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SPECIAL REPORT

Word on Workers' Compensation

WorkCompCentral's annual review of key issues facing the workers' compensation industry

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What Should Workers' Comp Pay For?

As medicine has evolved, so has the type of injuries and illnesses covered by workers' comp, but each state sets its own rules.

by Elaine Goodman

Geography can be as important as science when deciding whether a medical condition should be compensable through workers' comp.

"In St. Louis, for example, the physician cannot provide a causation opinion without first knowing whether the worker was injured in the state of Missouri or the neighboring state of Illinois," Dr. Charles Goldfarb, an orthopedic surgery professor at Washington University in St. Louis, said in a June article about carpal tunnel syndrome in the Journal of Hand Surgery. "In Illinois, work must only 'contribute' to the condition, whereas in Missouri, work must be the 'prevailing factor' to allow treatment under workers' compensation laws."

Cumulative trauma injuries such as carpal tunnel syndrome — along with varying compensability standards — are among the issues that couldn't have been envisioned when states began launching workers' compensation systems in the early 1900s. In those days, the cause of a work-related medical condition was usually obvious: a train derailment or factory explosion leading to sudden and often severe injuries.

Since then, much has changed. Advancements in medical science have led to a greater understanding of the role of occupational factors in injuries and illnesses. Stress has become recognized as a contributor to illness. Chemicals once thought to be safe are found to be dangerous.

After more than century's worth of experience with workers' comp, the question of what types of injuries and illnesses should be covered is still being debated. Each state provides an individual answer through its statutes, but those statutes change over time, and sometimes the judicial branch decides that the meaning of a law isn't the same as conventional wisdom would have it.

For some, the answer to the question is plain.

"If work contributes in a real way, workers' comp should pay," Goldfarb said in an interview.

Trey Gillespie, assistant vice president for workers' compensation at Property Casualty Insurers Association of America, agreed. But he said the difficulty comes in applying that principal.

"The rub comes in identifying what is a work-related injury or illness," Gillespie said. "It's been a tricky tug of war — where do you draw that line in the sand?"

Cumulative trauma conundrum

At one end of the spectrum are states such as California, where an employer is responsible for covering medical treatment for an injury, even if work was only a small contributing factor.

For example, Los Angeles County has covered medical treatment for diabetes, hypertension and renal disease in a cumulative trauma claim by a 35-year employee, where work-related stress was believed to have contributed to the woman's conditions, according to county workers' compensation manager Alex Rossi.

In Virginia, cumulative trauma cases are not covered because state law says workplace injury claims are compensable only if they are "injuries by accident," which the courts have said must occur due to an "identifiable incident or sudden precipitating event."

That means a worker whose back has worn out from years of heavy labor likely wouldn't be eligible for workers' compensation in Virginia unless there was an accident at a specific time, says attorney Peter G. Irot, a partner in the insurance practice group at Gentry Locke in Roanoke, Virginia.

Even the "injury by accident" standard is subject to differing interpretations. In July, the Virginia Court of Appeals ruled in Van Buren v. Augusta County that a firefighter who injured his back while maneuvering a 400-pound man from a shower onto a stretcher, and then to an ambulance, over the course of about 45 minutes, was eligible for work comp benefits.

The state Workers' Compensation Commission had found just the opposite, ruling that the injury was caused by repetitive trauma over the course of the incident and was not compensable.

The Court of Appeals concluded, however, that Robert Van Buren's back injury resulted from an identifiable incident that was "bounded with rigid temporal precision."

"This, of course, raises the question: Is there any limit to the amount of time that can be termed 'rigidly temporally precise?'" Irot wrote in a blog post. "If the rescue had taken about three hours, would that be rigid and precise enough? What if the rescue had been complicated enough to take place in shifts, or if the firefighter had taken breaks to briefly rest or catch his breath during the rescue?"

States that allow cumulative trauma claims pay the price. In California, the percentage of cumulative injury cases has more than doubled over the past 10 years and now accounts for nearly one out of every five indemnity claims, according to the state's Workers' Compensation Insurance Rating Bureau. The bureau found about 18% of indemnity claims filed in 2014 involved a cumulative injury. From 2005 to 2007, cumulative trauma was alleged in about 8% of indemnity claims.

Among employees of Los Angeles County, cumulative trauma injuries accounted for 17.5% of claims from July 2012 to April 2016, or about 7,000 claims. The workforce includes a large number of public safety workers.

Rossi, the Los Angeles County workers' compensation manager, said 44% of the employer's 336 claims with a total cost exceeding $1 million were cumulative trauma claims, with a combined total incurred value of more than $243 million. With cumulative trauma representing such a large expense, Rossi said an alternative approach would be to switch to a "predominant cause" standard for compensability of cumulative trauma claims.

Predominant cause, in which more than half of the cause must be attributable to work-related factors, is used for psychological claims in California. Cost savings from switching to the new standard could potentially be used to increase other benefits for injured workers, Rossi said.

The Pendulum Swings

Workers' compensation is often described as the nation's oldest social insurance program. States began enacting workers' compensation statutes in 1910, and by 1920, all but five states had done so.

Under workers' compensation, employers provide medical treatment and disability benefits for injured workers and, in exchange, employees cannot bring tort suits against their employers — a deal often referred to as the Grand Bargain. According to John Burton, professor emeritus at Cornell and Rutgers universities, most states require workers to meet four legal tests in order to receive workers' compensation benefits: (1) there must be a personal injury (2) resulting from an accident that (3) arose out of employment (4) and in the course of employment.

Within those tests are additional legal tests. For example, the "accident" test has four parts: (1) unexpectedness of cause; (2) unexpectedness of result; (3) definite time of cause; and (4) definite time of result.

Burton said the accident test precluded compensation for occupational diseases, so states over time adopted occupational-disease provisions. The approaches vary among states, from a broad use of the term "injury" in states such as Massachusetts and California, to separate acts covering occupational diseases in states such as Montana and Pennsylvania.

Benefits to injured workers further expanded in the 1960s and 1970s, Burton said, in part due to the work of Arthur Larson, a law professor and undersecretary of labor under President Dwight D. Eisenhower from 1954 to 1956. Larson's treatise helped liberalize the interpretation of tests to determine compensability of workplace injuries, Burton said.

The early 1970s saw the formation of the National Commission on State Workmen's Compensation Laws, which Burton chaired. The commission was directed by Congress to determine whether state workers' compensation laws provided adequate benefits for injured workers. The 18-member commission concluded unanimously in a 1972 report that "state workmen's compensation laws are in general neither adequate nor equitable." The report included 19 recommendations that the panel deemed "essential."

Following the commission report, states scrambled to beef up workers' compen-

John F. Burton, Professor emeritus

sation benefits, spurred by the fear of federal intervention in state systems, Burton said.

The range of medical conditions covered by workers' compensation continued to expand, and by 1990, compensation for mental stress was grabbing headlines, particularly in California.

In March 1990, the Los Angeles Times reported that stress-related complaints were the fastest-growing type of job disability claim in the state. Claims of mental stress resulting in lost work time increased from 1,178 cases in 1979 to 9,368 in 1988, the publication reported, citing data from the state Department of Industrial Relations. The California Workers' Compensation Institute said at the time the number could be even higher, estimating 35,000 claims in 1988. Employers and insurance companies started looking for ways to reduce workers' compensation costs. One way to do that was through changes to compensability standards.

Gillespie, with PCIAA, said legislatures became sympathetic to employers who were forced to pay for workers' medical treatment in cases where work was only an "aggravating factor." The issue was seen as one of cost and civil justice, he said.

Massachusetts changed its compensability standard in the early 1990s from simply requiring work to be an "aggravating" factor in an injury to the current "major cause" of injury standard, according to Alan Pierce, an attorney with Pierce, Pierce & Napolitano in Salem, Massachusetts, and president of the Workers Injury Law & Advocacy Group, or WILG. Major cause is less stringent than requiring work to be the "predominant" factor in an injury, accounting for 51% or more of the cause, Pierce said.

But stricter compensability standards shift costs elsewhere, said Pierce. He favors the more lenient compensability aggravating-factor standard. However, he said even that standard might need fine-tuning, to eliminate claims for injuries where work is a minuscule factor.

"Any time the employer substantially contributed to the injury, the cost should be borne by the employer," Pierce said. "This is part of the Grand Bargain."

In contrast, Mark Walls, vice president of communications and strategic analysis at Safety National, would like to see a consistent threshold across states that work is the major cause — accounting for more than 50% — of a disabling condition in order for workers' comp to to be liable. Otherwise, he said, the condition should be covered by heath insurance.

"It's a constant debate and it's always going to be a constant debate," Walls said. "Where do we draw the line between occupational and non-occupational? For many conditions, there's a component of both."

