The Alabama Self-Insurer
The Alabama Self-Insurers Association Newsletter

SPRING 2011

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DATES TO REMEMBER...

2011 Summer Conference
August 14-16, 2011
Hilton Sandestin Beach
Golf Resort & Spa
Destin, Florida

2012 Winter Workshop
January 19-20, 2012
Cahaba Grand
Conference Center
Birmingham, Alabama

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NEW LEGISLATURE – NEW DAY

What a difference a year makes. The first year of any new quadrenninum is always exciting. Add to that mixture one-third new members and we should be in for one of the most interesting sessions in Alabama history. The Alabama Republican Party currently enjoys super majorities in both chambers and their agenda includes major changes to the status quo.

The leadership wants to finish the regular session early, possibly only using 25 legislative days, cutting the length of the session by 20 percent. As you can imagine, there is a lot of pent up demand for legislation by various associations. The competition for floor time is intense as groups vie or limited spots on the special order calendars.

TORT REFORM BILLS ON THE MOVE

ASIA follows the lead of the Alabama Civil Justice Reform Committee (ACJRC) on all tort related issues. ACKRC is a coalition of business-oriented associations, small businesses, corporations and others who seek to ensure fairness in Alabama's civil justice laws and balance on our appellate courts. ACJRC is pushing a four-bill package of tort reform bills that should help Alabama be more competitive with surrounding states in attracting new jobs. Under the new leadership in the Legislature, the business community was highly encouraged to sit down with representatives from the trial lawyers association to negotiate the bills. The negotiations have produced agreements to three of the four bills and may ultimately produce a compromise on all four.

The package includes the following bills:

PRODUCT LIABILITY REFORM

SB 184, by Sen. Ben Brooks (R) of Mobile, is known as the Alabama Small Business Protection Act. The bill would add protection for Alabama's retailers against product liability suits. The suits are aimed at the manufacturers, but often the trial lawyers sue Alabama retailers, wholesalers and distributors as defendants even though they did not participate in the manufacture or design of the product. This is done in some instances solely to allow the plaintiff

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A WORD FROM THE PRESIDENT...

ALLANE HYBART

I feel sure that your offices are probably like mine – someone is always sneezing with Spring allergies and it seems Mobile is worse this year than in years past (then again we always probably say that!)

But having Spring come, means Summer is not far behind which in turn means our great Summer Conference needs to be on your calendar – dates are August 14th thru 16th, 2011 at the Sandestin Hilton. The seminar committee has already met several times to put together an outstanding agenda. They have various physicians to explain the merits of new procedures which benefit our injured employees, a Risk Managers perspective of return to work practices, some legal updates (so we all can feel good those cases might not be ours!) and many other interesting topics. We will again have the golf and tennis tournaments on the schedule for Monday afternoon so get out there and practice for those.

We also anticipate having representatives from the Department of Industrial Relations be with us at the seminar to bring us word of new changes there with the change in governor. It is a great honor and tribute for a job well done that Governor Bentley asked Tom Surtees, a frequent ASIA speaker, to remain as Director of Industrial Relations.

I have always felt we ourselves in talking with each other at the conferences are the best source of information on what is happening in the Workers Compensation world – just listening to other employers, case managers, and attorneys compare their experience in real time is truly valuable. Another interesting place for information is www.workerscompensation.com where you can see what not only is going on in our State in some landmark cases but other States as well.

So, please be sure that August 14th thru 16th is on your summer calendar – more information on that to be out in a couple of months. Looking forward to seeing all again – minus the Spring Sneezes of course.

Allane

LEGISLATURE... *continued from page 3*

to file suit in counties favorable to plaintiffs and keep an out-of-state manufacturer in an Alabama state court and out of federal court. These suits cost Alabama businesses time and money while the true target of the suit is the manufacturer or designer of the product. If, on the other hand, the suit is brought against a retailer or distributor because the manufacturer is unknown and the retailer or distributor is needed in order to provide discovery concerning the manufacturer's identity, the bill provides a mechanism to accomplish this in a reasonable manner so that suit can then proceed against the appropriate manufacturer. SB 184 is pending on the Senate calendar. HB 251, by Rep. Wes Long (R) of Guntersville, is the companion bill pending on the House calendar.

