral or written, and includes legally employed minors *and aliens authorized to work by the United States department of justice, immigration and naturalization service*." [39] The court reasoned, "if the legislature intended that all employed aliens be covered by workers' compensation it would not have precisely stated that aliens authorized to work here are considered employees."[40]

…in light of **Hoffman Plastics**, undocumented workers are entitled to receive temporary total disability benefits.

2. Temporary Total Disability

Assuming the statute does apply to undocumented workers, the more difficult question is whether, in light of *Hoffman Plastics*, undocumented workers are entitled to receive temporary total disability benefits, which are meant to compensate the employee while he or she is disabled. Recall that the post-*Hoffman Plastics* federal labor cases all concur that an employee, regardless of status, would be entitled to back pay for work actually performed.

However, the same courts all seem to establish that in the face of the federal immigration policy of deterring employment of undocumented aliens, an undocumented worker is prohibited from recovering back pay for expected wages. This logic was extended to TTD benefits as well in the Pennsylvania case of *Reinforced Earth Company v. Workers' Compensation Appeal Board*.[41] That court determined that a disabled employee's inability to work was more attributable to his immigration status than to his medical condition and therefore granted that employer's request to suspend TTD. [42] The court specifically noted that the claimant's immigration status did not affect his right to medical benefits.[43]



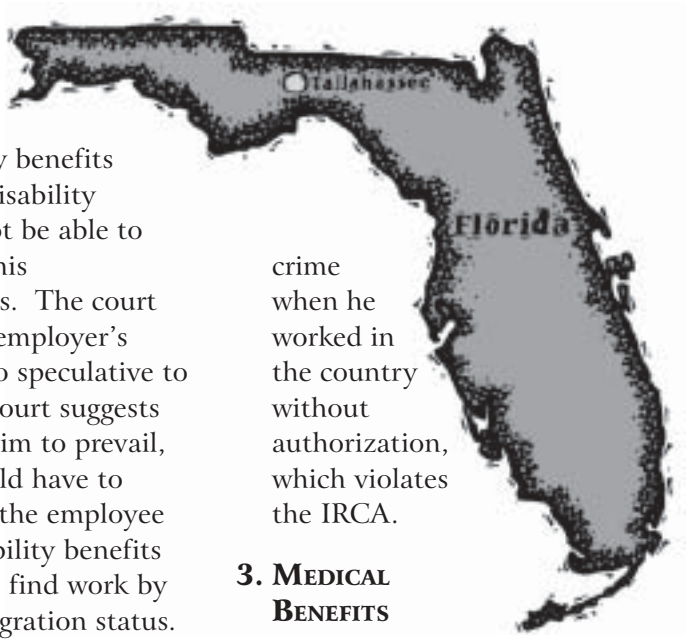
However, in *Mendoza v. Monmouth Recycling*[44], the employer attempted to preclude an award of TTD and argued that since unemployment benefits were unavailable to undocumented aliens, so should workers' compensation benefits.[45] The Supreme Court of New Jersey noted, however, that unemployment act expressly states that unauthorized workers are not entitled to benefits.[46] In addition, availability for work is always a prerequisite for unemployment compensation while workers' compensation rests on unavailability to work because of a work related disability.[47] "If his capacity to work has been diminished, that disability will continue whether his future employment is in this country or elsewhere.[48]" The court upheld the award of TTD to the undocumented claimant.

As of yet, medical benefits have not been withheld to an injured employee on the basis that he or she is an undocumented alien.

Other illustrative cases are:

***Del Taco v. Workers' Compensation Appeals Board*, (2000) 94 Cal.Rptr.2d 825.** The California Court of Appeal held that the claimant's immigration status does not affect entitlement to TTD, given that a legal alien would have been entitled to TTD if same type of injury.

***Dowling v. Slotnik*, 712 A.2d 396 (Conn 1998).** The employer argued that an order awarding benefits to employee violates equal protection clause because he would be forced to continue disability benefits regardless of his disability because he will not be able to find work due to his immigration status. The court believed that the employer's hypothetical is too speculative to adjudicate. The court suggests that for such a claim to prevail, the employer would have to demonstrate that the employee was awarded disability benefits for his inability to find work by virtue of his immigration status.



***Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324 (Minn. 2003).** The employer asserted that the claimant's benefits should be suspended because the IRCA prevented the employee from conducting a diligent job search. In Minnesota, total disability is based on inability to perform work and the inability to find work and if employee is capable of some work, he must conduct a job search. The court held that the IRCA does not preclude the employee from receiving TTD, even if it is conditioned on a diligent job search. Rather, a diligent job search is only a factor taken into consideration. There was evidence the employee conducted a diligent job search and that her inability to work was attributable to her work injury.

***Sanchez v. Eagle Alloy*, 658 N.W.2d 510 (2003).** The Michigan act allows for termination of benefits if the employee was otherwise unable to work due to the commission of a crime. Citing *Hoffman Plastics*, the Michigan Court of Appeals determined that the employee had committed a crime when he worked in the country without authorization, which violates the IRCA.

3. Medical Benefits

As of yet, medical benefits have not been withheld to an injured employee on the basis that he or she is an undocumented alien:

***Mendoza v. Monmouth Recycling*, 672 A.2d 221 (1996).** In dicta the court stated that an "[employee's] need for medical treatment and his right thereto as an incident of his employment do not derive from or depend upon his immigration status."[49]

***Cherokee Industries v. Alvarez* , 2004 OK CIV APP 15, 84 P.3d 798.** In dicta the court stated "some benefits such as vocational rehabilitation or medical treatment by specific physicians may not be available to a claimant who cannot stay in this country."[50]

***Reinforced Earth Company v. Workers Compensation Appeal Board*, 749 A.2d 1036 (Pa. Cmwlth.2000).** Employer may not seek suspension of medical benefits regardless of claimant's earning power.

