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## Appellate Court Rules IME Doctor Didn't "Aid and Abet" Carrier's Alleged Bad Faith

By Jim Gill, AWCCA President

Division One of the Arizona State Court of Appeals affirmed a lower court's decision granting summary judgment to an IME doctor accused of "aiding and abetting" bad faith allegedly committed by a workers' compensation carrier.

In a January 28, 2010 decision, the appellate court concurred with Maricopa County Superior Court Judge Robert Oberbillig, who threw out a plaintiff's case against Zoran Maric, M.D. Plaintiff Ray Federico had accused Dr. Maric of assisting Liberty Mutual Insurance Company in the commission of bad faith by performing an independent medical examination (IME) in relation to Federico's workers' compensation claim.

The case began in April of 2005 when Federico sustained a back injury in a work-related vehicle accident while he was employed as a driver for United Parcel Service (UPS). Federico filed a claim with the UPS work comp carrier, Liberty Mutual. He treated briefly with MBI Industrial Medicine through his workers' compensation carrier and then continued to treat on his own with a chiropractor after Liberty Mutual closed his claim.

According to the appellate court's decision, in April 2006, after having returned to full duty, Federico returned to MBI complaining that he had re-aggravated his prior back injury and was found by MBI to have a high probability of permanent impairment. Liberty Mutual accepted the re-injury as part of the April 2005 claim and allowed Federico to receive limited treatment.

In May of 2006, Federico suffered another work-related injury, this time to his knee. The following month, Liberty Mutual requested that MBI refer Federico for an IME and suggested using Dr. Maric as the IME physician.

After examining Federico, Dr. Maric issued a report to Liberty Mutual indicating that Federico needed no further medical treatment relating to his work comp injury. Dr. Maric commented on Federico's subjective complaints of pain and concluded that Federico demonstrated no objective evidence of physical injury or pain. He also suggested the possibility that Federico was malingering and Liberty Mutual terminated Federico's workers' compensation benefits accordingly.

Federico then filed suit against Liberty Mutual, MBI and its treating physicians, and against Dr. Maric. He sought damages against Liberty Mutual for their allegedly unreasonable denial of his continued work comp benefits and for its alleged bad faith handling of his claim. He also sought damages against the MBI and its physicians and against Dr. Maric for their alleged aiding and abetting of Liberty Mutual's bad faith conduct.

Dr. Maric filed a motion for summary judgment alleging that Federico couldn't prove his aiding and abetting claim. After oral argument, the court granted Dr. Maric's motion and entered a judgment in his favor. Liberty Mutual then filed its own motions for partial summary judgment. Eventually, Liberty Mutual and the remaining defendants reached separate settlements with

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# Appellate Court Applies Comp Benefits to Private Use of Company Vehicle

By Jim Gill, AWCCA President

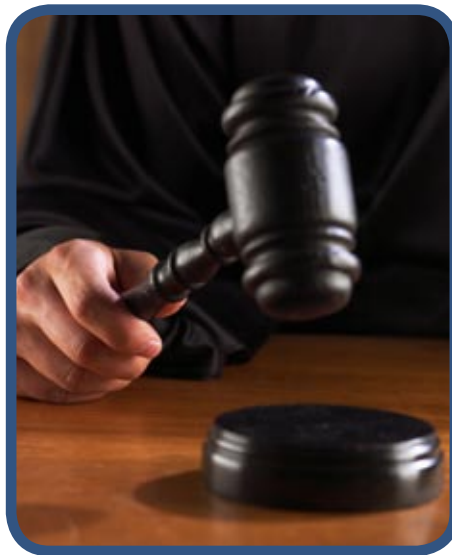
Employees injured while using company vehicles for after-hours personal business are covered by workers' compensation according to a decision from Division Two of the Arizona Court of Appeals.

In a non-published memorandum decision, the appellate court affirmed the decision of a Tucson Administrative Law Judge (ALJ) who awarded survivor benefits to the widow of a Pima County employee killed while driving his County-owned sport utility vehicle en route to meet his wife for dinner after work.

Robert Hooker, age 65, was Pima County's Public Defender at the time of his death in 2008. While on his way to meet his wife, he was struck by Alexander Rodriguez, who was drag racing with the driver of another vehicle at the time of the accident. Hooker's wife filed for workers' compensation survivor benefits and Tucson ALJ LuAnn Haley found her claim to be compensable.


Pima County, represented by M. Ted Moeller, filed a request for review and when the ALJ affirmed her original decision, the County filed an appeal. The County argued that in her decision, the ALJ "incorrectly interpreted the employer's conveyance exception to the going and coming rule".

Citing its "duty to 'liberally construe' the law on workers' compensation to ensure that industry bear[s] its share of the burden of human injury as a cost of doing business", the appellate court rejected Pima County's argument. The appellate judges noted that injuries sustained by an employee going to or coming from their workplace are generally not considered to arise out



of the course and scope of employment. However, they focused on the "employer's conveyance" exception to the "going and coming rule", stating that the exception applied when a vehicle was provided by an employer and the travel time in that vehicle appeared to benefit the employer.

Quoting from prior case law, the judges noted that, "in furnishing a vehicle for traveling to and from work, the employer 'has, in a sense, sent the employee home on a small ambulatory portion of the premises'". The appellate court then applied the "totality-of-the-circumstances test" to the subject case and decided that work comp benefits applied because "Pima County benefited from furnishing the vehicle to Hooker". The court noted the ALJ's conclusion "that Hooker had accepted his job with Pima County in part because it furnished him with the vehicle", that "he used the vehicle to attend work-related engagements" and that "he conducted work from the vehicle via his telephone", even though none of those conditions apparently existed at the time of the accident in which Hooker was killed.

Because the appellate case did not result in a published opinion, the appellate court's decision does not create legal precedent and it cannot be cited in future cases except as authorized by specifically applicable rules. According to defense attorney Ted Moeller, Pima County decided not to further appeal the decision to the Arizona Supreme Court. 

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Federico and the suit was dismissed by stipulation.

In their decision, the appellate judges noted that the tort of “aiding and abetting” required three elements:

- (1) the primary tortfeasor (in this case, Liberty Mutual) must commit a tort that causes injury to the plaintiff;
- (2) the defendant (in this case, Dr. Maric) must know that the primary tortfeasor’s conduct constitutes a breach of duty; and
- (3) the defendant must substantially assist or encourage the primary tortfeasor in the achievement of the breach.

Put more simply, the court noted that “because aiding and abetting is a theory of secondary liability, the party charged with the tort (i.e., Dr. Maric) must have knowledge of the primary violation. . . . Such knowledge may be inferred from the circumstances”, the court continued, “however, an inference of knowledge will not be made lightly.”

Federico had argued that there were sufficient facts raised in his lawsuit so that a jury should be able to decide whether Dr. Maric had knowledge of Liberty Mutual’s alleged intent to commit bad faith. This, he argued, should have caused the Superior Court to deny summary judgment in favor of Dr. Maric.

After admittedly viewing the evidence in a light most favorable to Federico, the appellate court still found his arguments to be unconvincing. In their opinion, the appellate judges noted that Federico had asked the court to infer that Dr. Maric was aware that Liberty Mutual intended to commit bad faith because Maric allegedly:

- 1. Knew he was working for Liberty Mutual.
- 2. Had done work for Liberty Mutual before.
- 3. Knew that calling somebody a malingerer can have a negative connotation.

- 4. Knew that opining that a claimant is motivated by secondary gains can have a negative affect on their claim.
- 5. Knew that his IME report would adversely affect the outcome of Federico’s workmans’ compensation claim.
- 6. Prejudges the patients he sees because he believes that the honest claims by legitimately injured people are settled and he never sees those people.
- 7. Believes the people he sees are seeking monetary damages far beyond what is appropriate.
- 8. Finds almost 60% of the people he sees are imagining their pain or exaggerating their pain to make money from lawsuits.
- 9. Believes that he sees a skewed population of patients.
- 10. Finds only about 3.7% of the people on whom he performs IMEs are truly injured, and that injury was caused by the incident complained of.
- 11. Believes that lawsuits drive the amount of care because that is how claimants’ attorneys make more money.
- 12. Performed an inadequate medical examination of Federico.

