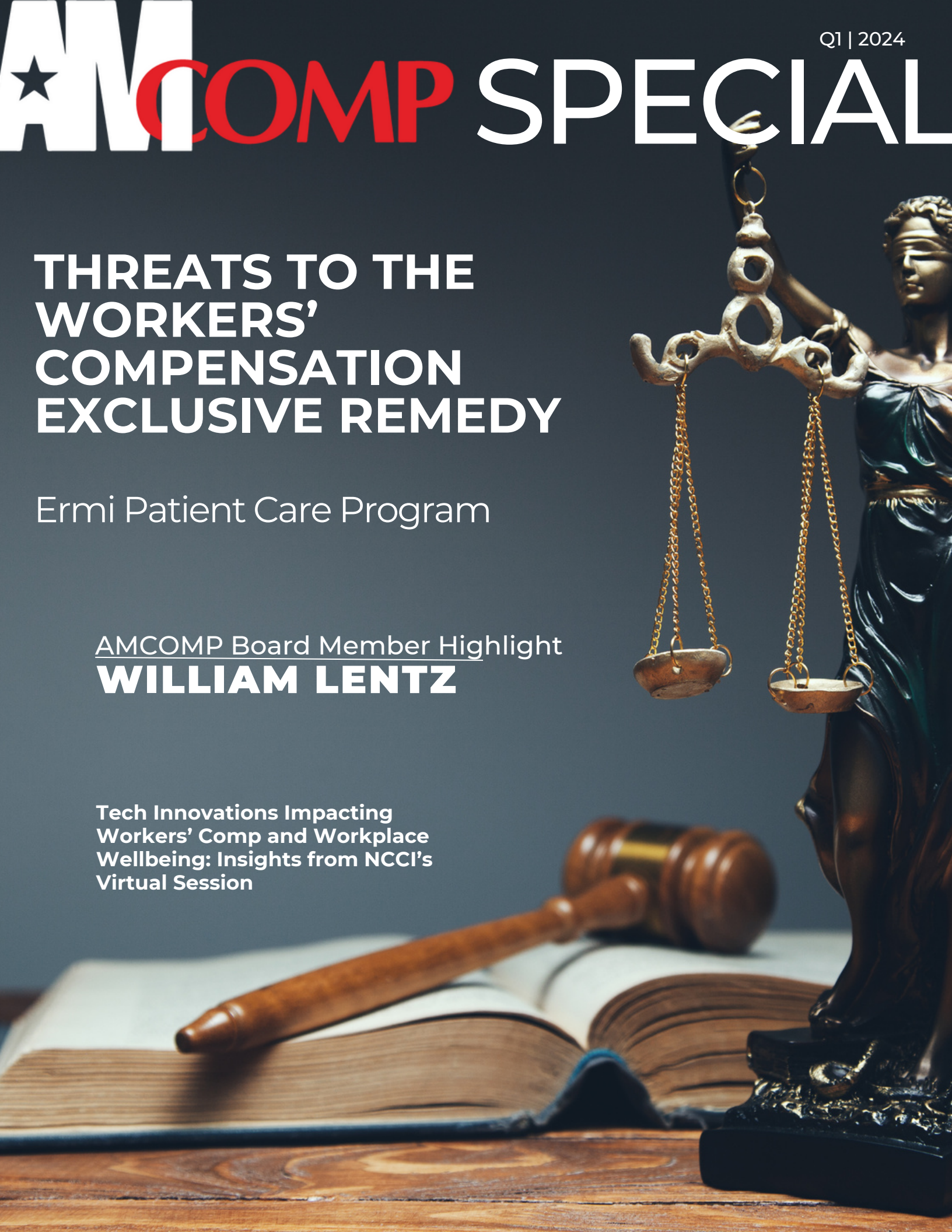


THREATS TO THE WORKERS' COMPENSATION EXCLUSIVE REMEDY

Ermi Patient Care Program

AMCOMP Board Member Highlight
WILLIAM LENTZ

Tech Innovations Impacting Workers' Comp and Workplace Wellbeing: Insights from NCCI's Virtual Session



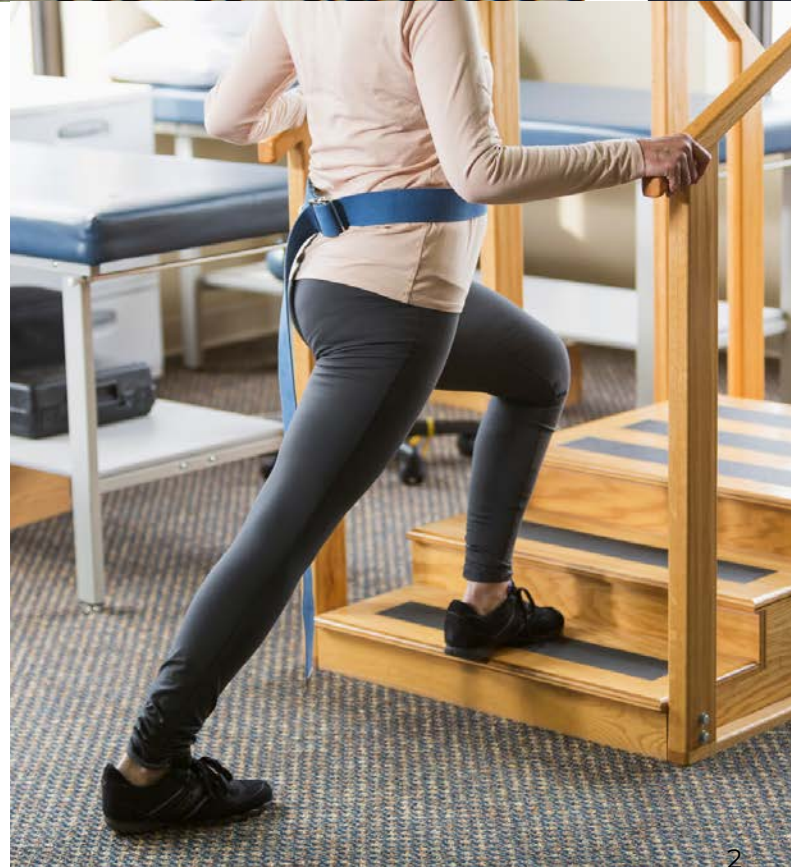
INSIDE THIS ISSUE

This quarterly newsletter highlights AMCOMP member's contributions to the work comp industry, legal updates, and trending news relevant to the work comp professional.



