

**WORKERS COMPENSATION  
SECTION NEWSLETTER**

April 2011 — Volume 1 • Issue 4

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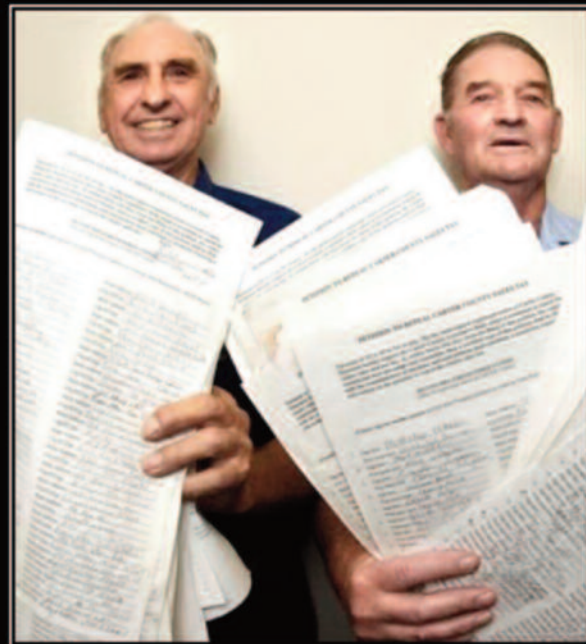
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**GOVERNMENT PAPER WORK**

Paper work is the embalming fluid of bureaucracy,  
maintaining an appearance of life where none exists. -  
Robert J. Meltzer

## Section President's Letter



It was great to see everyone at the 7th Annual Advance Worker's Compensation Seminar last August. We had a great turn out and a lot of learning was had by all. The speakers were first rate and imparted knowledge that was both relevant and fun to hear. However, at the top of my list is the opportunity to mix with my fellow attorneys outside the courtroom. Based on observation, I am not alone in this thought. The comments I received reaffirmed my belief that the Workers' Compensation Bar is the greatest group of attorneys! Speakers, vendors and even attorneys who practice in other areas of the law were amazed at the level of respect and fellowship we demonstrated for each other.

Our section's charity golf tournament raised approximately \$5,500.00. The sixty some golfers who braved the brutal Texas heat, had a simmering good time. I enjoyed being able to drive the refreshment cart and visit with our golfers on the course. It was amazing the big welcomes I got when golfers would see me coming around a corner heading their way. Of course, that could have been due to my driving!

As cooler weather headed our way so did the start of another legislative year. January 11, 2011, was the official start of the 2011 Texas Legislative Session. The big item for workers' compensation is the reauthorization of the Division of Workers' Compensation and the Office of Injured Employee Counsel. If the legislature does not reauthorize the agencies under the "sunset" process then any inaction would abolish them. The Sunset Advisory Committee recommended the agencies be continued with some modifications in the Divisions enforcement process. The legislature faces some big challenges this year such as budget shortfalls, education, immigration laws and redistricting. So only time will tell as to how much additional attention workers' compensation will receive. As we move through the legislative session, I urge our membership to use the section list serve to share information and discussion about proposed legislation. Forgot about our section list-serve? Go to: <http://mailman.io.com/mailman/listinfo/workerscompensationsection>

Yours in Workers' Compensation,  
*Barbara Lombrano-Williamson*

## Editor's Note:

In our last Newsletter I included an article “Do you Blog\*?” I promised an up-date in this newsletter and asked for folks to tell us where to find your blog. The response was truly underwhelming although I do know several of you blog, twitter, and other social networking opportunities. I did run across the following:

<http://www.lexisnexis.com/Community/workerscompensationlaw/blogs/workerscompensationlawblog/default.aspx>  
(national blog with an occasional posting by a Texas attorney)

But then a few weeks ago this story changed. News articles popped up from a variety of sources including Workers' Comp Central and the American Bar Association.

### CEASE AND DESIST RESPONSE WAS FEDERAL LAWSUIT

John Gibson, a claimant's workers' comp lawyer in Lubbock, Texas workers' comp lawyer filed suit <http://www.scribd.com/doc/49357336/Petition-Against-DWC> in federal court Feb. 22, 2011 alleging all manner of First Amendment and due process violations flowing from a Feb. 7 cease-and-desist letter from the Texas Department of Insurance Division of Workers' Compensation.

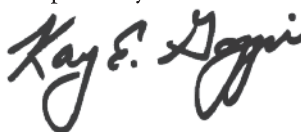
The letter said to stop using certain terms on a legal blog, and otherwise. Those terms are: “Texas Workers' Compensation” or the use of the term “Texas” along with either “Workers' Compensation” or “Workers' Comp.”

The ABA wrote: “The plaintiff, Texas Workers' Compensation lawyer John Gibson, writes the Texas Workers Compensation Law Blog, so the ban on certain words is more than problematic for his mission to “promote critical and spirited discourse” about developments and issues in that area of Texas law.”

According to Texas Labor Code § 419.002, its use is forbidden in connection with “any impersonation, advertisement, solicitation, business name, business activity, document, product or service.” That might be so broad as to include even Gibson's suit, filed by Lubbock lawyer Robert S. Hogan. Hogan loaded the complaint up with the forbidden words with example after example of the statute's logical conclusions:

- Texas physicians and medical clinics can't advertise that they accept workers' compensation patients.
- Lawyers cannot use the phrase “Board Certified in Workers' Compensation Law by the Texas Board of Legal Specialization” (which Gibson is, by the way).
- Legal professionals would be hard-pressed to conduct seminars on the latest decisions by the “Texas Workers' Compensation Commission” or criticize a ruling by a “Texas” court on a “Workers' Compensation” case.
- Candidates for public office cannot discuss in campaign literature or speeches the needs for reforming the “Texas Workers' Compensation” system.

Respectfully,



Workers' Compensation Section's  
Newsletter Editor

## Congress Urged to Adopt Federal Standards for Injury Benefits

The former chair of the 1972 National Commission on Workers' Compensation told Congress that the present system is deteriorating and a new course of action is warranted. Professor Emeritus John F. Burton, Jr., on Nov. 18, 2010 testified before The Subcommittee on Workforce Protections of the Congressional Committee on Education and Labor.

Professor Burton told Congress that during the last 20 years he has observed the "...deterioration in adequacy and equity of state workers' compensation programs..." He reported that "the decline in workers' compensation cash benefits in the states during the 1990's is explained by ....changes in workers' compensation provisions and practice than is explained by the drop in workplace injuries and disease during the decade."

Burton proposed that Congress consider new legislation to prohibit costs shifting from workers' compensation to Social Security Disability Insurance (SSDI). He advised the Subcommittee that cost shifting was continuing because 15 states were permitted to continue "reverse offset" provisions, the Social Security Administration (SSA) was paying benefits to

workers who were not totally disabled under workers compensation acts, and a larger number injured workers were not qualifying for workers' compensation benefits.

As Professor points out, the aging workforce further complicates the burden placed upon the nation's Medicare system. With the erosion of the doctrine that workers' compensation takes the worker as it finds him or her, medical treatment for pre-existing conditions will be a growing cost for Medicare and a cost-shift from the workers' compensation system. The New York Times reported that, "Nearly one-fourth of Medicare beneficiaries have five or more chronic conditions. They account for two-thirds of the program's spending."

A "reaffirmation" of "Federal standards" as enunciated in the 1972 National Commission report were recommended by Burton. Additionally, he called upon Congress to enact legislation requiring employers and/or their insurance carriers reimburse Social Security for permanent disability cash benefits paid by Social Security for disability flowing from a work related event or disability.

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## SAVE THE DATE FOR SECTION GOLF TOURNAMENT AUG. 11 2011

### WORKERS' COMPENSATION SECTION'S SECOND ANNUAL GOLF TOURNEY A SUCCESS

Sixty golfers, raising \$5,500 for charity, kicked off the 2010 State Bar's Advanced Workers' Compensation Course in August. Organized by section members Kyle Morris (claimant attorney) and John Molinar (carrier attorney) and staffed by volunteers. Each of the following charities will receive a pro rata share of the proceeds:

American Heart Association  
In Memory of W.J. "Bill" Morris

Town Lake Animal Shelter  
In Memory of Madeline Anderson

Aplastic Anemia & MDS Intl. Foundation  
Benefiting Matthew Lee Sprain

Leukemia and Lymphoma Society  
In Memory of Taylor Spencer

Dallas Intergroup Association  
In Memory of Robert Rogers

Iron Disorders Institute  
In Memory of Johnny Goodwin

East 19th Street Missionary Baptist Church  
In Memory of Joe Phillips

Continued from page 4.