On the other hand, Walls said the workers' comp industry should go farther in defining and covering occupational diseases. One example is bronchiolitis obliterans, or "popcorn lung," an inflammatory lung disease found among popcorn factory workers who are exposed to diacetyl, a chemical used to make artificial butter flavoring.

What Walls doesn't favor, however, are disease presumptions in workers' comp. Nearly 40 states have laws establishing a presumption that certain types of cancers contracted by firefighters are the result of duty-related exposure. Without presumption laws, firefighters have to prove their cancers were caused in the line of duty. With presumption, their employers have to be prove they didn't.

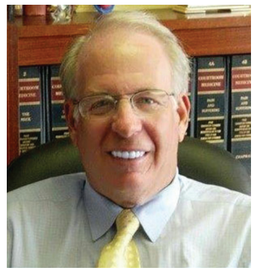
"The problem with presumption is you don't have to prove the exposure," Walls said. "Firefighters can work a 20-year career and never fight a structure fire."

Paul Tauriello, director of the Colorado Division of Workers' Compensation, said that although workers' compensation covers more conditions now than in the past, other benefits offered to workers have expanded as well.

Tauriello noted that 40-hour work weeks and two-day weekends didn't exist at one time. Those entitlements are now well established in society, and few would argue that they should be turned back, he said.

"I think folks have lost sight that we've increased benefits and the range of benefits over the century," Tauriello said. "I don't think we'll ever go backward in time."

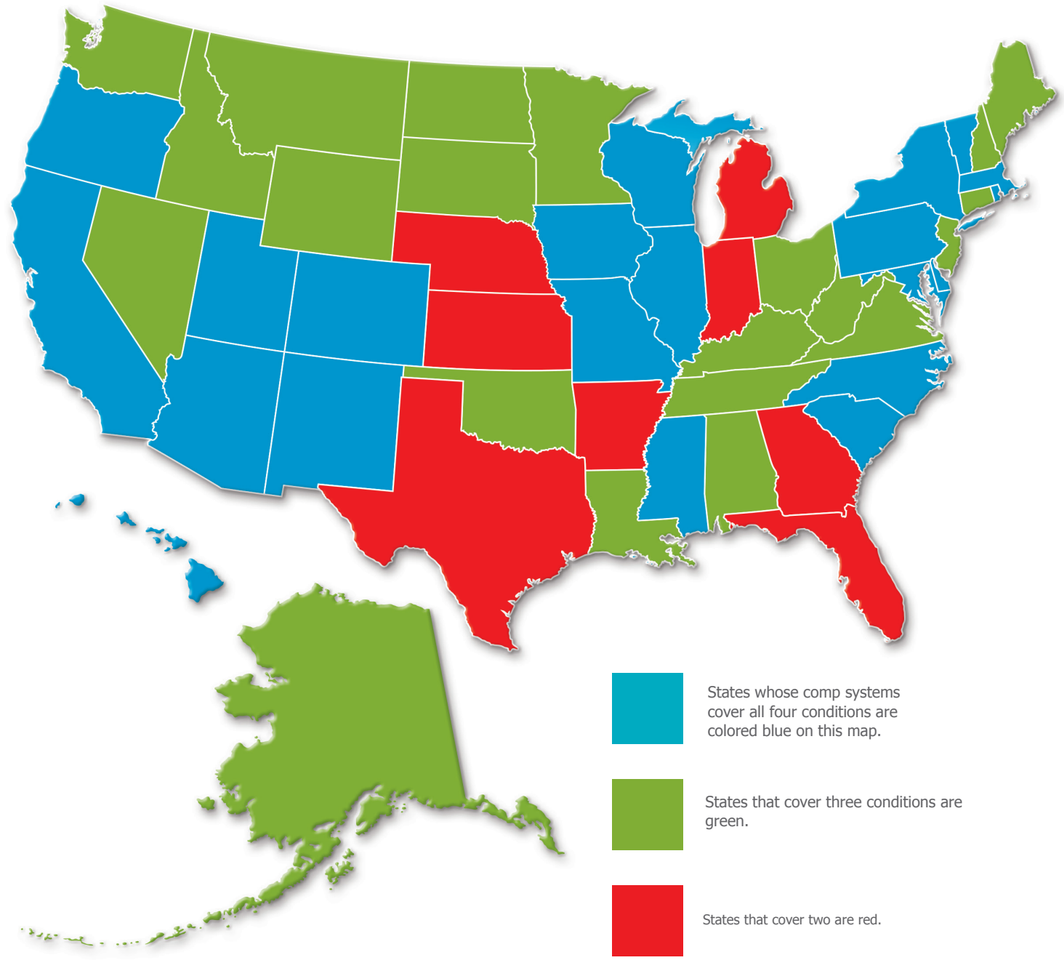
Dr. Charles Goldfarb



Alan Pierce, Attorney at Law

What's covered by work comp?

All state workers' comp systems cover either mental stress without physical injury, cumulative trauma, hearing loss and disfigurement, but some states cover only two of those conditions, some three and some all four.



Source: Workers' Compensation Laws as of Jan. 1, 2016, by the California Workers' Compensation Institute and the International Association of Industrial Accident Boards and Commissions

Work Comp's Compound Conundrum

Fuzzy Rules Leave Loopholes Providers Can Exploit for Profit

By Greg Jones

There's little if any evidence of the medical efficacy of compound creams, but these supposedly custom-made concoctions are accounting for an increasing amount of pharmaceutical spending in comp systems throughout the country and have been at the heart of several high-profile fraud cases.

While many states have treatment guidelines that identify which treatments are medically necessary, and therefore reimbursable, loopholes allow providers and pharmacies to sell millions of dollars worth of compounded creams despite the lack of evidence that they actually work, according to medical experts and industry observers.

"The problem you have in many states is the laws are ambiguous or unclear as to how (compounds) should be treated and whether you can deny the medication or deny payment for it," said Brian Allen, vice president of government affairs for Optum. "They play a law of numbers. Submit 20 bills for $5,000 or $6,000 a piece, and if one gets paid, they're still ahead. If more get paid, it's just profit."

Like many comp schemes, the epicenter of the compounding problem is Southern California. But the Golden State isn't the only one feeling the burn from what critics say is little more than grossly overpriced Bengay. Regulators in Texas recently sounded the alarm about significant increases in the number and costs of prescriptions for compound creams, as has the U.S. Postal Service. And the U.S. Attorney's Office in June brought criminal charges against providers throughout the country who allegedly used prescriptions for compounds as part of a scheme to defraud Medicare, Medicaid and Tricare, the health insurance program for members of the military and their families.

Compound drugs of all varieties used to account for only a small percentage of workers' compensation and health care spending, as would be expected given the conditions under which these specially formulated drugs are considered to actually be appropriate. Compounds are medically indicated in cases where a patient can't tolerate commercially available medications approved by the Food and Drug Administration. If a person is allergic to one of the inactive ingredients in a drug, then it would be appropriate for a compounding pharmacy to make a similar medication minus that wouldn't trigger an allergic reaction. If a person can't swallow capsules, a compounder could formulate a liquid version of a commercially available drug. And no one is opposed to compounding in these cases.

Compound creams are another story. They are commonly marketed as a way to treat pain or inflammation without any of the side effects that can come with commercially available drugs. Fusion Specialty Pharmacy, a compounder in Santa Clara, Utah, says on its website that compound creams can treat arthritis, trauma, sprains, muscle strains, nerve damage and chronic inflammation. And because "creams are absorbed into the blood stream at minimum levels" there are no risks of the types of drug interactions that can come with oral medications.

But Allen said there are no studies documenting that compound creams actually do what proponents say.

"We've not been able to find any indication that these do anything more than what's already available on the market for a much more reasonable cost," he said.

Compounds are supposed to be used as a last-resort, but they've become one of the first thing that some doctors prescribe, he said. And that raises the question of whether compounds are used because they're actually good medicine, or because there's money to be made in using them.

"Is it money, or is it medicine?" Allen asked. "What ultimately happens is you have an opportunity for a loophole to be exploited where prescribers and the compounding pharmacies that dispense this stuff have seen an opportunity to make some extra money in the workers' compensation system by promoting these compound medications."

"Y" is for Compounds

The Texas Division of Workers' Compensation reported earlier this year that the number of prescriptions for compounds increased after it adopted a formulary in 2011.

Employers in the Lone Star state paid an average of $316 for each of the 18,535 compound drug prescriptions that were covered in 2010. In 2014, employers paid for 21,200 compound prescriptions at an average cost of $646.

The cumulative change in reimburse ment for compounds was a 133% increase from 2010 to 2014, a period in which total prescription reimbursements dropped by a cumulative 31%.

The Texas DWC also reported that it's a small number of providers who are driving the trend. Ten individual physicians accounted for 48% of all compound bills that were submitted in 2014. The 11,614 bills submitted by the Top 10 compound prescribers compares to 12,423 bills submitted by the remaining 986 providers who also prescribed compounds that year.