4. Vocational Rehabilitation

Perhaps the most challenging scenario for the workers'

Most jurisdictions that have faced this issue have determined that such benefits are not awardable.

compensation practitioner is when confronted with a client who has permanent medical restrictions entitling him to enrollment in a vocational rehabilitation program, but whose undocumented status prevents him from seeking further employment in the U.S. Most jurisdictions that have faced this issue have determined that such benefits are not awardable:

***Foodmaker v. Workers' Compensation Appeals Board*, 78 Cal.Rptr.2d 767 (1999).** The California Court of Appeal held that an employer's equal protection rights are violated if ordered to provide vocational rehabilitation services (whether through providing modified work or enrolling the employee in a reeducation program) to an undocumented alien because it would provide a "more extensive and costly benefit than a similarly situated legal resident."[51] The court suggests that an undocumented alien would however be entitled to vocational rehabilitation if he or she would otherwise receive vocational rehabilitation regardless of his or her immigration status.

***Del Taco v. Workers' Compensation Appeals Board*, (2000) 94 Cal.Rptr.2d 825.** The California Court of Appeals determined that the undocumented claimant was not entitled to vocational rehabilitation services when he was able to work modified duty and the employer offered such. Here, Del Taco offered modified work but terminated the employee for his immigration status. The court found that it was the immigration status, not the disability, that prevented the employee from working for the employer. Therefore, an award of vocational rehabilitation would deprive the employer of equal protection of the law since an illegal worker would be "more protected" than an authorized worker, who under the same circumstances would be required to return to work for employer under modified duty.[52]

***Tarango v. State Indus. Ins. System*, 25 P.3d 175 (Nev. 2001).** The court held that the employer was precluded from providing an employee with modified work because to do so would circumvent the IRCA. It held that granting vocational rehabilitation benefits to an illegal alien would violate the equal protection clause of the U.S. Constitution and the Nevada's priority scheme. The court reasoned that to order vocational rehabilitation to such an employee would be merely because of his illegal status in the country and would violate the equal protection clause by allowing him to unfairly benefit from services prohibited to all similarly situated legal workers who would only be entitled to return to the modified duty.

The case provides excellent language for a practitioner seeking to expand vocational rehabilitation services.

***Cherokee Industries v. Alvarez* , 2004 OK CIV APP 15, 84 P.3d 798.** In dicta the court stated "some benefits such as vocational rehabilitation or medical treatment by specific physicians may not be available to a claimant who cannot stay in this country."[53]

However, the North Carolina appellate court decision of ***Gayton v. Gage Carolina Metals Inc.***[54] provides a **contrary argument** for those advocates whose states have not yet determined the issue. In that case, the employer argued that claimant's undocumented status constituted a constructive refusal to participate in vocational rehabilitation and sought suspension of benefits.[55]

The employer asserted that if it were forced to cooperate with vocational rehabilitation

An effective advocate must understand the potential reach of **Hoffman Plastics**.

services, it would be contravening the policy behind the IRCA. The court refused to suspend vocational rehabilitation services for the claimant in that case noting "several vocational rehabilitation practices are available to defendants that would not violate federal law. Defendants can perform labor market surveys to determine what jobs, if any, are available in the area the plaintiff resides that fit plaintiff's physical limitations."[56]

The court went on to cite other legitimate practices that do not conflict with the IRCA, such as counseling, job seeking skills, teaching new work skills, or obtaining an GED.[57] Finally, the court mentioned that "vocational rehabilitation may even include helping the employee take steps to obtain proper authorization forms" when the employee is able to return to work.[58] Needless to say, this is a very progressive opinion. However, it provides excellent language for a practitioner seeking to expand vocational rehabilitation services in his or her jurisdiction.

An effective advocate must understand the potential reach of **Hoffman Plastics** and its effect on the client's access to workers' comp benefits.

5. Retaliatory Discharge

Another problem may arise where a worker is placed on restricted duty and the employer indicates that he can accommodate those restrictions. The employee must return to work in a light duty capacity, or temporary total disability benefits (or maintenance benefits) will be suspended. Upon the undocumented employee's return to work, he or she receives a letter from his employer "discovering" that his social security number does not match the Social Security Administration records[59]. Under the IRCA, the employer is compelled to discharge the employee.

While it may be possible to bring a retaliatory discharge claim against the employer, it should be noted that the plaintiff in the case of *Renteria*, cited above, was also seeking damages under the Illinois tort claim for retaliatory discharge.[60] The employee was denied back pay that he expected to receive but for the discharge. However, using the discrimination cases cited above as a guide, courts may be inclined to invoke the same policy discussion in awarding an employee compensatory damages and punitive damages who was discharged for asserting a statutorily conferred right. Clearly, federal immigration policy is unaffected by such an award since the ability to continue employment with the employer or any employer is not relevant.

