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Workers' Compensation and Disability News • Fall 2009

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"Educating the courts about the latest advances in fibromyalgia studies will help to rid the courts of this negative perception and allow workers a fair chance at recovery."

Joel Everest, a recent law school graduate, author of the article "Fibromyalgia and Workers' Compensation: Controversy, Problems and Injustice."

Courts Finding for Employers on Fibro Cases

By John Kamin, Legal Editor, WorkCompCentral

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Courts are resolving a vast majority of fibromyalgia claims with conflicting evidence in favor of employers, according to a recent article in the Alabama Law Review.

The disputed concept of whether physical trauma can cause fibromyalgia often leads claimants and defense attorneys to present contradictory evidence before the courts, wrote Joel Everest, a recent law school graduate, in an article posted on the Law Review's website this month called "Fibromyalgia and Workers' Compensation: Controversy, Problems and Injustice."

Everest studied court rulings from throughout the nation by using the Westlaw database and said trial and appellate courts tend to resolve cases with conflicting evidence in favor of employers. Once a trial court has ruled that the worker did not satisfy the burden of proof that a work-

related physical trauma caused fibromyalgia, appellate courts can rule that "it was within (the court's) province to resolve the conflicting evidence in favor the employer."

Everest cited a 1998 New York case, *Gaylord v. Ichabod Crane Central School District*, as an example. School bus driver Donna Gaylord's treating physician testified that a combination of lifting a heavy special-needs child combined with the frequent rhythmical kicking on the back of her seat by an autistic child had combined to cause fibromyalgia in his patient. The trial court found testimony from the employer's physician that fibromyalgia was a chronic, pre-existing condition more credible.

"While deferring to the findings of the lower court if reasonable is the duty of the appellate court in this situation, some courts appear less willing to defer when the lower court has allowed recovery for fibromyalgia," Everest wrote. He backed up his conclusion by citing an Alaska ruling in *Safeway v. Mackey*, a Tennessee decision in *Payne v. Sequatchie Valley Coal Corp.*, and a Florida decision in *Liberty Corr. Inst. v. Yon*.

In the 2002 South Dakota case of *Rawls v. Coleman-Frizzell*, a court rejected expert testimony that an accidental injury caused fibromyalgia, even though the employer had offered no contradictory testimony. The appellate court noted that two physicians who had testified that Ann Rawls' fibromyalgia was caused by work also said their



conclusions were "open to doubt," while other physicians who examined her testified that they could not say what caused the fibromyalgia.

Courts are also hesitant to accept fibromyalgia as an occupational disease, Everest said, "often holding that the risks that led to the fibromyalgia were not characteristic of and peculiar to the particular occupation."

Everest explained that the courts' rejection of a majority of fibromyalgia claims is disturbing because the medical community has accepted the fibromyalgia as an actual illness that causes disability. He noted that the American Medical Association acknowledged this in 1987, and that in 1990, the American College of Rheumatology set out criteria for diagnosing the condition.

"To put this rejection rate into perspective, North Carolina statistics show that in the 1999-2000 fiscal year only 132 workers' compensation claims out of a total of 8,087 were denied in the state," Everest wrote. "This equals a 98.3% approval rate and a mere 1.7% denial rate. Similarly in Wyoming, studies show that for the fiscal years 2000 and 2001, approximately 89% of the reported injuries were compensable.

"In British Columbia, Canada, workers are calling for change to their system of workers' compensation because denial rates reached a 10-year high in 2006 of 8.2%. A majority denial rate for fibromyalgia patients is far greater than expected and shows that current treatment of fibromyalgia by the courts is an injustice that must be remedied."

Everest attributed part of the courts' denial rate to a negative perception of fibromyalgia.

"Educating the courts about the latest advances in fibromyalgia studies will help to rid the courts of this negative perception and allow workers a fair chance at recovery," he wrote. "Weeding out malingerers will also help to change the negative perception associated with fibromyalgia." ■

Deaths at Disney World Prompt Investigations

By Sarah McBride

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The accidental death of a performer at Walt Disney Co.'s Walt Disney World in Florida -- the third employee fatality at the park since early July -- has prompted separate local and federal investigations.

Anislav Varbanov, 30 years old, died late Monday after he was injured performing a tumbling roll during a rehearsal for a show based on the Indiana Jones character in the "Raiders of the Lost Ark" movie series.