The tournament winners, closest to the pin winners, long drive winners were as follows:

Team	Name	Hdcp. Handicap	Total Team of Players	Number Team Handicap	Adjusted Gross Score	Team Adjusted Score	Team	Place
5A	Don Walker	9	94	4	11.750	60	48.250	1st
	Matt Lewis	25						
	Janie Stone	30						
	Scot Schwartzberg	30						
1B	Tommy Lueders	12	97	4	12.125	62	49.875	2nd
	Darryl Silvera	20						
	John Gibson	30						
	Joe Anderson	35						
1A	Kyle Morris	15	105	4	13.125	64	50.875	3rd
	Bubba Haun	20						
	Daniel Morris	35						
	John Molinar	35						

**Closest To the Pin — Winners**

Hole 4 — 204 yds	Tommy Lueders
Hole 8 — 151 yds	Bubba Haun
Hole 13 — 158 yds	Steve Stamps
Hole 15 — 127yds	Daniel Barnes

**Long Drive — Winners**

Hole 6	Matt Lewis
Hole 12	Tommy Lueders



(left to right) David Brenner, Manuel Gonzales, and Larry Trimble celebrate escaping the heat at the post-tournament dinner the evening before the 2010 State Bar Workers' Compensation Course.



(left to right) Mark Mayfield, Quinten Haag, Frank Weedon and James Grantham pose at the 2010 Workers' Compensation Section's annual golf tournament.

## 2010 Educational Conference Presentations Available Online

The presentations from the 2010 Texas Workers Compensation Educational Conferences are now available on the TDI website at <http://www.tdi.state.tx.us/wc/events/conference10.html>. Please note that this information is current as of August 2010, and changes to laws and agency administrative rules made after this time may affect the accuracy of these documents.



*Matt Lewis*

## Evaluating the Diagnosis & Impairment of a Traumatic Brain Injury

*By Matt Lewis & Jennifer Bard*

Head injuries are a hot topic right now – think Jason Witten and the NFL in general. But head injuries are not limited to the gridiron. According to the National Institute of Health, approximately 1.5 million Americans sustain traumatic brain injuries each year, frequently caused by motor vehicle accidents or falls – both of which are work-place risks. Knowing how a traumatic brain injury is diagnosed and how an impairment rating may be appropriately determined for such an injury is important for all parties in the Texas workers' compensation system.

In the matter of head injuries, three terms commonly appear in the medical records – concussion, post concussive syndrome, and traumatic brain injury. The three terms are not mutually exclusive; often, a traumatic brain injury patient is deemed to have a concussion and suffer post concussive syndrome. Medical providers sometimes use the term “concussion” interchangeably with traumatic brain injury, although concussion is technically a mild form of a traumatic brain injury. Post concussive syndrome, while seen as a diagnosis by itself, is actually a sequelae of an estimated 40-50% of mild traumatic brain injuries. Post concussive syndrome consists of physical symptoms, such as headaches, and neuropsychological symptoms, such as concentration, memory, and judgment deficits, according to the Mayo Clinic. As defined by the Center for Disease Control, a traumatic brain injury is an injury to the head arising from blunt trauma or acceleration or deceleration forces with confusion, memory loss, loss of consciousness, seizures, headaches, irritability, dizziness, fatigue, or poor concentration. As the CDC definition implies, a traumatic brain

injury is a distinct injury with a functional component, meaning an injury that causes functional deficits.

Two common misconceptions in diagnosing traumatic brain injuries are, one, that negative brain imaging, such as CT scans of the head or brain MRIs, means that the injured worker did not sustain a traumatic brain injury, and two, that a person must lose consciousness at the time of the injury in order to suffer a traumatic brain injury. While loss of consciousness or positive brain imaging often accompanies traumatic brain injuries, neither is required to diagnose a traumatic brain injury. For example, the common “sudden deceleration” injuries, such as those caused by motor vehicle accidents, are difficult to detect on brain imaging because the brain “shearing,” or the stretching and tearing of the nerves involved in that mechanism of injury, is too subtle for imaging to pick up. Such an injury to the brain occurs when the brain bounces violently inside the skull, causing damage to individual nerves.

So how do doctors appropriately diagnose a traumatic brain injury? According to the Center for Disease Control, a mild traumatic brain injury diagnosis should be considered when one or more of the following occur after a head injury: confusion or disorientation, amnesia near the time of the injury, loss of consciousness for less than thirty minutes, neurological or neuropsychological problems, and/or a score of 13 or higher on the Glasgow Coma Scale. The neuropsychological symptoms include emotional, cognitive, and behavioral changes. Visual field changes and sensory loss in the upper extremities are also cited as accompanying a traumatic brain injury.

Once an injured worker exhibits some of the above signs of a mild TBI, imaging can be useful in confirming a TBI diagnosis, especially when the injury is a blunt trauma with

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obvious contusions or hematomas easily seen on such imaging. However, doctors frequently rely on a neuropsychological examination to diagnose a traumatic brain injury, even when brain imaging is negative. A neuropsychological exam is a comprehensive assessment of cognitive and behavioral functions administered using a set of standardized tests. The battery of tests can vary by provider. Because a traumatic brain injury is a functional injury, the Medical Disability Advisor notes that observing the individual's actual functional limitations, both at injury and throughout the recovery process, offers a more reliable assessment of the actual extent of brain injury. For this reason, a neuropsychological exam is a useful diagnostic tool to formally assess brain function and impairment. The Official Disability Guidelines recommends obtaining a neuropsychological assessment, in addition to imaging, to make an initial brain injury diagnosis.

While most mild traumatic brain injury patients recover fully (again, think Jason Witten, back on the field a week after a concussion diagnosis), a significant percentage experience permanent impairments related to the traumatic brain injury. Experience has shown that many injured workers in Texas who suffer from traumatic brain injuries are certified to have little or no permanent impairment resulting from their injury. It may be that medical providers are not aware of the methods available to rate brain injuries under the fourth edition of the AMA Guides.

Traumatic brain injury impairment ratings should be considered under Chapter 4 of the AMA Guides. As the introduction to Chapter 4 notes, "impairment criteria are defined in terms of the restrictions or limitations that the impairments impose on the patient's ability to carry out activities of daily living, rather than in terms of specific diagnoses." Therefore, an impairment rating should not be affected by a diagnosis of "post concussive syndrome" vs. "concussion" if the resulting effects of the injuries are the same.

Chapter 4 contains five sections – the central nervous system, the brain stem, the spinal cord, the muscular and peripheral nervous systems, and pain. An evaluator must rate an injured worker under each of these sections, if functional deficits are found in each, and combine the ratings for each section for a total brain injury impairment rating.

The most common impairment in the traumatic brain injury patient will most likely be found under the central nervous system section. This is where the neuropsychological examination becomes a factor. Under the central nervous

system section of Chapter 4, the evaluating physician must look at specified functional deficits of brain injury, such as sleep disturbance, cognitive problems, speech deficiency, and emotional and behavioral problems. Then, each one of those aspects is rated using tables contained in Chapter 4. Those tables provide numeric ranges for mild, moderate and severe injury. The most severe of the impairments, which is the highest impairment rating for the above deficits, represents the impairment rating for the central nervous system. If no other impairments under Chapter 4 are noted, then this number will represent the appropriate impairment rating for the traumatic brain injury.

For example, an injured worker with a traumatic brain injury who is able to perform activities of daily living with the assistance of a journal, which is a common brain injury rehabilitative device, may be rated under Table 2 of Chapter 4. This table, titled "Mental Status Impairments," provides a *whole person impairment range* from 15% to 29% for a person whose "impairment requires direction and supervision of daily living activities." It is within the discretion of the evaluator as to what impairment between 15% and 29% best fits the injured worker's condition. Under that same table, a traumatic brain injury patient who requires continued supervision and home or facility confinement would be given an impairment rating between 30% and 49%.

Because objective improvement in brain injuries can take two or more years, according to the Medical Disability Advisor, prematurely rating a mild to severe traumatic brain injury patient may result in an inflated impairment rating. Access to targeted rehabilitation programs can facilitate a faster and more complete recovery, which is the goal of all system participants.

Proving and defending against a diagnosis of traumatic brain injury requires being familiar with the expected symptomology and a thorough review of the available medical records. In most every case, specialized testing will be necessary to diagnose and document the functional deficits associated with a traumatic brain injury. If these deficits exist, then special attention should be given to the impairment rating certification because of the potential ranges of impairment in play, subject to the discretion of the evaluator.

**Matt Lewis & Jennifer E. Bard**

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## New Required Forms Put Into Service

**DWC 32:** The Texas Department of Insurance, Division of Workers Compensation (TDI-DWC) has revised the DWC Form-032, Request for Designated Doctor Examination. Workers compensation system participants seeking a designated doctor examination for an injured employee must use this form to request an examination order from the TDI-DWC.

The form has been revised to comply with recently adopted new rules 28 Texas Administrative Code §§127.1, 127.5, 127.15, 127.20, and 127.25, concerning Designated Doctor Scheduling and Examinations. The adopted rule was published in the December 17, 2010 issue of the Texas Register. **All system participants must use the new form on or after February 1, 2011.** Previous version of the form will not be accepted by TDI-DWC after this date.