Conclusion

There is no question that in the wake of *Hoffman Plastics*, employers have attempted to utilize its holding to the fullest. In an effort to escape the basic remedies available to injured workers under state workers compensation systems, employers attempt to make relevant his or her immigration status. An effective advocate must understand the potential reach of *Hoffman Plastics* and its effect on the client's access to workers' compensation benefits in order to best defend against this plain manipulation of federal immigration policy. WILG

See CHALLENGES, page 40

CHALLENGES, continued from page 39

Footnotes

1 535 U.S. 137 (2002)
2 8 U.S.C. § 1324a(a)(1)
3 8 U.S.C. § 1324a(e)
4 29 U.S.C. § 158(a)
5 29 U.S.C. § 160
6 Id.
7 467 U.S. 883 (1984)
8 Id. at 903
9 Del Rey Tortilleria v. NLRB, 976 F.2d 1115 (7th Cir. 1992).
10 Id. at 1122
11 NLRB v. A.P.R.A., 134 F.3d 50 (2nd Cir. 1997)
12 Id. at 52
13 535 U.S. 137 (2002)
14 Id. at 149
15 Id.
16 Id. at 151-152
17 Id.
18 210 F.R.D. 237 (C.D. Ill 2002)
19 Id. at 238
20 Id.
21 364 F.3d 1057 (9th Cir. 2004)
22 Id. at 1067
23 Id.
24 Id.
25 Id. at 1068
26 Rivera v. NIBCO, Inc., 384 F.3d 822 (9th Cir.) 2004.
27 Singh v. Jutla, 214 F. Supp. 2d 1056, 1060 (N.D. Cal. 2002)
28 Id.
29 Id. at 1061
30 2003 U.S. Dist. LEXIS 14698 (N.D. Ill 2003)
31 Id. at 19
32 Id.
33 Ind. Code § 22-3, et. seq.
34 1C Larson's Workers Compensation Law, §§ 57.00, 57.12.
35 Larsons, supra, §61.00
36 Larsons, supra, §61.21
37 Larsons, supra, §61.22
38 986 P.2d 161 (Wyo. 1999).
39 Wyo. Stat. Ann. § 27-14-102(a)(vii) (emphasis added)
40 Felix at 164
41 570 Pa. 464 (Pa. 2002)
42 Id. at 479
43 Id. at 480
44 672 A.2d 221 (1996)
45 Id. at 223
46 Id. at 224
47 Id. at 224
48 Id. at 225
49 Mendoza, supra, at 224-225
50 Cherokee, supra, at 801
51 Foodmaker, supra, at 775
52 Naturally, this logic should then extend to payment of permanent and total disability benefits given that the employee would be receiving what a legal worker would receive in same scenario.
53 Cherokee, supra, at 801
54 560 S.E.2d 870 (2002)
55 Id. at 872
56 Id. at 873
57 Id.
58 Id. at 874
59 Typically, the Social Security Administration notifies the employer of the "no match" only after the employers have submitted to the SSA wage statements and W-2s showing conflicting information. See generally, National Employment Law Project, Fact Sheet: "SSA 'No Match Letters: Top Ten Tips for Employers", October 2003, at *http://www.nelp.org/docUploads/SSANomatch%20top%20ten%20tips%20october%202003%2Epdf.*
60 Id. at 20

Our thanks go to Injured Workers Pharmacy: see back cover. IWP underwrote most of the printing costs of this issue of the *Workers First Watch* magazine.

PERSPECTIVES, continued from page 22

Alone or in conjunction with specialists from other technical disciplines (e.g., industrial hygiene, epidemiology, occupational medicine), toxicological analysis can be valuable in developing a scientifically valid case, whether that be pro or con. Regulatory exposure guideline values may be useful indicators that can be related to the significance of exposure, but their derivation and their limitations must be acknowledged.

> Toxicological analysis can be valuable in developing a scientifically valid case.

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LETTER TO THE EDITOR, continued from page 8

You may call me whatever you want. I am a civil trial lawyer, a workers' comp lawyer, and I represent working families. I am proud to be called any one of those titles, and I suspect, so is each of you.

Personally, you can call me a seeker of justice, but the people I know will laugh at that phrase and at my efforts at repackaging what I call myself or what I do for a living. We are lawyers, and everyone knows that about us, no matter what name we decide to call ourselves. It is the public's perceptions we –and our legal predecessors– have periodically sought to change, but the prior names ATLA members called the organization did little to change the disdain that attorneys continue to experience.

For any name change to be effective, the issues must be refocused upon the injustices that we see daily. The public, media, and the legislatures of our states must recognize the just morality of supporting laws that preserve and protect the health and safety of America's workers. We are the enablers of that message. We can draw examples out of the cases we litigate, and cause the light of day to expose unscrupulous insurance companies, corrupt businesses, and the devastation which place at risk working families.

Didn't "*The Artist Formerly Known as Prince*" change his name back again? If North Dakota were to change its name to North Florida upon the advice of economic consultants, I still would not be ready to spend my Februarys on its beaches. More than a name change is required.

So, my good friends, my brothers and my sisters, we find that six decades later, there is a striking similarity of issues facing us. Those whom we represent continue to have their rights and remedies denied or delayed. Our legal ancestors were fighting the same fights that we now see.

The investment of the last 60 years should be valued. We must ask: "Are working families no longer adequately protected by my state's workers' compensation laws?" And if not, what steps must be taken? The nation's attention has to be re-directed to the rightful place. WILG

Sincerely,

John B. Boyd

*Anyone wishing to know more about this long evolution should read *David v. Goliath: ATLA and the Fight for Everyday Justice*, Jacobson, Richard S. and White, Jeffrey R., 2004. Mr. White, incidentally, is a lawyer at the Center for Constitutional Litigation. He spoke at the 2006 WILG Annual Conference & CLE in Orlando. He is instrumental in working with a group of Missouri-WILG members in the constitutional challenge litigation to 2005 comp "reforms". (*Editor's Note: John Boyd is a past president of WILG. He may be contacted at 816-471-4511 or via email at jbboyd@boydkenterlaw.com)*

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injured workers and accident victims. Plaintiffs' lawyers must be familiar not only with their own state law, but also the liberal trends in other states. Law schools should include courses in workers' compensation. Legislators must be educated to the need for increasing workers' compensation payments. The right to trial by jury must be expanded."