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"Florida tracks park accidents, but only those affecting customers."

*Rob Jacobs,
chief of the Bureau of
Fair Rides Inspection*



Deaths at Disney...

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The U.S. Labor Department sent an Occupational Safety and Health Administration investigator to Orlando to determine what had happened. OSHA has up to six months to report its findings, a spokesman said. In addition, the local sheriff's office is looking into the matter, and Disney has launched its own investigation.

Mr. Varbanov's death followed the death last week of Mark Prince, 47, from complications following a head injury suffered during the performance of a pirate show. Last month, Austin Wuennenberg, 21, died when another train backed into a monorail he was operating. OSHA is also investigating those deaths.

A medical examiner in Orlando performed an autopsy on Mr. Varbanov Tuesday and ruled the death was caused by a neck fracture and was accidental, said Sheri Blanton, a senior program manager with the medical examiner's office.

Mr. Varbanov, a native of Bulgaria, had joined Walt Disney World last month and had worked and trained as a gymnast and acrobat since at least 1991, according to a Disney spokesman.

The Disney spokesman said the park uses its own "rigorously trained" employee team,

including engineers, to examine the safety of equipment and practices at Disney parks. Eleven months ago, the safety team was reorganized to combine employee and customer safety at Disney's parks and resorts.

OSHA has launched five inspections of parts of Disney World in 2009, three because of the fatalities and two in response to complaints. In February, OSHA fined Disney \$4,000 for violations related to exposed openings and electrical wiring. Walt Disney World employs some 60,000 people.

Florida tracks park accidents, but only those affecting customers, said Rob Jacobs, chief of the Bureau of Fair Rides Inspection. In the quarter ended June 30, Disney reported a dozen, ranging from a 66-year-old who fractured his ribs after colliding with another guest on the Rudder Buster water slide to a 48-year-old woman who felt weak after riding on the Rock 'n' Roller Coaster.

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Low-Wage Workers Are Often Cheated, Study Says

By Steven Greenhouse

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Low-wage workers are routinely denied proper overtime pay and are often paid less than the minimum wage, according to a new study based on a survey of workers in New York, Los Angeles and Chicago.

The study, the most comprehensive examination of wage-law violations in a decade, also found that



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68 percent of the workers interviewed had experienced at least one pay-related violation in the previous work week.

"We were all surprised by the high prevalence rate," said Ruth Milkman, one of the study's authors and a sociology professor at the University of California, Los Angeles, and the City University of New York. The study, to be released on Wednesday, was financed by the Ford, Joyce, Haynes and Russell Sage Foundations.

In surveying 4,387 workers in various low-wage industries, including apparel manufacturing, child care and discount retailing, the researchers found that the typical worker had lost \$51 the previous week through wage violations, out of average weekly earnings of \$339. That translates into a 15 percent loss in pay.

The researchers said one of the most surprising findings was how successful low-wage employers were in pressuring workers not to file for workers' compensation. Only 8 percent of those who suffered serious injuries on the job filed for compensation to pay for medical care and missed days at work stemming from those injuries.

"The conventional wisdom has been that to the extent there were violations, it was confined to a few rogue employers or to especially disadvantaged workers, like undocumented immigrants," said Nik Theodore, an author of the study and a professor of urban planning and policy at the University of Illinois, Chicago. "What our study shows is that this is a widespread phenomenon across the low-wage labor market in the United States."

According to the study, 39 percent of those surveyed were illegal immigrants, 31 percent legal immigrants and 30 percent native-born Americans.

The study found that 26 percent of the workers had been paid less than the minimum wage the week before being surveyed and that one in seven had worked off the clock the previous week. In



addition, 76 percent of those who had worked overtime the week before were not paid their proper overtime, the researchers found.

The new study, "Broken Laws, Unprotected Workers," was conducted in the first half of 2008, before the brunt of the recession hit. The median wage of the workers surveyed was \$8.02 an hour - supervisors were not surveyed - with more than three-quarters of those interviewed earning less than \$10 an hour. When the survey was conducted, the minimum wage was \$7.15 in New York State, \$7.50 in Illinois and \$8 in California.

Labor Secretary Hilda L. Solis responded to the report with an e-mail statement, saying, "There is no excuse for the disregard of federal labor standards - especially those designed to protect the neediest among us." Ms. Solis said she was in the process of hiring 250 more wage-and-hour investigators. "Today's report clearly shows we still have a major task before us," she said.