The DWC Form-032 is available for download in English and Spanish from the TDI website at [www.tdi.state.tx.us/forms/form20.html](http://www.tdi.state.tx.us/forms/form20.html).

For additional information regarding the DWC Form-032, contact Erika Copeland at 512-804-4029 or [Erika.Copeland@tdi.state.tx.us](mailto:Erika.Copeland@tdi.state.tx.us).

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**DWC 69:** The Texas Department of Insurance, Division of Workers Compensation (TDI-DWC) has revised the DWC Form-069, Report of Medical Evaluation. Doctors selected by TDI-DWC, insurance carriers or treating doctors must use this form when evaluating permanent impairment or maximum medical improvement of injured employees. In addition, treating doctors may agree or disagree with the other doctors findings on this form.

The revisions to DWC Form-069 are intended to provide more clarity and harmony with 28 Texas Administrative Code §130.1 regarding Certification of Maximum Medical Improvement and Evaluation of Permanent Impairment. **All system participants must use the new form on or after March 1, 2011. Also effective on or after March 1, 2011, system participants are required to file the DWC Form-069 and associated narratives with the TDI-DWC by faxing them to 512-490-1047.**

The DWC Form-069 and the Sample Notice for Health Care Providers, the written notice required to be sent by health care providers to injured employees with the completed DWC Form-069, are available for download from the TDI website at [www.tdi.state.tx.us/forms/form20.html](http://www.tdi.state.tx.us/forms/form20.html).

For additional information regarding the DWC Form-069 or the Sample Notice for Health Care Providers, contact Erika Copeland at 512-804-4029 or [Erika.Copeland@tdi.state.tx.us](mailto:Erika.Copeland@tdi.state.tx.us).

### NEW BRC FORM NOT AN ISSUE; RULES FOR OBTAINING BRC CAUSING COMPLAINTS

**DWC 45:** Last fall Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC) revised the DWC Form-045, Request for a Benefit Review Conference. Due to the recent rule adoption, all workers' compensation system participants requesting a benefit review conference (BRC) will be required to file the new DWC Form-045 with the TDI-DWC on and after October 1, 2010. The announcement of the new form seemed routine. Publicity on obtaining the form (available for download in English and Spanish from the TDI website at <http://www.tdi.state.tx.us/forms/form20.html>) was extensive.

However, the DWC in approving the request has stirred controversy among all system participants. The DWC has stated: "When requesting a BRC using the DWC Form-045 the requesting party must provide details and supporting documentation of efforts made to resolve the dispute prior to requesting a BRC. The supporting documentation should be clearly marked. If exchange materials used for dispute resolution are submitted at the same time as the DWC Form-045, the exchange materials should be separate and clearly marked. BRC requests not submitted pursuant to the rule requirements will be denied. The recently adopted 28 Texas Administrative Code (TAC) §§141.1, 141.2, 141.4 and 141.7 regarding Benefit Review Conferences (BRC) were published in the August 20, 2010 issue of the Texas Register and may be viewed on the TDI website at <http://www.tdi.state.tx.us/wc/rules/adopted/index.html>."

The adoption, which is effective October 1, 2010, was necessary according to the Division of Workers Compensation to implement changes to the Texas Labor Code §§410.007, 410.0223, and 410.026 relating to BRCs under House Bill 7, enacted by the 79th Legislature, Regular Session (effective September 1, 2005).

If there are any questions regarding the DWC Form-045 or requesting a BRC, contact Randy Steger at [Randy.Steger@tdi.state.tx.us](mailto:Randy.Steger@tdi.state.tx.us) or 512-804-4085.

## Rate of Nonfatal Occupational Injuries and Illnesses for Private Industries in Texas Declined in 2009

November 10, 2010 AUSTIN, TX – Private industry workplaces in Texas reported a total of 213,507 nonfatal injuries and illnesses during 2009. The incidence rate of 2.9 cases per 100 equivalent full-time employees is six percent lower than in 2008, when the incidence rate was 3.1 cases per 100 equivalent full-time employees. Last year marked the seventh consecutive year that the incidence rate dropped. The Texas rate is below the national rate of 3.6 for 2009.

The 2009 injury and illness data are the latest available from the Survey of Occupational Injuries and Illnesses conducted by the Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC) in cooperation with the U.S. Department of Labor, Bureau of Labor Statistics (BLS). The occupational injury and illness rates are based on a statistical sample of private firms in Texas.

The 2009 reference year data is based on the latest edition of North American Industry Classification System (NAICS) 2007. For more information regarding NAICS 2007 revisions, visit: <http://www.bls.gov/bls/naics.htm>.

### Highlights of the 2009 Annual Survey:

In the private sector, the incidence rate for goods producing industries decreased by 12 percent from 2008 and 38 percent

from 2003. Within goods producing industries, the largest decrease from 2008 was 33 percent seen in agriculture, forestry, fishing & hunting. Construction followed with a 16 percent decrease from 2008 and 41 percent from 2003; manufacturing declined 10 percent from 2008 and 34 percent from 2003.

The overall incidence rate for the service providing industries, showed a 3 percent decline from 2008. Within this group, wholesale trade reported the largest decrease of 24 percent from 3.3 in 2008 to 2.5 in 2009. Meanwhile, transportation and warehousing declined 15 percent over the last year. Rate increases from 2008 only occurred within the service providing industries group, and included information (33 percent), education services (20 percent), utilities (16 percent), retail trade and health care and social assistance (5 percent), and other services, except public administration (3 percent) (Table 1).

Of the major private sector industries with the 10 highest incidence rates in 2009, air transportation and couriers and messengers are the top two. The industry with the largest increase was air transportation (19 percent), followed by transit and ground passenger transportation (16 percent). Notable decreases within these industries occurred in food and beverage stores (15 percent) and beverage and tobacco product manufacturing (14 percent) (Table 2).

TABLE 1. Incidence rates (1) of nonfatal occupational injuries by private industry sector, 2003-2009, Texas – Total Recordable Cases

Industry Sector	NAICS Code <sup>(3)</sup>	2003	2004	2005	2006	2007	2008	2009
Private Industry – Nation		5.0	4.8	4.6	4.4	4.2	3.9	3.6
Private Industry – Texas <sup>(6)</sup>		4.0	3.7	3.6	3.7	3.4	3.1	2.9
Goods producing <sup>(6)</sup>		4.8	4.3	4.2	4.3	4.0	3.4	3.0
Natural resources and mining <sup>(6,7)</sup>		–	3.0	2.9	3.5	2.7	2.3	–
Agriculture, forestry, fishing & hunting <sup>(6)</sup>	11	–	5.3	4.9	5.2	5.3	5.1	3.4
Mining <sup>(7)</sup>	21	2.2	2.2	2.3	3.1	2.2	1.9	–
Construction	23	4.4	4.0	4.3	3.8	3.8	3.1	2.6
Manufacturing	31-33	5.3	4.8	4.5	4.8	4.4	3.9	3.5

*Continued on page 10.*

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Industry Sector	NAICS Code <sup>(3)</sup>	2003	2004	2005	2006	2007	2008	2009
Service providing		3.7	3.4	3.4	3.5	3.2	3.0	2.9
Trade, transportation, and utilities		5.0	4.6	4.5	4.6	4.2	4.0	3.7
Wholesale trade	42	4.1	3.7	3.8	3.8	3.2	3.3	2.5
Retail trade	44-45	5.0	4.4	4.3	4.6	4.3	3.9	4.1
Transportation and Warehousing	48-49	6.6	6.3	5.9	6.1	5.8	5.4	4.6
Utilities	22	3.4	4.7	2.8	3.1	3.0	2.5	2.9
Information	51	1.6	1.2	1.9	1.4	1.7	1.5	2.0
Financial activities	52-53	1.7	1.8	1.6	1.7	1.4	1.4	1.4
Professional and business services	54-56	2.1	1.6	1.6	1.7	1.8	1.5	1.4
Education and health services	61-62	4.9	4.8	4.5	4.8	3.9	3.5	3.8
Educational services	61	1.7	1.8	1.6	1.8	1.5	1.5	1.8
Health care and social assistance	62	5.1	5.0	4.7	5.1	4.1	3.7	3.9
Leisure and hospitality	71-72	3.5	3.7	3.9	3.9	4.2	3.2	3.0
Other services, except public administration	81	2.6	2.6	2.3	2.0	2.1	3.0	3.1

TABLE 2. Major industries with the highest nonfatal occupational injury and illness incidence rates (1) per 100 full-time employees for total cases, 2009, Texas.