POST JUDGMENT INTEREST REFORM

SB 207, by Sen. Cam Ward (R) of Alabaster, would change the rate of interest on judgments in Alabama from 12% to 7.5%. Under current Alabama law, if a defendant loses a lawsuit and chooses to appeal, he must begin paying 12% post-judgment interest on the amount the court or jury awarded the plaintiff, creating a significant financial deterrent to appealing an unjust verdict. This helps prevent the cost of money from dramatically impacting a defendant's decision whether or not to appeal a verdict. A survey of states in the southeast demonstrates that Alabama's rate is out of step with the 10 states surveyed. Five had flat rates like Alabama and Alabama's 12% is the highest. Five used variable rates similar to the federal standard and are substantially lower than Alabama's 12%. SB 207 is pending on the Senate calendar. HB 236, by Rep. Greg Canfield (R) of Vestavia Hills, is the House companion pending on the House calendar.

WRONGFUL DEATH VENUE REFORM

SB 212, by Sen. Clay Scofield (R) of Guntersville, prohibits "forum shopping" of wrongful death actions by requiring that a suit can be brought only in the county where the decedent could have filed suit. This will prevent the current practice of finding a personal representative in a plaintiff-favorable county solely for purposes of obtaining venue there due to the residency of the personal representative. For example, if a person lives in Shelby County and dies in Shelby County,

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ASIA CALENDAR OF EVENTS

August 14-16, 2011	**ASIA Summer Conference** Hilton Sandestin Beach Golf Resort & Spa • Destin, FL
January 19-20, 2012	**ASIA Winter Workshop** Cahaba Grand Conference Center Birmingham, AL
August 12-15, 2012	**ASIA Summer Conference** Hilton Sandestin Beach Golf Resort & Spa • Destin, FL

PAYING WORKERS' COMPENSATION BENEFITS TO A MINOR MAY CREATE LIABILITY FOR THE PAYOR

JOSHUA G. HOLDEN | FISH NELSON, LLC

When a minor is to receive benefits you must take into account the Alabama Uniform Guardianship and Protective Proceedings Act (AUGPPA). Ala. Code §26-2A-6. The AUGPPA is in place to assure that minors are protected when it comes to receiving money. The AUGPPA states that anyone under a duty to pay money to a minor may perform this duty, within the amounts referenced below, by paying (1) Any person having care and custody of the minor and with whom the minor resides; (2) A guardian of the minor; or (3) The judge of the probate or like officer of the county in which the minor resides, if a resident in this state, or, if a nonresident, to the judge of probate or like officer in the county in which the person owing the money resides. If the payment exceeds (1) a $5,000.00 single payment;(2) $3,000.00 in one year paid in a series of payments; or (3) $25,000.00 paid during the period of minority of the minor, then payment can be made to any of the parties listed above. However, a notice of such payment must be filed with the judge of the probate or like officer of the county in which the minor resides, if a resident in this state, or, if a nonresident, to the judge of probate or like officer in the county in which the person owing the money resides. Id. This notice can simply be a letter to Probate Court or judge. This section does not apply if the payor has actual knowledge that a conservator has been appointed. Id. If there is a conservator then the payment should go through the conservator.

The AUGPPA goes on to state that persons who received money of behalf of the minor have to spend the money in a certain manner. The payor is not responsible for the proper application or use of the money if payment is made in accordance with AUGPPA.

The AUGPPA is intertwined with the *Alabama Workers' Compensation Act* pursuant to §25-5-60 et seq. As a result of the payments potentially being made to a minor, pursuant to the *Alabama Workers' Compensation Act,* a minor may be entitled to benefits if his or her parent was injured on the job and this injury lead to the parent's death. Depending on the parent's average weekly wage, the benefits paid to the minor child might exceed the limits set by the AUGPPA. If that is the case, then the AUGPPA should be considered before making the payment to the minor or the minor's guardian.