After reviewing these allegations by the plaintiff, the judges stated: “even if we accept all of these allegations as true, none of them suggests in any way that Maric had knowledge of Liberty Mutual’s intent or even propensity to act in bad faith toward Federico’s claim. We see no way that a reasonable jury could find that the alleged facts provide evidence of a strategy to assist Liberty Mutual in acting in bad faith or even a general knowledge that Liberty Mutual was acting in bad faith in this case...

“Federico’s argument comes down to the assertion that any time Liberty Mutual hires Maric, even through a third party intermediary, it does so to further its bad faith intent and, because of that, any time

Maric performs an IME for Liberty Mutual, even when retained through a third party intermediary, he does so for the purpose of aiding and abetting Liberty Mutual in acting in bad faith. Federico further argues that Maric knows or has a general knowledge that his IMEs will be used by Liberty Mutual for an improper purpose (i.e., the denial of claims in bad faith). These arguments go far beyond the inferences that may reasonably be drawn from the facts presented.”

The appellate court continued its comments by noting that, “...Federico failed to provide any evidence to support even the inference that Maric’s IME assisted Liberty Mutual in its acting in bad faith. While evidence may show that Liberty Mutual requested the IME for a questionable purpose (i.e., because of Federico’s numerous contacts regarding his injury), this does not mean that the IME was necessary in order for Liberty Mutual to act in bad faith. In fact, the same evidence cited by Federico contains indications that the IME was unnecessary in order for Liberty Mutual to deny Federico’s claim (e.g., Liberty Mutual employee’s questioning of the necessity or usefulness of the IME when Federico was already discharged from care).”

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# President's Message

By Jim Gill, AWCCA President

On February 3, 2010, kite surfer Stephen Schafer was killed after being attacked by a shark off the coast of Florida. According to the lifeguard who swam to Schafer's aid and eventually pulled him to shore, there were actually dozens of hungry sharks circling Schafer and his board, especially after they smelled his blood in the water.

The story made news because shark attacks, though frightening, are extremely rare. From 2001 to 2008, only eight people died in the U.S. at the fins of a shark. Compare that figure to the 5,728 people killed in bicycle accidents during that same period and it's clear that Schwinn's are the more lethal killing machines. The fact is that we humans just don't taste very good to Mr. Jaws and his homies. All things being equal, they'd rather munch on tuna and turtles than tourists. Dining preferences notwithstanding, wild animals that are little more than mindless feeding machines are driven to expand their diets and stalk unusual prey when their normal feeding grounds are otherwise depleted. As the saying goes, "desperate times call for desperate measures".

Of course, those of us in the insurance arena know there are few people more desperate than hungry claimant attorneys looking for new sources from which to collect their contingency fees. As of *The Examiner's* press date, the ICA's 2009 Annual Report hadn't yet been posted on its website. However, according to the 2008 ICA Annual Report, litigation hearings had gone down by 7 percent since 2006. Total workers' compensation claims filed with the ICA were down 17.7 percent since 2002 and total lost time claims—the applicant bar's bread and butter—dropped by 20 percent from 2000 to 2006 (figures for 2007 or 2008 weren't included in the ICA's statistics).

Does the downward trend in claim volume mean Arizona workers are getting safer? Maybe. Does the drop in lost-time claims mean employers making a greater commitment to return-to-work programs? Possibly. Does the reduction in litigated claims being heard by the ICA Hearing Division mean expense-conscious carriers are litigating fewer cases under the perception that ALJs are too "claimant-friendly" to give them a fair shake? Probably.

Regardless of the reason for dwindling numbers of claims and claim disputes, Arizona's work comp litigation pie has gotten measurably smaller over the past few years. And, although the State's increased average monthly wage has partially helped satiate the appetites of hungry applicant attorneys, a small but aggressive handful are searching for new cuisine in their quest to take a bite out of the work comp industry.

So what's the juicy new fare on these claimant lawyers' menus? IME doctors!

To be fair to the work comp applicants' bar, most of its members haven't pointed their forks in this direction. And interestingly, the comp attorneys' first big mouthful of fricasseed physician didn't come from any recipe they'd cooked up. Rather, it came in the form of a large table scrap tossed their way by even bigger carnivores on the Superior Court side of the dining hall. The verdict in the *Ritchie vs. Krasner* medical malpractice case undoubtedly had many comp claimant attorneys salivating at the idea that IME doctors would rather clear out of the kitchen than risk ending up skewered on some med mal lawyer's

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## AWCCA Mission Statement:

The purpose and objective of this association shall be to promote the general welfare of its members by developing close relationships among those engaged in the handling of workers' compensation claims; to promote cooperation by mutual exchange of experiences and information and discussions thereon and, to educate its members.

## NEW AWCCA P.O. BOX #

Don't forget, the AWCCA changed its mailing address earlier this year. All mail correspondence including checks, membership applications, Letters to the Editor of *The Examiner* and other items addressed to the organization or its officers should be sent to:

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kabob to the tune of \$1.425 million, simply for providing a one-time opinion to a comp carrier.

But that win only wet the whistles of a few hungry barristers looking to carbo-load on more comp carrier cuisine. The more recent case of *Federico vs. Maric* (see “*Appellate Court Rules IME Doctor Didn’t Aid and Abet Carrier’s Alleged Bad Faith*”) had all the promise of a Thanksgiving Day feast until the Arizona Court of Appeals stuck its judicial finger down some applicant attorneys’ throats, forcing the plaintiff to upchuck his claim that Dr. Zoran Maric had “aided and abetted” the alleged bad faith of a comp carrier by performing an IME, and by opining that the claimant was malingering when he had no objective findings to substantiate his subjective complaints.

The plaintiff in that case contended that the carrier breached its good faith duty—with aiding and abetting from Dr. Maric—because of the high percentage of IME claimants the good doctor had previously found to be exaggerating their pain complaints for secondary gain. The plaintiff also argued that Dr. Maric only rarely found IME claimants to be truly injured and that he believed his IME practice exposed him to a skewed population of claimants. Well duh, duh and duh! That’s like arguing that muffler repair shops only see a “skewed population” of cars—i.e., the ones that need new mufflers! Would anyone expect a Midas mechanic to not find stuff wrong with *most* of the mufflers he sees?

The fact is that most carriers and TPAs don’t spend thousands of IME dollars on claimants who *do* demonstrate an objective basis for their ongoing subjective complaints. So, it stands to reason that the cross-section of that “skewed population” of claimants seen by most IME doctors is going to be the portion in which things just don’t add up to an adjuster who sees

hundreds of comp claims a year and who knows how to sniff out a genuine malingerer. This is not bad faith. This is common sense.

Fortunately, the trial court granted Dr. Maric summary judgment—the judicial equivalent of saying “bullpucky”—and the appellate court affirmed, thereby dismissing a meritless claim.

But the fact remains that claimant Ray Federico actually went on the offensive and found a liability attorney to accuse a doctor in Superior Court of conspiring with a comp carrier to cheat a claimant out of his benefits, and to simultaneously accuse the carrier of bad faith for hiring that specific IME doc. Those are generally not the kinds of legal theories that just pop into a comp claimant’s noggin on their own... Could there have been some behind-the-curtain puppet-mastering by an applicant attorney?