INDUSTRY	NAICS Code <sup>(3)</sup>	2009 Rate
Air transportation	481	8.9
Couriers and messengers	492	7.7
Hospitals	622	7.1
Nursing and residential care facilities	623	6.4
Food manufacturing	311	6.2
Beverage and tobacco product manufacturing	312	6.2
Transit & ground passenger transportation	584	5.8
Warehousing & storage	493	5.4
Building material & garden equipment/supply dealers	444	5.3
Food and beverage stores	445	5.3

**Footnotes for Tables 1 and 2.**

1 Incidence rates represent the number of injuries and illnesses per 100 full-time employees and were calculated as:  $(N/EH) \times 200,000$  where N = number of injuries and illnesses EH = total

hours worked by all employees during the calendar year 200,000 = base for 100 equivalent full-time employees (working 40 hours per week, 50 weeks per year).

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- 3 North American Industry Classification System 2007 Edition
- 6 Excludes farms with fewer than 11 employees.
- 7 Data for mining (Sector 21 in the North American Industry Classification System – United States, 2007) include establishments not governed by the Mine Safety and Health Administration (MSHA) rules and reporting, such as these in oil and gas extraction and related support activities. Data for mining operations in coal, metal, and nonmetal mining are provided to BLS by the Mine Safety and Health Administration, U.S. Department of Labor. Independent mining contractors are excluded from the coal, metal, and nonmetal, and nonmetal mining industries. These data do not reflect the changes the Occupational Safety and Health Administration made to its recordkeeping requirements effective January 1, 2002; therefore estimates for these industries are not comparable to estimates in other industries.

NOTE: Because of rounding, components may not add to totals. Dash indicates data do not meet publication guidelines.

SOURCE: Bureau of Labor Statistics, U.S. Department of Labor, Survey of Occupational Injuries and Illnesses, in cooperation with participating State agencies.

The TDI-DWC collects survey data in order to assist employers, safety professionals, and policymakers in identifying safety and

health issues in the state. The TDI-DWC Workplace Safety program area provides various safety and health services to help reduce injuries and illnesses in the workplace through accident and illness prevention. Services include: free safety and health consultations on Occupational Safety and Health Administration (OSHA) regulations; regional and statewide safety conferences; customized on-site safety training; free safety and health publications; free safety training audio-visual loans; and the Safety Violations Hotline. For more information on these services, visit the TDI-DWC website at <http://www.tdi.state.tx.us/wc/safety/index.html>, or call 1-800-687-7080, 1-800-687-7080. Employers with questions about participating in this survey may call 866-237-6405, 866-237-6405.

In November, the TDI-DWC will release more in-depth case and demographic data about the 2009 injury and illness cases involving days away from work. Additional Texas nonfatal occupational injury and illness data are available by contacting 512-804-4664, 512-804-4664, or [injuryanalysis@tdi.state.tx.us](mailto:injuryanalysis@tdi.state.tx.us).

Details about the national BLS injury and illness data can be found at <http://www.bls.gov/iif/oshsum.htm>.

For more information contact: [Public.Information@tdi.state.tx.us](mailto:Public.Information@tdi.state.tx.us)

## 2011 Legislative Session In Full Swing

**Snippets appear in the news about proposed changes to workers compensation this legislative session. Gossip swirls wherever two or more comp attorneys gather. But for real information, go to Texas Legislature Online <http://www.capitol.state.tx.us/>. Critical dates are:**

**Friday, March 11, 2011** (60th day) Deadline for filing bills and joint resolutions other than local bills, emergency appropriations, and bills that have been declared an emergency by the governor [House Rule 8, Sec. 8; Senate Rule 7.07(b); Senate Rule 10.01 subjects joint resolutions to the rules governing proceedings on bills]

**Monday, May 30, 2011** (140th day) Last day of 82nd Regular Session; corrections only in house and senate [Sec. 24(b), Art. III, Texas Constitution]

### Session Ends

**Sunday, June 19, 2011** (20th day following final adjournment) Last day governor can sign or veto bills passed during the regular legislative session [Sec. 14, Art. IV, Texas Constitution]

**Monday, August 29, 2011** (91st day following final adjournment) Date that bills without specific effective dates (that could not be effective immediately) become law [Sec. 39, Art. III, Texas Constitution]

Many speakers at the Advanced Workers Compensation Course for the last several years talked about liability for work-place accidents as brought to headline-status by the case of *Entergy Gulf States v. Summers*. The Supreme Court issued a decision followed by a flurry of briefs and newspaper articles, it withdrew that opinion and affirmed its own decision in 282 S.W.3d 433 (Tex. 2009). The 2009 legislature debated these issues of third party liability but did not pass any legislation. In a joint interim hearing July 29, 2010 the House Judiciary & Civil Jurisprudence Committee and the House Business and Industry Committee considered interim study charges relating to third party liability issues and specifically the Entergy case. On Aug. 18, 2010, the Senate State Affairs Committee considered interim study charges relating to worker's compensation issues. Entergy is still on everyone's mind because of indemnity and subrogation by contractors. You can watch archived hearings at: <http://www.house.state.tx.us/media/welcome.php>

To reach the Judiciary and Civil Jurisprudence Committee report, go to [http://www.house.state.tx.us/\\_media/pdf/committees/reports/82interim/HouseCommitteeonJudiciaryandCivilJurisprudenceInterimReport2010.pdf](http://www.house.state.tx.us/_media/pdf/committees/reports/82interim/HouseCommitteeonJudiciaryandCivilJurisprudenceInterimReport2010.pdf).



*Joe R. Anderson*

## **“Everything You Always Wanted to Know By Sunset But Were Afraid To Ask.”**

***Joe R. Anderson, Partner  
Nick Huestis, Workers' Compensation Consultant and  
Coordinator of Governmental Affairs  
BURNS ANDERSON JURY & BRENNER, L.L.P.***

### **Introduction**

In 1977, the Texas Legislature passed The Texas Sunset Act, creating the Sunset Advisory Commission. The Sunset Advisory Commission is a legislative body created to identify and eliminate waste, duplication, and inefficiency in government agencies. Government agencies are ordinarily reviewed at least every twelve years, and are automatically abolished unless legislation is enacted to continue them. The Texas Sunset Act can be found in the Texas Government Code at section 325.001.

The Sunset Advisory Commission has twelve members. The Lieutenant Governor and the Speaker of the House of Representatives each appoint six members. The Commission consists of five Senators, five State Representatives, and two public members. The Commission also has an adequate number of professional staff to administer the data gathering and review process of each agency being reviewed during the interim of the legislative sessions.

The current members of the Texas Sunset Commission are: Chairman, Senator Glenn Hegar, Jr.; Senators Juan Hinojosa, Joan Huffman, Robert Nichols, John Whitmire; Vice Chair, Representative Dennis Bonnen; Representatives Rafael Anchia, Byron Cook, Linda Harper-Brown, and Larry Taylor. In addition to these legislative appointees, there are two public members: Charles McMahan, and Lamont Jefferson.

The Commission, after careful review of the state agencies, including public hearings, makes recommendations to the Legislature to continue or abolish the agency. The Commission can make recommended changes needed to accomplish the agency's purpose as the Legislature has determined and may determine.

### **Status of Process**

The Sunset process starts with setting a date that each agency will be abolished. Unless legislation is passed to continue the agency, with a renewed mission and specific mandates, that date is adhered to. There are about 150 agencies and, between each legislative session, a portion of the agencies are selected to be reviewed; thereafter, those remaining agencies will be reviewed about every twelve years. Courts and universities are not subject to the Sunset Act, and some constitutionally created agencies are subject to Sunset review, but not abolishment.

The Commission staff works with each agency under review to evaluate the need for the agency and needed statutory and/or administrative changes. They then develop recommended legislative changes necessary to implement any proposed changes. The Commission staff uses standards set by the Legislature to evaluate each agency. The standards can be found in the Texas Government Code at section 325.011. The staff review of the agency takes three to eight months, based upon the size and complexity of the agency.

The Sunset staff review process of the Division of Workers' Compensation started in September 2009 and continued through April 2010. The Sunset Staff Report was published and presented to the Sunset Commission at its organizational meeting on November 17, 2009. The Sunset staff, after completing its review and evaluation of the Division of Workers' Compensation, made its recommendations, including management and statutory changes, to the Commission at a public hearing on May 25, 2010.

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### **Issues Addressed: Staff Recommendations and Commission Decisions.**

**Issue 1: The Division's complicated dispute resolution process often fails to provide a quicker, more accessible alternative to the courts.**

#### **Staff Recommendations and Commission Decisions:**

R-1.1 Require parties to a dispute to prove preparedness as a prerequisite to a Benefit Review Conference.

**Commission Decision:** Adopted staff recommendation.

R-1.2 Require parties to a non-network medical fee dispute to attempt a low-level mediation, through a benefit review conference before appealing to the Contested Case Hearing.

**Commission Decision:** Adopted staff recommendation.

R-1.3 Establish an administrative appeal machismo for network medical necessity disputes.