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Workers' Compensation Professional WCP® Program

What is the AMCOMP WCP® Program?

AMCOMP's certified Workers' Compensation Professional (WCP®) program provides industry professionals with a strong educational foundation in the various aspects of the workers' compensation industry. Those who complete the coursework will have a better understanding of how the various pieces of the workers' compensation industry (e.g., claims, risk management, pricing, ratemaking) all work together to make the greater whole. The program highlights the following topics: History of workers' compensation, Statutory provisions, Benefits, Claims Administration, Cost Containment Strategies, Methods for Determining Rates, Exclusive Remedy Challenges, Federal Legislation, and the Availability of Insurance. Students are also required to learn the AMCOMP Code of Ethics which describes the minimum standards of individual conduct expected of those certified as a WCP®.

Who Should Be Certified as a WCP®?

Professionals from all areas of the workers' compensation industry such as claims examiners, health care providers, attorneys, rehabilitation counselors, and auditors will benefit from this program. It is strongly recommended for all employees of insurance companies, self-insured, agents, brokers and third-party administrators as well as those from state agencies. The WCP® coursework is offered in various formats, including self-study, classroom lectures, and online. Students must successfully complete all course material and pass a final examination to earn their WCP® designation. Upon graduation, WCP® professionals will receive a diploma and are entitled to use the WCP® designation. Visit www.amcomp.org to review the various study options available or email info@amcomp.org for more information.

Additional WCP® Benefits

Certified professionals are invited to participate in both an annual meeting and a Fall seminar designed to further educate workers' compensation professionals and encourage discussions on important and emerging workers' compensation issues and trends. Additionally, AMCOMP provides the finest forum for workers' compensation professionals to network with leaders and other professionals who are making a difference in the industry.

For more information about AMCOMP and the WCP® program, [CLICK HERE](#) or contact AMCOMP Headquarters at 833.626.2667 or email info@amcomp.org.



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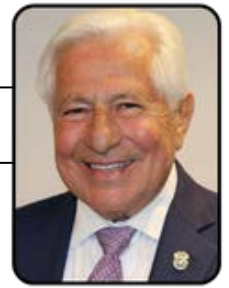
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EDITOR'S CORNER



Roger Thompson, my esteemed colleague of many years, has collaborated with me on various endeavors, notably with Travelers Insurance Companies, the AIA, and AMCOMP. Together, we have authored numerous articles on Workers' Compensation and related insurance topics. In this latest edition of AMCOMP SPECIAL, Roger contributes an insightful piece discussing the current status of the Workers' Compensation Exclusive Remedy under the title "Threats To The Workers' Compensation Exclusive Remedy." His article delves into the fundamental concept of the "grand bargain," where injured employees are provided no-fault benefits for work-related injuries, while employers benefit from the exclusivity of Workers' Compensation as the sole remedy for employment-related bodily injuries. This arrangement eliminates the necessity for litigation between employers and employees in court. Additionally, Roger's article highlights emerging trends related to the Workers' Comp Exclusive Remedy, offering valuable insights into the evolving landscape of this critical aspect of insurance.

Building on the theme of trends in Workers' Compensation from previous editions of AMCOMP SPECIAL, we present an article authored by medical professionals focusing on an innovative method for aiding patients recovering from joint surgery with severe motion loss in shoulders and knees. This article outlines a meticulously crafted rehabilitation program proven to facilitate effective home rehab, enabling post-surgery patients to return to work. This program, developed by the esteemed Doctors from Ermi and implemented across numerous states for several years, has garnered recognition, including adoption by institutions such as the Veterans Administration, as a valuable supplement to traditional outpatient rehabilitation.

Furthermore, I am thrilled to announce that AMCOMP'S April Annual Meeting in Charleston will feature Robert Hartwig, Ph.D., from the University of South Carolina, as our keynote speaker. Dr. Hartwig is a distinguished authority on Workers' Compensation insurance and the economy, offering unique perspectives on underwriting, claims, investments, and pertinent topics such as the Covid return to work and industry results. The lineup of additional speakers and topics promises an equally enriching experience. We eagerly anticipate welcoming you to Charleston for what promises to be an engaging and enlightening event. See you there!

All the Best to Our Readers,
DON DECARLO, JD | EDITOR
FOUNDER OF AMCOMP



THREATS TO THE WORKERS' COMPENSATION EXCLUSIVE REMEDY

By: Roger Thompson, WCP

Exclusive Remedy, the workers' compensation law, can best be described as a social compromise between employers and their employees. Employers (via their insurance carrier or benefit administrator) agree to compensate employees for work-related injuries arising out of and in the course of their employment, even if the employee was at fault. In exchange for these certain benefits, employees agree to accept these defined workers' compensation benefits and give up the right to sue their employer for a more lucrative recovery under tort.

Identified by the Insights and Court Case Updates published by the National Council on Compensation Insurance (NCCI), a rating/advisory organization serving the workers' compensation insurance industry, challenges to the workers' compensation exclusive remedy have been identified as one of the ongoing issues being currently watched by industry stakeholders. It has also been independently observed that the issue of exclusive remedy is likely to increase as more injured workers, along with their families, sue their employers. According to an NCCI report, Court challenges to the constitutionality and scope of exclusive remedy - providing employer immunity from injured employee tort suits - continues to be a closely watched topic among WC stakeholders.

The compromise, referred to as the "exclusive remedy," provides the employee's right to recover compensation under worker's compensation is the individual's exclusive remedy against the employer, any coworker, and the worker's compensation carrier. Stated more succinctly, with minor exceptions, an employee who sustains a work-related injury cannot pursue the more monetarily lucrative tort claims through the courts.

The exclusive remedy rule in workers' compensation has been under assault since the mid-20th Century, with trial lawyers' lobby groups and labor organizations arguing strenuously that courts and legislatures need to craft various exceptions to the rule. With a few exceptions that have developed over the years, the rule has held fairly stable over this period.