Under the Texas formulary rules, so-called "Y" drugs can be prescribed without preauthorization, while so-called "N" drugs need to be approved in advance before they can be prescribed. As applied to compounds, the formulary requires pre-approval only for those drugs made using N drugs.

Not surprisingly, the growth in costs is linked to a handful of compound ingredients that are designated as Y-drugs on the formulary.

For example, Gabapentin, used primarily to treat epilepsy and neuropathic pain, is classified as a Y-drug in the Texas formulary. And the DWC reports that from 2010 to 2015, the average cost for Gabapentin increased by 1,474%. Average payments for Ketoprofen, a non-steroidal anti-inflammatory and a Y-drug, increased 518% over the same period. Payments for muscle relaxant baclofen, a muscle relaxant designated as a Y-drug, increased 427%.

"Texas said if it has an N ingredient, it's not allowed," Allen said. "Then, all N ingredients were gone and shortly after, there was a big spike in compounds with all Y ingredients. How do you argue medical necessity when that's the game that's being played?"

Allen said he thinks all compound drugs should require pre-authorization. Requiring doctors to document the medical necessity for using a custom- made medication rather than something that's commercially available should ensure that workers have access to these drugs, but only when necessary.

He said it's too easy for some providers to exploit loopholes in the formulary rules. And as long as it's easy and profitable, providers will keep prescribing compounds.

"We need to create barriers, speed bumps, and that will help, I think, over time curb the practice and get it to where it needs to be," he said. "We're all for having compounds, there are some cases when they're appropriate, just not as many as we're seeing."

The Texas Division of Workers' Compensation showed its concern about the problem in May, when it adopted an audit plan that will include a review of up to 10 physicians who prescribe the largest number of compounds to ensure they are complying with the Workers' Compensation Act.

Prescriptions Down, Prices Up

The experience in California suggests that reining in compounds is no easy feat.

Lawmakers and regulators in the Golden State have been dealing with the compounds for nearly 10 years now. Compounds emerged as a cost driver almost immediately after the state's Division of Workers' Compensation in 2007 adopted rules that eliminated the ability for doctors to profit by dispensing repackaged drugs.

In 2011, lawmakers passed a bill that attempted to control costs by requiring that compounds be billed at the ingredient level based on rates paid by Medi-Cal – the state's Medicaid program.

The bill was successful in reducing the number of prescriptions for compounds, according to a 2013 report by the California Workers' Compensation Institute. Compounds accounted for 2% of all prescriptions in the first half of 2012, compared to 3.1% in the first half of 2011, CWCI reported.

However, the average amount paid per compound increased 68.2% over the same period, to $774.21 from $460.42. The higher average payment was the result of a 13% increase in the average number of ingredients used per compound, and a 48.7% increase in the average cost of the ingredients being used.

The average payment has fallen a bit since then, with the Workers' Compensation Insurance Rating Bureau reporting employers were paying an average of about $575 per compound through the last six months of 2015. There is, however, a significant difference in average compound costs depending on who receives payment and where they're located.

Statewide, the average compound payment to pharmacies is $862, compared to an average payment to physicians of $293. This disparity is driven almost exclusively by the Los Angeles area.

The average payment for compounds to pharmacies in Southern California is about $1,000, while the average payment to physicians in and around Los Angeles is $325, according to the WCIRB. In San Diego, the average payment to pharmacies was $216, compared to an average payment of $247 to physicians. And in the San Francisco Bay Area, the average payment was $104 to pharmacies and $292 to physicians.

The high cost and volume of compound payments in California persisted despite the limited situations under which they're authorized by medical treatment guidelines that have been in effect since 2009.

The chronic pain section of California's Medical Treatment Utilization Schedule says topical analgesics are experimental and primarily recommended to treat neuropathic pain when trials of antidepressants and anticonvulsants have failed. The state's treatment guidelines also say there is scant research supporting the medical efficacy of compounded topical creams.

But the only outright prohibition on compound creams is when they contain at least one drug or drug class that is

not recommended. Lidocaine is recommended in the MTUS if it used to treat localized peripheral pain, assuming other first-line therapies have failed. It is not recommended for non-neuropathic pain.

Gabapentin is not recommended in any topical analgesic. But other sections of the guidelines say the anti-epilepsy drug is recommended for chronic neuropathic pain as well as complex regional pain syndrome.

Dr. Gary Franklin, medical director of the Washington state Department of Labor and Industries, said it's not difficult to exploit rules that prohibit compounds only if they contain a drug or drug class that is not recommended.

"It's not too hard to put together a compound for stuff that is approved for other uses orally," he said. "You could drive a truck through that policy. Compounding firms are pretty smart. Knowing that policy, they're not going to put anything in compounds that's not already approved for oral use."

In recent years, California has had some success in rejecting compound prescriptions based on those guidelines thanks to an administrative review procedure to resolve treatment disputes that was created as part of legislative reforms passed in 2012. The independent medical review process created in the 2012 reforms has overwhelmingly found that compounds are not medically necessary, and therefore not authorized.

Out of 12,617 IMR decisions addressing compounds that have been issued since 2013, 99.9% of these prescriptions were declared medically unnecessary. A total of 12,615 IMR decisions sided with the utilization review physician who said that the compound was not appropriate. Only 56 decisions said there was a legitimate reason to use a compound drug.

Crossing the Line

If state and federal prosecutors are to be believed, the compound trade drug is so lucrative that some pharmacies are paying doctors kickbacks in exchange for prescribing the medications.

In 2014, the Orange County District Attorney's Office in Southern California announced that a grand jury indicted Kareem Ahmed, the president and chief executive officer of Landmark Medical Management, on charges of paying more than $25 million in kickbacks to doctors who prescribed compound creams to injured workers. According to the indictment, Ahmed intentionally formulated the creams using the most expensive ingredients available to maximize his profits.

Ahmed is fighting the charges – his attorney insists Ahmed is innocent – and it hasn't been easy going for county prosecutors. An appellate judge in March threw out all but one of the counts in the original case after finding that the district attorney's office charged more than what the grand jury alleged.

A new complaint filed in June alleges Ahmed was paid more than $105 million for compound creams provided to injured workers since 2009. The fraud allegations have nothing to do with the appropriateness of the prescriptions. Instead, prosecutors say any bill for medical services that were occasioned by kickbacks are inherently fraudulent, regardless of whether the worker actually needed the service or prescription.

In July 2014, the U.S. Attorney's Office for Eastern California charged Bahar Gharib-Danesh, manager of Pain Relief Health Center with offices in Bakersfield, Fresno, Los Angeles, Reseda and Visalia, of directing medical staff consisting of doctors, chiropractors and psychologists to churn bills by making sure every injured worker treated at the clinic received a host of treatments, including compound creams.

The feds don't provide much in the way of additional detail in the charges filed for the case scheduled to go before a jury in August 2017. But a related whistleblower case filed in Sacramento claims that part of the alleged scheme to prescribe compounds included a list of drugs that was used to try to avoid drawing unwanted attention from claims administrators.

The whistleblower in the civil case is a former billing manager at one of Danesh's clinics who said that a spreadsheet was used to monitor the number of compounds that were prescribed to injured workers and to stop those prescriptions at a predetermined threshold that raise suspicions in adjusters or regulators. State comp systems aren't the only ones that have been targeted in the alleged compound schemes.

In March, the U.S. Postal Service's Office of Inspector General reported that compound drugs accounted for 34% of prescriptions and 53% of prescription drug costs in 2015. In 2014, compounds accounted for 22% of prescriptions for injured USPS workers and 27% of costs. In 2011, compounds accounted for just 8% of prescriptions and 6% of costs, according to the report.

The Postal Service said it was paying an average of $390,000 a day for compound drugs in 2015.

Not long after that report was released, the U.S. Justice Department announced a "coordinated takedown" of 301 people accused of generating $900 million in fraudulent bills targeting federal health care programs. Several of the defendants in what federal prosecutors called the largest anti-fraud action in its history were accused of paying kickbacks to doctors who prescribed compound drugs.

A grand jury indictment filed June 16 with the U.S. District Court for Southern California accuses Hootan Melamed, owner of New Age Pharmacy, RoxSan Pharmacy Inc. and Concierge Compounding Pharmaceuticals Inc. of bribing doctors to prescribe his products.

David M. Jensen, owner of Valley View Pharmacy, was also accused in a complaint filed the same day with the U.S. District Court for Central California of paying kickbacks to marketers who convinced doctors to prescribe compounds to people covered by Medicare, Tricare and the federal Office of Workers' Compensation Programs.

A complaint filed on June 20 in the federal court for Central California charges Randall J. Jett, a marketer for Products for Doctors, of arranging kickbacks for doctors who prescribed compound creams.