**Commission Decision:** Adopt staff recommendation.

R-1.4 Streamline the process for resolving non-network medical disputes by removing SOAH's involvement in conducting contested case hearings.

**Commission Decision:** Adopted a modification as an alternative to resolving medical disputes by holding all medical necessity hearings before the Division and all fee dispute hearings before SOAH; it also retains staff recommendation to remove the statutory provisions requiring spinal surgery cases to go through the DWC Appeals Panel and instead, treats these cases like all other medical necessity disputes; it eliminates SOAH costs paid by DWC for fee disputes by requiring the losing party to pay SOAH; it authorizes the Division to intervene in SOAH hearings that involve significant issues of fee guideline interpretation; and it only affects appeals of IRO medical necessity decisions and staff-level medical fee decisions issued on or after the effective date of the Sunset bill.

R-1.5 Authorize the Division's Appeals Panel to issue written affirmation in limited circumstances.

**Commission Decision:** Adopts staff recommendation with the modification that it apply only to the following types of cases: a) cases of first impression; b) cases that are impacted by a recent change in the law; and c) cases involving errors which

require correction but which do not affect the outcome of the dispute, including findings of fact for which there is insufficient evidence, incorrect conclusions of law, and findings of fact or conclusions of law which were not properly before the hearing officer, or other legal errors.

R-1.6 Extend the timeframe allowed for appeals of DWC decisions regarding medical necessity and non-network medical fee disputes to district court.

**Commission Decision:** No action reported.

R-1.7 Clarify the venue for district court appeals of agency decisions regarding medical disputes;

**Commission Decision:** No action reported.

R-1.8 The Division should require a review of all Contested Case Hearing decisions to ensure consistency among field office staff.

**Commission Decision:** Recommendation adopted.

**Issue 2: The Division's medical quality review process needs improvement to ensure thorough and fair oversight of workers' compensation medical care.**

#### **Key Staff Recommendations:**

Require Division staff, rather than the Medical Advisor, to manage and oversee the medical quality review process;

Require the Division to develop guidelines to strengthen the medical quality review process;

Establish a more streamlined medical review process by removing the Quality Assurance Panel's involvement;

Require the Commissioner to develop additional qualification and training requirements for members of the Medical Quality Review Panel; and

Require the Division to work with health licensing boards to expand the pool of Medical Quality Review Panel's members.

#### **Commission Decisions:**

The following provisions were adopted by the Sunset Commission to replace the staff recommendations contained in Issue 2. (Four of the five provisions will require statutory change):

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CD-2.1 Change in Statute. Requiring the Division to develop guidelines to strengthen the Medical quality review process. This would “require the Division to develop criteria, subject to the Commissioner’s approval, to further improve the medical quality review process. In developing such guidelines, require the Division required to consult with the Medical Advisor and consider input from key stakeholders. The Division should also define, at a minimum, a fair and transparent process for the handling of complaint-based cases and selection of health care providers and other entities for review.” This would also “require the Division to make the adopted process for conducting both complaint-based and audit-based reviews available to stakeholders on its website.”

CD-2.2 Change in Statute. Establish the Quality Assurance Panel in statute. This recommendation would establish the Quality Assurance Panel (QAP) in statute and require the Division to hold QAP meetings as a means to assist the Medical Advisor and the Medical Quality Review Panel, while providing a second level of all reviews.

CD-2.3 Management Action. “Improve the medical quality review process by clarifying the Quality Assurance Panel’s involvement. This would work in conjunction with CD-2.2, but as a management action, the Commissioner should adopt procedures, subject to input from the Medical Advisor, to further define the QAP’s role in the medical quality review process and establish the frequency of QAP meetings. At a minimum, such procedures should include: a) a process for selecting QAP members from the pool of appointed MQRP members, including health care professionals from diverse health care specialty backgrounds and individuals with expertise in utilization review and quality assurance; b) a policy outlining the length of time a member may serve on the QAP; c) procedures to ensure QAP members are kept informed of enforcement outcomes of cases under review; and d) procedures to clarify the roles and responsibilities of QAP members and Division staff at QAP meetings.” This decision “would ensure that the QAP is properly structured and managed to maximize its value in the review process.” It “would also ensure that all participants in QAP meetings are aware of their required tasks and do not compromise the decision-making process for reviews that become active investigations in the enforcement process.”

CD-2.4 Change in Statute. Require the Division to develop additional qualifications and training requirements for Medical Quality Review Panel members. This would “require the Commissioner, subject to input from the Medical Advisor, to adopt rules outlining clear prerequisites to serve as

a MQRP expert reviewer, including necessary qualifications and training requirements. In developing these policies, the Division could use the Texas Medical Board’s expert reviewer process as a guide. At a minimum, rules on qualifications should include: a) a policy outlining the composition of expert reviewers serving on MQRP, including the number of reviewers and all health care specialties represented; b) a policy outlining the length of time a member may serve on the MQRP; c) procedures defining areas of potential conflicts of interest between MQRP members and subjects under review and avoidance of such conflicts; and d) procedures governing the process and grounds for removal from the Panel, including instances when members are repeatedly delinquent in completing case reviews or submitting review recommendations to the Division.” “The Division would also develop rules on training. Under this recommendation, MQRP members would be required to fulfill training requirements to ensure panel members are fully aware of the goals of the Division’s medical quality review process and the Texas Workers’ Compensation Act. Training topics should include, at a minimum, the following areas: a) administrative violations affecting the delivery of appropriate medical care; b) confidentiality of the review process and the qualified immunity from suit granted to MQRP members under the Labor Code; and c) medical quality review process guidelines adopted under CD 2.1.” “The Division would also be authorized to include training on other topic areas such as the Division’s adopted treatment and return-to-work guidelines, other evidence-based medicine resources, and the impairment rating process.” “The Division would also be required to better educate Panel members about the status and enforcement outcomes of cases resulting from the medical quality review process.”

CD-2.5 Change in Statute. Require the Division to work with health licensing boards to expand the pool of Medical Quality Review Panel members. “The Division, in consultation with the Medical Advisor, would be required to work with health licensing boards, beyond just the Texas Medical Board and the Texas Board of Chiropractic Examiners, as necessary, to expand the pool of health care providers available as expert reviewers. The Division should also work with the Texas Medical Board to increase the pool of specialists available, as necessary, enabling the Division to better match an MQRP member’s expertise to the specialty of a physician under review.” “When selecting the composition of expert reviewers serving on MQRP, the Medical Advisor should advise the Division by identifying areas of medical expertise that may not require ongoing representation on the MQRP. In such circumstances, the Division should develop a method to partner with these other agencies to access outside expertise on an as-needed basis.”

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**Issue 3: The Division cannot always take timely and efficient enforcement actions to protect workers' compensation system participants.**

**Key Recommendations:**

R-3.1 Clarify that the Division can conduct announced and unannounced inspections;

R-3.2 Authorize the Division to refuse to renew designated doctor certifications;

R-3.3 Authorize the Commissioner to issue emergency cease-and-desist orders;

R-3.4 Specify that the judicial review standard for appeals of Division enforcement cases is substantial evidence;

R-3.5 Authorize the Commissioner to make final decisions on enforcement cases involving monetary penalties; and

R-3.6 Remove outdated and confusing enforcement provisions in the Labor Code.

**Commission Decision:** The Commission adopted all six staff recommendations without modification.

**Issue 4: The Division's oversight of designated doctors does not effectively ensure meaningful use of expert medical opinions in dispute resolution.**

**Key Recommendations:**

R-4.1 Require the commissioner to develop qualification requirements for designated doctors;

R-4.2 Direct the Commissioner to adopt rules requiring designated doctors remain with case assignments, unless otherwise authorized;

R-4.3 Authorize the Commissioner to establish a certification fee in rule for designated doctors; and

R-4.4 The Division should remove the designated doctor scheduling data from its website.

**Commission Decision:** The Commission adopted only staff recommendations R-4.1 and R-4.2.

**Issue 5: The Division's responsibility for making some individual claims decisions conflicts with its oversight and dispute resolution duties.**

**Key Recommendations:**

R-5.1 Transfer the responsibilities for certain claims decisions from DWC to insurance carriers;

R-5.2 Direct the Division to require insurance carriers to make decisions on certain individual claims.

**Commission Decision:** The Commission adopted both staff recommendations, R-5.1 and R-5.2.

**Issue 6: Employers outside the workers' compensation system are failing to report information the Legislature needs to evaluate the health of the system.**

**Key Recommendation:**

R-6.1 The Division should closely coordinate with other state agencies to include no subscription reporting requirements in their print and electronic publications.

**Commission Decision:** The Commission adopted the staff recommendation, R-6.1.

**Issue 7: Texas has a continuing need for the Division of Workers' Compensation.**

**Key Recommendations:**

R-7.1 Continue the Division of Workers' Compensation for twelve years, and remove its separate Sunset date from the statute;

R-7.2 Require the Division to develop standard procedures for documenting complaints and for tracking and analyzing complaint data.