Moreover, the Federico case isn’t the only one in which visions of bad faith sugarplums have danced in the heads of a few hungry claimant lawyers looking to fill their bellies on contingency fees by choking a comp carrier’s ability to seek a second opinion. Other applicant attorneys—some of whom advertise a dual specialty in workers’ compensation and insurance bad faith—have clearly tried to make a meal out of specifically targeted physicians, making it clear to carriers that soliciting those doctors’ IME opinions is equivalent to bad faith per se. One prominent local defense attorney has bemoaned the fact that his ethical duty requires that he warn clients when their selection of certain IME doctors is likely to draw an immediate bad faith suit. The applicant attorneys’ purported goal, of course, is to “keep the adjusters honest” so that doctors reportedly known for cutting the burner on a claimant’s comp gravy train are starved out of the business by insurers’ fears of bad faith recrimination: *Wanna*

*schedule an IME on my clients? You may be in bad faith just for having the chutzpa to question them. Wanna use Dr. So-and-So? You ARE in bad faith and here’s the lawsuit to prove it!*

Of course, IME doctors have given claimant attorneys indigestion for years. But claimant attorneys suing carriers and TPAs for simply selecting a certain doc conjures up the proverbial name-calling case between the pot and the kettle. The part that really leaves a bad taste in the mouths of most adjusters is the fact that claimant attorneys can cook up their own doctor deals without the slightest twinge of heartburn. Claimant attorneys can’t be sued for “bad faith” when they hand pick docs who will maximize their clients’ disability, and therefore, their own slice of those juicy indemnity benefits. Claimant attorneys are supposed to be governed by ethical rules. But has anyone ever heard of an attorney being sanctioned for sending his client to a knife-happy surgeon or to a psychiatrist who hands out “PTSD” diagnoses like grocery chains hand out free shoppers cards?

To be sure, the threat of bad faith against carriers and TPAs has been around for years. And frankly, it should be. Companies handling claims for injured workers do have a duty to act ethically in the administration of their claims. But trying to blackball certain IME doctors by frying the companies that hire them has added a bitter new ingredient to the legal theories that were previously being cooked up by some claimant lawyers.

So, can nothing be done to curb the appetites of applicant lawyers looking for a feast of contingency fees at the expense of gun-shy carriers worried about bad faith litigation? Of course it can. Spitting back a bit of sour milk in the other direction

*Continued on page 6...*




should create enough of a bad taste to deter even the most insatiable attorney. IME doctors simply need to get on the offensive and start force feeding the culprits some of their own gruel.

Arizona courts recognize the torts of malicious prosecution, defamation and tortious interference with contractual relations, all of which are allegations that can be levied against anyone who, as a matter of course, sues a doctor for doing nothing more than conducting an IME and rendering an honest medical opinion. Although IME claimants are the ones whose names are in the "Plaintiff" caption on any lawsuit, plaintiff attorneys who take on such cases are certainly not immune from being sued, especially if it

can be shown that they have engaged in a pattern and practice of targeting certain doctors in order to shoo them out of the IME kitchen. Shish-kabobbing one or two of these applicant attorneys in Superior Court would likely cause them to lose their appetites for scurrilous bad faith allegations in a big hurry. And, it will have the added benefit of dissuading this small group of lawyers from trying to fry every insurance company or TPA that schedules an IME with a doctor on their dinner menu.

Will that really happen? Who knows. For years, insurance companies have had the ability to cook the geese of attorneys who honk "bad faith" at every turn by firing up the legal arguments outlined above. But they rarely do, possibly because

insurance companies generally don't make very sympathetic plaintiffs. To be sure, if IME doctors allow this small group of attorneys to shake and bake them without so much as a fight, many more applicant lawyers will smell blood in the water and want in on the feeding frenzy. Would wrongfully persecuted IME doctors have any more jury appeal than an insurance company? Perhaps...if they could convince a courtroom audience that they were swimming for their lives and just trying to escape the gaping jaws of some unusually hungry predators... 



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## AWCCA Now Offers Continuing Education Credits

The AWCCA Executive Committee has made arrangements with the Insurance Educational Association (IEA) to offer continuing education credits for attendance at most of its monthly dinner meetings, and at the AWCCA Spring Seminar each February. This will assist dinner meeting and seminar attendees who have earned their WCCP (Workers Compensation Claims Professional) designation in meeting their annual six-hour continuing educational requirement.

Continuing education credits were offered for the first time to attendees at the January dinner meeting and at this year's Spring Seminar in February.

Credits will also be offered for attendance at the March and April meetings.

No continuing education credits will be offered for attendance at the annual AWCCA Holiday Party held each December, or for attendance at the annual May meetings when the programs will honor winners of the Fred Brick Memorial Rehabilitant of the Year awards.

For further information, please contact AWCCA Vice President Donell Hewett at donellh@ri-net.com or AWCCA Executive Member-At-Large Denise Young at denise.young@ashtontiffany.com. 

## SAVE YOURSELF A SEAT: RSVP BEFORE THE DEADLINE!

The AWCCA Executive Committee would once again like to remind everyone to please RSVP for future monthly dinner meetings by no later than the RSVP deadline date. RSVPs can be transmitted by clicking on the link that is included in the monthly dinner meeting invitations that are sent via e-mail or, they can be transmitted on the AWCCA website ([www.awcca.org](http://www.awcca.org)).


From September through May, dinner meetings are held on the second Tuesday of each month (with the exception of February, when the AWCCA Seminar is scheduled). RSVPs for monthly meetings are due by no later than 9 AM on the Friday preceding each meeting.

Although the AWCCA Executive Committee works with the Embassy Suites Hotel staff to ensure that some additional seating is available, large numbers of last-minute "walk-ins" can cause seating problems and delay meeting start times as was the case in November.

Prior to each meeting, a "standby" list will be created for all dinner guests who have RSVP'd after the Friday deadline, and for last-minute walk-ins who have not RSVP'd. Every attempt will be made to seat all "standby" dinner meeting attendees. However, only those guests who have RSVP'd by the Friday morning deadline will be guaranteed a seat.

To ensure that your RSVP has been received, each dinner attendee should RSVP personally (vs. assuming that a boss or co-worker has RSVP'd on your behalf).

And, of course, if you find that you are unable to attend after RSVP-ing, please notify a member of the Executive Committee as soon as possible. The AWCCA is billed based on the number of dinner reservations and no-shows will be billed.

Thanks for RSVP-ing responsibly! 

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# Fred Brick Memorial Fund Seeks Rehabilitant of the Year Candidates

By Lisa A. Clapp, MA, CRC, CEA

The Fred Brick Memorial Rehabilitant of the Year Award is presented annually to an injured worker who has overcome significant obstacles and has reached his or her highest rehabilitation potential. "Highest potential" is relative to each injured worker and should not be misconstrued as securing and retaining competitive employment. Awards are also distributed for each injured worker nominated.

This process begins with people like you! If not for the financial support and emotional encouragement from professionals in the workers' compensation field, many of our injured workers would have no one to rely upon but themselves when attempting to regain autonomy and hopefully return to gainful employment.

The Fred Brick Memorial Rehabilitant of the Year Award was established in 1992. Fred Brick was a labor market consultant, vocational counselor and valued member of our community. He passed away early in 1992 due to complications due from cancer. Fred's presence has faded, but our memory of him and all he accomplished and contributed to our industry remains strong.

Fred was a knowledgeable, jovial, and ever-willing individual who assisted any and all

professionals in the community. He was President of the Arizona State Chapter of International Association of Rehabilitation Professionals (IARP). Much like AWCCA provides for claims professionals, IARP offers monthly educational meetings and networking to vocational and medical professionals. The organization sponsors these events for continuing education and keeps members up to date on current events affecting the rehabilitation community.


Fred directed many meetings, providing legislative and educational information both on a local and national level. He willingly extended his knowledge and assistance to others in the community. He was unique in his ability to maintain objectivity, while still having compassion and recognition for those who helped themselves. It is in this spirit that the Fred Brick Memorial Rehabilitant of the Year Award was founded and continues.