However, while the exclusive remedy provision states that an employee cannot sue his employer in tort, there are certain exceptions. (A tort is a wrongful act other than a breach of contract that injures another or interferes with their property and for which the law imposes civil liability. Torts may be either the result of intentional acts or negligence.) The major exception to exclusive remedy which has become common in a number of states is allowing an injured

employee to sue his/her employer for an intentional tort or assault by the employer or a co-employee.

At the onset it is important to recognize the difference between an intentional act and negligence. The primary difference is that in an intentional tort claim, the wrong-doer is alleged to have harmed someone else on purpose. In a negligence claim, the defendant is alleged to have harmed someone else by merely being careless. Negligence is fault-based, without the requirement of proving any intent on the part of the other person. In other words, even if they did not mean to cause an

accident, they may still be held liable for the injuries caused. By contrast, to prove any intentional wrongdoing, you must prove the intent of the defendant to cause harm.

If the employer commits an intentional tort against the employee, the employee can collect workers' compensation and also sue the employer in tort for the intentional injury. This leads to the important question as to what constitutes an intentional act, In the majority of states, the following are examples of intentional acts:

Assault

An attempt by one person to cause serious bodily harm to another person.

Battery

The criminal act of intentionally touching, or applying force to the body of another person in an offensive manner. This includes a wide range of acts including those of a sexual nature.

Intentional Infliction of Emotional Distress

Intentionally or recklessly causing severe emotional distress. This involves outrageous conduct, such as threatening someone with personal harm.

Defamation

Harming the reputation of another person through libel (written) or slander (spoken) communications.

However, it is important to point out that not all states respond to intentional acts in the same manner. There are several states that still grant the employer exclusive remedy protection even when their actions constitute an intentional act or even gross negligence. Alabama, Colorado, Delaware, Georgia, Hawaii, Iowa, Rhode Island, and possibly Idaho remain states which do not allow an injured employee to sue the employer or a co-employee even if there is an intentional act.

To illustrate the thought-process behind an intentional act, the Texas Supreme Court in *Mo-Vac Service Co. v. Escobedo*, clarified that the intentional-injury exception applies only to situations where the employer purposefully causes injury or when the employer believes "that its actions are substantially certain to result in a particular injury to a particular employee, not merely highly likely to increase overall risks to employees in the workplace." This provides much-needed guidance regarding the "substantial certainty" aspect of the intentional-injury exception. Its decision in Texas clarifies that an employer is "substantially certain" that injury will result only when the employer subjectively believes its actions will cause particular injury to a particular employee. In so doing, the Court made clear that evidence an employer engaged in actions that were "highly likely" to increase overall workplace risks is insufficient to satisfy the requirements of the exception.

As the Court explained, "intentional injury" requires an employer's specific intent to inflict injury. Thus, the Court concluded that the intentional failure to furnish a safe place to work does not rise to the level of intentional injury except when the employer subjectively believes that injury to a particular employee from a particular risk is substantially certain to occur. Under the clarified standard, the Court determined that evidence the employer required its drivers to work long hours to make more profit did not indicate that the employer intended that a driver be killed on the job. In short, the evidence did not demonstrate that the employer intended the employee's death or that the employer was substantially certain that the employee's grueling work schedule would cause his death. As a final point, it is also important to remember that when an employee is injured in the course and scope of employment, and, in addition to compensation benefits, seeks tort recovery because of an intentional act, the potential for double recovery exists. Many states have resolved this issue by holding that the employer found to have committed an intentional act is entitled to a credit for all workers' compensation benefits paid against his/her tort liability for the intentional act.

While intentional injury is a cause of action for recovery of tort benefits in the majority of states, other causes have been identified in select states.

These include:

Dual Capacity

The dual capacity exception – limited to a very few states including California – recognizes the fact that employers may have multiple duties towards their employees whether based on common law or statute. The dual capacity exception applies in one of two scenarios. First, an employer that manufactures a product that injures its employee bears civil responsibility where the following conditions are present: the employer manufactured a defective product and the defective product was the proximate cause of the employee's injury or death. The second scenario applies where the employer serves a separate legal role or assumes an obligation that is not normally imposed by the employer-employee relationship. For example, in *Miller v. King*, The California Appeals Court held that the employee was permitted to sue for damages where she was injured after she slipped and fell at a restaurant where she worked.

Fraudulent Concealment

The fraudulent concealment exception applies where an employer fraudulently conceals a worker's injury and its connection to employment whereby the concealment results in an aggravation of the injury. There are three necessary elements: (1) the employer concealed the existence of the injury; (2) the employer concealed the connection between the injury and employment; and (3) the injury was aggravated following the employer's concealment. The fraudulent concealment exception more typically arises in situations involving exposure to asbestos, mold, or a toxic chemical.

Grave Injury

In New York, an injured employee may seek to recover from a third party for that party's alleged negligence in causing the employee's injuries. The third party may not seek indemnification and/or contribution from the employer on the basis of the employer's own alleged negligence unless the employee suffered "grave injury." A "grave injury" is a statutorily-defined to include one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability. If there is no third-party action, the worker cannot directly sue his employer, even if he sustained grave injuries.

Uninsured Employer

The statute in every state, with the exception of Texas, requires every employer to purchase workers' compensation insurance or to be self-insured. An employee injured during the course and scope of employment may bring a civil claim against his or her employer who had failed to secure workers' compensation coverage as of the time of the injury.

Power Press

Some employers modify the design of a power-press machine by removing a guard or failing to install one at the point of operation. A power press is any material-forming machine that uses a die to press, impact, punch, stamp, or extrude material and not simply to cut material in the manner of a blade. Such employer action is usually aimed at increasing productivity and efficiency, but it comes at the cost of worker safety. When a necessary guard is missing, the worker operating the machine risks serious damage to the hand or arm, including severe nerve damage and amputation.