Once when asked why he had chosen workers' compensation – a field regarded by many lawyers as "boring" – Sam said, "Of course it is not boring. Each case is a person. The people who work are the salt of the earth. They represent the strength of America. Instead of working to transfer money from one crook to another, from one big businessman to another, the lawyer is working to help a worker who has built our country."

As the *American Association for Justice* searches for ways to reconnect with the public on issues of advocacy for victims of injury and disease, it would do well to reflect upon the style and substance of the attorneys who first brought these matters to national attention six decades ago. WILG

Footnotes

1 Richard S. Jacobson, Jeffrey R. White, *David v. Goliath*: ATLA and the Fight for Everyday Justice, United Book Press, Inc. (2004), p. 21.

2 Ibid. at 23.

3 Second WILG chairman, N. Michael Rucka, is pictured on page 6 at the Heathman to commemorate the 60th anniversary of the founding of NACCA.

4 Soon thereafter the name was changed to the National Association of Claimants' Compensation Attorneys.

SALUS POPULI, continued from page 16

developed political clout, they will continue to be subject to the whims of their employers and the insurance industry.

We who are workers' comp attorneys are already committed. We choose to represent injured workers and their unions rather than corporations and insurance companies. As compensation attorneys and workers' advocates, we have had success in the past. Sometimes this success comes incrementally, and other times in major events, such as the California law establishing the Agriculture Labor Relations Board. Regulations promulgated by this state agency have significantly affected pesticide use and have contributed to reductions in illness and injuries.

Along with such successes, we have also witnessed backsliding in workplace standards most emphatically demonstrated by the recent West Virginia coal mining disasters. We have seen workers' compensation "deformation" occur in Texas, Florida, Oregon, Missouri, and in my own state of California.

We should all be concerned about the current trend of outsourcing jobs. Outsourcing immensely complicates a worker's ability to maintain a safe workplace and decent wages. We face a seemingly uniform belief that a "race to the bottom" is in all of our best interests. Those who favor outsourcing argue that the cost of production requires ratcheting down wages and safety requirements if we are to stay competitive in a global economy.

Perhaps, in the abstract, there may be some truth in this argument. But if there are no domestic industries employing workers, there will be no consumers as they, too, will have been outsourced. How will they buy the goods, however cheap, created in Chinese and Indian sweatshops? How different are these foreign sweatshops from those of the later 19th and early 20th century American ones?

There is no conceivable moral rationale for the disparate treatment of similarly-situated individuals.

Workers' Comp a National Program?

Are these current trends – destroying unions, the Wal-Mart approach, and outsourcing – irreversible? The answer to this is part of the answer to a broader question that must be asked: why is workers' compensation not a national program?

Why is workers' compensation not a national program?

By the end of 1995, total spending nationally on workers' compensation was more than $43 billion. By 1998 over 110 million workers were covered by workers' compensation laws. Yet there are wildly disparate variations in coverage among the 50 states. As one example, the loss of a hand in a state such as Connecticut, Iowa or New Hampshire is worth over $16,000 while the loss of the same hand in Colorado or Massachusetts garners a mere $30,000.

Yet there are wildly disparate variations in coverage among the 50 states.

Many writers in the workers' compensation field have observed that there is no conceivable moral rationale for the disparate treatment of similarly-situated individuals. In June of 1934, Franklin Delano Roosevelt promulgated Executive Order 6757, a little known enactment creating the Committee on Economic Security whose extraordinary mandate was as follows:

> "The field of study to which the committee should devote its major attention is that of the protection of the individual against dependency and distress. This includes *all* forms of social insurance (*all accident insurance*,

health Insurance, invalidity insurance, unemployment insurance, retirement Annuities, survivors' insurance, family endowment, and maternity benefits) and also providing work (or opportunities for self-employment) for the unemployed, and training them for jobs that are likely to become available. These several problems must be studied not only from the point of view of long-time policy, but must be related to the present relief and unemployment situation."

An effort to create such a national plan was formulated in 1954, but by 1956 it had been abandoned.

However, as we know, all efforts to create national standards and/or a national policy have essentially failed. The principal reasons have been the precepts of Federalism, the lack of a "crisis" (with most states having at least an operating program of workers' compensation by the time of the New Deal), and, most importantly, politics.

The 1972 and 1976 reports of the Commission show that States were nowhere near meeting 19 essential recommendations. (See p. 7)

The American Medical Association, which opposed Medicare, also opposed the federalizing of workers' compensation, as ultimately did labor and the progressive left. The insurance industry, the trial bar, and the International Association of Industrial Accident Boards and Commissions (IAIABC), all major stakeholders in the existing system, were opposed to a national plan. An effort to create such a plan was formulated in 1954 by then Undersecretary of Labor, Arthur Larson, but by 1956 it had been abandoned.

Then in 1968, the mining disaster in Farmington, West Virginia focused media attention for ten straight days in November, while 78 of 99 trapped miners died. (150 West Virginia coal miners had already died that year, along with 159 in other states.) New health and safety regulations proposed by President Lyndon Johnson, then endorsed by President Richard Nixon, culminated in the passage of the Black Lung Act of 1969.