**Commission Decision:** The Commission adopted staff R-7.1 with the modification of continuing the Division for only six years and retains the separate Sunset date. The Commission adopted the staff recommendation R-7.2.

**New Issues:**

In addition to the seven basic issues raised by the Sunset Staff Report, there were thirty-two issues raised by others. Of the thirty-two added issues, the Commission adopted only four.

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They follow:

NI-1: The Commission recommends amending the statute to deposit all administrative penalties assessed and collected by the Division in the General Revenue Fund, instead of the Texas Department of Insurance operating account;

NI-2: The Commission recommends amending the statute to modify the designated doctor matrix selection process to be based on diagnosis and injury area, instead of a treatment-based selection process;

NI-3: The Commission directs the Division through the rule-making process, to allow all designated doctors to participate in any county desired, rather than the current twenty-county maximum service area;

NI-4: The Commission directs the Division as part of the rulemaking process adopted in Issue 2, to develop an ex parte communication policy that extends to any case under investigation in which the Commissioner is to be the ultimate arbiter in a final enforcement action. The adopted policy should prohibit ex parte communication before the minimum timeframes outlined in the Administrative Procedures Act and should aim to preserve the agency's enforcement process.

### Summary

The Sunset Commission's decisions on recommendations made by Sunset staff on the seven issues reviewed, studied, and deliberated, and thirty-two new issues presented by others, was be the bases of the Compliance Report presented to the Legislature in early January 2011. The Sunset Commission adopted sixteen, modified three, rewrote five; and did not adopt four of the staff recommendations. There were thirty-two new recommendations made to the Sunset Commission by others and four of them were adopted.

The Commission spent much of its time reviewing and rehearing information related to the medical quality review process (MQRP), which was disputed by former Division staff and stakeholders in the workers' compensation system. This led to a complete rewrite and adoption of all new MQRP recommendations. There are several statutory changes recommended in this Issue.

The Sunset Commission found that the "overall system seems to be healthier, with stabilizing medical costs, fewer claims and disputes, lower insurance rates, fewer lost days of work, and better return-to-work outcomes." The Division was,

however, "still in the wake of incredible transition" with many aspects of the previous reforms still very much in the implementation phase.

The Sunset Commission, after careful consideration, approved a six-year extension of the Division of Workers' Compensation rather than the usual twelve-year extension.

## 2010 Sunset Review of the Office of Injured Employee Counsel

### Issues Addressed:

#### Issue 1: Texas has a continuing need for the Office of Employee Counsel

##### Key Recommendations:

R-1.1: Continue the Office of Injured Employee Counsel for twelve years.

Apply standard Sunset across-the-board requirements to the Office of Injured Employee Counsel.

R-1.3: Direct the Office to work with the Division to ensure injured employees are fully prepared by ombudsmen before attending a DWC benefit review conference.

##### Commission Decisions:

CD-1.1: The Commission adopted with a modification to continue the Office for six years instead of the standard twelve-year period.

CD-1.2: The Commission adopted as recommended.

CD-1.3: The Commission adopted as recommended.

#### Issue 2: The Office has inappropriate access to claims information held by the Division of Workers' Compensation.

##### Key Recommendations:

R-2.1: Change the statute to limit the Office's authority to access claim files for injured employees the Office is not directly assisting.

R-2.2: Direct the Office to work with the Division to complete firewalls in the new database system.

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**Commission Decision:** The Commission adopted both recommendations.

**New Issue:** There was one new issue raised of a managerial nature, but the Commission did not adopt any new issues related to the Office.

### Summary

The Office of Injured Employee Counsel is a new agency and is in the latter stages of its implementation phase. The Office

is still developing its place in the claimant assistance process, and while the need for the Office is clear, the bounds of the Office's authority to enter the claims process are still being defined. The Commission has focused upon the role of the Office in assisting claimants needing to be educated and prepared with regard to their rights and responsibilities, specifically by being well prepared for participation in the dispute resolution process.

## Civil Case Law Update

Last issue of this newsletter it was reported that two notable cases had been argued before the Supreme Court: **Ruttiger**, 08-751 and **Leordeanu**, 09-0330. No decision has been issued yet on Ruttiger, Leordeanu opinion was issued Dec. 3, 2010.

Texas Supreme Court oral arguments are aired live and archived for later viewing via <http://stmarytxlaw.mediasite.com>

1. March 3, 2011, the Texas Supreme Court heard oral arguments on Cause number 09-0340, **Insurance Company of the State of Pennsylvania versus Carmen Muro** from Dallas county in the Fifth District Court of Appeals Dallas. Issues in this worker's compensation case are 1) whether Texas law requires a direct injury to feet and hands in order to support benefits for loss of feet and hands alleged as a result of the back shoulder and hip injury and 2) whether the trial court should have had the jury decide whether the injuries she suffered produced the lost use of her feet and hand. In this case the insurance carrier challenged the hearing officer's determination granting Muro lifetime disability income for on-the-job injuries to her back neck shoulder and hips that she claimed resulted in permanent loss of the hand and her feet. A jury found Muro had permanent loss of her feet and hand and awarded her lifetime benefits and attorneys fees. The court of appeals affirmed holding that a direct injury is not necessary to support the award and that the trial court did not abuse its discretion by failing to submit a producing cause jury question. The insurance company argues that the jury should have considered the producing cost factor because evidence indicated Muro had normal feelings in her feet and hand and use of them after the accident.

2. **Transcontinental Insurance Company v Crump**, Texas Supreme Court No. 09-0005, (Tex. August 27, 2010) (reh'g denied), dealt with the issues of the term "producing cause" and claimant attorney fees. Based on that decision, the jury should be given the instruction that "producing cause" means a substantial factor in bringing about an injury or death and without which the injury or death would not have occurred. The bottom line is that now we have a "but for" test for determining causation. The Crump case also addressed claimant attorney fees in civil court cases that the carrier lost after filing suit in civil court. The court held that the insurance carrier has a right to submit the attorney fee issue to the jury to determine the reasonableness and necessity of the fees claimed by the claimant attorney and for which it is liable. The Crump court did find the differential diagnosis methodology is a process in which the treating doctor formulates a hypothesis as to the likely causes for the patient's presented symptoms and then eliminates unlikely causes by a process of deductive reasoning. According to the court, the testimony of Crump's expert was reliable and legally sufficient with this analysis.

3. **American Home Assurance v. Poehler**, No. 12 – 09 – 00293 – CV, Tyler Court of Appeals, October 20, 2010, provided some useful guidance concerning impairment ratings. The Tyler court determined that Poehler's impairment rating was 5% under the injury model rather than 20% using either the range of motion model or Advisory 2003 – 10. First, the court agreed that advisory 2003 – 10 cannot be considered in determining an impairment rating and second, there was no

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specific impairment rating performed using the range of motion model. Without a specific range of motion model impairment rating, the range of motion model could not be used as a differentiator. What is helpful about this case, is the guidance it provides for future cases. If the doctor decides to use the range of motion model as a differentiator, he or she must first provide a specific percentage impairment rating under the range of motion model. Thereafter, the doctor can select the injury model impairment rating that is closest to the rating he or she arrived at using the range of motion model. Another alternative mentioned in the case is to base an impairment rating on table 70 and provide a specific rating under that table. It would clearly not hurt for the treating doctor to use both alternatives.