While there are various exceptions resulting in exposure on the part of the employer to action for damages from an employee, an active Occupational Safety and Health Administration (OSHA) could also be a factor. Under the current administration, OSHA, which investigates serious and deadly workplace incidents, has been increasingly aggressive in identifying workplace hazards. If the agency fines an employer following an incident - regardless of whether a citation is contested - it could be the impetus for a lawsuit claiming negligence or intentional acts on the part of the employer, Bert Randall, principal at Franklin & Prokopik P.C. in Baltimore has observed that "If there's evidence of an OSHA violation, it would mean that their chances of recovery on a negligence theory likely go up; perhaps significantly up. If they feel that they've got a fairly strong case on the

negligence side, then the next question is, 'okay, can we pierce the exclusivity provisions in this state statute to be able to get to that negligence needed in a case where damages are sufficient to make it worthwhile?'

It is obvious that despite the fact that workers' compensation is usually considered to be the exclusive remedy for covered employees, there are cases that slip under the threshold of exclusive remedy. Before concluding this article with a discussion of available data on exclusive remedy cases, or lack thereof, it is helpful to examine case law results to monitor and identify trends. NCCI, in its Court Case Updates, has noted that industry stakeholders "remain interested in cases addressing challenges to the constitutionality and scope of exclusive remedy."

In conducting their monitoring of the subject, the NCCI and other organizations have identified numerous cases. For purposes of this article, only a small selection of cases will be considered beginning with those in which the injured worker prevails in their action against their employer.

- An interesting case arose in Pennsylvania concerning a dog bite. In *Franczyk v. The Home Depot, Inc.*, the Pennsylvania Superior Court handed down a decision favoring the employee. The employee had filed a negligence suit against her employer after she was bitten by a dog brought into the store by a customer. The court found that Home Depot was responsible because the employee's supervisors did not stop the customer from bringing the dog into the store. Additionally, Home Depot was not protected by the exclusive remedy provision because it had not obtained the name of the dog owner and was therefore responsible for the employee's inability to contact the wrong-doer to seek redress.
- Cases in South Carolina and Idaho's concerned whether contract employees were eligible for workers' compensation benefits. In South Carolina, the state's supreme court held that the workers' compensation exclusive remedy did not give a manufacturer immunity from a wrongful death lawsuit after a contracted maintenance worker died while doing repairs. The court found that in this case the manufacturer was not the worker's statutory employer and, therefore, not protected by the provision.
- In the case of *Kelly v. TRC Fabrication, LLC* the Idaho Supreme Court clarified that companies using a third-party delivery driver are not statutory employers, and therefore not entitled to workers' compensation benefits. This ruling occurred after

a delivery driver was injured while delivering goods from a manufacturer. The driver sued TRC Fabrication, the company that had purchased the goods. The company, in turn, argued that they could not be sued in tort court because of the exclusive remedy.

- In February 2020, the Idaho Supreme Court issued a substitute opinion in the case of *Gomez v. Crookham Co.* and ruled that a separate civil lawsuit filed by the estate of an employee who was fatally injured on the job, can proceed against the employer who paid workers' compensation death benefits. The court found that an employer may be subject to a separate civil lawsuit if the employee/claimant can prove the employer was aware of, but consciously ignored, a danger that would result in an injury, so as to constitute a "willful or unprovoked physical aggression" against the employee under an exception to exclusive remedy.
- In February 2019, in *Daniel v. City of Minneapolis*, the Minnesota Supreme Court reversed its previous precedent, ruling that an employee - who was injured while working and received workers' compensation benefits - may also bring claims against his employer under the Minnesota Human Rights Act for disability discrimination related to his workplace injury.

More frequently has been the case where the employer has prevailed as held in the following cases:

- In 2018, the United States District Court Southern District of California in *California Quinones v. Zurich American Insurance Co.* dismissed a lawsuit against a workers' compensation insurer, finding that exclusive remedy precluded a lawsuit by the estate of a deceased worker whose death was allegedly caused by the insurer's delay in approving medical treatment.
- On October 17, 2022, the federal District Court for the Southern District of Indiana in the case of *Indiana Johal v. FedEx Corp.* dismissed a lawsuit brought against an employer by the estates of employees who were killed in a shooting event at work. The court reasoned that the employees' fatal injuries were deaths by accident where sustained within the period of employment, within minutes of starting or stopping work, and in the workplace parking lot. This, the court determined, indicated that the injuries were in the course and scope of employment and that the lawsuit should be dismissed because workers' compensation benefits were the exclusive remedy available to the employees' estates.

- The Louisiana Supreme Court in 2019, in the case of *Griggs v. Bounce N' Around Inflatables, L.L.C.*, held that minors who are injured while illegally employed or engaged in illegal tasks during the employment are not exempt from the exclusive remedy provision of workers' compensation and cannot sue in tort.
- The Montana Supreme Court in *Ramsbacher v. Jim Palmer Trucking* upheld as constitutional a workers' compensation statute that extends exclusive remedy protection to the professional employer organization (PEO) and to the PEO client, as the "immediate employers" of an injured PEO employee.
- In *Graef v. Continental Indemnity Co.* the Supreme Court of Wisconsin found that workers' compensation exclusive remedy barred a lawsuit filed by an employee against a workers' compensation insurer for a denial of benefits to treat the employee's depression. The employee alleged that he sustained self-inflicted injuries caused by the insurer's denial of medication to treat his depression stemming from a workplace accident. The court concluded that the employee's injuries were a direct result of the prior workplace accident and, therefore must be brought as a workers' compensation claim. The court reasoned that workers' compensation covers subsequent injuries that stem from a first work-related injury.

We turn now to the final subject of available data regarding the incidents or threats to workers' compensation exclusive remedy. The workers' compensation program operates under the guise of an administrative agency, operating at the state level, which has an extensive history of collecting information and statistical data concerning the incidents of workplace injuries and death. These efforts have been directed toward the collection of detailed claim information regarding the types of injury and the causes of injury. In addition, the administrative agency collects detailed data regarding the type and amount of benefits paid to injured workers and their dependents in the case of death.

This degree of detail regarding the type and amount of benefits paid does not extend to those claims in which the subject is exclusive remedy. Claims involving exclusive remedy are covered under the Employers Liability (Part Two) portion of the standard workers' compensation policy. Part Two of the policy covers the legal liability of the employer separate and apart from any legal obligation to pay workers' compensation benefits because of a work-related injury or death. It is to be noted that Part Two coverage is addressed through the judicial system

rather than the workers' compensation administrative agency. In other words, it is the court system that handles claims involving exclusive remedy and not the state administrative workers' compensation agency.