This gave impetus to a broader inquiry into occupational health and safety which, in turn, led to the 1972 National Commission on State Workers' Compensation Laws. The Commission's report (See p. 7) considered but rejected a federal takeover of states' systems, but recommended that the states be given three years to comply with 19 essential elements and "if necessary, Congress with no delay … should guarantee compliance." (1972:127).

…since that discrimination weakens the rights of **all** workers, violates fairness, and thwarts justice.

The Commission's follow-up report in 1976 indicated the states were nowhere near being in compliance with the 19 essential recommendations. The Commission's report remains the high-water mark for national attention to workers' compensation. The predictable failure of political will to force compliance per the original report has continued to today.

So back to the original question about irreversible trends: with the concept of a national policy or scheme for workers' compensation stalemated, are we doomed to endure the status quo indefinitely?

Changing Forces and Our Challenge

Changing economic, social and political forces are at play here. The world's economy is dramatically different today than 30 years ago. The types of industrial injuries and diseases are significantly different. (The AMA now represents fewer than 28% of all physicians but nearly 90% of all medical directors in the insurance industry are members of the AMA.)

SALUS POPULI, continued from page 43

Conservative think tanks relentlessly bombard the media with the view of the worker as fungible and merely a cost item on a corporate balance sheet.

> We need to revisit our own obligations and commitment. We must be more than we are now, and better.

Union representation has dwindled to only about 9% of the non-government workforce. Unions urgently need to rethink how they survive in this poisonous climate, and reassume the roles of unions of the 1930s CIO model.

We as lawyers need to revisit our own obligations and commitment to our clients. We must fight discrimination that deprives workers of medical and compensation benefits if they are here without proper documentation, since that discrimination weakens the rights of *all* workers, violates fairness, and thwarts justice. We must challenge insurers in the rate-setting mechanisms when they allege they are better at "finding fraud", and we must insure that any inquiries about fraud include provider fraud, employer premium fraud for underreporting their covered workers.

Our organization and we, individually, must educate ourselves, our clients, and their families about the current state of politics that is creating these problems. We and our clients must participate in organizations that sponsor and shape the national debate about health and safety. We must urge transparency at every level. In short, we must be more than we are now, and better.

> We must participate, sponsor, and shape the national debate about health and safety.

Above all, to those who mistreat and demean the worker, we must constantly stress the ancient admonition: "…you shall not rule over your worker through rigorous labor; furthermore, his family has to be provided for." *Leviticus 25:41*. By making this the goal of all our endeavors, we will fulfill our duty as workers' compensation attorneys and further the mandate, however idealistic, that the people's safety is the highest law. WILG

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this new requirement of coal operators to bear some of the costs of the loss of life, but by 1920, the ratio of underground fatalities per 1,000 miners had fallen to 3.73.

By the turn of the next century, Department of Labor statistics indicate that the amount of tons of coal produced per each man hour worked was approaching an astonishing 6 tons. Mining industry efforts to dismantle federal safety legislation gained momentum under the Bush administration. Congressional hearings were held in 2000 where industry urged lawmakers to eliminate mandatory quarterly inspections.

> Mining industry efforts to dismantle federal safety legislation gained momentum under the Bush administration.

Less than one year later, on September 13, 2001, 13 miners were killed in a series of explosions at the Jim Walters No. 5 Mine in Alabama. Elaine Chao, Secretary of Labor, spoke at a memorial service and promised that the administration was "determined to do everything we possibly can do to keep it from ever happening again." Less than eight weeks later, the real [later] tragedy at the Sago mine began. Mine Safety and Health administrator David Laurinski, who came to the post following a long career as a coal mine official, moved to halt the ongoing regulatory development of tougher regulations begun under the Clinton administration. Included among those regulations were provisions that would have required more responsive mine rescue teams and additional underground oxygen supplies.

Yet, in 2005, when 22 miners were killed on the job, the nation had its lowest mine fatality rate in history. The country had earlier watched with fascination and relief when nine trapped miners were pulled alive from the flooded Quecreek mine in Pennsylvania. Rescue technology, it seemed, had finally reprieved the otherwise doomed coal miner. The tragic history of death in the nation's coal mines was seemingly a thing of the past.

Sago

On the early morning of Monday, January 2, 2006, 23 men were entering the Sago mine for their ten hour shift. The fire boss, Terry Helms, had entered earlier in the morning to prepare for the first shift after the

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holiday. A half hour later, an underground explosion occurred, trapping the "2 Left" crew of 12 men, disrupting power, and filling the area with smoke and carbon monoxide. The second crew ("1 Left"), which included the brother of one of the trapped men, attempted to reach the "2 Left" crew but were forced back by the smoke. They could not know that they came within 500 yards of the trapped men, but without communication or better knowledge of conditions, were turned back.

Ten minutes later, the "1 Left" crew made contact with the surface, reported the explosion, and proceeded to walk out of the mine through an air intake tunnel. Over the next hour, mine officials arrived and attempted to reach the "2 Left" crew. At 7:40 a.m., state and federal mine officials were called. State mine regulators arrived at the mine at approximately 8:30 a.m., and began the task of monitoring the air quality at the mine entrance. Shortly thereafter, MSHA issued an order preventing entry into the mine. The first mine rescue team entered Sago that evening, nearly twelve hours following the explosion.

Drilling from the surface into the mine demonstrated dangerous levels of carbon monoxide in the area of the explosion. On Tuesday evening, mine officials announced that the body of one of the missing miners was found. Terry Helms was near the site of the explosion and was the only miner who died instantly.