Another complaint accuses John Garbino, president of Trestles Pain Specialists, of receiving nearly $1 million in kickbacks in 2015 for arranging compound prescriptions for patients covered by the federal Tricare program.

At the same time prosecutors charged Robert Paduano of operating telemedicine sites based in Florida to generate fraudulent compound prescriptions on behalf of Trestles Pain Specialists.

Sticking to the Evidence

Given the number of health care systems that appear to be struggling with compound drugs, it may seem like there's no easy solution. But Franklin, the medical director of the Washington state Department of Labor and Industries, says that's not really the case.

L&I pays for compound drugs only in a limited number of situations, such as special medications needed to wean people off opioids or antibiotics that a patient may need. But there is no situation in which the state will pay for compound creams.

"I'm not going to say anything nasty about other states," he said. "But ever since I came here, we've been using evidence to make decisions."

Billing rules based on evidence-based medicine allow claims administrators – whether they're working for the state-run comp program or third-party administrators hired by self-insured employers – to refuse payment for compounds as well as other questionable treatments and services.

"Most of these states, do they have anything that they don't pay for?" Franklin said. "What don't they pay for? This is only one example. Do they ever not cover a lumbar fusion? What don't they pay for? And how do they make that decision?"

Franklin said it's difficult for a claims manager getting hounded to pay for expensive compounds or treatments to say no unless there are clear regulations and policies in writing. Compound creams are just one example of fee-for-service schemes that pump money out of other comp systems.

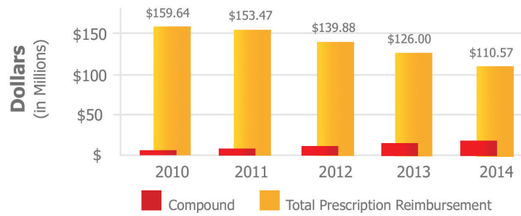
Franklin said there is simply no evidence that compound creams are medically effective, and as far as he's concerned, that's the end of the conversation.

"There's no compromise solution," he said. "There's no evidence, and we don't pay for stuff that doesn't have evidence."

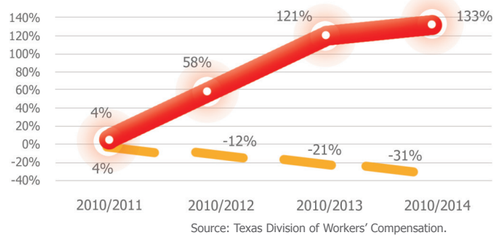
The Rising Cost of Compounds

Spending on compounds has increased in both Texas and California, despite adoption of a drug formulary in Texas and legislation in California, AB 378, aimed specifically at curbing the use of compounds to treat injured workers.

TEXAS: Prescriptions Payments by Calendar Year



Cumulative percent change in reimbursement



Source: Texas Division of Workers' Compensation.

California: Exhibit A. Distribution of California WC Prescriptions

Compound vs Non-Compound Drugs Pre-and Post AB 378 Study Samples		
Prescription Type	**Pre-AB 378** (Jan-Jun 2011)	**Post-AB 378** (Jan-Jun 2012)

California: Exhibit B. Distribution of California WC Prescriptions Payments

Compound vs Non-Compound Drugs Pre-and Post AB 378 Study Samples		
Prescription Type	**Pre-AB 378** (Jan-Jun 2011)	**Post-AB 378** (Jan-Jun 2012)

Source: California Workers' Compensation Institute.

Unlevel Playing Field?

Fee caps for workers' compensation attorneys vary widely among the states, but court challenges have overturned some of the limits set by state lawmakers.

By Sherri Okamoto

Spending on defense and claimant attorney fees in Florida was about even before passage of a reform bill in 2003 that removed a requirement that claimant's attorneys be "reasonable." Afterward, spending on claimant attorneys plummeted to the point that defense attorneys are now paid nearly two-thirds of the total.

Source: Florida Office of Judges of Compensation Claims

Ideally, states that cap workers' compensation attorney fees find a Goldilocks formula generous enough to ensure adequate representation for injured workers but miserly enough to protect employers from the expense of undue litigation.

But appellate court decisions in Florida and Utah earlier this year showed how precarious it can be for employers and insurers to rely on any attempt by state lawmakers to find middle ground.

The Florida Supreme Court in April ruled that a statutory fee cap that limited an attorney's rate of pay to $1.53 an hour violated claimants' due-process rights.

The Utah Supreme Court in May ruled that state lawmakers have no business setting attorney fees because the state constitution grants the judicial branch exclusive authority to regulate the legal profession.

The Florida high court's decision in Castellanos v. Next Door Co. was based on broader due-process principles that are more likely to spread to other jurisdictions. In essence, the court ruled that state lawmakers had violated claimant Marvin Castellanos' constitutional rights by passing a reform bill that removed the requirement that fees be "reasonable" and required strict adherence to the statutory formula.

The National Council on Compensation Insurance projected that the return of the mandate that attorney fees be reasonable would increase costs by 15% to 18.1% and recommended a 19.6% rate increase. Insurance Commissioner David Altmeier decided that a 14.5% increase was sufficient, with about 10% of that attributable to Castellanos.

The high court's ruling applies to all claims dating back since the statute took effect in 2003. That immediately created a $1 billion unfunded liability for workers' compensation insurers, according to an actuarial analysis by NCCI. Even before NCCI released its projection, American International Group increased its workers' compensation reserves by $109 million in reaction to the ruling.

Michael J. Winer of Tampa, one of the attorneys who represented Castellanos, said the lesson is that there needs to be a balance when determining the appropriate level of compensation for legal services to injured workers.

"If fees are too low, justice for individual clients and the public suffers," Winer said. "But if fees are too high, the credibility of the legal system is called into question."

Different approaches

States that set no maximums at all for workers' comp attorneys are the exception, not the rule. But there's a wide variation in both methods, and the amount of the caps.

Florida's statutory formula set maximum fees at a variable percentage of benefits, starting at 20% of the first $5,000 in benefits secured for a client, 15% of the next $5,000 and 10% of any amount secured in excess of $10,000. What ran afoul of the state constitution is the unyielding nature of those caps. The statute made no allowances for any variations.

In addition to Florida, at least 20 states limit attorney fees by a percentage of benefits awarded. The District of Columbia does, as well.

Other states set maximum hourly rates, which are sometimes coupled with a total-dollar ceiling. Some of those caps apply to claimants' attorneys only, but other states cap fees for both the claimant and defense attorneys.

West Virginia limits a worker's attorney fees to $125 per hour, and Vermont has a cap of $145 on fees awarded to a claimant's attorney by a workers' compensation commissioner.

The maximum hourly rate for claimants' attorneys in North Dakota is $150, but attorneys are also subject to a series of caps on their total compensation depending on how far a case gets litigated. If a matter makes it all the way to the state Supreme Court, then a North Dakota attorney can recover a fee of no more than $11,300.

Texas caps hourly fees at $150 for both sides of bar, but the Division of Workers' Compensation has proposed a rules change that will increase the maximum to $200 per hour on Jan. 1. That will mark the first increase since the fee caps were adopted 25 years ago.

Not all fee caps are tied to disability benefit awards. According to the Workers' Compensation Research Institute, Colorado, Minnesota, New Hampshire, Oregon and Tennessee have provisions to allow a fee for an attorney in "medical-only" disputes – but Arkansas, Oklahoma, Georgia, Maryland generally prohibit an attorney from getting a fee based on medical benefits or services.

Happy campers

Other states have kept workers' comp attorneys relatively happy by allowing fees beyond a fixed percentage of benefits for complex cases -- or simply by capping fees at a higher percentage of benefits.

Illinois limits attorneys who represent injured workers to a fee equal to 20% of the client's recovery – up to an amount equal to 20% of the value of 364 weeks of permanent total disability payments.

However, Illinois attorneys can petition an arbitrator or the Workers' Compensation Commission for a fee in excess of the 364-week fee cap, and it's "not unusual" for attorneys to do so, said Marc Perper, a claimants' attorney and partner with Horwitz, Horwitz & Associates in Chicago.

As the standard Illinois fee agreement provides for a 20% contingent fee, Perper said he believes that the best practice for an attorney wishing to charge a fee in excess of 20% is to enter into a written agreement with the client setting forth the fee percentage for which the attorney ultimately intends to seek approval.

In his experience, Perper said, "more often than not," the fee petitions are granted, particularly where the client has no objection to the increased fee.

Given the leniency of the cap, Perper said he had "no serious complaints" with it.

On the defense side, Jason Kolecke of Hennessy & Roach and Mark Cosimini of Rusin, Maciorowski & Friedman both said the 20% cap hasn't been a controversial or contentious issue in any of their cases, and they haven't heard any grumbling about it from opposing counsel.

In Pennsylvania too, workers' comp attorneys say they've heard few complaints about the the state's hard cap on attorney fees at 20% of benefits secured, which state lawmakers enacted in 2006.