So, where should you release the funds once they become due, whether in weekly payments or a lump sum, and they exceed the amounts listed in the AUGPPA?

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MEMBERS IN THE NEWS...

BIRMINGHAM ATTORNEY NAMED ONE OF LEXISNEXIS' WORKERS' COMPENSATION NOTABLE PEOPLE FOR 2010

BIRMINGHAM, Alabama, Feb. 17, 2011 — Michael Fish, an attorney with the Birmingham, Alabama law firm of FISH NELSON, LLC, was recently selected as one of LexisNexis' "Workers' Compensation Notable People for 2010." Fish was only one of two defense attorneys selected in the nation.

The LexisNexis Workers' Compensation Law Community sponsored the awards the recipients of which are considered to be people who have worked tirelessly on behalf of their clients and have made significant contributions this past year to the workers' compensation system and/or the workplace.

The recipients of the 2010 awards were selected by LexisNexis with feedback from various organizations and experts in the field, including the Workers Injury Law & Advocacy Group (WILG), the National Workers' Compensation Defense Network (NWCDN), the Work Comp Analysis Group on LinkedIn, and selected members of the Larson's National Workers' Compensation Advisory Board.

If a conservatorship has been set up by proper filing with the appropriate court, pay the conservator. If a conservatorship has not been set up, the payments can be made to the person having care and custody with whom the minor resides or the minors guardian as long as notice of said payment is filed with the probate judge or like officer in said county or payment should be made to the probate judge or like office in the subject county. However, the best protection would be to require the guardian or person receiving payment on behalf of the minor to set up the conservatorship before payments are made.[1]

When could liability become an issue?

1. Weekly benefits have been paid to the widowed spouse and guardian of the minor for several years that exceed the $3,000.00 per year and no notice was filed with the probate court. Before the benefits are exhausted you agree to a lump sum settlement of the remainder of the benefits. The guardian then goes to file a conservatorship because the Guardian Ad Litem (GAL) involved in the settlement, who was not involved while prior benefits were being paid, recommends that a conservatorship be set up. Upon setting up the conservatorship, the new GAL appointed to the minor inquires as to how the money has been spent over the years. The guardian spent the money on items that were not allowed by the probate court. Now the person/entity that released the funds is potentially liable for the misappropriated funds.

2. The weekly benefits have been made to the minor's guardian until they are exhausted. Upon reaching the age of majority, the child wants his/her money but it has been spent. The child, now an adult, seeks the Probate Court's assistance to determine if the funds were handled pursuant to the AUGPPA. The Probate Court determines that some, or all, of the funds were handled inappropriately. Now the person/entity that released the funds is potentially liable for the misappropriated funds.

One option is to file a Declaratory Judgment action immediately with the Court to determine how the benefits should be apportioned or paid.2 This will require that a GAL be appropriately appointed on behalf of the minor before any benefits are paid. If this is done, the fees owed the GAL should be deducted from the minor's benefits, not to exceed 15% of the benefits. Frawley By and Through Frawley v U.S. Steel Min. Co., Inc., 496 So. 2d 731, 736-7 (Ala. 1986). The Supreme Court stated that GAL fees were not owed by the employer because the employer filed a declaratory judgment action seeking guidance and "had no other interest in the action and played a non-adversarial role." Id at 736.

One other option to be considered is found in Ala. Code §35-5A-8(a), the Alabama Uniform Transfer to Minors Act (AUTMA). The section provides that one owing a debt to minor, who does not have a conservator, can make an irrevocable payment to a custodian for the benefit of the minor if the amount does not exceed $10,000.00 at the time of the transfer. The payment should be made payable to the minor's legal guardian as custodian for the minor under the AUTMA. There is clearly a conflict in the amounts set forth in the AUTMA and the AUGPPA. However, there is no case law that states the AUTMA can be used in place the AUGPPA but, at the same time, there is not case law that says it can not.