While this award and recognition ceremony began under the IARP State Chapter, AWCCA subsequently agreed to keep up the tradition of this special event by carrying the torch and continuing the award to injured workers. AWCCA has graciously committed its continued support of the award fund. Other moneys are solicited from various community members, such as carriers, law offices,

medical and rehabilitation facilities, as well as individuals. Be it \$10 or \$1,000, this money makes the Fred Brick Rehabilitation Award possible.

Nominations for this year's awards are currently being solicited. Your nomination should include information concerning the nature of the injury, the medical treatment, obstacles experienced, descriptors of support (i.e. family, community, etc.) as well as the final outcome. This information will be given to the audience the evening of the award. Recognition of the nominees and winner(s) will be made at the May AWCCA dinner meeting. Recipients will receive a cash prize as well as a certificate of recognition. **If you know of someone who should be nominated for this recognition, please complete and submit the nomination form with a detailed narrative no later than April 1st.**

To obtain a copy of the nomination form, to submit a nomination or make a donation, or for more information about the Fred Brick Memorial Fund, please contact: Lisa Clapp, Arizona Vocational Consulting & Forensic Services, Inc. 3120 W. Carefree Highway, #1-150, Phoenix, AZ 85086; FAX: (623) 742-7270; Phone: (623) 742-7269.



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# The Arizona Legislature Tries to Curb Pain Killer Prescriptions – A Doctor’s Perspective of A.R.S.23-1062.02

By Abram H. Burgher, M.D., The Center for Pain and Supportive Care, Scottsdale, AZ

## A.R.S.23-1062.02 is Powerful but Narrow in Scope

In 2009, the Arizona State Legislature amended a section of Title 23 relating to workers’ compensation claims. The revised statute (A.R.S.23-1062.02) pertains to Schedule II prescriptions, like the “narcotic” (opioid) pain medications Oxycontin®, Percocet®, Actiq®, Duragesic® and Morphine. A.R.S. §23-1062.02 effectively allows workers’ compensation to force physicians to implement specific measures designed to reduce risks of abuse and improper use of opioid-containing medications. The FDA also took steps to reduce risks with these medications when it began requiring manufacturers of opioids to institute risk mitigation strategies in 2009. Janet Woodcock, M.D., Deputy Commissioner and Chief Medical Officer at the FDA, wrote, “We at the Food and Drug Administration (FDA) have been engaging physicians, pharmacy groups, patients and other stakeholders in an ongoing effort to strike the right balance between two important goals: on the one hand, providing access to pain medications for those who need them, and on the other hand, managing the variety of risks posed by analgesic drugs.”

The Arizona statute applies narrowly, only to prescribing of Schedule II medications when they are not prescribed for the FDA-approved indication (“off-label”), but it does give a fair amount of power to workers’ compensation. The law allows workers’ compensation to withhold physician reimbursement for failure to comply with any item included in the statute. Details of what may be required from opioid-prescribers by workers’ compensation are seen in Table 1. (An excellent article, by

Chris Garland (then of State of Arizona Risk Management), can be found in the Fall, 2009 issue of *The Examiner*. Ms. Garland outlines the problem and identifies resources for workers’ compensation case managers and others which help clarify issues such as, “what is meant by off-label use?” and “what are considered Schedule II substances?”)

**Table 1:** Requirements of Health Care Providers as Included in Amendment to Title 23 (A.R.S. §23-1062.02) Pertaining to “Off-label” Schedule II Prescriptions in Workers’ Compensation:

1. Documented justification for use of the medication
2. Treatment plan that includes a description of measures the physician will implement to monitor and prevent the development and abuse, dependence, addiction or diversion
3. Medication contract between the treating health care provider and patient
4. Plan for subsequent visits
5. Drug testing
6. Documentation that the medication is providing relief as demonstrated by improved function

## Limiting Opioid Risk is like Reducing Risk with Surgery

As a physician in interventional pain management, I consider a variety of options when caring for patients with pain, only one of which is treatment with oral opioids. Other treatments include non-opioid pain medications, physical and occupational therapy, behavioral health, injections, and for intractable and persistent pain surgery or implanted pain devices, like implanted

spinal cord stimulators or pain pumps. For any therapy, I try to find the appropriate balance of risk, benefit and cost. I look for any strategy to reduce risk, since complications from treatment not only result in poorer health outcomes but can also lead to greater overall cost.

For example, when implanting a device for pain relief, recent data indicate device-related infection can be reduced when certain preoperative infection precautions are used. The infection precautions are time-consuming, cost about \$100 and probably only eliminate less than one infection per twenty implanted devices. However, since total costs of an implanted spinal cord stimulator are upwards of \$30,000, cost of the infection precautions are far outweighed by expected reduction in cost of a lost device. Opioid prescribing should be viewed similarly: just as measures are used to reduce complications after surgery, providers should look to use strategies which limit risk associated with pain medications. Fewer complications with opioids could mean improved health outcomes and cost savings.

## Will A.R.S.23-1062.02 Have a Big Impact?

The medical literature in my specialty has proposed, “...it is the physician’s responsibility to recognize the potential for and occurrence of misuse, abuse, and addiction, and in light of this, the necessity of means of predictive assessment, determination and treatment...adherence monitoring is essential...[the physician should] ensure that patients are sufficiently compliant so as to maximize the benefits

*Continued on page 11...*




## AWCCA ELECTION OF OFFICERS FOR 2010 – 2011 MEETING YEAR

The AWCCA Executive Committee is currently accepting nominations of any regular members interested in running for open positions on the Executive Committee for the 2010 -2011 meeting year.

In accordance with current AWCCA Constitution and Bylaws, the current Vice President will assume the office of President, and the current Treasurer will continue in that position for another year. Accordingly, the Executive Committee will be accepting nominations for the office of Vice President and Secretary.

As outlined in the Constitution and Bylaws, candidates for Vice President should run with “the presumption that one will serve for a two-year term on the Executive Committee: the first year as Vice President of the Association; the second year as President of the Association”.

Additionally, the Constitution and Bylaws state that “the office of the Secretary will be by election in every even numbered year with the presumption that they will serve on the Executive Committee for a two year term”.

Regular members can nominate themselves for office or, they can be nominated by any other regular AWCCA member. Nominations should be submitted via e-mail to any current member of the Executive Committee. Current Executive Committee members are listed on the “Board Members” tab on the AWCCA web site ([www.awcca.org](http://www.awcca.org)). The deadline for nominations is Tuesday, April 13, 2010, the night of the AWCCA April dinner meeting. Voting will take place at the May dinner meeting. Voting will be done in person via ballot at that meeting. 

## National Workers’ Compensation Conference Scheduled In Las Vegas

The 19th Annual National Workers’ Compensation and Disability Conference & Expo will be held at the Las Vegas Convention Center, November 10 - 12, 2010.

Educational sessions will focus on:

- Claims Management
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and minimize the risks and burdens of treatment” (Manchikanti 2008). Experts in pain management recommend several ways to reduce risk: periodic face-to-face reviews between patient and provider, screening for substance diversion, monitoring programs (which may involve urine drug testing, among other things) and controlled substance agreements (“opioid contracts”).

The Arizona Medical Board and U.S. Drug Enforcement Administration (DEA) have released guidelines and regulations, respectively, for prescribing of Schedule II medications. While the DEA regulations are vague, essentially stating only that the prescription must be for a “legitimate medical purpose”, the Arizona Medical Board’s guidelines do recommend specific “best practices” for opioid prescribing. These recommendations mirror good common practice and expert opinion in the specialty of pain management and A.R.S. §23-1062.02 is basically an application of the same principles. The highest-quality specialty pain management practitioners in Arizona generally already adhere to them, even though guidelines are never meant to be interpreted as “law”, or even “standard of care”.