One of the most surprising findings was how successful low-wage employers were in pressuring workers not to file for workers' compensation.

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The fatality rate among oil and gas workers was seven times the average for all occupations.

Centers for Disease Control and Prevention

Low Wage Workers...

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The study's authors noted that many low-wage employers comply with wage and labor laws. The National Federation of Independent Business, which represents small-business owners, said it encouraged members "to stay in compliance with state and federal labor laws."

But many small businesses say they are forced to violate wage laws to remain competitive.

The study found that women were far more likely to suffer minimum wage violations than men, with the highest prevalence among women who were illegal immigrants. Among American-born workers, African-Americans had a violation rate nearly triple that for whites.

"These practices are not just morally reprehensible, but they're bad for the economy," said Annette Bernhardt, an author of the study and policy co-director of the National Employment Law Project. "When unscrupulous employers break the law, they're robbing families of money to put food on the table, they're robbing communities of spending power and they're robbing governments of vital tax revenues."

When the Russell Sage Foundation announced a grant to help finance the survey, it said that low-wage workers were "hard to find" for interviews and that "government compliance surveys shy away from the difficult task of measuring workplace practices beyond the standard wage, benefits and hours questions."

The report found that 57 percent of workers sampled had not received mandatory pay documents the previous week, which are intended to help make sure pay is legal and accurate. Of workers who receive tips, 12 percent said their employer had stolen some of the tips.

One in five workers reported having lodged a complaint about wages to their employer or trying to form a union in the previous year, and 43 percent of them said they had experienced some form of illegal retaliation, like firing or suspension, the study said.

In instances when workers' compensation should have been used, the study found, one third of workers injured on the job paid the bills for treatment out of their own pocket and 22 percent used their health insurance. Workers' compensation insurance paid medical expenses for only 6 percent of the injured workers surveyed, the researchers found. ■



Nevada construction deaths prompt safety review

By Kevin Freking, Associated Press Writer

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Federal officials will investigate workplace safety programs across the country after the deaths of 25 workers in construction accidents in Las Vegas over an 18-month period.

A federal review of Nevada's workplace safety program showed inspectors didn't know enough about construction safety hazards and failed to issue citations for willful and repeat violations. The workers were killed from January 2008 through June 2009.

The review happened after the Las Vegas Sun exposed serious safety flaws on the sites and lax oversight by regulators, leading lawmakers to question whether other states were experiencing similar problems. Now the safety programs in 27 states and territories will be scrutinized.

The Occupational Safety and Health Administration is responsible for enforcing worker safety standards at about 60 percent of job sites around the country. States oversee the rest, and are encouraged to do so, with monitoring by the federal government.

In a case cited during a congressional hearing Thursday, Nevada's OSHA program actually weakened penalties against a casino company after two workers died and one was seriously injured, despite that company's history of similar problems.

"Essentially nothing happens for the death of a worker," California Democratic Rep. George Miller, chairman of the House Education and Labor Committee, said. "There's something very wrong with that. It just doesn't pass the smell test."

Jordan Barab, OSHA's acting assistant secretary, told lawmakers his agency will review state programs and, in a worst-case scenario, would end up running a state program that is lacking.

Some lawmakers applauded the review but didn't like the idea of states losing control over job safety. "We should not disregard a model that has worked well in other states," said Rep. Cathy McMorris Rodgers, R-Wash.

Rep. Dina Titus, D-Nev., said a perception of political influence has dogged Nevada's program. Barab said that his federal agency will open an office in Nevada to improve the state's oversight of worker safety. ■



Workplace Deaths Fell 10% in 2008

By Sara Murray

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Workplace fatalities reached their lowest point on record last year, as the recession forced employers to trim back hours, particularly in risky professions such as construction, the Labor Department said Thursday.

Workplace suicides, meanwhile, hit an all-time high of 251, although that remains a tiny fraction of U.S. suicides.

Fatalities on the job dropped to 5,071 in 2008, down more than 10% from the previous year, the Labor Department said in its preliminary count. It is the smallest number of fatalities since the Labor Department started keeping track in 1992.

It is difficult to tell if safety has improved. The recession likely played a large part in the overall decline in deaths as companies laid off workers.