A few hours later, near midnight on Tuesday, a rescue team found the "2 Left" crew. Through miscommunication, news was leaked that they found "twelve alive". The news was broadcast over national television, and printed on the front page of newspapers across the country. For nearly three hours, the families of the trapped miners celebrated while awaiting the return of the "2 Left" crew, only to later learn that eleven of their husbands, fathers, and brothers had died.

Randall McCloy miraculously survived. He later reported that the miners had tried to exit the area but were turned back by thick smoke. They barricaded themselves behind a makeshift wall of thick canvas and pounded the roof to try to contact the surface. For the first time, authorities learned that four of the self-rescuer oxygen supply devices had failed. The miners lived to describe their last hours in notes left to comfort their families. They suffocated of carbon monoxide poisoning as the rescue teams were trying to reach them.

West Virginia Governor Joe Manchin arrived on Monday, cutting short a trip to Atlanta for the Sugar Bowl. He was frequently interviewed by the national news media, and offered support and compassion throughout the ordeal of the families, joining their vigil at the Sago Baptist Church. It was widely reported that the governor's uncle was one of the miners killed at the Farmington mine disaster in 1968. At the same time that Gov. Manchin was comforting the Sago families, his administration was vigorously pursuing a policy of terminating workers' compensation benefits to some 142 widows and widowers.

> The Governor's administration had been pursuing a policy of terminating workers' comp benefits to 142 widows and widowers.

Widow Benefits

Like 31 other jurisdictions that follow the 1972 National Commission on Workers' Compensation essential recommendations (*See page 7*) regarding dependents' benefits, the West Virginia statute provides that the dependents of the victims of workplace fatalities be paid benefits for the duration of dependency. For widows and widowers, benefits are to be provided until death or remarriage; for children, benefits are to be provided until a certain age, which generally conforms to the age of emancipation. Those benefits are to be paid at the same rate as total disability benefits would have been paid to the deceased worker had he/she lived.

In 1995, reform legislation terminated the payment of permanent total disability benefits upon eligibility to receive Social Security retirement benefits. In 2003, the statute expanded benefits to age 70. The rate of permanent total and temporary total benefits was not amended.

In March of 2004, the Workers' Compensation Commission initiated Policy Statement 2.02, which interpreted the 1995 amendments to mean that dependents could not receive benefits beyond the date of the deceased workers' 65th or 70th birthday, depending upon the statute in effect on date of death. In some cases, benefits were stopped even though the award letters issued several years prior had promised payment until death or remarriage.

In most cases, workers' compensation benefits were the

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WORKERS INJURY WIG LAW&ADVOCACY GROUP

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primary source of income for the surviving families. One widow, Diana Dickerson, lost her home and most of her possessions when the bank foreclosed on her mortgage and its contractor caused a fire while remodeling, before Mrs. Dickerson could remove her personal property.

Several dozen of the affected widows appealed the termination of their benefits, and a number of those filed writs of mandamus in the West Virginia Supreme Court of Appeals. Following litigation at the administrative law judge level, it was held that the policy terminating benefits was contrary to statute. The Commission refused to implement these decisions in the widows' cases, and filed appeals before the Board of Review.

The Board, upon the Commission's motion, forwarded a certified question to the Supreme Court. The Court heard arguments on November 15, 2005, and subsequently remanded the certified question to the Board without an answer. It also entered an order deferring a decision on the writs, pending a decision below. The Board entered a briefing schedule in the cases and ordered that oral argument be presented on May 24, 2006.

Effective January 1, 2006, BrickStreet Insurance was formed as a mutual by an act of the legislature, which also terminated the Workers' Compensation Commission, a monopolistic state fund agency.

The Sago mine tragedy occurred the next morning. WILG was contacted for assistance in advocating for the widows of the Sago miners, and devoted significant time and resources to that effort. *[Editor's Note: Sue Anne Howard spearheaded this effort for WILG and did a superb job.]*

A press release was issued and generated the interest of several West Virginia newspapers. On Sunday, February 12, 2006, the *Charleston Gazette* ran a front page feature article on the broken promises made to the widows.

By February 15, 2006, Gov. Manchin was calling for an investigation, stating, "I really don't know, but I'm going to find out. The bottom line is we have to take care of people." He publicly complimented BrickStreet Insurance for processing the claims of the Sago widows so promptly.

> Benefits were stopped even though the award letters had promised payment until death or remarriage.

At a meeting with legislators, labor, and the governor's senior staff that same afternoon, the concern expressed by the administration was the lack of a rationale as to why widows should be paid benefits longer than their spouses would have worked. Nothing was resolved, and that Friday, the AFL-CIO held a press conference featuring several of the widows who had been impacted by Policy 2.02. The issue garnered the public's attention, but Policy 2.02 remained in effect.

> The administration asked why widows should be paid benefits longer than their spouses would have worked.

The Chamber of Commerce defended the policy, commenting that West Virginia was a "wage replacement" state, and that workers' compensation was not intended to replace life insurance. BrickStreet Insurance, operated by the same administrators who ran the abolished state agency that implemented Policy 2.02, publicly added that providing benefits for life or remarriage would require an increase in employer premiums. The Insurance Commissioner declined to take a position, and commented that she was going to allow the litigation process to proceed.

Meanwhile, the award letters issued by BrickStreet to the Sago mine widows contained a standard 30 day protest period. Upon being notified that their benefits would terminate in as little as 8½ years, the Sago mine widows filed protests and moved to intervene in the writs being deferred at the West Virginia Supreme Court of Appeals.