If that’s the case – if A.R.S. §23-1062.02 simply codifies what is already best practice

for all Schedule II medications – perhaps the question shouldn’t be, “is A.R.S. §23-1062.02 going too far?” but rather, “does it go far enough?” Remember, the statute applies only to “off-label” prescribing of opioids, sometimes a subtle distinction. While “off-label” prescribing for many medicines is common, it is probably considerably less common for opioids. As is, A.R.S. §23-1062.02 will have a more limited impact. Table 2 shows that FDA-approved indications for the most commonly prescribed opioids are broad. For opioids like Oxycontin® and Dilaudid® it would be virtually impossible for workers’ compensation to differentiate between “on” and “off-label” prescribing since even qualified providers might disagree. Further, the opioids with narrow indications, in which an outside party could more easily detect “off-label” use, are less commonly used. If the legislature truly wanted to make an impact, perhaps they should have revised the statute to apply to all Schedule II prescribing, whether “on” or “off-label”.

**Even Good Laws, Poorly Supported, Can Have a Negative Impact**

Regardless if the statute applies to all opioid prescribing or only to a smaller subset of prescriptions, if it’s consistent with good practice it should lead to better

care, right? Yes, unless complying with the requirements places unreasonable burden on the average provider. In that case, providers would likely cease writing opioid prescriptions for workers’ compensation patients, potentially restricting access to medically appropriate care. I work in a specialty pain management practice, in which a strategy to mitigate risks with Schedule II medications goes with the territory. Opioid prescribing is a very common intervention used by our group, so complying with the requirements of A.R.S.23-1062.02 would usually only mean faxing to workers’ compensation information we already collect.

However, the majority of opioid prescriptions come from primary care groups or non-pain management specialist, who may have more difficulty complying. If workers’ compensation wanted to both improve the quality of care for its beneficiaries and continue to provide reasonable access, it might implement a strategy to help all contracting providers comply with the revised statute. This may be in the short run more costly, since it could entail distributing compliance checklists, having personnel readily available to facilitate collection of risk reduction measures, coordinating urine

**Continued on page 12...**

**Table 2: Examples of “On” and “Off-label” Use of Schedule II Medications**

Schedule II Medication	FDA-approved Use	Potential “Off-label” Use
Oxycontin®(Oxycodone SA)	Moderate-to-severe pain when an analgesic is needed for an extended period of time	Pain that has no constant component
Duragesic® (Fentanyl patch)	Moderate-to-severe chronic pain	Acute pain (lasting less than 4 weeks)
Actiq® (Fentanyl lozenge)	Breakthrough cancer pain in opioid-tolerant patients	Chronic pain (in patients without cancer)
Fentora® (Fentanyl tablet)	Breakthrough cancer pain in opioid-tolerant patients	Chronic pain (in patients without cancer)
Dilaudid® (Hydromorphone)	Moderate-to-severe pain	None
Dolophine® (Methadone)	Moderate-to-severe pain; detoxification and maintenance treatment of opioid addiction as part of an FDA-approved program	None
Ritalin® (Methylphenidate)*	Attention-deficit/hyperactivity disorder (ADHD); narcolepsy	Fatigue associated with opioid use or chronic pain


\*Ritalin is not an opioid but is a Schedule II medication.



collection and drug testing, or establishing secure health information technology portals on-line that patients and providers could access. However, as we've seen with other measures in medicine designed to reduce risk, up-front costs can often be more than made up for in the long run.

techniques, and utility. Pain Physician, Volume 11, 2008.

United States Department of Justice, Drug Enforcement Administration (DEA), Office of Diversion Control. Practitioner's Manual: An informational outlines of the controlled substances act, 2006.


Woodcock J. A difficult balance – Pain management, drug safety and the FDA. New England Journal of Medicine, November 26, 2009. 

**REFERENCES:**

Amendment to Title 23: Arizona Revised Statute (A.R.S.) 23-1062.02.

Garland C. Doctors are not drug dealers – Using A.R.S.23-1062.02 effectively. The Examiner, Fall 2009.

Manchikanti L. Monitoring opioid adherence in chronic pain patients: Tools,



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## Legislature Addresses IME Issues Created by *Ritchie v. Krasner*

By Jim Gill, AWCCA President

In an effort to neutralize an Arizona Court of Appeals' decision holding an independent medical examiner liable for a claimant's death-by-overdose, bills have been introduced in both the Arizona State House and Senate to provide immunity for physicians who are acting essentially as expert witnesses.

House Bill 2465 and Senate Bill 1214 were designed to provide immunities to physicians performing independent medical exams (IMEs). The bills are designed to extend the same protection to physicians performing pre-employment exams.

Both bills were introduced in response to a decision from Division One of the Arizona Court of Appeals in the *Ritchie v. Krasner* case (summarized in *The Examiner*, Spring, 2009 Edition). In that decision, the Court upheld a Maricopa County jury's \$1.425 million award against Dr. Scott Krasner, an IME physician who had seen a workers' compensation claimant in a single visit approximately four years before he overdosed on narcotics prescribed by a subsequent treating doctor. Among the defense raised in the case, Krasner's attorneys argued that, as an IME physician, Krasner had no doctor-patient relationship with the claimant. Even though the

claimant had acknowledged this fact in a written document prior to his IME, the trial court had refused to allow the jury to view that document and the Court of Appeals affirmed the lower court's decision.

Supporters of the bills include the Arizona Chamber of Commerce, the Arizona Self Insurers Association (ASIA) and SCF Arizona. Opponents include labor unions and the plaintiffs' bar.

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House Bill 2272 has been introduced to add a new article to public health statutes regulating "pharmacy benefits management," defined as the procurement of prescription drugs at a negotiated rate for dispensation in Arizona. If passed, the bill would impose new, broad-ranging notification and financial requirements on pharmacy benefits managers (PBMs) such as those that work comp carriers and self insureds use to distribute medications to injured workers. As of *The Examiner's* press date, that bill was being reviewed by the House Committee for Health and Human Services.

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**Continued on page 14...**

## AWCCA Job Referral Coordinator Is Ready to Help!

Are you a claim manager who just lost your most experienced Senior Claims Examiner to retirement? Are you an MO Adjuster looking for the opportunity to advance your career in the work comp industry? Has your nurse case management business grown to the point where you need to add a new RN to your staff? Or, are you a labor market expert who just moved to Arizona wondering how to find a job in the workers' compensation industry? If you answered "yes" to any of these questions, Joe Strange, the AWCCA's Job Referral Coordinator, is waiting to help.

The AWCCA offers an excellent, cost-free way to match up qualified employees with job opportunities in the Arizona workers' compensation industry. So, if you're an adjuster, nurse case manager, voc rehab specialist, private investigator or other industry professional looking for a new employment opportunity, or if you're a manager for an insurance carrier, TPA or other professional organization hoping to attract that perfect candidate to your staff, contact AWCCA Job Referral Coordinator Joe Strange via e-mail at [jstrange@transcityins.com](mailto:jstrange@transcityins.com) or, by phone at 480-483-4323.


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Also as of press time, Senate Concurrent Resolution 1042 had been introduced with the intent of giving voters the chance to re-write one of the main underpinnings of the State's workers' compensation statutes. If passed, the resolution would require that the 2010 general election ballot carry the question of whether to amend Article XVIII, Section 8, of the Arizona Constitution to give work comp claimants the right to receive workers' compensation benefits and sue their employer.

The proposed change would allow employees injured on the job as a result of an employer's or another employee's willful disregard of their safety to receive statutory work comp benefits while simultaneously pursuing a lawsuit against their employer and/or, against any co-workers who allegedly caused their injuries. The statutory change would allow

for such an action when injury was caused by an employer or co-worker "with the direct object of injuring an employee." The injured employee's right to workers' comp would then be supplemented, not replaced by, a right to sue the employer or other employee. The proposal states that payer of workers' comp benefits would have a lien on the recovered damages. The amendment also includes a definition of "with the direct object of injuring another."