That change withstood a constitutional challenge in 2011. Pennsylvania Workers' Compensation Judge David Torrey said the hard cap that's existed since then doesn't seem to be a sore spot for attorneys.

Larry Chaban, a past chairman of the Pennsylvania Bar Association Workers' Compensation Section and a claimants' attorneywith the Alpern Schubert law firm in Pittsburgh, said that adoption of an absolute ceiling really hasn't been a big deal because most attorneys never tried to claim a fee in excess of 20%.

Vincent Quatrini, a claimants' attorney with Quatrini Rafferty in Greensburg, said Pennsylvania's fee structure generally produces enough income for attorneys to recoup the money they invested on cases they don't win, and allows them the "luxury" of being able to take on cases that may not provide a "good fee, but can make good law."

In Ohio, fees are capped at 33.33% of a worker's award from the Industrial Commission, according to Philip Fulton, a claimants' attorney and author of the "Ohio Workers' Compensation Law" treatise.

While this is a larger percentage than what's allowed in most other states, Fulton said the amount of the awards workers get generally are not very large because most injured workers do not get sizable awards. He said attorneys "either have to do a very high-volume practice, or other types of law," to make ends meet.

Legislature vs. judiciary

Michael C. Duff, vice chairman of the Workers' Compensation Committee of the American Bar Association's Tort Trial and Insurance Practice Section and a professor of Law at the University of Wyoming College of Law, said regulating workers' comp system is tricky because the system involves participation of all three branches of government. That necessarily creates some "ambiguity with respect to separations of power."

With Utah now a notable exception, Duff said state legislatures are generally free to "do just about anything they want," as long as they aren't "intermeddling with fundamental rights," and have a "rational basis" for their actions.

In many states, Duff said, lawmakers decided to "make it harder for claimants to have access to attorneys" because of a belief that "attorney involvement increases the expense of claims." Often those controls are based on a percentage of benefits, which invariably causes lawyers to overlook cases that don't involve large disability benefit awards.

Duff said he didn't enjoy working under a fee schedule when he was in private practice as a claimants' attorney in Maine from 1995 to 1997. "I was unable to provide representation in many cases striking me as clearly meritorious," he said.

Still, Duff said he likes Wyoming's approach to attorney fees. It has a monopoly state Workers' Compensation Fund that pays a flat fee of $150 per hour to a claimants' attorney, regardless of the outcome of the case. Defense attorneys have the same cap on their fees.

Duff acknowledged such a program would be "a political non-starter" in many other states. He said the next best thing would be to have a fee schedule set by the legislature, with allowances for an attorney to petition a court for a higher fee for exceptionally complex cases.

The problem, said Duff, is that legislatures

sometimes stray too far toward cost containment and away from ensuring adequate representation.

Duff said the problem for Florida was that the legislature established a fee schedule that made no recognition of differences in the difficulty of cases, and "represented an attempt by the legislature to assume plenary control of attorney fees."

Duff said that it'd be more likely for the type of analysis done by the Florida court to spread to other jurisdictions than the Utah Supreme Court's reasoning, since the outcome of the Utah case turned on the fact that the state had a constitutional provision placing the practice of law under the supervision of the judiciary.

He said he didn't think this means lawmakers would "give up on fee schedules," and his hope is that the schedules "will be closely supervised by the judicial branch."

But he cautioned, "anytime a legislature tries to wrest complete control over a subject, it's going to get a judicial response."

Trouble spots

Around the country, attorneys are working to make sure the judicial branch keeps a close eye.

Even though Florida attorneys won a victory with the high court's ruling that their fees must be reasonable, legal battles over work comp attorney fees continue.

In August, the Florida 1st District Court of Appeal ruled in Miles v. City of Edgewater that limiting a worker's ability to retain counsel under a contract that provides for the payment of a reasonable fee for the attorney's services violates the worker's constitutionally guaranteed right to free speech, freedom of association and right to petition for redress.

The decision "creates an absolute right of worker to contract for representation at an hourly rate" in Florida, and it could be persuasive precedent for challenging a the law in "any state that has fees tied exclusively to a fee schedule and restricts the ability of a worker to go out and hire an attorney on an hourly basis," said attorney Geoff Bichler of Bichler, Kelley, Oliver & Longo in Maitland. He represented Martha Miles in the case before the appellate court, along with Winer, who is mentioned above.

In Texas, where state regulators have proposed to tack an extra 33% onto hourly fees and bring the hourly rate to $200, some attorneys are still demanding greater flexibility to ensure that injured workers are not left without an advocate.

Texas attorney Brad McClellan, of counsel for the Law Offices of Richard Pena in Austin, has two cases pending at the district court in Travis County in which he is arguing that the failure to provide for an attorney fee in medical-only disputes is unconstitutional.

In Dixon v. TDI and FedEx v. Trejo, McClellan is seeking a declaratory judgment that the inability of an attorney to get a fee in medical treatment disputes violate the rights guaranteed by Article 1, Section 13, of the Texas constitution.

This provision requires that courts "be open" for every person to seek a remedy "for an injury done him."

McClellan is arguing this section "includes at least three separate constitutional rights: 1) courts must actually be operating and available; 2) the Legislature cannot impede access to the courts through unreasonable financial barriers; and 3) meaningful remedies must be afforded.

McClellan said the way the Texas attorney fee limit is written, the only way an attorney can get paid is by taking a chunk of a worker's award of indemnity benefits.

If there's no indemnity benefits in dispute, then there's no potential fee for the attorney, he explained. The worker can't offer to pay an hourly fee either, since the statute expressly limits fees to being 25% of indemnity, McClellan said.

The end result, he said, is that workers in medical-only cases "go pro se, and they usually lose."

McClellan said he also dislikes the idea that fees come out of a claimant's recovery when there is an indemnity award.

"When were taking about a limited recovery to begin with," and a worker "already can't pay his bills and things," McClellan contended "it's just not right" to have an attorney taking money away from the worker.

With the absence of a bad faith claim in Texas, he said carriers can wrongfully deny a claim without fear or reprisal, and when a worker challenges this action, the attorney fee serves as "a penalty, basically, for being right."

Claimants Outgunned on Legal Fees

Spending on defense and claimant attorney fees in Florida was about even before passage of a reform bill in 2003 that removed a requirement that claimant's attorneys be "reasonable." Afterward, spending on claimant attorneys plummeted to the point that defense attorneys are now paid nearly two-thirds of the total. Source: Florida Office of Judges of Compensation Claims

Fiscal Year	Claimant Attorney Fees	Percent Change	Defense Attorney Fees[81]	Percent Change
2002-03	$210,660,738		$216,698,474[82]	
2003-04	$215,322,360	2.21%	$226,585,434[83]	4.56%
2004-05	$211,157,073	-1.93%	$259,021,415[84]	14.32%
2005-06	$208,369,260	-1.32%	$290,172,000[85]	12.03%
2006-07	$191,197,443	-8.24%	$277,386,580[86]	-4.41%
2007-08	$188,701,256	-1.31%	$260,160,946[87]	-6.21%
2008-09	$181,660,686	-3.73%	$269,280,414[88]	3.51%
2009-10	$176,996,765	-2.57%	$269,657,104[89]	0.14%
2010-11	$157,081,084	-11.25%	$259,323,175[90]	-3.83%
2011-12	$152,848,003	-2.69%	$242,446,703[91]	-6.51%
2012-13	$151,889,627	-0.63%	$240,894,494[92]	-0.64%
2013-14	$141,858,184	-6.60%	$237,364,154[93]	-1.47%
2014-15	$136,180,202	-4.00%	$234,592,581	-1.17%

McClellan said he thought that the rule should be that anytime a carrier disputes a claim, it should be liable for the claimant's reasonable attorney fees.

"That would bring a little more attorney representation into the Texas comp system, and it wouldn't penalize the worker for prevailing," he opined.

On the other hand, Texas has an Office of Injured Employee Counsel that can handle complex cases with low value that private attorneys don't want to take, points out Trey Gillespie, senior workers' compensation director for the Property Casualty Insurers Association of America.

Several states – including Kansas, Maine, Minnesota, Missouri, Nevada, New Hampshire, New Mexico, New York, Oregon, North Dakota, South Carolina, Tennessee and Washington – also provide injured workers with the assistance of ombudsmen orpublic advocates, free of charge.

Gillespie said the Texas OIEC provides workers with "competent and qualified representation" at no cost. And for that reason, he doesn't think Texas is as vulnerable to the type of constitutional challenges that rattled Florida this year.

Free markets

Some states stay completely out of fee-setting business for workers' comp attorneys. State laws in Connecticut, Hawaii, Maryland, Montana, North Carolina, New York, Oregon, South Carolina, and Virginia require only that attorney fees be reasonable.