When paying benefits where some, or all, of the benefits are for a minor, be sure the payments comply with the AUGPPA, the AUTMA or similar laws in whatever state you are dealing with. If you are unsure, make the payments to the Probate

Court in the appropriate county until a conservatorship is set up or you receive specific instructions from the Court. If this is done, you should not find yourself defending allegations that you released funds for the benefit of a minor in violation of the law.

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1 The conservator can be the minor's guardian, family member, or the county's conservator.

2 Filing a Declaratory Judgment with the Court is available due to Alabama still handling its Workers' Compensation cases through the state's Circuit Court system.

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LEGISLATURE... *continued from page 3*

the bill would require a wrongful death lawsuit to be filed in Shelby County. Under current law, the family of the deceased could retain a lawyer in Macon County to be the personal representative of the deceased and the suit could be filed in Macon County. SB 212 is pending on the Senate calendar. HB 228, by Rep. Ron Johnson (R) of Sylacauga is the House companion bill pending on the House calendar.

EXPERT WITNESS REFORM

SB 187, by Sen. Ben Brooks (R) of Mobile, would require Alabama courts to use the same standards for determining expert witnesses as is used in federal courts. The United States Supreme Court has ruled that lesser standards are not correct, which can lead to junk science and outlandish testimony in court cases. This can be used to mislead jurors and cast doubt on widely accepted scientific principles. SB 187 would require the application in Alabama of the federal expert witness rule enunciated in the Daubert case. Alabama is one of a minority of states that has not adopted the rule, even though in 1993 the U.S. Supreme Court mandated its adoption in all federal courts. A stricter standard for admitting expert testimony helps business, and indeed all litigants, in insuring valid scientific and other technical expert testimony

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NATIONAL COUNCIL OF SELF-INSURERS NEWS

LARRY HOLT, EXECUTIVE DIRECTOR

The following is a summary of an article, which recently appeared in Business Insurance. It was written by Roberto Ceniceros, Senior Editor.

Larry Holt
Executive Director

FALL IN COMP CLAIMS COMING TO AN END?

A long term trend of declining frequency of workers' compensation claims has flattened.

The widespread shift is significant because declining frequency of workers' comp claims has helped counter rising costs driven by the severity of claims, said Eric Brosius, Senior Vice President and Corporate Actuary for the Liberty Mutual Group in Boston.

Claims frequency, which had been falling an average of 4% a year because of safety programs and worksite automation, is a substantial driver of workers' comp loss costs and rates.

But the change in the frequency of claims, according to some observers, could be a temporary fluke driven by the ailing economy. As an example, financial pressures could have eroded some employers' ability to fund safety programs that reduce worker injuries.

Regarding self-insurers, Keith Higdon, Senior Vice President of Sedgwick Claims Management Services says, "We are seeing flattening or small increases of new workers' comp claim counts, among self-insured employers. We can't, though, say conclusively at this point the extent to which the trend is driven by changing patterns of behavior as opposed to changes in the total number of people at work,"

Liberty Mutual's data shows that the frequency has flattened or even increased slightly based on the number of claims filed per employer payroll. That happened in 2009 and has appeared to continue throughout 2010. The shift to flattened or slightly increased claims frequency is evident across Liberty Mutual's entire workers' comp book of business, including all industry segments, U.S. regions and employer sizes, Mr. Brosius said.

Because it is "happening everywhere, we are convinced it is not a blip." Mr. Brocius stated.

SUBJECT: IMMIGRANT STATUS NOT RELEVANT IN WORK DEATH

The decision by the 1st District Court of Appeals of Texas in Republic Waste Services Ltd. vs. Elida Griselda Martinez upheld the trial court's grant of a $1.4 million judgment to the deceased worker's common-law wife and father.

Oscar Alfredo Gomez and Ms. Martinez immigrated to Houston from El Salvador. He died when a co-worker backed a garbage truck over him.