As part of the judicial system, there is no effort made to collect detailed claim information on the types and causes of injury being adjudicated. Therefore, it becomes difficult to monitor or distinguish the type of claims that are being adjudicated along with the outcome of those claims.

The lack of detailed claim information regarding the type of claims being made under the exclusive remedy umbrella precludes an accurate measure of the number of claims alleged for intentional acts, dual capacity, uninsured employers, and so forth. The lack of this detailed information results in guesstimates as to the number of claims and precludes comparison of such activity across state lines.

In addition to the lack of detailed claim information, there is the lack of information concerning the amount of payments to the injured party and the very question as to how the claim was resolved. Under the workers' compensation program, indemnity benefits are generally paid out periodically whereas in a tort claim, benefits are paid out in a lump sum at the time the claim is completely resolved. In addition, claims resolved through the judicial system may be resolved through agreed upon settlement between the parties where the amount of the settlement is known only to the parties directly involved. In the more explicit cases, the outcome may be reported only in outside publications that focus on the more extreme cases. In the end, many claims that are resolved are not publicly reported so the outcome of the dispute cannot be determined.

It is probably true that the number of exclusive remedy claims is on the increase and that new allegations undermining the exclusive remedy designed to circumvent the traditional workers' compensation program are similarly on the increase, but without statistical data to support the observation, it is difficult to excite interest and solicit support to address the issue.

About the Author Roger Thompson, WCP



Roger Thompson is a retiree from Travelers Insurance following thirty years of service in the area of Workers Compensation. Prior to his retirement, Mr. Thompson was Director for Worker's Compensation Legislative and Regulatory Issues.

During his career with Travelers, Mr. Thompson worked with various trade associations including the American Insurance Association (AIA), The International Association of Industrial Accident Boards and Commissions (IAIABC) and served on the Research Committee at the Workers Compensation Research Institute (WCRI).



2024 AMCOMP **ANNUAL MEETING** APRIL 15-17, 2024

THE CHARLESTON PLACE
CHARLESTON, SOUTH CAROLINA

EVENT DETAILS

Join us at the 2024 AMCOMP Annual Meeting, April 15-17, 2024 at The Charleston Place in Charleston, South Carolina. Take advantage of this exciting opportunity to network with peers, receive updates on industry trends, and connect with industry partners. This meeting is designed for the benefit of workers' compensation professionals throughout America, along with industry partners and suppliers. Experience all of this at The Charleston Place, a historical landmark in the heart of Charleston.



REGISTER TODAY AT WWW.AMCOMP.ORG

AGENDA

The agenda is subject to change without notice. All times listed are in Eastern Time.

MONDAY, APRIL 15

11:00 a.m. – 3:00 p.m. Registration and Event Information Desk
Attendee Lunch
12:00 – 1:00 p.m.

AMCOMP Welcome and Outlook on the Property/Casualty Industry

This session will provide an overall economic outlook of the property/casualty insurance industry and will include a high-level look at industry trends and disruptors. The always-popular Robert Hartwig, Ph.D., will provide important insights that will help you manage your company's risk.

Robert Hartwig, Ph.D. | Director, Center for Risk and Uncertainty Management | University of South Carolina

2:00 – 2:15 p.m.
2:15 – 3:00 p.m.

Networking Break

Recent Findings From WCRI Research

Join us for an insightful session during which we delve into the latest research findings from the Workers Compensation Research Institute. This session aims to provide a comprehensive understanding of key topics, including comorbidities, provider consolidation, and the evolving trends in indemnity payments and medical costs in workers' compensation. By the end of this session, participants will be equipped with a nuanced understanding of recent WCRI research. Don't miss this opportunity to stay at the forefront of industry insights and enhance your expertise in workers' compensation dynamics.

Sebastian Negrusa | Vice President of Research | Workers Compensation Research Institute (WCRI)

3:00 – 3:15 p.m.
3:15 – 4:00 p.m.

Networking Break

The Intersection of Claims and Risk Control

Join this session to learn how to leverage key attributes of claims and risk control to strategically manage and mitigate risk and the associated loss-cost impact to your company.

Devin Lindsey, ARM | Manager, Business Development and Analytics, Risk Control Services | Liberty Mutual Insurance

4:00 – 4:15 p.m.
4:15 – 5:00 p.m.

Networking Break

Demystifying AI: The Reality Behind the Artificial Intelligence Buzz

The artificial intelligence hype machine is running at full speed, but what are these tools actually capable of? And what impact will they have on our personal and professional lives? During this session, we'll sift through the hype, explore how AI truly works, and break down how it's reshaping the world of work. Walk away with a clear understanding of AI's practical magic and its real-world impact.

Matt Cyr | Vice President, Health | The Primacy

5:30 – 6:30 p.m.

President's Reception

TUESDAY, APRIL 16

7:00 a.m. – 4:30 p.m. Registration and Event Information Desk
8:30 – 10:00 a.m. Celebration Breakfast
10:00 – 10:15 a.m. Networking Break
10:15 – 11:00 a.m.

Return-to-Work Post-COVID

Drew Rice, MS | Director, Work Management Services | Windham

11:00 – 11:15 a.m.
11:15 a.m. – 12:00 p.m.

Networking Break

Panel Discussion: Mega Claims and Catastrophic Claims Management

In the realm of workers' compensation, managing mega claims and catastrophic claims poses unique challenges that demand a comprehensive understanding of legal, medical, and operational intricacies. This panel brings together industry experts to delve into the complexities of handling mega and catastrophic workers' compensation claims. Attendees will gain insights into the evolving landscape of catastrophic claims, best

practices for mitigation, and the collaborative strategies necessary to navigate the complicated web of legal, medical, and compliance considerations.

*Deborah Castellucci, RN, MPA, CLNC | Founder | Catastrophic Care Network
Shawn Deane | General Counsel and Vice President of Claims Solutions | J29
Carol Dennehy, RN, CRRN, LCP | Director of Case Management | Occupational Resource Network
Laurie Parsons | President | Kids' Chance of Massachusetts*

12:00 - 1:00 p.m.
1:00 - 1:45 p.m.