Using a new methodology, the Labor Department said the rate of fatal work injuries declined to 3.6 per 100,000 full-time workers in

2008 from four per 100,000 a year earlier. The new fatality rate figures go back only to 2006, when there were 4.2 fatal work injuries per 100,000 workers.

Industries such as construction, which is

historically a large contributor to the fatalities, faced sharper declines in employment. Deaths in private-sector construction dropped 20% from 2007, but the industry still reported the largest number of private-sector deaths. For example, a spate of deaths in July 2008 left five construction workers dead in two states. An iron worker in Normal, Ill., died after the boom of a crane fell on him. In Houston, a 30-story crane collapsed at a LyondellBasell Industries refinery, killing four workers.

Transportation-related fatalities, which made up two-fifths of all workplace fatalities, fell 13% to 2,053 in 2008 -- a new low. The number of deadly falls at work also fell 20%.

Deaths among blacks and Hispanics dropped 16% and 17%, respectively, in 2008.

Homicides in the workplace fell 18% to 517 last year, down more than half from a high of 1,080 in 1994.

The number of deaths could still rise when the Labor Department updates its 2008 data in April 2010. It noted that state budget constraints may have prevented some government agencies from processing fatality data on time, increasing the odds of the data being revised upward.

The number of workplace suicides reached 251 -- 28% higher than in 2007. Among the workplace suicides was Thierry Magon de La Villehuchet, a 65-year-old co-founder of an investment firm that lost \$1.5 billion in the Bernard Madoff scandal. He committed suicide in his New York office in December.

The number of suicides in the workplace is a small subset of all suicides; 33,185 people killed themselves in 2007, according to the latest numbers available from the Centers for Disease Control and Prevention. ■

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Bone to pick with the MTA

By ALEX GINSBERG

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If you treat the stiff joints and muscles of NYC Transit workers, watch out. You might wind up getting stiffed yourself.

A workers'-compensation doctor has sued the MTA, claiming the agency is a deadbeat that is refusing to pay out more than \$600,000 in claims he has billed since January 2007.

Combined with interest and penalties, that's more than \$1 million the agency is on the hook for, according to the suit, filed last week in Brooklyn Supreme Court.

"I cannot imagine the current president of MTA would condone noncompliant behavior and blatant disregard for applicable laws by its division responsible for reimbursement of workers'-compensation medical bills," Dr. Michael Hearn wrote in a July 29 letter to MTA President Howard Roberts.

"It is equally disturbing to imagine that a sitting president would knowingly allow MTA to waste taxpayers' money on unnecessary penalties and interest payments, disrupt the patient-doctor relationship and deny injured MTA workers their rights to medical care."

The suit demands \$10 million in damages. "It's astounding that an agency with so much public responsibility can act so irresponsibly," said lawyer Steven Gildin.

"This is exactly why health care is so out of control. Why would a doctor treat patients when

he knows he won't get paid?"

Transit spokesman Paul Fleuranges said the agency had paid out 14,000 claims worth some \$2.5 million to Hearn, but added that the agency had a responsibility to make sure all claims were valid before spending the public's money.

"We are committed to satisfying both those obligations," he said.

Unlike smaller employers, who are covered by private insurers for workers'-comp claims, the MTA is self-insured, and thus pays all the bills itself -- when it pays.

According to Hearn, who runs Central Medical Services of Westrock, with offices throughout the metro area, he has been fighting the MTA for prompt payment for years.

In some cases, he said, it has even affected his ability to refer patients to specialists.

Injured bus driver Joyce Smith told The Post that she had nearly been denied the care of a neurosurgeon to whom Hearn had recommended her.

"They called me to say that my appointment was canceled," Smith said. "I called them back to find out why, and that's when they informed me that they weren't going to see me again because [NYC Transit] hadn't paid the bill. So the doctor didn't want to see me again."

In the end, she said, Hearn interceded and got the neurosurgeon to see her. ■



“Surgeons can do effective repairs by borrowing bone and cartilage from another part of the knee”

Dr. Constance R. Chu, director of the Cartilage Restoration Center at the University of Pittsburgh

Mimicking Human Cartilage to Repair a Knee

By Anne Eisenberg

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One way for surgeons to repair injured knees is to take cartilage and bone from another part of the knee and transplant it in the damaged area.

Now companies are developing potentially simpler knee patches: small, off-the-shelf plugs engineered to mimic the composition of human bone and cartilage.