Republic is a "nonsubscriber," as defined under the Texas' Workers' Compensation Act, which essentially allows employers to opt out of the system, and Ms. Martinez filed a wrongful death suit alleging negligence. During legal proceedings, the parties argued about the relevance of Mr. Gomez's immigration status. The plaintiffs argued that such evidence was not relevant and highly prejudicial.

The employer said the plaintiffs had planned to show that the 21-year-old Mr. Gomez earned $33,000 per year and would have worked another 35 to 40 years had he lived. But the employer argued that Mr. Gomez would have been deported after a federal immigration raid at Republic's facility two weeks after Mr. Gomez's death.

The trial court ruled that it was "gross speculation' whether Mr. Gomez would have been deported and would not allow a jury to hear evidence concerning his immigration status.

Among other findings, the appellate court also concluded that testimony on whether the raid may have led to deportation was speculative. It also found that the trial court's decision to exclude evidence regarding Mr. Gomez's illegal immigrant status was in line with Texas law.

The appellate court affirmed the trial court's decision.

The above was from an article written by Roberto Ceniceros , Senior Editor of Business Insurance.

SUBJECT: THE STRENGTHENING MEDICARE AND REPAYING TAXPAYERS ACT

Rep. Tim Murphy, R-Pennsylvania, and Rep. Ron Kind, D-Wisconsin, have introduced in the U.S. House of Representatives, The Strengthening Medicare and Repaying Taxpayers Act, HR 1063. The bill is designed to amend the Medicare Secondary Payer Act.

HR 1063 has a broad base of support, including insurance trade groups, self-insurers associations and claimants' attorneys.

Melissa Shelk, Vice President of Federal Affairs for the American Insurance Association, said the legislation is needed to help insurers deal more effectively with the problem of sending timely information to the Centers for Medicare and Medicaid Services (CMS), regarding payments made by insurers to people who have also been paid for their injuries through Medicare.

Ms. Shelk said that the current penalties imposed by Medicare for providing inaccurate data to CMS are punitive. Under current rules, insurance companies and self-insured companies can be penalized per day for inaccurate information, even though the data is only required to be submitted quarterly.

Under the current law, she said, penalties of $1,000 per day per claim can be imposed. The proposed legislation would change the penalty to "up to" $1,000 a day.

David Farber, a lawyer with Patton, Boggs in Washington, D.C. who represents a coalition of interested parties called The Medicare Advocacy Recovery Coalition, said the legislation will improve communication between Medicare and insurers plus self-insurers, resulting in faster settlements, by allowing insurers and self-insurers to obtain information from CMS on the Medicare repayments owed, before settlement, rather than after.

The bill would also create a right to appeal for all parties. Currently only Medicare beneficiaries can appeal.

The legislation would establish a threshold for settlements, for the purpose of ensuring that CMS does not spend more on collecting small claims than it stands to recover, Mr. Farber said.

If you have any questions at all, please feel free to contact me by e-mail at natcouncil@aol.com or by phone at 908-665-2152.

Larry Holt
Executive Director

MEMBERS OF THE NATIONAL COUNCIL OF SELF-INSURERS:

The 2011 annual meeting of the National Council of Self-Insurers will occur from Sunday, May 15 to Wednesday, May 18 at the new Tropicana in Las Vegas. A special attraction of the meeting, as well as a distinct honor to the National Council, is the keynote speaker; David Michaels, Assistant Secretary of Labor for Occupational Health and Safety.

Registration forms may be downloaded from www.natcouncil.com.

The Meeting Registration fee for a conferee or a spouse/companion includes the cost of the President's Reception and Buffet Dinner on Sunday evening, the luncheon on Monday, the Dinner-Dance (black tie optional) on Tuesday evening, the brunch on Wednesday, continental breakfasts on Monday and Tuesday and the hospitality room.

LEGISLATURE... *continued from page 7*

has a solid foundation and basis. For example, Alabama already requires that DNA evidence in criminal cases meet the standards for reliability established in Daubert. This bill will simply take the next logical step of requiring all expert testimony to meet the Daubert standard. SB 187 is pending on the Senate calendar. HB 239, by Rep. Steve McMillan (R) of Bay Minette, is the House companion bill pending in the House Judiciary committee.