Attendee Lunch

Medical Developments in Workers' Compensation

Join Dr. Marcos Iglesias as he discusses medical developments that are having and are poised to have an impact on how we manage workers' compensation claims. Mental health and wellness have become more accepted in the management of work-related injuries. Learn how to think about the wide continuum of psychological issues facing injured workers and how the right approach is essential. We will discuss the prevalence and proper management of PTSD claims. Learn about psychedelic drugs being used for mental health diagnoses. We will also discuss the impact of growing vertical integration in healthcare and uses for artificial intelligence and machine learning.

Marcos Iglesias, MD | Vice President, Chief Medical Director | Travelers

1:45 - 2:00 p.m.
2:00 - 2:45 p.m.

Networking Break

Panel Discussion: What's Trending in Workers' Comp Pharmacy?

During this session, a panel of experts will share insights on what is trending in workers' compensation pharmacy benefits and the impact of those trends on injured workers and medical outcomes. The panelists will offer their observations on the current and future drug pipeline, the increasing demand for high-cost specialty drugs, emerging alternative and experimental treatments for opioid-use disorder, post-traumatic stress disorder, and treatment-resistant depression, and the evolution of drug formularies in workers' compensation.

*Gus R. Gonnella, AIC, WCP | Vice President | The MEMIC Group
Aliza Krug, MMSC, PA-C, MPLC | Vice President, Clinical Services | Arbicare
Emily Peak, PharmD | Vice President | Cadence Rx
Sandy Shtab | Vice President, Industry and State Affairs | Healthesystems*

2:45 - 3:00 p.m.
3:00 - 4:00 p.m.

Networking Break

The Basics of Insurance Receivership - What an Industry Stakeholder Needs to Know and Closing Comments

This presentation will provide an overview of the interstate insurance insolvency scheme, including: a background on financial standards for carriers, what can put carriers in hazardous financial conditions, conservatorship/receivership versus liquidation, payment of claims, run-off or sale, and the guaranty association system. Dan Price | Partner | Shanley Price, LLP

4:00 - 5:00 p.m.
5:00 - 6:00 p.m.

AMCOMP Board Meeting
Networking Reception

WEDNESDAY, APRIL 17

7:00 - 8:00 a.m.

Attendee Breakfast

Thank you to our sponsors!

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TECH INNOVATIONS

Impacting Workers' Comp and Workplace Wellbeing: Insights from NCCI's Virtual Session

AMCOMP is dedicated to educating and advancing the careers of workers' compensation professionals. With that goal in mind, this article summarizes one segment of a three-part virtual series offered by NCCI in late 2023, which focused on the technological innovations poised to reshape the landscape of workplace safety. These innovations offer promising solutions to mitigate workers' comp risks and enhance employee well-being. Awareness and impact of such technologies is an important trend for a healthy workers' compensation system. More information can be found at https://www.ncci.com/Articles/Pages/Insights_video-FutureOf-Workplace-Safety.aspx.

Workplace safety technological innovations are generally divided into five categories: wearables, Video Artificial Intelligence, Internet of Things, apps, and drones. Through a variety of applications specific to each category, these technologies reduce danger by detecting potential risks or assisting workers with a task. For example, they can send feedback to alert a worker of high-risk body postures or use cameras to increase awareness of machinery.

The providers of this technology are focusing their efforts on three fronts. One focus is on the manufacturing and warehouse industry because this category leads in the number of claims. Another focus is on the size of the workman's comp premium, with some technology providers targeting the larger end of the premium scale, while others concentrate on smaller premium organizations. The latter approach helps boost safety in companies that may not have a dedicated safety or risk manager role. Lastly, some technology providers are aiming to address specific types of injuries, such as bodily sprains and strains. The prediction is that over time, technology will spread along these same threads to wider availability across industries.

While these technological innovations are reducing workers' compensation claims, the solutions are primarily focused on improving the employee experience. In fact, worker fatigue, decision-making, and near-misses all show improvements with the technology's implementation.

Like all new technology, there are challenges to overcome. Awareness of the technological options seems to be a common obstacle, as the innovations are not yet mainstream. Additionally, workers express privacy and data security concerns, which can present management obstacles. Lastly, the cost of implementation is a significant consideration.

In the world of workers' compensation, the insights of industry leaders like William Lentz, Vice President at Gen Re, carry significant weight. With a career spanning decades, Lentz has witnessed the evolution of the insurance landscape. His expertise and foresight have contributed to navigating the complexities of an ever-changing industry.

In an exclusive interview, we delve into the mind of William Lentz, exploring his perspectives on the challenges and opportunities facing workers' comp today. From technological advancements to the impact of global events, Lentz offers invaluable insights garnered from his extensive experience.

AMCOMP BOARD MEMBER SPOTLIGHT: William Lentz



Tell us about your career from the beginning to what you're doing now.

After graduating college, I started my insurance career with Liberty Mutual as a claims adjuster in New Jersey. It was there that I gained multi-line claims experience and received training in workers' compensation, marking my first exposure to that line of business. After spending a number of years there, I moved on to Reliance National in New York as a claims account manager. In that role, I provided oversight on unbundled programs involving TPAs, handling multi-line accounts that included workers' compensation across all 50 jurisdictions, which exposed me to their unique nuances.

Dealing directly with risk managers of large and medium-sized companies, I transitioned to a similar role in Kempers' Risk Management Division, where I helped establish a new unbundled program. It was during this time that a former colleague, now at Gen Re, approached me. She mentioned that the reinsurer was seeking someone with a multi-line claims background but with a strong focus on workers' compensation. Though I wasn't actively seeking a move, I decided to explore the opportunity further.

During the interview with Gen Re, I was struck by the caliber of individuals I met and was intrigued by their description of what they do as a direct reinsurer. The wide scope of their work and the value they brought to clients fascinated me, and I saw it as a chance to expand my horizons even further. Ultimately, I was offered the position and have been with Gen Re for 20 years now. For the last decade, I've served as the Workers' Compensation Claims Manager, with responsibility for the oversight, reserving, technical claim support and administration for all workers' comp and employers liability reinsurance claim exposures.