4. ***Republic Waste Services v. Martinez***, Jan. 20, 2011 Houston Court of Appeals [1st] No. 01-09-00236-CV, on appeal from Probate Court No. 2, Harris County. The issue was did the trial court properly exclude evidence of the decedent's immigration status. What's the proper measure of damages in a wrongful death case when the decedent was an illegal immigrant subject to deportation? Should the ever-present risk of being kicked out of the country be considered in calculating future lost earnings? The Court of Appeals affirmed the trial court in deciding that evidence of a garbage worker's immigration status was properly excluded in determining how much his widow should be compensated in his work-related death. The decision came in a wrongful death lawsuit against Republic Waste Services. One of its employees, Oscar Alfredo Gomez, was killed when a garbage truck backed over him. Republic is a "non-subscriber" under the Texas workers' compensation system, so the employer was open to a wrongful death lawsuit brought by Gomez's widow, Elida Griselda Martinez. At trial, Republic wanted to introduce evidence that Gomez had entered the country illegally from El Salvador and had falsified immigration documents to gain employment with the company. Republic argued that Gomez's illegal status was relevant to the issue of his future lost income. To further bolster its case, Republic wanted to establish that in all likelihood Gomez would have been deported because federal immigration authorities raided Republic's facilities two weeks after Gomez's death. Had he been sent back to El Salvador, Gomez would have been making only \$1,000 a year instead of the \$33,000 a year he was making with Republic. The trial court excluded this evidence and awarded Gomez's widow \$1.4 million. On the issue of Gomez's immigration status, the court
5. On Dec. 9, 2010, a Travis County trial court took under advisement after arguments in a hearing in a lawsuit filed on behalf of an injured police officer, a case challenging adopting of ODG Guidelines. Stakeholders are closely watching the litigation, which argues that the DWC's adoption of the ODG constitutes an improper delegation of state agency rule-making authority to a private entity – namely, the Work Loss Data Institute, the California-based publisher of the ODG. The lawsuit is **Brian Fanette v. City of Port Arthur and v. Texas Department of Insurance, Division of Workers' Compensation**, No. D-1-GN-09-001187. The Texas Attorney General's Office has requested dismissal of the suit for lack of jurisdiction. An exhibit filed with the court says Fanette injured his right hip and side when he fell from a balcony onto a stairway while he and other officers were practicing SWAT maneuvers in an empty building. After several years of medical treatment, Fanette's doctor recommended the officer undergo a total hip replacement, with a three-day inpatient stay, the pleadings state. However, Port Arthur disputed the recommendation for surgery. An independent review organization (IRO) denied the requested procedure, citing a "lack of documentation on recent conservative measures to treat (Fanette's) ongoing hip pain." The IRO also cited Fanette's "young age" in its denial, saying the ODG "state that an individual under 50 is not a candidate for hip replacement surgery." A DWC hearing officer, following a contested-case hearing, determined that Fanette did not meet the criteria for hip-replacement surgery under the ODG. The injured worker's attorney argues, in part that because the DWC calls for use of the most recent edition of the ODG, the Institute effectively is engaged in rule-making by continually updating the electronic version of the guidelines.

## APPEALS PANEL DECISIONS UPDATE

### AWW

The claimant sustained a compensable injury while employed with a delivery service. The evidence further establishes that during the 13-week prior to the injury, the claimant had concurrent employment working as an independent contractor umpiring baseball games for school age children. The claimant asserted that his AWW should include income from his concurrent umpiring employment. The claimant filed an Employee's Multiple Employment Wage Statement (DWC-003ME) which included estimated earnings for the 13 weeks prior to the date of injury. The DWC-003ME did not have any non-claim employer's information for the 13 weeks prior to the injury as required under Rule 122.5. The claimant did not report his umpiring income to the IRS (with the exception of one IRS Form 1099) and did not submit any other tax information or documentation from the non-claim employers for the 13 weeks prior to the injury. The claimant's argument that the carrier had the necessary resources to have obtained the information from the various leagues, schools and teams for which the claimant umpired is directly contrary to Section 408.021(e) and Rule 122.5(a). It is the claimant's responsibility to obtain the required wage information from the non-claim employer(s). The hearing officer erred in including wages from the non-claim employers in his calculation of the claimant's AWW.

APD 100497

### Disqualifying Association of DD

In this case, the hearing officer erred in determining that the DD did not have a disqualifying association under Rule 180.21 that would prevent him from serving as the DD in this case. The DD appointed to determine MMI/IR and EOI referred the claimant to a doctor in order to provide an IR for depression. The referral doctor had already served in the capacity as a peer review doctor for the carrier regarding this claimant and this case. The Appeals Panel held that a doctor, serving in the capacity as a carrier peer review doctor or as an RME doctor for the carrier, cannot serve as a referral doctor of the designated doctor for the claimant in the same claim because of the perception of a disqualifying association.

APD 100842

### Extent-of-Injury

In this case, the hearing officer found that the claimant sustained right CTS as a natural and direct result of his com-

pensable injury of July 22, 2009. The hearing officer stated that "[c]onsidering the mechanism of injury, it is logical to conclude that injured tissue in [the] [c]laimant's right wrist would swell, causing pressure on the right radial nerve and consequent right [CTS]." The evidence reflected that other than the results of a 2009 EMG linking CTS to Parsonage Turner syndrome or idiopathic brachial plexopathy, no medical evidence was presented to link the claimant's right CTS to the compensable injury. Given the facts of this case, the Appeals Panel reversed the hearing officer's determination that the compensable injury extends to CTS because a puncture wound through the hand causing CTS is a matter beyond common knowledge or experience. *See generally, Guevara v. Ferrer*, 247 S.W.3d 662 (Tex. 2007). The Appeals Panel rendered a new decision that the compensable injury does not extend to right CTS.

APD 100786-s

In this case, the hearing officer erred in finding that the compensable injury extends to vestibular dysfunction, bilateral tinnitus, bilateral high frequency sensorineural hearing loss with moderate high frequency sensorineural hearing loss in the right and severe high frequency neurosensory hearing loss present in the left ear, depression and anxiety, and an undiagnosed injury to the cervical spine. The recitation of the various conditions in the medical records without attendant explanation how those conditions may be related to the compensable injury does not establish those conditions are related to the compensable injury within a reasonable degree of medical probability, particularly in this case where expert medical opinion establishes causation cannot be determined or states affirmatively that there is no causation to the compensable injury.

APD 100822

The hearing officer erred in finding that the compensable injury included a left L5-S1 disc herniation with S1 radiculopathy. In this case, how shoulder surgery can cause a herniated lumbar disc or an aggravation of a pre-existing lumbar condition requires expert medical evidence to a reasonable degree of medical probability. The designated doctor, who was appointed to determine the extent of the compensable injury, stated that while positioning during surgery would not cause an aggravation of a lumbar condition in most cases but does not completely rule out the plausibility or probability of that happening. This evidence does not meet the required

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standard of proof of causation within a reasonable medical probability required by Guevara v. Ferrer, 247 S.W.3d 662 (Tex. 2007) and City of Laredo v. Garza, 293 S.W.3d 625 (Tex. App.-San Antonio 2009, no pet.)

APD 100895

### MMI

A date of MMI becomes prospective if it is projected to occur at some time after the certification of MMI is made. The key consideration is that the date of MMI was not after the date of certification, that is, signature of the certifying doctor, on the DWC-69. In this case the parties stipulated that the claimant reached SMI on June 5, 2007. The DWC-69 in evidence shows that the Dr. L certified on June 20, 2007, that the claimant reached MMI on June 20, 2007, with a 5% IR. The MMI date of June 20, 2007, as certified by Dr. L, is not a prospective MMI date.

APD 100636-s

### Payment of Benefits

In this case, the hearing officer determined that the claimant sustained a compensable injury, however because the designated doctor was not properly appointed, based on Division memorandum which provided guidance on requesting a designated doctor examination, the hearing officer concluded that the carrier was not liable for payment of IIBs. *See* Sections 408.121(a) and 408.0041. The Appeals Panel noted that the memorandum correctly stated that “the report of the designated doctor indicating the existence of an injury, in and of itself, does not obligate the insurance carrier to initiate the payment of income or medical benefits.” Under the facts of this, the Appeals Panel reversed the hearing officer’s payment of IIBs because the hearing officer determined that the claimant sustained a compensable injury which was affirmed by the Appeals Panel, the Appeals Panel reversed and rendered a new decision that the designated doctor was properly appointed, the carrier is liable for payment of benefits in accordance with the filing date of the Appeals Panel decision.

APD 100705-s

### Proper Appointment of DD

In this case, the hearing officer erred in determining that the Division appointed a designated doctor to determine the date of MMI and IR at a time when compensability had not been established, and concluding that the designated doctor was not properly appointed as the designated doctor to determine MMI and IR. The hearing officer based his determination on

a Division memorandum which provided guidance on requesting a designated doctor examination. The memorandum stated that the Division would not schedule a designated doctor examination to address a legal issue (whether the injury occurred in the course and scope of employment), but rather would schedule a designated doctor examination to address a medical issue (whether the injury resulted from the claimed injury). The carrier in this case requested the designated doctor examination and noted in the attached matrix to the DWC-32 that the compensable injury areas were to the neck and back. Given that the hearing officer determined that the claimant sustained a compensable injury, and the carrier requested a designated doctor examination, the Division properly appointed a designated doctor to determine MMI and IR.

APD 100705-s

### SIBs – New Rules [qualifying period that begins after July 1, 2009]

The qualifying period for the 8th quarter of SIBs began on October 12, 2009, and ended on January 10, 2010. The evidence reflects that the claimant was awarded a Pell Grant in December of 2009, and that she completed 12 credit hours in the fall semester beginning August 24, 2009. The record reflects that one of the classes ended on October 15, 2009, but that the other three classes did not end until December 10, 2009. The evidence further reflects that the claimant enrolled in 12 credit hours for the spring semester beginning January 19, 2010. The claimant attended school the first 9 weeks of the qualifying period. However the claimant did not document any job searches for week 12 of the qualifying period. The claimant did not present any evidence that she performed any other activity in connection with her IPE in week 12 of the qualifying period. The hearing officer erred in finding that the claimant made a reasonable effort to fulfill her obligations in accordance with the terms of her IPE for the 8th quarter. Rule 130.102 provides that an injured employee demonstrates an active effort to obtain employment by meeting at least one or any combination of the specified work search requirements each week during the entire qualifying period. Accordingly, the hearing officer’s decision is reversed.