DIRECT ACCESS FOR PT SERVICES

HB 202, by Rep. Ed Henry (R) of Huntsville) is a major overhaul of the current statute on physical therapy. This bill substantially revises and recasts the Physical Therapy Practice Act as the act relates to the regulation and licensure of physical therapists and physical therapist assistants. This bill would provide legislative intent relating to the Physical Therapy Practice Act and would revise definitions and the manner of appointing board members. This bill would provide immunity for members of the board, provide further for the powers and duties of the board, and specify the rights of consumers to board and licensee information. This bill would provide for the filing of complaints with the board and would expand the disciplinary powers of the board.

We understand the bill would also change Alabama law to allow consumers to seek PT services without a prescription or direction from a medical doctor. The bill is still pending in the House Health Committee.

ADVERSE CASE ALERT – EX PARTE HAYES

DAVID HANNAN JOHNSTONE, ADAMS,BAILEY, GORDON & HARRIS, LLC

On March 18, 2011, in a unanimous opinion, the Alabama Supreme Court reversed a favorable opinion for employers from the Alabama Court of Civil Appeals.

Previously the Court of Appeals in *Vintage Pharmaceuticals, LLC v. Hayes 2007* WL 268453 (Ala. Ct. Civ. App. September 14, 2007) had itself unanimously reversed a finding of permanent and total disability by the Circuit Court Judge of Madison County. The trial court below had concluded that an injury to a foot had resulted in a non-scheduled injury to the body as a whole and found that the claimant Thomas Hayes was permanently and totally disabled. Mr. Hayes had worked as a custodian and sustained an open fracture of his right heel bone in a forklift accident. The injury was severe and involved several complications. Just as significantly, Hayes had a congenital defect to his left foot on which he had received surgery as a child. Hayes had been able to accommodate the congenital left foot defect with a normal right foot, but, after the right foot was injured in the subject accident, his feet could no longer function properly and, in addition he had to elevate his right foot throughout the day. After observing the various witnesses, including the claimant Hayes, the trial court concluded that the effect of Hayes' physical injury to his right foot extended beyond that member and was entitled to compensation outside the schedule set out at § 25-5-57(a)(3)a., Ala. Code 1975. The trial court then specifically considered the vocational disability evidence and concluded that, because of all of Mr. Hayes' previous deficits, the loss of the right lower extremity had an increased impact upon the patient's ability to stand, walk, and perform functional activities, and, finally, based upon all factors, along with the age of the plaintiff, the trial court opined that Mr. Hayes had sustained an injury to his right foot that resulted in a **permanent total disability**.

Vintage Pharmaceuticals appealed to the Court of Civil Appeals, which compared Mr. Hayes' condition favorably to those suffered by the plaintiff in *Ex parte Drummond Co.*, 837 So. 2d 831 (Ala. 2002), who coincidentally had sustained a damage to a lower extremity and apparently had to elevate one leg at night. The Court of Civil Appeals analogized that the injury sustained by the plaintiff in *Drummond*, Mr. Pate, were very similar to those sustained by Mr. Hayes and further stated that Hayes had not "established that his right-foot injury caused an injury to any particular non-scheduled part of the body". *Vintage Pharmaceuticals, LLC v. Hayes* at *3. Based on the foregoing rationale, the Alabama Court of Civil Appeals reversed the judgment of the trial court and held that injury to Mr. Hayes was a scheduled injury and reversed the trial court.

Mr. Hayes then sought certiorari to the Alabama Supreme Court to review whether the Alabama Court of Civil Appeals' decision conflicted with the Alabama Supreme Court's prior decisions in *Ex parte Drummond Co.*, supra, and *Ex parte Jackson*, 997 So. 2d 103 (Ala. 2008).