Nebraska attorney Roger Moore, of Rehm, Bennett & Moore in Lincoln, said a comp system needs to give workers the ability to hire an attorney under a contingent fee arrangement. A cap on fees – as either a percentage of recovery or a dollar amount, "forces attorneys to take a very restrictive view of cases," he said."

Moore said he believes most claimants' attorneys in Nebraska take a contingent fee "in the one-third range." He said he wasn't aware of anyone who tried to take more.

John C. Fowles, a fellow Nebraskan and claimants' attorney with the Fowles Law Office, said he generally sees agreements in the 25% to 33.3% range.

He said the Workers' Compensation Court is "not overly difficult about fees" that stay within those parameters. He said he never heard of an instance where the court told anyone "your fee is not appropriate."

But the lack of fee controls still doesn't mean that claimants always get representation. Fowles said he has turned away potential clients with low-value indemnity claims because it was unlikely his fee would be enough to offset his investment of time.

Missouri regulators keep their hands off attorney fees as well, as long as a hearing officer deems them reasonable. Martin Klug, a defense attorney with Huck, Howe & Tobin in St. Louis, said "as a matter of custom, fees are typically 25% of a worker's recovery."

He said that custom probably serves as a disincentive" for attorneys to take low-value claims. Workers tend to "lawyer up on big cases and go pro se on smaller ones," he said.

California also has a requirement that attorney fees be "reasonable," in light of the responsibility assumed by the attorney, the care exercised in litigating the case, the time spent by the attorney, and the results obtained.

California defense attorney Tim Kinsey of Grancell, Stander, Reubens, Thomas & Kinsey said that from what he's seen, most workers' compensation judges treat 15% as meeting the state's "reasonable" standard, and his opponents do not complain about this.

He said he believed the percentage tends to stay low so it "won't preclude a worker from getting an attorney" and so that the worker's recovery "won't be substantially reduced" by the attorney's fee.

Alan Gurvey of Rowen, Gurvey & Win in Sherman Oaks, California, said fees present a conundrum for the attorneys, like him, who represent injured workers.

"The system says that we are entitled to a percentage of their recovery and of their benefits, but many of my clients need the money and it is hard to justify taking more money from them," he said.

Gurvey said it's possible to get a fee above 15% in cases involving claims involving retaliation, employer misconduct, or penalties, but the amount usually has to be included in a retainer agreement signed by the worker when the attorney gets hired.

Most of the time, the 15% mark is the "de facto" ceiling, he said, and attorneys very rarely ask for more since the extra money "would come from the applicant's pocket."

Marc Perper, Claimants' Attorney

Michael Duff, Attorney at Law

State Fund's Chief Rides Tide of Litigation

Vernon Steiner led California's largest carrier through the tumult of litigation and reform

By Emily Brill

In 1990, Vernon Steiner left the University of California, Los Angeles, with a bachelor's degree in philosophy, unsure what to do next.

He had ditched an early plan to study computer science, telling himself the logic, ethics and metaphysics classes he loved would help him crack the legal field. When it came time to apply to law school, though, he decided he didn't want to go.

"The more I understood about law, the less I was attracted to going that route. Beyond that, I didn't have a plan," Steiner said. "I worked my way through college, working in the dormitory food service operations — I was a student supervisor for several years — and when I graduated from college, I just knew I wanted to do something other than food service."

Steiner got away from the cafeteria. He had less success keeping his career away from the courtroom. In February 2014, after two decades in the insurance field, Steiner became chief executive officer of a California carrier with a long history of litigation: State Compensation Insurance Fund. Under Steiner's watch, significant legal battles have played out both outside and within the state-chartered carrier.

'A beastly case'

The month Steiner started at State Fund, a Southern California hospital owner pleaded guilty to bribery and conspiracy in a $500 million workers' compensation fraud scheme.

Michael D. Drobot admitted to paying kickbacks to doctors who sent patients to Pacific Hospital of Long Beach for spinal fusion surgeries. He also admitted to bribing state Sen. Ron Calderon, hoping to protect a legislative loophole that required the state to pay for spinal fusion hardware.

Drobot faces up to 10 years in prison at a sentencing hearing set for February 2017. In his plea agreement, he agreed to cooperate with authorities and testify against Calderon. Calderon has since pleaded guilty and prosecutors are recommending a five-year prison term.

Eight months before Drobot confessed, State Fund filed a racketeering complaint against the hospital owner, his son and the companies they ran. That case has since become a behemoth, involving almost 40 defendants, a contentious motions practice, multiple settlements and more than 1,000 docket entries — not to mention issues with State Fund's counsel.

State Fund retained Newport Beach law firm Irell & Manella when it sued Drobot in 2013, working with two-time California Lawyer of the Year John Hueston. When Hueston left the firm to form Hueston Hennigan in 2015, State Fund followed.

This March, U.S. District Court Judge Andrew Guilford disqualified Hueston Hennigan after years of work on what he admitted was a "beastly case." A lawyer at the firm had represented a marketer associated with Pacific Hospital in a criminal case. Guilford called the conflict of interest "severe."

For three years, State Fund's attorneys had pushed for a trial by jury, seeking attorneys' fees, restitution and compensatory damages in their case against Drobot. The carrier did not specify an exact amount in its complaint, but said Drobot owed it "millions."

Last month, State Fund notified the court that it had reached a settlement with Drobot.

"The fact [that] that law firm got disqualified is a huge motivating factor to pursue settlement," said Nicholas Roxborough, a partner with Roxborough, Pomerance, Nye and Adreani who has gone up against State Fund in court. "It changed the whole dynamic of the case, because now they lost all their firepower."

Losing a high-powered corporate attorney such as Hueston, whose record with Fortune 500 companies and governments includes a $5.15 billion settlement negotiation, dealt an enormous tactical blow to State Fund — not to mention a financial one, Roxborough said.

"Let's be honest — you pay a law firm millions and millions in legal fees on a case, then have to go hire another law firm. How many millions are they going to have to pay to get them up to speed?" Roxborough said. "So they're settling."

All the while, State Fund's in-house attorneys were asking why the carrier had not used them to pursue litigation instead of outside counsel.

In 2015, State Fund had 332 attorneys on staff. It paid them a combined $33.5 million that year, according to state payroll records published by the Sacramento Bee.

Yet the carrier had a history of looking to outside counsel to take on big cases. The union that represents State Fund's lawyers has been fighting the practice since the early 2000s, union attorney Patrick Whalen said.

This spring, the State Personnel Board disapproved of several State Fund contracts with outside firms, including Hueston Hennigan. The carrier failed to demonstrate that its in-house lawyers could not handle the cases, the board said, and it needed to follow the rules of civil service attorney use like any other state agency.

Whalen said he doesn't blame Steiner for the problem.

"Current management seems to be very dedicated to reducing their outsourcing," he said. "Prior management changed with some frequency — there were several housecleanings, if you will — and litigation tends to go on. It could look like they're doing a lot of outsourcing, but that could be because it was under a prior administration and the litigation is still ongoing."

Since the State Personnel Board order, State Fund has trained and hired more high-level in-house attorneys, Whalen said. He believes the carrier now has six Level V attorneys.

"We are committed to compliance now and in the future," Steiner said of the State Personnel Board order in an emailed comment.

Defender of reforms

While the Drobot litigation unfolded in its fraught, stop-and-start manner, State Fund had more luck in the courts defending recent workers' compensation reforms.

One year before Steiner joined State Fund, California passed a bill that changed the way the workers' compensation system handles liens and medical disputes. That law, designed in part to address high premiums, also slashed State Fund's market share as private carriers started writing more policies.

"When I joined the organization, it was clear to me that it had gone through a tremendous amount of change. We had grown to be 55% of the market and subsequently shrunk back down to around 10% of the market," Steiner said. "That kind of rapid change — which is completely consistent with the reason we exist; we served our purpose — had an exhausting impact on the people that make up State Fund."

To combat medical cost inflation, SB 863 introduced a lien-filing fee and the independent medical review process. Both components of the law have been challenged, and State Fund has helped defend them.

In a case called Angelotti Chiropractic v. Baker, a group of medical and service providers who collectively held 33,000 liens challenged SB 863's $100 lien-activation fee. Filing a complaint with the federal court in Los Angeles in July 2013, the providers claimed the activation fee was an improper government taking of private property without just compensation that violated due process by forcing them to pay a fee to access the workers' compensation system.

State Fund filed an amicus curiae brief in support of Department of Industrial Relations Director Christine Baker's argument that the fee was fair. In June 2015, the U.S. 9th Circuit Court of Appeals found in the state's favor, dismissing an injunction that had prevented the Division of Workers' Compensation from collecting the fee.

Steiner has issues with California's lien system, but he says the changes wrought by SB 863 have done some good in that area.

"It's initially reduced the number of liens in the system, potentially freeing up more WCAB time to focus on the injured worker," he said. "However, I think it's a little bit early to determine if that's going to be an ultimate outcome, because the trend in lien filing seems to be changing. So we're going to have to continue to watch that to see if the lien impact has been a lasting impact."