Outside of the pandemic, what is a major change in workers' comp that you have seen over time?

There have been so many changes and shifts in workers' compensation; it's hard to pinpoint just one. For example, the growth of the gig economy, the favorable trend of reduced opioid usage, and the significant increase in safer work environments leading to lower injury frequencies. But if I had to choose the most impactful change, it would undoubtedly be the advancement in technology and its integration across all facets of the workers' compensation industry.

And when I say this, I'm not just reflecting on my extensive experience spanning over 30 years in the business. I'm also considering the rapid changes we've witnessed in just the last decade or so. Technological progress has revolutionized how we safeguard employees and support injured workers, with innovations like wearable technology and advancements in medical equipment such as exoskeletons, implantable devices, and prosthetics.

These breakthroughs have notably benefited individuals with catastrophic injuries like brain trauma, spinal cord damage, and severe burns. Furthermore, the increased use of telemedicine and mobile apps has enhanced accessibility to medical care and streamlined communication between injured workers and claims professionals.

All these advancements serve a singular purpose: fulfilling our industry's responsibility to serve injured workers and their families better. Moreover, technological advancements have also bolstered our internal operations, with more robust claims systems, remote work capabilities, quicker and more efficient data utilization, including predictive analytics, and the emergence of artificial intelligence, which holds the potential to shape the industry in ways we can't fully grasp yet.

What is one of the biggest challenges that workers' compensation carriers are currently facing today?

Reflecting on the workers' compensation industry, it has been doing very well, especially when compared to other P&C lines of business. However, there are still numerous challenges that workers' comp carriers are facing. These challenges range from navigating a lower rate environment to grappling with escalating medical severity costs. Additionally, there's the looming prospect of mainstream adoption of medical marijuana as a treatment option for workers' compensation cases.

However, if I were to pinpoint the most formidable challenge, it undoubtedly revolves around the staffing and training of claim professionals. This became glaringly evident during the pandemic, where many carriers grappled with turnover issues and struggled to fill vacant positions with seasoned personnel. This wasn't unique to a few; rather, it was a widespread issue affecting many of our clients to varying degrees.

I entered the industry at a time when companies boasted extensive in-house training programs—a stark contrast to the present scenario. While it's crucial for carriers to ensure that veteran professionals engage with younger staff to facilitate knowledge transfer, the new remote or hybrid work environment poses its own set of challenges. This is where organizations like AMCOMP can step in to

provide support and guidance, bridging the gap and aiding in the professional development of claim professionals amidst evolving work dynamics.

How did you get involved with AMCOMP?

As a direct reinsurer, Gen Re maintains strong relationships with its clients, and providing expertise across both underwriting and claims is paramount—and that involves a significant amount of personal interaction. Therefore, it's crucial for me to continually sharpen my skills and stay updated on the current and emerging issues within the workers' compensation industry.

That's why I've found the WCP® designation program, along with the seminars and conferences offered by AMCOMP, to be invaluable resources for developing and maintaining expertise in this field. Regardless of one's role—whether in claims, underwriting, medical management, marketing, rating bureau, etc.—it's essential to stay informed about developments not only within your own department and company, but also within the broader workers' comp industry.

AMCOMP facilitates this knowledge exchange wonderfully. Not only does it provide insight into various aspects of the industry, but it also offers opportunities for networking with other professionals in the workers' compensation sphere. This networking aspect not only enriches my understanding but also allows for valuable collaboration and idea sharing within the community.

What kind of future do you envision for AMCOMP?

Given the challenges I highlighted earlier concerning the training and development of workers' comp professionals, I foresee AMCOMP stepping up to fulfill this critical need more extensively.

Over the years, AMCOMP has shown significant growth, and with its recent association with NAMIC, it is poised to elevate its profile even further. This expansion provides an excellent opportunity for professionals in the industry to access valuable resources and training programs offered by AMCOMP.

Employees who pursue the WCP® designation and engage in ongoing training while staying abreast of industry developments not only enhance their value to their employers but also bolster their personal brand. This commitment to continuous improvement not only benefits individuals but also contributes to the overall advancement of the workers' compensation profession. AMCOMP's expanding role in this regard is promising, and I believe it will play a vital part in addressing the training and development needs of workers' comp professionals in the future.

Oklahoma Supreme Court in Cantwell v. Flex-N-Gate, Inc.

Clarifying Permanent Partial Disability Benefits under the AWCA

In the case of *Cantwell v. Flex-N-Gate, Inc.*, decided on December 12, 2023, the Supreme Court of Oklahoma rendered a judgment regarding the entitlement of claimants to permanent partial disability benefits (PPD) under the Administrative Workers' Compensation Act (AWCA). The court ruled that the statutory cap of 350 weeks on PPD benefits does not preclude claimants from receiving additional benefits if they have not reached 100% impairment to any body part or the body as a whole. This decision stemmed from a case where a claimant suffered various work-related injuries both before and after the enactment of the AWCA in 2014.

In the case, the claimant had received 360 weeks of PPD benefits for injuries sustained prior to 2014, with a 71.3% impairment rating. However, when filing claims for injuries post-AWCA, the claimant's additional PPD benefits were denied, citing the 350-week cap under section 46(H) of the AWCA. Despite not having reached a 100% impairment rating, the claimant's requests were rejected. Upon review, the Supreme Court sided with the claimant, emphasizing the consistency of the 100% impairment limitation


on PPD benefits, irrespective of changes in the maximum number of weeks before and after the AWCA's enactment.

The court's ruling underscored the primacy of section 45(C)(1) of the AWCA, which mandates that PPD benefits cannot exceed a 100% impairment rating to any body part or the body as a whole. By prioritizing this limitation over the cap on the number of weeks, the court ensured equitable treatment for claimants and upheld constitutional principles. This decision provides clarity in the interpretation and application of workers' compensation laws in Oklahoma, reaffirming the rights of injured workers to seek fair and just compensation for work-related injuries, regardless of the timeline of their occurrences.