Similar initiatives have failed to pass in prior legislative sessions.

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House Bill 2263 had been introduced to allow The Board of Psychological Examiners to certify licensed psychologists to prescribe medication for the treatment of behavioral health conditions. If

passed, the statute would allow the Board to establish training, education and supervision requirements, as well as certification application and renewal fees, by rule.

A similar bill failed in last year's legislative session.

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*Status of the bills referenced above is as of The Examiner's press date. However, that status can change quickly. For current information on any bill pending at the Arizona State Legislature, go to: <http://www.azleg.gov> and click on the "Bills" tab.*



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## Prior Impairment Plus Two Scheduled Injuries Triggers Special Fund Apportionment

*By Jim Gill, AWCCA President*

In a January 21, 2010 decision, Division One of the Arizona State Court of Appeals imposed liability on the Industrial Commission of Arizona (ICA) Special Fund in a case where a diabetic claimant received two scheduled permanent impairment ratings from a work comp injury. The court's ruling affirmed a prior decision by ICA Administrative Law Judge (ALJ) James B. Long.

Claimant Michael Sordia suffered right leg and left arm fractures in a job-related accident while working for McCarthy Building Companies in April of 2004. His workers' compensation claim was accepted for benefits by McCarthy's carrier, Arch Insurance and its claims administrator, Gallagher Bassett. Thereafter, he received extensive medical, surgical, and psychological treatment for his injuries. Eventually, it was determined that Sordia had suffered an unscheduled loss of earning capacity (LEC) after having "sustained 10% permanent impairment of the left upper extremity" and "37% [permanent impairment] of the . . . right lower extremity," which together equal "20% permanent impairment of the whole person."

Both Sordia and McCarthy protested the subsequent LEC award, with Sordia seeking a greater loss of earning capacity finding, and McCarthy seeking apportionment from the ICA Special Fund under A.R.S. 23-1065(C). Generally, reimbursement under that statute is available to employers that knowingly hire persons with qualifying impairments and who then suffer a loss of earning capacity as a result of their prior

impairment plus the additional impairment from their industrial injury.

After hearing testimony from Sordia, three physicians, two psychologists, and several labor market experts, the ALJ entered an award finding Sordia permanently and totally disabled and awarding McCarthy and its carrier apportionment from the Special Fund. The ALJ noted that Sordia had a pre-existing permanent impairment from Type II Diabetes, that this condition predated the April 2004 industrial injury, and that McCarthy was aware of this condition when it hired Sordia.

The ICA Special Fund then appealed the ALJ's decision on apportionment, arguing that Judge Long erred by awarding reimbursement to McCarthy and Arch under A.R.S. § 23-1065(C).

In rendering its decision, the court cited its duty to consider the intent of a statute when drafted by the legislature. In doing so, it noted that:

"Section 23-1065(C) provides, in pertinent part: In claims involving an employee who has a preexisting physical impairment which is not industrially-related. . . and the employee thereafter suffers an additional permanent impairment not of the type specified in §23-1044, subsection B, the claim involving the subsequent impairment is eligible for reimbursement . . . .

A.R.S. §23-1044-B enumerates various "scheduled injuries" for which injured workers are entitled to limited, specified permanent partial disability (PPD) benefits.

The appellate court further noted that "If certain conditions are met, the employer or carrier may be reimbursed by the Special Fund for half the compensation paid to the claimant" under A.R.S. § 23-1065(C)(4).

The court cited prior case law in stating that the statute was enacted to "promote the hiring of disabled or handicapped workers" and that prior to its enactment, "an employer that hired an individual with a preexisting injury who then suffered an industrial injury was required to fully compensate the individual for both the preexisting injury and the permanent physical impairment. Employers therefore had an incentive to avoid employing disabled workers. Section 23-1065 was adopted to remedy that situation by ameliorating the employer's burden in such a case."

According to the appellate court's decision, the ICA Special Fund contended that because Sordia simultaneously suffered work-related injuries to both an arm and a leg, the work-related permanent impairment he suffered in addition to his pre-employment diabetic impairment was "not of the type specified in §23-1044, subsection B" and that therefore, apportionment did not apply.

In its ruling, the appellate panel noted that, "if viewed individually, Sordia's injury to his leg and his injury to his arm are of the type specified in § 23-1044(B) – an injury to the arm is enumerated at § 23-1044(B)(13) and an injury to the leg at § 23-1044(B)(15). Sordia did not suffer the injuries separately,

**Continued on page 16...**



however, but as part of the same accident. Section 23-1044(B) does not list, as a “scheduled injury,” an impairment to one arm and one leg. Except for subsection (B)(19), which describes “permanent and complete loss of hearing in both ears,” the listed injuries are all to a single body part. Because Sordia suffered an injury to two body parts – a non-enumerated injury – we conclude that the ALJ did not err in finding Sordia’s impairment was not of the type specified in § 23-1044(B).

“Our conclusion is supported by the principle that an injury to the whole person often will have a greater overall effect than might be expected simply from the separate injuries. Arizona case law recognizes that two scheduled injuries, when suffered contemporaneously, are beyond the purview of § 23-1044(B).”

Citing from *Ossic v. Verde Central Mines*, 46 Ariz. 176, 177-78, 49 P.2d 396,397 (1935), the appellate court commented that “the undoubted fact that the actual loss of earning power occasioned by a combination of two or more separately scheduled injuries may be much greater than the amount reached by merely adding together the losses presumed to be caused by each of such injuries considered

separately” and that “in compensation cases two plus two does not necessarily equal four, but in some cases may equal six or more.”

Because the *Ossic* opinion had been case law since 1935, the court of appeals stated “*Ossic* pre-dates the amendment of §23-1065(C) into its current form. We presume the legislature was aware of existing law and court decisions when amending the statute...We are not aware of any reason to believe that the legislature intended to reject the principles from *Ossic* when it amended § 23-1065(C) to provide the current reimbursement provisions.”

In its argument against apportionment, the ICA Special Fund cited *Universal Roofers v. Industrial Commission*, a case in which a claimant with a preexisting impairment from diabetes and a preexisting back injury suffered a work-related leg injury resulting in permanent impairment. The carrier compensated the claimant via an LEC award based on his injury being “unscheduled”, and then argued for Special Fund apportionment on the basis that “when a claimant is given an unscheduled award, his injuries are necessarily “not of the type specified in 23-1044(B).”

In *Universal Roofers*, the court denied apportionment, holding “that the words ‘an additional permanent impairment not of the type specified in §1023-1044, subsection B’ in section 23-1065(C) refer to the nature of the impairment, not to the nature of the disability compensation.” Since the injury to the claimant’s leg was, in fact, specified in §23-1044(B), the court found that apportionment was not available.

In the Sordia case, the court ruled that its holding was “consistent with *Universal Roofers*.” According to the judges, “in determining reimbursement under A.R.S. § 23-1065(C), the focus is on the additional impairment, not on the nature of the disability compensation. The claimant in *Universal Roofers* suffered an additional permanent impairment to his right leg, an injury clearly specified under § 23-1044(B)(15). In contrast, Sordia suffered a permanent impairment to both his arm and leg from the same accident. As explained above, Sordia’s overall injury is not one of the enumerated injuries under § 23-1044(B).”