Steiner spent the majority of his career in the California marketplace, working for Carter Hawley Hale, Crawford and Co., Health Net and Zenith. Through stints at CNA and American International Group, though, he engaged with other states' systems via regional management positions. These positions put him in direct contact with other methods of handling liens.

"Most of the other systems have features that drive the dispute resolution over whether or not a medical treatment is owed by the carrier to the front — not push it out years, as California has allowed through the lien system," Steiner said. "Pushing it out years allows for opportunity for liens to become a profit center, even when people don't expect to be paid for the amount of their lien or even half the amount of their lien."

State Fund has defended SB 863 not because management supports the law, but because its position as a state-chartered insurance carrier obliges it to, Steiner clarified. He did not express a position on the bill, choosing to comment on its provisions. He praised independent bill review as a process that addresses liens that "don't need to exist." He thinks it's a step in the right direction.

"I believe if there was the will, we could remove more liens from the system," Steiner said. "Not by jeopardizing an injured worker's ability to get the treatment that they need, but by simply understanding that those are important decisions that need to be made now, and if there's a dispute, then the system has to support resolving that dispute now."

Along with independent bill review, SB 863 ushered in the process of independent medical review. California borrowed the practice from systems such as Texas, which for years has resolved disputed

medical decisions through review by doctors instead of the courts.

IMR use plays out very differently in each state. California has an exclusive contract with Maximus Federal Services, which in turn contracts with physicians to perform independent medical review.

Texas assigns cases to 37 entities on a rotating basis. IMR costs between $123 and $515 in California; it costs between $460 and $650 in Texas.

The most stark difference comes in the number of IMR requests the states field. Texas received 1,209 requests for independent medical review in 2015. California received 160,000. Stakeholders started to worry about the costs of cost containment.

"SB 863 has had the somewhat unanticipated impact of increasing the expense of claim handling due to the really high level of IMR usage that continues and doesn't show any current sign of dying down," Steiner said.

While the state did not predict the high volume of IMR decisions, it did identify a more fundamental concern about the process early on. A law firm warned SB 863's drafters in 2012 that IMR might create due process concerns because it didn't allow injured workers to obtain a "meaningful judicial review" of medical decisions.

In 2014, a disabled worker who had been denied coverage for home health services questioned IMR's constitutionality in a lawsuit.

Frances Stevens was a "very sympathetic injured worker," said Ellen Langille, general counsel of the California Workers' Compensation Institute. A magazine publisher and boxer training for the Golden Gloves, Stevens sustained serious nerve damage to her foot after tripping at work. Later diagnosed with complex regional pain syndrome, Stevens suffers pain so acute that contact with socks and bedsheets hurts even 17 years later, according to a report by National Public Radio. State Fund authorized a manual wheelchair for her, but difficulties moving the chair caused her to develop bilateral shoulder problems. She later became severely depressed.

The case dragged on for three years. Eventually, the California 1st District Court of Appeal found in favor of the state. Both the Department of Industrial Relations and State Fund were respondents. Baker said State Fund's contributions were key to winning the case. The carrier's lawyer — William Anderson, an in-house attorney since 2001 — "ably demonstrated" the need for IMR in court by providing an overview of the issues facing California's workers' compensation system, Baker said in an emailed comment.

State Fund has won a handful of other cases involving SB 863 since Steiner took office — among them, 2015's Chorn v. Brown, which upheld a $150 lien-filing fee, and this year's California Highway Patrol v. Margaris, which held that IMR deadlines are not mandatory.

"State Fund tends to take on everything," Roxborough said. Though the practice sometimes works in the carrier's favor, it's a "take no prisoners" approach that sometimes results in bad case law, he said.

Sometimes, State Fund finds itself defending not the state's system, but its own practices. Roxborough's firm filed a racketeering suit against the carrier this year, alleging State Fund and its utilization vendor collaborated to deny requests for H-Wave treatments regardless of medical necessity.

Whether Steiner likes it or not, as long as he's with State Fund, his career will remain latched to the courts. He recognizes the necessity of the role when it comes to interpreting reforms. In particular, he hopes to avoid an outcome that will cause State Fund's market share to balloon the way it did before 2013.

"It's a terrible thing for an organization to have to go through, to go through that kind of tremendous uncontrolled growth," Steiner said. "If we can help bring clarity to the system by speeding these kinds of decisions along through the courts, then we won't have as much opportunity for a built-up backlash that comes from an unanticipated court decision."

State Compensation Fund CEO Vernon Steiner (right center) with (left to right) CFO/CIO Peter Guastamachio and State Fund board members Daniel Curtin and Jack Neureuter. Photo courtesy of State Fund.

STATE COMPENSATION INSURANCE FUND

State Fund Since Steiner

An overview of some notable events involving State Fund since Vernon Steiner became CEO:

MAY 2014

Steiner becomes president and CEO of State Fund, leaving a position as the senior vice president of claims at Zenith.

OCTOBER 2014

Dubon II decision issued. The first Senate Bill 863-related court case, Dubon held that a utilization review (UR) decision is only invalid if it is untimely. Dubon II

APRIL 2015

April 2015: State Fund joins the California Department of Insurance in a news conference to announce three arrests in a $14.6 million workers' compensation fraud case involving manufacturing CEOs and their accountant.

MAY 2015

Arredondo decision issued. The Workers' Compensation Appeals Board determined that administrative law judges cannot make decisions on medical necessity if independent medical review (IMR) takes too long.

JUNE 2015

Chorn and Angelotti decisions issued. The cases uphold lien-activation fees imposed by SB 863.

OCTOBER 2015

Stevens decision issued. A California appellate court upholds the constitutionality of IMR.

JANUARY 2016

The state Division of Workers' Compensation approves a medical provider network launched by State Fund in conjunction with Harbor Health.

FEBRUARY 2016

U.S. Supreme Court denies review of Stevens.

APRIL 2016

The State Personnel Board questions State Fund's use of outside counsel one year after the board's executive officer disapproved a number of contracts State Fund had with outside law firms, on the grounds that the state-chartered carrier is required to "abide by rules requiring the use of civil service attorneys like any other state agency," according to a WorkCompCentral article published that month.

MAY 2016

U.S. Supreme Court denies review of Angelotti.

JUNE 2016

Margaris decision issued, ruling that IMR deadlines are not mandatory. State Fund reduces rates by an overall 9.5% and revises pricing structure.

STATE FUND'S 2015 BY THE NUMBERS

- Net income: $271 million (14% increase from 2014).
- Policies written: 138,000.
- Premiums earned: $1.6 billion.
- Policyholders' surplus growth since 2014: $164 million.
- Net investment income: $731 million.

Source: State Compensation Insurance Fund 2015 annual report.

After Four-Decade Fight, Miami Lawyer Turns Fla. Work Comp on its Head

By Emily Brill
WorkCompCentral reporter

A few months before Florida adopted arguably its last pro-labor workers' compensation reform package, a Miami law firm asked its new guy – a young criminal defense attorney from the Bronx – if he'd mind helping out the partner who handled workers' compensation.

Fresh off a three-year stint as an assistant district attorney in Brooklyn, the New Yorker had joined the firm as a criminal defense attorney. The practice, which primarily represented labor unions, needed someone to handle felony charges against union members.

That week, though, it needed someone to help out in a pinch. The workers' compensation attorney's coworker had quit the week before, the senior partners explained. They knew it was the New Yorker's first day, but could he just help out until the firm filled the spot? They'd really appreciate it.

It was 1974. Mark Zientz has been a workers' compensation attorney ever since. In recent years, the plaintiffs' attorney has made himself visible through a series of constitutional challenges to the state's workers' compensation system.

Zientz has been filing constitutional challenges since 1994, the year Florida started requiring injured workers who had reached maximum medical improvement to pay a $10 co-pay for doctors' visits. Two of his challenges succeeded in the Florida Supreme Court this year.

The high court's ruling in Castellanos v. Next Door Co. lifted a cap on attorneys' fees that the Tampa Bay Times editorial board called "disturbingly effective at discouraging people from pursuing claims in the first place."

Westphal v. City of St. Petersburg raised the cap on temporary total disability benefits from 104 weeks to 260 weeks. One justice's concurring opinion in Westphal called for large-scale reform.

"Workers' compensation benefits have been steadily chipped away and reduced by the Legislature to such an extent that intelligent, able jurists have now concluded enough is enough and declared the entire statutory scheme unconstitutional," wrote Justice Fred R. Lewis.

The decisions raised the hackles of employer advocates, who predicted skyrocketing premium costs that will drive industry out of the state.

Insurance Commissioner David Altmaier in September gave the nod to a 14.5% rate hike effective Jan. 1, with 10% of that attributable to Zientz's victory in Castellanos and about 2% for the victory in Westphal.