Soon thereafter, Gov. Manchin instructed the Insurance Commissioner to direct that Policy 2.02 be voided as contrary to statute. The Insurance Commission, which now administers legacy claims, moved to dismiss the writs before the Court; however, the petitioners objected on the grounds that finality demanded judicial interpretation of the statute. The Court agreed and scheduled oral argument in the cases on May 10, 2006. It granted relief to the widows and found Policy 2.02 void and unenforceable as contrary to statute.

Epilogue

The brave families of the Sago mine victims have worked tirelessly and selflessly to promote stronger mine safety legislation in the wake of their tragic loss. The January 23, 2006, testimony of acting MSHA chief David G. Dye before a Senate subcommittee was that his agency had an "aggressive"

enforcement policy. However, it was learned that enforcement of fines levied against mine operators for violation of safety regulations was lax, and multiple millions of dollars in fines have been unpaid for years while violators continue to operate mines.

In 1994, when the Republicans gained control of Congress, the leadership attempted to abolish MSHA and place workplace safety in the mining industry under OSHA. Lead Sago investigator, J. Davitt McAteer, who was then head of MSHA in the Clinton administration, discussed this attempt in an article published in the *West Virginia Law Review*, cited in an article by the *Charleston Gazette* on February 19, 2006:

> Enforcement of fines levied was lax, and millions of dollars have been unpaid.

"What happens to mine safety laws when the terrible disasters that produced legislation are rare? We should be grateful that the question is timely. It means that decades of progressively stronger laws have finally made a difference for miners, their families and their communities. But this hard-won success has had one ironic result: Some people are tempted to believe that a strong statute is no longer necessary."

By the end of February 2006, coal industry lobbyists resumed their efforts to reduce or eliminate MSHA's mandatory quarterly inspections.

International Coal Group, operator of the Sago mine, has been fined approximately $130,000. ICG's owner, Wilbur Ross, is a New York billionaire. David Dye, acting director of MSHA, stated that these fines "reinforce MSHA's stepped-up and aggressive enforcement record at the Sago Mine before the tragic disaster occurred on January 2."

Lightning has been identified as a probable ignition source of the explosion. The *Charleston Gazette* has reported that as many as five electrical systems at Sago did not have required lightning arresters, which could have resulted in an electrical charge reaching underground and igniting a methane buildup. The area where the explosion occurred had recently been sealed using Omega block seals which were apparently approved by the state, but may not have met a federal 20 lbs. per square inch pressure standard.

The federal investigation of the Sago disaster is continuing. The report of a *state* investigation led by J. Davitt McAteer[1] is complete, and offers twelve recommendations for improved mine safety, including research, strengthening of seals, installation of refuge chambers, review of self-rescuers, and improved communications systems.

On March 15, 2006, coal was again being mined at Sago.

> The fight will go on... As advocates for injured workers in all walks of life, this is something that **must** be done.

At a memorial service for the Sago mine victims, author and rocket scientist Homer Hickham, of Coalwood, WV spoke of why these "extraordinary" men, and so many others, spend their lives "digging coal from beneath a jealous mountain." Mr. Hickham recalled that his own grandfather had lost both legs in the mine, and that his father was blinded in one eye while trying to rescue trapped miners.

His father returned to work in the mine for 15 years after that, and later died of black lung disease. Yet, Homer Hickham's father had a calling, and took his son into the mine as a young teenager: "He wanted to show me where he worked, what he did for a living. I have to confess I was pretty impressed. But what I recall most of all was what he said to me while we were down there. He put his spot of light in my face and explained to me what mining meant to him. He said, 'Every day, I ride the mantrip down the main line, get out and walk back into the gob and feel the air pressure on my face. I know the mine like I know a man, can sense things about it that aren't right even when everything on paper says it is. Every day there's something that needs to be done, because men will be hurt if it isn't done, or the coal the company's promised to load won't get loaded. Coal is the life blood of this country. If we fail, the country fails.'"

The fight will go on to pay tribute to the men who have lost their lives so that the country will not fail. As advocates for injured workers in all walks of life, this is equally something that *must* be done. **It falls upon us to make sure that the memory does not fade, and that workplace safety is guarded with uncompromised vigilance.** When safety measures are not effective, it falls upon us to advocate for the victims and do all that can be done to prevent the social and financial costs of these losses. "If we fail, the country fails."

Footnote

[1]Available online at *www.wvgov.org/SagoMineDisasterJuly2006FINAL.pdf*

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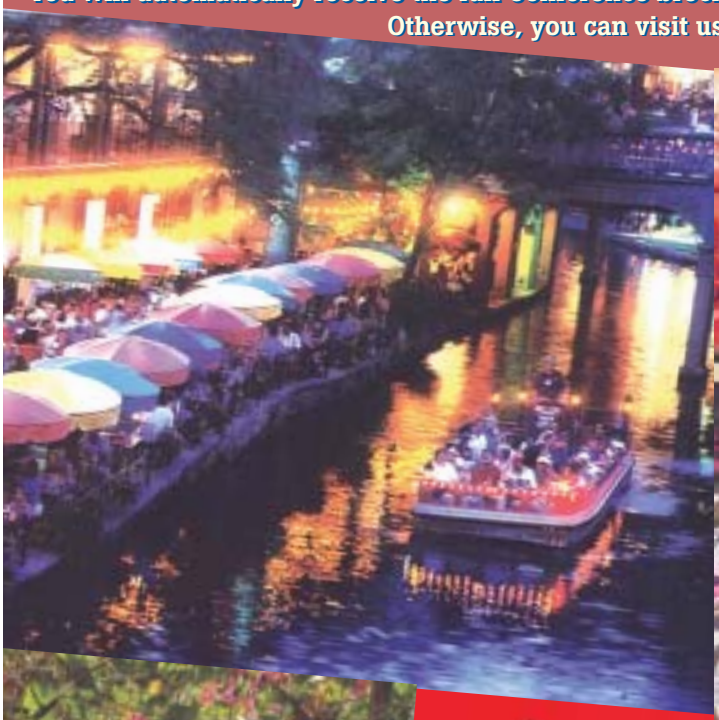