## THANKS TO THE 2009 AWCCA HOLIDAY PARTY COMMITTEE

I would like to thank those who participated on the Holiday Party Committee. The amount of time and effort from each person is greatly appreciated. I also like to thank the employers of these fine individuals for allowing them the time to work on the Committee. With all the support of the members and guests purchasing raffle tickets, bidding on the silent auction, sponsoring tables we were able to raise \$8,000 for Kids’ Chance of

Arizona. Thank you, to 2009 Holiday Party Committee:

Bernie Cook /Liberty Mutual; Brianna Haase/ Az Spine and Stroke; Debbie Hill/ STI Physical Therapy; Jason Torres/ STI Physical Therapy; Joe Cunningham / US Healthworks; Josie Lenard /SCFaz; Joyce Capinjola /CorVel Corporation; Julia Thielbar /Columbia Medical Consulting; Linda Barton /Concentra Medical;

Michelle Pauley/ Canyon Orthopedic; Norma Montey/ Phoenix Orthopedic Group; Sue Franzen/ Valley Schools; Terry Roach Body/ Stabilization; Tom McLaughlin /Genex; Tony Cipriano / MAG; Susan Williams/ TOCA; Kathrine Crippen/ Banner Health; and Yvonne Smith/ Centre for Neuroskills

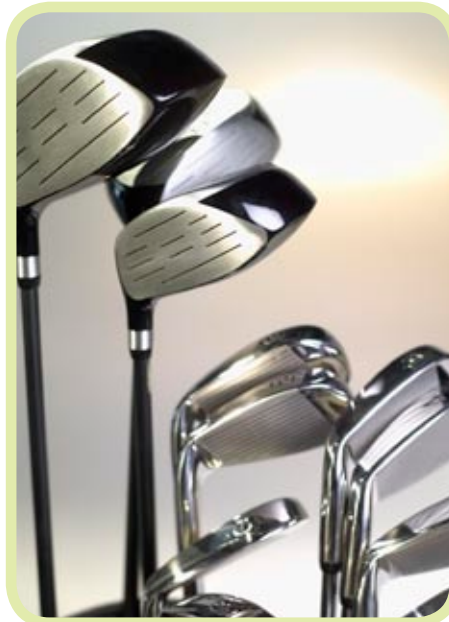
Sam Lloyd STI Physical Therapy




# Annual AWCCA Golf Tourney Set for May 7th


The 18th Annual AWCCA Golf Tournament is scheduled for Friday, May 7, 2010 at Camelback Golf Club, located at 7847 N. Mockingbird Lane in Scottsdale. Sponsored by AWCCA, Inc., proceeds from the event will benefit Kids' Chance of Arizona, and Arizona Adoption & Foster Care (Arizona Action for Foster Children.)

This year's tournament begins with a 7:30 a.m. shotgun start. The field will be capped at 144 players. An awards luncheon will immediately follow the event, with well over 100 raffle prizes being given away to attendees. Participants and guests will also have the opportunity to bid on over 45 silent auction items.



Last year, after expenses, the event netted \$20,000 which AWCCA, Inc. was able to donate to the designated charities. Event Co-Chairs Sam Lloyd and Bernie Cook are hoping to meet or beat that donation this year.

Those interested in golfing, donating raffle prizes or silent auction items or partial sponsorships should contact Sam Lloyd at 602-349-2540, Bernie Cook at 602-971-2202, or Cheryl Altman at 602-541-9863 if Sam and Bernie are unavailable. 



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# Letters to the Editor

Dear Board Members of AWCCA,

On behalf of Kids' Chance of Arizona, I'd like to thank you for your generous donation of \$8,000. Your contribution to Kids' Chance will allow us to continue our efforts to provide scholarships to the children of Arizona workers seriously, catastrophically or fatally injured in a compensable work-related accident.

Our many thanks to the AWCCA and all the board members for their support in the past and for the all the support you provide to Kids' Chance organization throughout the year.

Sincerely,

Kathy West  
Vice President of Development  
Kids' Chance of Arizona

\*\*\*\*\*

Jim,

I thoroughly enjoyed and identified with your *President's Message* in the last *Examiner* issue. You verbalized so much of the irony of this business, but not with skepticism and criticism. I love the way you make us all think of WHY we choose WHO we choose to partner with. Thank you for the effort and time you always give to us all.

Jan Hazelton  
Vice President of Case Management  
Operations  
Orchard Medical Consulting

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Jim,

I had to tell you how much I enjoyed this past edition of *The Examiner*. The article from Chris Garland was very well done and good info. Your additions of *The Day before Christmas* and the *President's Message* were right on!! Best Wishes for a wonderful New Year.

Thanks,

Deb Wilkerson RN BSN CCM  
AZ District Manager - CorVel Corporation

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Jim-

As always, this past issue was outstanding and a credit to the AWCCA! Your articles were topical and actually enjoyable to read. I hope you had a very Merry Christmas and a safe New Year. See ya in 2010!

Regards-

Mike Nathe  
Nathe & Nathe Investigations, Inc.

Hi Jim,

It's not my intention that any of this gets reprinted in 'Letters to the Editor' section. Should you elect to use or reprint any of it - well, that's your call.

I must admit that industry newsletters and e-mails are usually about as worthwhile as a vehicle without an engine. Both can look very good but neither seem to have much practical functionality. That is until I read the Summer Issue of *The Examiner* and your *President's Message*. As we discussed at the November dinner meeting, your message really convicted me of not doing my part to support an industry that has helped support my company (my employees, my vendors, my local and federal governments, etc.) and my family for my 15 years of being in business. After reading your message and really digesting it, I realized that 'sitting on the sidelines' was not going to work anymore and that it was time for me to role up my sleeves and begin giving back. After all, life is not all 'take' and not all 'give' but a balance between the two. Sometimes one side is slightly more demanding than the other, but the pendulum swings both ways and usually always ends up pretty close to center.

Today, I read your *President's Message* on marketing and customer development within the industry. And, again, you hit the nail on the head!! I realized how many GREAT people I've come to know in the WC 'arena' and how much better my life is because of them. And every one of them wants the same things - consistency, professionalism, objectivity, and integrity. The senior adjusters I've come to know are all dedicated professionals who, in many

**Continued on page 19...**



... Letter to the Editor continued from page 18

cases, put their personal lives on hold at various times in order to handle their volume of claims. To provide them with anything less than our best efforts in these four performance areas is a sin!!

I have thoroughly enjoyed reading, not only your message, but several of the other articles in *The Examiner* as they have been informative and entertaining. I just wanted to say 'thank you' for your efforts and for your valuable opinions and thoughts. Sometimes, great efforts go unappreciated and un-acknowledged and that is completely unfair. I really appreciate the leadership you are demonstrating for AWCCA and also appreciative that you have 'fanned the flames' of my desire to contribute and be a part of this organization

much more than I ever had been in the past. Thanks for hooking me up with Liz Flores on the spring conference and hope that I will be able to contribute more in the future.

Here's to a healthy 2010 for you and your family!!

Regards,


Jim Lawson

Cobra Company of Arizona

*(Editor's Note: The letter above was printed with Jim Lawson's kind permission)*



## Letters to the Editor

Do you have an idea for an *Examiner* article? Wanna suggest a speaker or topic for our monthly dinner meetings or for our seminar? Do you have suggestions on how we can improve the AWCCA? *The Examiner* welcomes Letters to the Editor! Please direct letters via e-mail to Jim Gill at: [jgill@berkleyrisk.com](mailto:jgill@berkleyrisk.com) or mail them to: Editor: **The Examiner, c/o AWCCA, P.O. Box 44941, Phoenix AZ 85064-4941**. Please include your name. Anonymous letters will not be published. 

## Continuing Education Credits Offered for Seminar

Foothills Sports Medicine Physical Therapy is hosting a free continuing education seminar on "Physical Therapy Approaches to Knee Injuries:


Concepts in Identification, Treatment and Criteria for Return to Function".

The seminar will be held on April 22, 2010 from 1:00 to 4:30 PM at the Hilton Garden Inn's Hacienda Meeting Room, 3422 East Elwood Street, Phoenix, AZ, 85040.