APD 100615-s

### DD Appointment Is Proper Even If Carrier Has Disputed Compensability and Carrier Isn’t Liable to Pay Benefits Based on DD’s Report Until Claim Is Compensable

In this case, the hearing officer erred in determining that the Division appointed a designated doctor to determine the date

*Continued on page 21.*

*Continued from page 20.*

of MMI and IR at a time when compensability had not been established, and concluding that the designated doctor was not properly appointed as the designated doctor to determine MMI and IR. The hearing officer based his determination on a Division memorandum which provided guidance on requesting a designated doctor examination. The memorandum stated that the Division would not schedule a designated doctor examination to address a legal issue (whether the injury occurred in the course and scope of employment), but rather would schedule a designated doctor examination to address a medical issue (whether the injury resulted from the claimed injury). The carrier in this case requested the designated doctor examination and noted in the attached matrix to the DWC-32 that the compensable injury areas were to the neck and back. Given that the hearing officer determined that the claimant sustained a compensable injury, and the carrier

requested a designated doctor examination, the Division properly appointed a designated doctor to determine MMI and IR.

Carrier properly did not pay benefits based on the DD's report because it had disputed compensability of the claim. Carrier became liable for the payment of benefits based on the DD's report based on the HO's decision that the claim was compensable.

APD 100705-s

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## Office of Injured Employee's Counsel Re-appointed; (OIEC) Marks Milestone

Texas Gov. Rick Perry has reappointed Norman Darwin of Benbrook as the state's Injured Employee Public Counsel for a term to expire Feb. 1, 2013.

The public counsel helps injured employees in the workers' compensation system, oversees the ombudsman program and advocates on behalf of injured employees to ensure balance and fairness for all in the system.

Darwin is a former attorney in private practice. He is a member of the State Bar of Texas and Tarrant County Bar Association,

a past member of the American Board of Trial Advocates, and past director emeritus of the Texas Trial Lawyers Association. He is also president of the Fort Worth Rotary Club. He served in the U.S. Army.

Darwin's appointment is subject to Senate confirmation.

OIEC is celebrating its fifth year of service On March 22, 2011 from 10 a.m. to 2 p.m.

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## TDI/DWC Commissioner Re-appointed

Texas Gov. Rick Perry reappointed Rod Bordelon to a second term as head of the Division of Workers' Compensation for a term to expire Feb. 1, 2013. He was first appointed in February 2000. The Senate Nominations Committee on March 8, 2011 approved the appointment and sent the nomination to full Senate on a 5-0 vote.

## COMMUNITY NEWS

*Workers compensation attorneys in Texas make up a small community. We are interested in what is going on with you, both personally and professionally. News to share with the rest of us? A change in job? A special honor? A personal achievement? A tribute? E-mail newsletter notices to [kay@gogginlaw.com](mailto:kay@gogginlaw.com)*

Smith & Carr, P.C. moving  
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*Phone, fax and website stay the same.*

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**Ana B. Anchondo** has joined The Law Offices of Leticia Gonzalez, PLLC handling worker's compensation cases along with immigration and family law.

Sean Markey has left the firm to do title work.

The Law Offices of Leticia Gonzalez, PLLC  
1100 NW Loop 410, Ste 215  
San Antonio, TX 78213  
(210) 558-7416

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## Barry Acting Deputy After Lang Retires

Bob Lang, deputy commissioner for hearings at the Texas Division of Workers' Compensation, will retire effective March 31, the division announced March 15, 2011.

Lang has worked for the DWC and its predecessor agency for 18 years. During that time, Lang has served as a managing staff attorney, hearing officer, managing hearing officer, Appeals Panel manager, judge and director of indemnity dispute resolution. Workers' Compensation Commissioner Rod Bordelon said that Dan Barry, director of proceedings, will be the acting deputy commissioner for hearings after Lang leaves.

Barry joined the agency in January 2001 as an appeals panel program attorney. Since then, he has served as an appeals panel judge, appeals panel manager judge, hearing officer manager and director of proceedings.

## CONGRATULATIONS!

### Michele Wong Krause

Michele Wong Krause (claimant attorney) was honored with the 2010 Dallas Hispanic Bar Association's President's Award. She received the award at the Fifth Annual Lighting the Path to Legal Education event September 30, 2010. She has also been elected to the board of directors of the Dallas Bar Association for 2011.



## Texas Super Lawyers Rising Stars Edition 2011 for Workers' Compensation

*Texas Super Lawyers Rising Stars Edition 2011 for Workers' Compensation attorneys names:*

**Lea Burleson Buffington**

Burns Anderson Jury & Brenner, Austin

**Mark A. Doyle**

Knott & Doyle, Dallas

**Matthew B. Lewis of Rogers**

Booker & Lewis of Richardson

## *In Memory Of*

### **Joe E. Phillips, husband to Flahive, Ogden & Latson attorney Lynette Phillips.**

Joe Earl Phillips, age 50, passed away August 15, 2010, peacefully at home due to complications from colon cancer. Survivors include his wife of 26 years, Lynette (Saterfield) Phillips; sons, Sterling Jamal and Spencer Tremaine; He was born in Refugio, Texas, educated in Corpus Christi, and graduated from F. H. Moody High School in 1978. While at Moody High, he excelled as a basketball player and was named to the All-District and All South Texas Teams. He received his BBA degree from Southwestern University in 1982. Joe worked at Hospira, Inc. (formerly Abbott Laboratories) for 27 years. He was also devoted to youth basketball and served as President of Texas Thunder Basketball Club. The family designated memorial contributions to be made in Joe's name to the East 19th Street Missionary Baptist Church Building Fund, 3401 Rogge Lane, Austin, Texas 78723.

### **Bryan Scott Drazner, M.D., a workers' compensation doctor**

Bryan Scott Drazner, primarily with NJZ Medical Associates in Dallas, age 48, passed away Monday October 18, 2010, due to complications stemming from an accident. Bryan was a proud graduate of the University of Pennsylvania, attended Medical school at State University of New York, Syracuse and trained later at John Hopkins Hospital. Bryan is survived by his spouse Jim Parrish and sons Noah, Joshua and Zachary. In lieu of flowers, the family has requested that donations be made in Bryan's memory to Temple Emanu-El.

### **Armina "Nina" Hancock, mother of Denton Field Office Hearing Officer Warren Hancock**

Armina "Nina" Hancock was born February 26, 1918 in Doddridge, Arkansas, and passed away December 1, 2010 at the age of 92 in Dallas, Texas. Nina earned her R.N. at Highland Sanitarium School of Nursing in Shreveport, Louisiana in 1940. She was OB-Gyn and Nursery Supervisor and Assistant Director of Nurses at Shreveport Charity Hospital. She married Warren E. Hancock, M.D., on January 3, 1944. She furthered her nursing career at Johns Hopkins University Hospital, Baltimore, MD., Hahnemann & University Hospital, Philadelphia, PA, and Ochsner Hospital in New Orleans, LA while her husband was stationed in those locations with the U.S. Army. For the next 40 years, she worked as a registered nurse in her husband's medical practice in Dallas. Nina was preceded in death by her husband of 51 years, Warren E. Hancock, M.D.. She is survived by son, Warren E. Hancock, Jr. of Dallas, daughters, Jan Nolen and husband Brian of Garland, and Debbie Turnham and husband Mike of Mesquite; survived by grandchildren, great grandchildren and sisters. Memorials may be made to Our Children's House at Baylor Hospital, Baylor Health Care System Foundation, 3600 Gaston Ave., Suite 100, Dallas, Texas 75246.

### **Thomas Hight, Sr., father of Dallas Field Office Hearing Officer Thomas Hight, Jr.**

Thomas Howell Hight, Sr., born April 15, 1926 passed away peacefully on the east Texas ranch he loved on February 19, 2011. Tom was a lover of Texas and its history, and an early champion of gourmet cooking and fine wines. He led a life full of varied accomplishment that included once winning the title of Texas State Fencing Champion. He served in the Army in World War II and was active in the reconstruction of Europe after the war. He returned home to attend Texas University, graduating from its law school. He moved his young family to Dallas where he practiced law for the rest of his life. Throughout his life he was deeply involved in Democratic politics. He was among those seated at a luncheon awaiting the speech by President Kennedy that never came in 1963. At his passing he was semi-retired to his ranch, where he specialized in raising Beefmaster cattle. He was preceded in death by his wife of 50 years, Jean, and his granddaughter, Adrienne. He is survived by his three children, Thomas Jr., Lee and Hillary, as well as six grandchildren and two great-grand-children. In lieu of flowers the family requests that memorial contributions be made to the Jordon-Hight Cemetery Association, PO Box 549, Eustace, Texas, 75124.

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