The Alabama Supreme Court unanimously reversed the Alabama Court of Civil Appeals. Ex parte Hayes, 2011 WL 926047 (Ala., March 18, 2011). Relying principally upon the factors enumerated in the *Drummond* case, the Alabama Supreme Court reiterated its considerations from *Drummond* and also specifically relied upon an earlier decision of *Bell v. Driskell*, 213 So. 2d 806 (Ala. 1968), and language from 4 Lex K. Larson, *Larson's Workers' Compensation Law* 87.02 (2001), as follows:

> "The great majority of modern decisions agree that, if the effects of the loss of the member extend to other parts of the body and interfere with their efficiency, the schedule allowance for the lost member is not exclusive."
>
> *Hayes*, 2011 WL 926047 at *4

The Alabama Supreme Court emphasized that when evidence is presented to a trial court sitting without a jury, appellate courts should defer to the trial court to make credibility determinations and to weigh the evidence presented and pointed out that the role of the appellate court is not to reweigh the evidence but to affirm the judgment of the trial court if its findings are reasonably supported by the evidence and the correct legal conclusions have been drawn therefrom. *Hayes*, 2011 WL 926047 at *3

In the final analysis, the Alabama Supreme Court simply concluded that the Alabama Court of Civil Appeals had not appropriately reviewed the evidence and had favorably – but mistakenly so – compared the injury sustained by Hayes with the injury discussed in *Drummond*. Interestingly, in *Drummond*, the Alabama Supreme Court, despite setting out parameters that would allow a plaintiff to claim compensation outside the workers' compensation schedule, actually concluded that the plaintiff in that case had **not** done so. (Maybe that was because Charles Carr helped with the appeal on that one.) Therefore, we should all be aware if there is enough evidence at the trial court level to support a circuit court judge's decision taking the injury outside the schedule (based principally upon the language cited above from *Larsen's Workers' Compensation Law*), then the employer will be significantly at risk before the Alabama Supreme Court in spite of what the Alabama Court of Civil Appeals might do at the first level of appeal.

David Hannan graduated from Auburn University in 1968, and from the University of Alabama Law School in 1971. Upon graduation, David began his law practice with the firm of Johnstone, Adams, Bailey, Gordon & Harris, LLC, where he has practiced ever since. After coming to Mobile, David has been active in professional as well as numerous civic organizations. He is a member of the International Association of Defense Counsel and the Maritime Law Association. David's workers' compensation experience began in the 1970s when he was one of the first lawyers to depose Dr. Irving Selikoff at New York City's Mount Sinai Hospital in a mesothelioma case. A long-time member of ASIA, David has been an AV-rated lawyer in Martindale-Hubbell for 25 years. Mr. Hannan may be reached at Johnstone Adams, P. O. Box 1988, Mobile, Alabama, 36633, phone (251) 432-7682, email dch@johnstoneadams.com.

ARTIFICIAL DISK REPLACEMENT IN THE CERVICAL SPINE

SAM BOWEN | BIRMINGHAM NEUROSURGERY AND SPINE GROUP

Cervical disk disease is a common problem seen in both men and women, usually in the 40-60 age group. It is more common in those who undergo strenuous physical activities, with those who operate jackhammers at greatest risk. Although it can be associated with a specific injury this is not the norm and is seen in only 30-40% of cases. Most patients either wake up with pain or just notice that it has been hurting. Treatment with conservative measures is usually successful and, despite the initial pain, most will improve without needing surgery. Rest, cervical traction, and Physical Therapy all help and should be tried in most cases. Surgery is reserved for those that do not respond to conservative care, or present with severe cord compression and/or weakness.