"The employers in the state are not happy with the claimant bar, and that is an understatement," said Florida defense attorney Jim McConnaughhay.

Zientz predicted the criticism. Since he started as a workers' compensation attorney, he said he's watched the "race to the bottom" play out in real time as Florida legislators chipped away at the promises made by pro-worker legislation passed in 1974.

That legislation was called the "Papy Package," after the late Florida Rep. Charles Papy. It passed the Florida Legislature two years after the release of a report by the National Commission on State Workmen's Compensation Laws that concluded that benefits around the country were "inadequate and inequitable."

The national spotlight was on workers' compensation then, prompting Florida to adopt its "last set of workers' compensation amendments that were intended to improve the life of injured workers," Zientz said. "After that, everything was intended otherwise."

After the 1970s, workers' compensation drifted to the background of the national stage. Like many states, Florida took advantage of that obscurity to slash pro-worker reform laws, Zientz said.

Zientz filed a petition to the U.S. Supreme Court in July to review the adequacy of Florida's system.

The odds of the court granting review are slim — the court accepts about 75 of the 10,000 petitions it receives yearly.

"I'll be very surprised if the U.S. Supreme Court takes an interest in little ol' Florida's workers' compensation system," said David Langham, deputy chief judge of compensation claims for the Florida Office of Judges of Compensation Claims and Division of Administrative Hearings.

Zientz, however, said the strong response of the defendant in Stahl v. Hialeah Hospital may raise the case's profile.

"The other side, which is highly inhospitable, has hired the most expensive and most accomplished constitutional law firm in the country, the firm of Gibson & Dunn, and the lawyer heading up this part is Theodore Olson, who is the former solicitor general of the United States under George W. Bush's administration," Zientz said.

"So they've got the big guns. And I'm kind of hoping that that causes the Supreme Court to say, 'If it's so important that they've hired Gibson & Dunn to defend it, let's take a look at it,'" Zientz said.

Jason Bent, an associate professor of employment law at Steston University in Gulfport, Florida, said the odds are "quite slim" that the U.S. Supreme Court will take up Zientz's case. But he said it's not outside the realm of possibility, either.

Bent said that for the first time since 1972, several states are questioning whether workers' compensation is an adequate replacement for the tort system.

"I think there is a growing possibility that these challenges go somewhere," Bent said. "I think for a long time — from the early 1900s to, really, just recently — we had a stable state system, where everyone but Texas was mandatory, and then over the past 20 to 30 years, a number of reforms in various states have really cut back on benefits in certain ways."

Zientz wants the Supreme Court to consider whether Florida's statutes uphold the foundational premise of workers' compensation: the grand bargain.

The U.S. Supreme Court last considered workers' compensation in a 1917 case called New York Central Railroad v. White. The case resulted in the court "(putting) its stamp of approval on the substitution of workers' compensation for giving up the right to sue in tort" — a compromise between employers and employees, Zientz said.

But, "in that same case, the U.S. Supreme Court said, 'We're not commenting on whether or not the benefits are too onerous on the employers on the one hand or too insignificant for the employees on the other. That issue wasn't raised in this case, and we'll leave that for another day,'" Zientz said. "Well, in 100 years, 'the other day' hasn't come up, and that's the issue that I'm raising in Stahl v. Hialeah Hospital — that the benefits have become insignificant."

Mark Zientz (left) stands with client Daniel Stahl on the steps of the U.S. Supreme Court building. Zientz is hoping to persuade the Supreme Court to accept review of Stahl's constitutional challenge to the adequacy of Florida workers' comp benefits. Photo courtesy of Zientz.

Bent said it's a valid question. But he doesn't know if the Supreme Court will answer it now.

"I think for the first time in modern history, there may be some pressure on the Supreme Court to clarify what it meant when it said it complied with due process to have a grand bargain like this, but I think it's much more likely that the Supreme Court is going to let that go for a little while," Bent said.

If workers' compensation challenges make their way to the Supreme Court from several states, or state courts begin declaring statutes unconstitutional en masse, perhaps the high court will feel some pressure, Bent said.

But Bent sees Congress as the more probable venue for federal comp action, and that probably won't happen unless both chambers are controlled by Democrats.

"The Department of Labor can come out with a report condemning the states, but the real pressure would come if (Congress) switches," Bent said. "I don't see a sweeping national commission in the style of the 1972 one. It could happen, but I don't think it would unless we saw a switch so that both chambers were held by Democrats."

Both national and state legislatures are slow to take action, though, Zientz said. He sees the courts as the only battleground where workers have a chance, especially in Florida.

"We haven't got a shot at winning anything in the Legislature," Zientz said. "Since 1974, the Legislature in Florida has been pretty much controlled by business interests — Associated Industries, the Chamber of

Commerce, building associations — who have been able to pretty much write the law they want."

Though McConnaughhay, the defense attorney, said characterizing the businesses as in control of the Legislature smacks of "some paranoia," he acknowledged that "certain types of benefits have been cut."

"But certainly not to the point that the whole workers' compensation system should be done away with," he added.

Bent said that Florida followed the lead of other states in the years following the national commission's report: reforming its statutes, then cutting back benefits.

Now the state is grappling with a reversal of some of those cutbacks. The Castellanos decision returns attorneys' fees to the model in use before the 2003 workers' compensation reform package required strict adherence to a statutory formula when awarding claimant attorney fees and removed aprovision of law that required those fees to be "reasonable." The Westphal decision reverted the TTD cap to the time period initially set in 1990, 260 weeks.

The decisions suggested something wasn't working in Florida's workers' compensation system — and, if a suggestion wasn't enough, Justice Lewis spelled it out loud and clear in his concurring opinion on Westphal, saying at least one statute
governing workers' compensation is "hopelessly broken" and "cannot be constitutionally salvaged."

"Over time, the Florida judiciary has repeatedly rewritten provisions of the workers' compensation law to avoid a declaration of unconstitutionality," Lewis wrote. "I have a full appreciation for the judicial attempts to save the workers' compensation statute from total disaster. Florida needs a valid workers' compensation program, but the charade is over. Enough is enough, and Florida workers deserve better."

The Tampa Bay Times signed on in an editorial, saying legislators should heed Lewis' call for reform and calling the system "fundamentally unfair to injured workers."

Bent said he thinks the Florida state Legislature will have to "go back to the drawing board and figure out what they're going to do."

The way he figures, legislators have three options.

"One, they can narrowly fix the two problems the court found. They could come out with new attorney fee restrictions that would keep rates low but not violate the Florida Supreme Court ruling, and they could also fix the temporary total disability benefit issue that was in the other case," Bent said. "Another option would be to do some kind of sweeping reform that all the justices on the Florida Supreme Court would find legitimate."

The third option is to consider initiating the Texas or Oklahoma model: allowing employers to opt out of the workers' compensation system.

That approach didn't work so well for Oklahoma, however. The Oklahoma Supreme Court overturned the opt-out provision of reform legislation passed in 2013, finding it violated the equal protection provision of the state Constitution.

Associated Industries of Florida assembled a task force after the Castellanos and Westphal decisions to brainstorm how "to help restore a stable, self-executing and affordable workers' compensation system in Florida," said Chief Executive Officer Tom Feeney.

So far, he's heard of "at least a dozen proposals" batted about among working group members, which include representatives of small employers, large employers, domestic carriers, providers, and police and fire, among other industries. As everything is on the table at this point, opt-out isn't out of the question.

"We're going to review each proposal on their merits, if they can be useful to the system," Feeney said, emphasizing that the group is not presupposing any solutions. "Everything from scrapping the workers' compensation system to...(getting) rid of all the lawyers in the system and starting a new government agency to represent injured workers."

"A third (option) is to go back and send another fee schedule to the Supreme Court. It took them 13 years to decide Castellanos," Feeney said. "If they take another 13 years — and in the meantime we can have a system that has worked well for employees and help Florida grow its economy — well, if they're going to take another 13 years, then maybe that's an option. Just send them a slightly altered fee schedule."

For his part, Zientz doesn't realistically expect things to change in Florida's comp system.

"I've been asked repeatedly by other lawyers I run into, 'What do you think the Legislature's going to do? What's going to happen as a result of those rate increases, the Castellanos case and the Westphal case?'" he said. "And I tell these people, 'They'll do what they've always done in the past. They'll pass a law which they know is unconstitutional because they also know it'll take six years to fix it.'"

So why does he keep fighting for change?

"In the code of Hammurabi, an ancient law, the preamble said that the strong shall not take advantage of the weak. And in American politics, the majority in the legislative body should not take advantage of the minority," Zientz said. "We're talking about a situation where injured workers are being taken advantage of by the rich and by the powerful, and they have no place to go." "I'm not fighting the battle in the Legislature," he said. "I've advised my peers that the battle is in the courts."

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