These references were used for the development of this summary article:

<https://www.workerscompensation.com/expert-analysis/court-case-update-oklahoma-january-2024/>

<https://law.justia.com/cases/oklahoma/supreme-court/2023/120189.html>



Supreme Court of Appeals of West Virginia, in Hood v. Lincare Holdings, Inc.

Neutral Risk while Working

In the case of Robert Hood v. Lincare Holdings, Inc., heard by the Supreme Court of Appeals of West Virginia, the issue revolved around whether an injury sustained by an employee during a seemingly routine activity at work was compensable under workers' compensation. Robert Hood, a delivery driver, experienced knee pain while descending stairs after making a delivery. Despite no slip, trip, or fall, he felt a "pop" in his knee. The Workers' Compensation Board of Review affirmed previous rulings denying the claim, concluding the injury wasn't work-related. Hood appealed.

On November 8, 2023, the Court affirmed the decision, emphasizing the lack of a causal connection between Hood's work and his injury. Although the injury occurred during work hours, it didn't stem from his employment activities. The Court acknowledged the distinction between risks associated with employment, personal risks, mixed risks, and neutral risks. Neutral risks, such as the one Hood encountered while descending stairs, are neither distinctly employment nor distinctly personal. Courts commonly use the "increased-risk test" to determine compensability for injuries resulting from neutral-risk activities.

The Court highlighted previous cases where this test was applied. In cases where employees faced an increased quantity of risk compared to the general public, compensability was upheld. However, in Hood's case, there was no evidence of an increased risk associated with descending stairs, a common daily activity. The Court affirmed the Board of Review's decision, emphasizing that Hood's injury didn't result from his employment, and thus, lacked a compensable causal connection.

These references were used for the development of this summary article:

<https://caselaw.findlaw.com/court/wv-supreme-court-of-appeals/115426844.html>

<https://www.ncci.com/Articles/Pages/Insights-CourtCaseNov2023-WV.aspx>



ERMI PATIENT CARE PROGRAM

By: Dr. Thomas Branch, Dr. Raz Winiarsky and Shaun Stinto, Phd.

The Ermi Patient Care Program is a program designed to help patients suffering from severe motion loss. Dr. Branch, CEO of Ermi, explains that “Severe motion loss in the joint results in subsequent loss of function, which makes it challenging to regain motion after surgery or an injury.” Dr. Branch goes on to state that “The goal of our company is to rescue patients dealing with severe motion loss to be free to move again, and free to live.”

Severe motion loss is often associated with a diagnosis of artrofibrosis or adhesive capsulitis limiting a patient’s ability to perform activities of daily living. Erin’s Patient Care Program is a non-invasive treatment alternatives used in a patient’s home as an adjunct to physical therapy. Ermi utilizes high intensity devices (Flexionaters) that have also been referred to as PASS (patient actual serial stretch) devices. These high intensity devices apply loads to the joint that are similar to the force applied by physical therapists.

The **Flexionaters** are unique devices which combine a patented patient-controlled high-intensity hydraulic mechanism with bidirectional stretching capabilities supporting both flexion and extension. This provides optimal protocol flexibility and accelerates the patient’s return to their active lifestyle. Flexionater devices are designed to address motion restriction in the shoulder, knee, elbow, ankle and great toe.

The Patient Care Program devices are not designed for routine use following an orthopedic injury or surgery. The program is indicated solely where the patient has a documented history of severe motion restriction and is a non-invasive treatment alternative that can be used in the patient’s home in addition to the services of a physical therapist.

Where the joint is not properly exercised, the result will be restricted motion. In the case of knees, the associated restriction (artrofibrosis) is an excessive inflammatory response to an injury or surgery which is associated with increases in both the production of fibroblasts and the deposition of extracellular matrix proteins. When not effectively treated, the extra fibrous tissue grows and restricts the patient’s knee function. In the shoulder, adhesive capsulitis is the fibrosis and contracture of the capsuloligamentous complex, resulting in restricted shoulder range of motion.

In the case of both knees and shoulders, these conditions are based on the biological principle that connective tissue will adapt over time in response to physical stress. At the cellular level, motion restriction involves the formation of cross bonds or the periarticular connective tissue that forms between the collagen bundles.

Ermi has been around since 2003. Many reviews and studies have been done in the interim. A systemic review of medical stretching devices was published in 2021 which examined the use of the devices to treat knee arthrofibrosis. Patients who had failed physical therapy after knee replacement surgery were treated with Erin devices. All 58 patients were able to avoid additional surgical procedures. The review also found that displacement control devices are most effective in increasing knee range of motion in the treatment of knee stiffness and that Ermi devices may be more effective than static progressive stretch devices.

Another review conducted relative to restriction in the knee was a retrospective cases of more than 11,000 patients who were prescribed the Ermi Knee

Flexionater. Patients demonstrated excellent flexion gains of nearly 30 degrees on average. Based on recent studies it is evident that high-intensity stretching should be considered in any patient who is at risk for a secondary motion loss surgery because in 90% of these patients the complications and costs associated with surgery can be avoided. Ermi devices empower the patient to slowly stress the joint, simulating physical therapy by stretching the tissues.

Ermi's most recent shoulder study was a retrospective case series of 1,871 patients who were treated with the Ermi Shoulder Flexionater. These patients had excellent gains in range of motion which averaged 29.9 degrees in external rotation, 40.5 degrees in abduction, 30.3 degrees in forward flexion and 15.2 degrees in internal rotation. The final range of motion was above the level need to complete activities of daily living. Ermi's most recent shoulder study was a retrospective case series of 1,871 patients who were treated with the Ermi Shoulder Flexionater. These patients had excellent gains in range of motion which averaged 29.9 degrees in external rotation, 40.5 degrees in abduction, 30.3 degrees in forward flexion and 15.2 degrees in internal rotation. The final range of motion was above the level need to complete activities of daily living.

The Ermi Patient Care Program has helped more than 150,000 patients from 37 states over the last 25 years without any complications related to treatment. In the Official Disability Guidelines (ODG), the program devices are currently classified a "recommended" or "understudy" as the submission of research studies continues. Based on Ermi's standing with ODG, the program has an 80% approval rating by Utilization Review Physicians around the country.

In the end, however, it is important to recognize that regardless of applied force, no device can improve range of motion if the patient does not use it.



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