These ready-made cylinders can be inserted in an arthroscopic procedure; they are often used after a sports injury. They are known as osteochondral scaffolds, because they support new bone and cartilage as it grows.

Orthomimetics, a company in Cambridge, England, has developed a scaffold approved for use in Europe that resulted from a collaboration

between faculty members at the Massachusetts Institute of Technology and the University of Cambridge.

The scaffold provides a temporary, engineered matrix when inserted into a drilled hole, said Lorna Gibson, a professor of

materials science and engineering at M.I.T. and one of the inventors of the device. Stem cells from the bone marrow that can form bone or cartilage impregnate the pores of the cylinder.

“The scaffold guides the tissue formation of bone on one side and cartilage on the other,” Dr. Gibson said.

The scaffold disappears in about six months. “Over time the cells that attach to the scaffold produce enzymes that dissolve it,” Dr. Gibson said. At the same time, the cells are putting down their own matrix.

Dr. Constance R. Chu, director of the Cartilage Restoration Center at the University of Pittsburgh and the Albert Ferguson associate professor of orthopedic surgery and bioengineering, said that there were potential benefits to using the cylinders to help repair cartilage that protects bones in the knee joint from rubbing against one another.

“Surgeons can do effective repairs by borrowing bone and cartilage from another part of the knee” that is less weight-bearing, Dr. Chu said. “But people don’t have a lot of extra cartilage — if any — to go around.”

Dr. Chu has herself worked on creating such devices. “The thinking has always been that the scaffold will support and guide the repair,” she said. “That’s why people will spend years to make something like this.”

The plugs are for the treatment of small lesions of no more than half a square inch of surface area, said Andrew Lynn, the chief executive of Orthomimetics. Myron Spector, a professor of orthopedic surgery at Harvard Medical School who collaborated with the M.I.T.-Cambridge group in a preliminary study, said the scaffold had promise. An off-the-shelf equivalent of transplanted cartilage and bone is clearly better than such a transplant, Dr. Spector said, but he pointed out that the device was as yet unproven in clinical trials.

Dr. Spector said he was also concerned that doctors might use the device in patients who had only cartilage damage, drilling into bone to insert it. “You wonder, why create a defect in bone where it didn’t exist before, to put in the device?” he said.



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Another plug, TruFit CB, is approved for use with bone and cartilage injuries in Europe, Canada and Australia, said Joe Metzger, a spokesman for its maker, Smith & Nephew of Andover, Mass. It is sold in the United States under the name TruFit BGS, and is cleared for use to fill some voids or gaps in bone but not for cartilage repair, he said. The TruFit plugs are being tried out by Dr. Riley J. Williams III, director of the Institute for Cartilage Repair at the Hospital for Special Surgery in New York, where he treats many professional basketball and soccer players. Dr. Williams first used the devices to fill holes from which tissue had been taken for transplants, and, after seeing good results in MRI scans, experimented with using them for cartilage repair in about 250 patients. Doctors are permitted to use approved drugs and devices in unapproved, or "off label," ways as they deem appropriate.

"I'm very pleased with the clinical results," said Dr. Williams, who said he had no connection to Smith & Nephew. "It's a less traumatic surgery and you are not damaging the other areas of the knee" by removing cartilage.

Dr. Bert R. Mandelbaum, an orthopedic surgeon at the Santa Monica Orthopaedic and Sports Medicine Group in Santa Monica, Calif., said the new plugs were appealing. "They are off-the-shelf, and the intervention is relatively easy," he said. "They don't bring in those other variables of big expense and time."

But the scaffolds aren't appropriate for everyone, Dr. Mandelbaum said: "The problem is that sometimes they don't integrate with the surrounding bone."

One solution is to consider surgical intervention earlier in life and in the development of the problem being treated. "A 16-year-old will respond well to our interventions, but a person who has had a problem for 16 years might respond differently," Dr. Mandelbaum said. "Every cartilage repair technique works better in the young." ■

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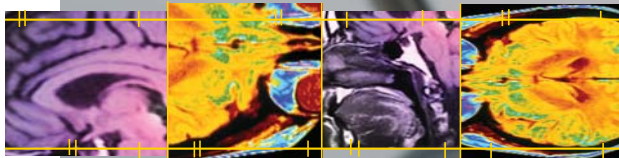
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