Surgical treatments have evolved over the years with new technologies and approaches to the spine. Decades ago, the majority of cases were treated with a posterior approach to the spine similar to the approach for a lumbar disk herniation. This approach is still used today and works well in the correct patient. The advantage to the posterior approach is that the patient can have a nerve decompression without undergoing fusion. These patients also do not have the risk to the other structures of the neck seen with the anterior approach. There are downsides to the posterior approach though. First and foremost is that the spinal cord can get in the way. Most disk herniations are paracentral in location, so it can be nearly impossible to remove the entire herniation without retracting on the spinal cord. This obviously can cause serious neurologic injury. Retraction on the dura in the lumbar spine is much better tolerated because the spinal cord actually ends around the first lumbar vertebrae, which is well above where >95% of lumbar disk herniations occur. Secondly, the posterior approach requires dissection through a larger amount of muscle which causes more pain and soreness postoperatively. Finally, since this surgery is usually done without a fusion, recurrent herniation can occur.

With time, the anterior approach has become more popular and is the most common approach in use today due to its several advantages over the posterior approach. First the disk herniation occurs anterior to the spinal cord so no cord retraction is required when removing the disk from an anterior approach. The pathology is being pulled away from the cord and nerves while it is removed. Second, there is much less muscle to dissect through when approaching anteriorly. The downside to this is that the entire disk is removed and a fusion is required. Initially surgeons tried removing the disk without a fusion, but this was associated with collapse in the disk space and increased pain with possible recurrent stenosis. Fusing across the disk space is associated with less postoperative pain and it prevents any type of recurrent stenosis. Cervical disk arthroplasty gives the advantages of an anterior approach to the spine, but without having to fuse across the disk.

Today artificial cervical disks are still relatively new and considered experimental by most medical insurance companies. There have been many studies on many different types of artificial disks over the last several years. Today there are only two artificial disks that are FDA approved for use in the cervical spine (Fig 1 and 2). Both of these use a ball and socket mechanism to mimic normal cervical motionMany other implants are currently under

investigation, but these are the only two currently FDA approved. Many of the investigational devices involve more direct soft tissue ingrowth into the implant, and are made of materials which closely mimic the normal cervical disk. With time, many more of these devices will become available and may prove to be better than current treatment with a fusion.

Finally, to justify using these devices we must be able to prove some benefit over the current standard, which is a fusion. The most obvious advantage is that no motion is lost at the segment which requires surgery. This can be especially important if the patient ends up having to have multiple levels operated on. Currently, after a one level cervical fusion, one loses around 4% of the total motion in the cervical spine. Studies have shown that clinically this is not a noticeable difference. When two levels are fused a person loses around 10% and this is enough to be noticeable. The other potential advantage has to do with the stress a fusion places on the adjacent levels. Initially this was felt to be the most important benefit to an artificial disk. The problem has been proving this. There are many studies that show that after a fusion the adjacent levels show increased motion, but this increased motion does not necessarily equate to a higher incidence of adjacent level problems. At this time, studies have not proven that a fusion causes an increased incidence of adjacent level surgery. The best study to date took patients that required surgery and split them into two groups, one that had an anterior fusion, and another that had posterior decompression without fusion. The incidence of adjacent problems over time was the same. It is hard to prove that those patients who required surgery and had a fusion would not have had further problems at other levels, even if they had not had a fusion. It may just be that those who required surgery at one level were going to have problems at another level over time due to the natural history of degenerative spine disease.

Even if we cannot prove that artificial disk lowers adjacent level disease, there are certainly some potential benefits. First, these patients do not require any prolonged immobilization and are actually encouraged to resume normal activities as soon as possible. This has been proven in several studies to be associated with a quicker return to work when compared to patients who had a fusion. Also, studies have suggested that overall satisfaction and postoperative discomfort is lower in those who have had an arthroplasty. Even though this may be largely due to placebo effect, they do tend to do better overall. Finally, there certainly is some benefit to preserving neck motion, especially when multiple levels can be involved.

Even though cervical arthroplasty has its advatanges, it will never replace cervical fusions completely. There are some problems such as a degenerative and collapsed disk, or a bony spur associated with a large amount of stenosis which are considered contraindications to artificial disk placement. In these patients a fusion is still the best treatment. However, in those patients with a soft disk herniation requiring surgery, it is certainly a viable alternative to a fusion. Certainly, with advancements in technology and patient care, we will be seeing more and more artificial disk being placed in the future.

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