The purpose of the seminar is to instruct participants in new approaches to identification and treatment of common knee injuries in the work setting and strategies to identify functionally based goals to establish criteria for return to work.

Attendees completing the seminar will receive 2.5 hours of continuing education credit as approved by the Arizona Nurses' Association, which is an accredited approver by the American Nurses

Credentialing Center's Commission on Accreditation.

For signup information, please contact Katie Lucas at Foothills Sports Medicine Physical Therapy at 480-706-1161, XT 36, or send an e-mail to: [klucas@foothillsrehab.com](mailto:klucas@foothillsrehab.com). 



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# **PSYCHIATRIC WORKERS' COMPENSATION ASSESSMENT**

## **VALIDITY OF PRESENTATION**

*By Saif U. Jaffery, M.D., Medical Director, Scottsdale Behavioral Health, LLC*

In order for the injured worker to be compensated by the employer, the employee has to show that the “injury was the direct result of work related accident.” The injury must arise “out of employment” meaning worker was exposed to a risk in the place of employment which was greater than they encountered in everyday life. An injury must have occurred in the “course of employment” meaning the exposure occurred within the time and place of employment. Impairments and disability in psychiatric injuries are very subjective. Injured workers usually have few signs, but multiple symptoms and complaints. The job becomes even tougher for a psychiatric IME physician who has to ascertain how the psychiatric impairments affect activities of daily living, social functioning, concentration, persistence and complex work setting. This task has to be undertaken for any impairment rating which is usually required by most insurance companies.

Therefore, it is very crucial for a psychiatric IME physician to find out how credible the injured worker is in reporting the symptoms as they relate to the industrial injury. Related questions would be, how the injured worker is approaching the psychiatric examination relative to the rest of the population, other disability claimants and injured workers. Also how the injured worker is doing overall relative to others with the same psychiatric illnesses and symptoms.

In the following paragraphs, I am going to outline some of the measures which a qualified psychiatric IME physician would undertake to be able to address the issue of validity of psychiatric presentation in the psychiatric assessment of injured workers. I am going to broadly divide these measures into:

A. Subjective measures

B. Objective measures

### **A. SUBJECTIVE MEASURES:**

1. History and Psychiatric Examination: Nothing can be more useful for an IME psychiatrist than a vast and broad experience in dealing with people with mental illnesses and addiction in the general community as this gives a foundation for establishing and understanding psychiatric symptoms, synopsis, diagnosis and formulating treatment plans. A psychiatric IME physician who is evaluating an injured worker has to take a detailed history of current psychiatric symptoms as it relates to the industrial injury in question. This includes a detailed account and information on the industrial injury itself; how this can be causally related to reported psychiatric symptoms; circumstances around the injury; current or previous industrial injuries; disability status; how the pre-morbid or the pre-injury personality, social and psychopathology status of the injured worker relates to the current injury and symptoms; and what are the issues at hand which prompted the psychiatric independent examination currently being undertaken.

2. Functional Assessment: Another subjective measure in addressing the validity of psychiatric presentation in an injured worker's assessment is to compare and verify, if possible, the injured worker's reported day-to-day functioning before and after the industrial injury. In this regard, asking the injured worker to describe the typical day before and after the injury is a very useful tool. This indirectly reflects how the alleged symptoms which were reported to arise from the industrial injury are related to impairments and functioning on a daily basis. Any inconsistencies can

be easily detected which contradict the worker's claim for cognitive symptoms like memory and concentration problems, decision making, organization problems, etc. or mood symptoms like lack of pleasure, a depressed anxious mood, social avoidance, etc.

3. Review of Psychiatric and Other Medical Records: The third subjective measure in assessment of validity of psychiatric presentation in an injured worker is to thoroughly review the medical records from different evaluators, and treaters from different disciplines before and after the injury. This would allow the psychiatric IME physician to formulate how the injured worker reported complaints to different providers from different disciplines and if there are any inconsistencies in doing so. Also a relevant issue would be the opinions of different providers, differences in their opinions, and the bases of their differences.

So far, measures described for verifying or addressing the validity of psychiatric presentation in workers' compensation assessments are very subjective. These can be interpreted by different evaluators and can be debated by different providers and evaluators to some extent. Now in the following paragraphs, I am going to outline the objective measures.

**B. OBJECTIVE MEASURES:** There are certain currently available measures which are very scientific. They can be quantifiable and have values for normative as well as clinical samples and also for disability claimants. These measures and values can withstand court scrutiny as they have solid research and review articles behind them. In the following paragraphs, I am going to briefly outline two of them.

***Continued on page 22...***



1. MMPI-2R F-Protocol Validity: MMPI-2R F is a widely researched and widely used personality and psychopathology inventory. It has wide utilization both for clinical as well as forensic applications. In the following paragraphs, I am going to outline protocol validity indicators on this scale. These indicators pertain to the validity of psychiatric and cognitive assessment of injured workers.

a. Content non-responsiveness.

b. Over-reporting.

a. Content Non-responsiveness:

Content non-responsiveness is further subdivided into:

1a. Cannot say (CNS)

2a. Variable and true response inconsistency (VRIN, TRIN).

1a. Cannot Say (CNS): This subscale of the content non-responsiveness scale of the MMPI-2 RF reflects lack of cooperation. But this scale can also be elevated if the test taker lacks adequate reading skills or is seriously disturbed or is overly obsessive. This scale can be cautiously interpreted for these reasons of elevation.

2a. Variable and True Response Inconsistency (VRIN, TRIN): This protocol validity indicator of the MMPI-2 RF is a measure of the claimant's random of fixed responding to the items on the test. The magnitude of the elevation on those measures can detect an uncooperative attitude and intentional fixed or variable responding to test items. Different score ranges will have different interpretations.

The higher the score, the more likely the chances that injured worker who has taken that test was uncooperative in approaching the examination; therefore, they can be considered non-credible.

b. Over-Reporting: This is an extremely useful measure in the MMPI-2 RF protocol validity scale. This is a set of very uncommon and rarely endorsed psychological, cognitive and somatic symptoms in the general population, in individuals with genuine, severe psychopathology and medical patients receiving treatment for various physical disorders. This can be subdivided into F: infrequent responses in the general population, Fp: infrequent responses in people with genuine psychopathology, Fs: infrequent somatic responses in people who have physical conditions and FBS: symptoms validity infrequent responses for neurologic and somatic symptoms in medically ill patients. We have normative data as well as data on clinical samples and disability claimants for these scales. A psychiatric IME physician who is aware and well versed in this can compare the scores earned by an injured worker with the general population as well as disability claimants, general medical populations and patients with severe psychopathology. The degree of elevation for these scales reflects the magnitude of non-credible responding. This along with other non-test information like history, exam and review of the medical records can be a very useful tool in formulating opinions regarding

symptom and presentation validity in injured workers.

2. Validity Indicator Profile (VIP): There is a very high probability of malingering and exaggerating cognitive deficits in personal injury and workers' compensation cases. Most personality tests commonly include measures of how cooperative the individual was in answering the test items. However, no single cognitive test on the commercial market includes validity indicators as part of the reported score. As outlined earlier in my article, it is extremely important to find out if cognitive and neuropsychological reported deficits are exaggerated or do not exist at all. The VIP is a protocol designed to measure the intention and efforts of the test taker. As it relates to assessment of neuropsychological deficits in injured worker, it divides the test taker into four response style categories by using their performance curves as evidence of intention to respond correctly and level of applied effort. These response styles are *compliant*, *inconsistent*, *irrelevant* and *suppressed*. These categories in a sequence reflect poor intention and effort of the test taker, with a continuum as *compliant* having no problems and *suppressed* as showing strong intention and good effort to fabricate the test.

I hope this article helps examiners understand some issues which are relevant and important for assessing the validity of psychiatric presentation in workers' compensation claims in Arizona.

**Paul J. Gleason, PT**  
Principal

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