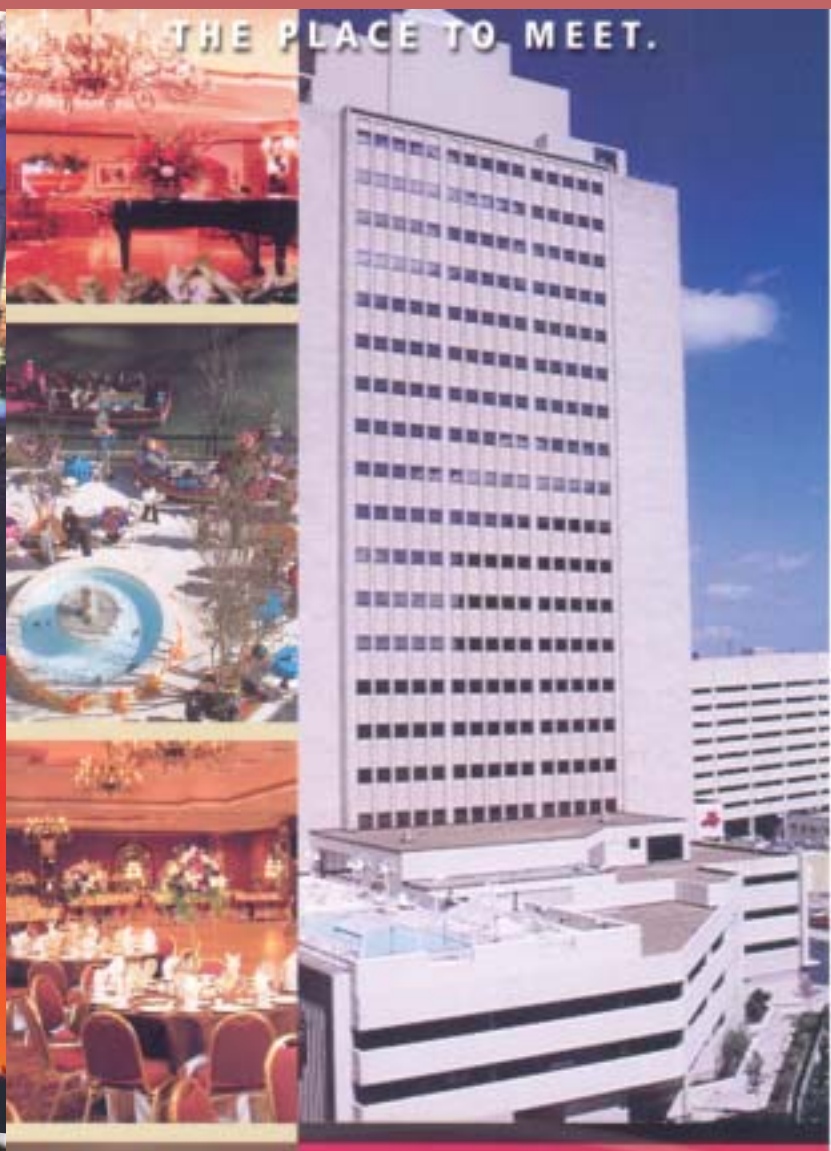

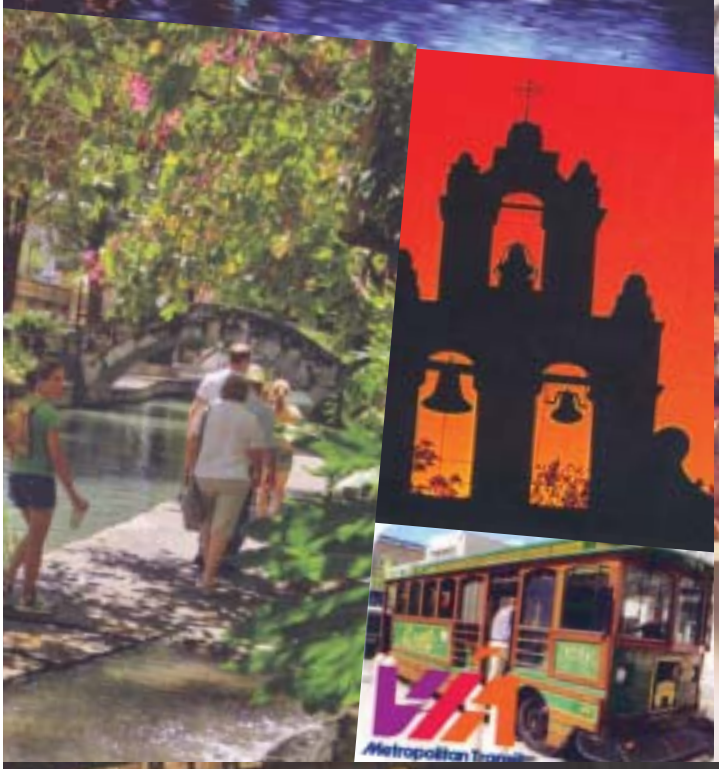

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