WORKERS' COMPENSATION AND BACK PAIN

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HISTORY OF WORKERS' COMPENSATION LAW

Before the industrial revolution and the development of factories, mills, and plants with their gigantic machinery, agriculture dominated economic life. No doubt injuries occurred but they were relatively few compared to when workers in large numbers were placed in proximity with dangerous machinery and implements of industrial production. If a worker on a farm was hurt, the employer would routinely provide medical help and some financial help through the period of disability. Workers were closer to their employers then and often lived on the farm. If their employer did not help, the workers' only recourse was to sue in common law court, a process that was time consuming and not always successful. In the meantime public charity would bear the burden of the injury.

The predominant claim in a common law suit by a worker was that the employer was somehow negligent, and therefore injury resulted. However, the employer had several advantageous defenses: contributory negligence, assumption of risk and the fellow-servant rule. In contributory negligence the employer would claim that the worker was partly to blame or the injury occurred from the worker's own actions. Alternatively, an employer could say that the worker knew the dangers of that employment before coming to work and so there was an assumption of risk that would bar liability. Finally, a number of injuries were not by the employer's actions or employment conditions at all, but due to other fellow workers who may have caused the accident. In these cases the fellow-servant rule prevented blame from being attached to the employer.

These defenses were quite effective for employers during the industrial age as well, so that 80% or more of the cases brought against employers were lost or uncompensated. Similar inequities were seen in Europe where the industrial revolution was also running at full steam. But there in 1884, Otto VonBismark, the first chancellor of the German empire, championed the idea of workmen's compensation legislation. For the first time, injuries were not compensated on the basis of the employer's negligence, but on their relationship to the job. Within a short time England followed suit and abolished common law workers' suits, instead establishing a formal workmen's compensation system. Liability depended not on who was at fault for the accident but, according to English legal scholars, whether the personal injury by accident arose out of and in the course of employment.

In the early years of the 20th century American legislators also clamored for a similar change of law. By 1911 Massachusetts, which debated the question for nine years, finally passed a workers' compensation law with ten other states changing to a similar system at about the same time. The change was not easily made and understandable opposition came from employers as well as insurance companies who had made large profits from common law coverage. But the Supreme Court of the United States upheld these acts and they gradually became established in every state and for federal employees. Clearly, workers' compensation laws were meant to be a humanitarian measure to create a new type of liability - a liability without fault. Industry was to be responsible but society as a whole, through increased costs of production, would share the loss.

In reality, workers' compensation laws are a compromise for both employee and employer. The employee is denied the right to sue at common law for indefinite damages, but instead receives a certain percentage of wages during the period of disability, and medical care at the employer's (insurer's) expense. The employer, at least in theory, does not have to defend against fault and is only liable for limited, statutorily set damages. With the rise of workers' compensation claims in the past fifty years, with employers feeling more and more that they are being accused unfairly of fault, and with alternative remedies now available in addition to workers' compensation (sexual harassment claims, discrimination suits, Americans with Disabilities Act), the premise behind that initial compromise may need to be re-examined.

IS BACK PAIN DUE TO INJURY?

A whole body of law surrounds what activity or circumstances of employment are sufficient for a worker's injuries to fall under the workers' compensation statute. What constitutes arising out of employment or in the course of employment is subject to debate and interpretation, with different jurisdictions offering distinctive views. Regardless of any negligence on the part of an employer, the central question is whether employment conditions were the cause of the injury. In many jurisdictions, those conditions must constitute a substantial factor for compensation to be allowed. The problem is particularly complicated in back pain, especially chronic back pain, and a historical perspective on the concept of injury leading to back pain is necessary.

Wadded eloquently outlines the history of back pain through the centuries and its rise to injury status in modern times. Certainly, degenerative changes in the spine have been found in the earliest human remains and deformities and fractures are well documented from the time of Hippocrates. For the most part, however, they have been written about as fleeting pains that affect joints and muscles. Even when terms such as lumbago and rheumatism were used in the last couple of hundred years, disability from chronic back pain was still relatively rare. Curiously, this is the case in many third world countries even today.

A number of factors beginning in the 19th century eventually led to a traumatic link. The first of these is that of spinal irritation, a popular concept now abandoned in which local spinal tenderness from irritations in the vertebral column and nervous system were thought to be the source of back pain. Next, a condition called railway spine, which was thought in part to be due to the speed and the nature of early railway travel, became quite popular. Finally, the discovery of x-rays and later the description of a herniated nucleus pulposus led to aggressive surgical procedures to correct spinal pathology. The term ruptured disc created visualization of a damaging, traumatic event.

However, back pain occurring without any external force is extraordinarily prevalent in all segments of society, and even a ruptured disc often occurs in the course of normal physical activity. Nachemson has concluded that the amount of physical activity necessary is not much more than leaning forward 20 degrees, if structural abnormalities are to be unmasked. Is this, then, really the cause of the herniated disc? It becomes even harder to define if the supposed trauma is of a repetitive or cumulative nature, rather than a single physical motion. Often, patients experience the onset of their symptoms during activity which they have performed hundreds of times previously without a problem. Complicating matters further is the fact that many people have bulging or extruding discs with no pain at all. To distinguish this further, many states have specifically required an accident to have taken place, meaning

some unexpected or untoward event. Others have required an unusual precipitant for a back injury to be compensable. But, it is argued by some that a repetitive loading or posturing process might be deemed an accident.

Therefore, establishing causation may need greater scrutiny. Did a pattern of ordinary use only make an underlying disease manifest? If so, what is the cause of the symptoms and disability, i.e. the actual force producing the effect? On the other hand when no definitive diagnosis is possible, as occurs in many cases, should the claimed employment circumstances be even more suspect?

In chronic back pain, although a patient may subjectively describe pain symptoms as beginning at a particular point in time, neither medically nor psychologically does that establish a discreet event that was the cause of those symptoms. It may be that the physical trauma and injury have such a profound effect on the psyche of the individual that he deteriorates emotionally and then physically as a consequence of that trauma. But, the traumatic event may have merely served as an opportunity for pre-existing psychological or psychosocial processes to become operative and now manifest themselves as physical illness. Here, the traumatic event is only incidental. Psychological and social gains from being sick may keep the symptoms alive or allow a face-saving means of resolving psychological conflict.

IMPAIRMENT AND COMPENSATION

In the United States during the course of their lives nearly 80% of people will experience some form of back pain. The problem, however, is not the pain itself but the disability that results. Therefore, it is important to distinguish between pain, impairment, and disability, since the terms are often used interchangeably but are quite different for compensation purposes.

Pain: The perception of an unpleasant sensation that is associated, at least in the mind of the individual, with tissue damage. Conscious awareness, the emotional experience, and value judgements, may lead to suffering.

Impairment: The loss of, the loss of use of, or derangement of any body part, system, or function.

Disability: The limiting, loss, or absence of the capacity of an individual to meet personal, social, or occupational demands, or to meet statutory or regulatory requirements.

Typically, physicians do not rate disability, but rate impairment. However, they do give opinions about disability in workers' compensation determinations. Most workers' compensation systems require only that the employee be unable either to perform his or her former employment or to obtain other employment suitable to his or her qualifications and training. The ability to perform work at a lower activity level is usually not a consideration in the award of workers' compensation benefits.

Workers' compensation systems provide four categories of compensable medical disability: temporary/total, temporary/partial, permanent/partial, and permanent total. The two temporary categories have been the least controversial because they are characterized by the expectation of a return to work after a period of recuperation; the controversy that does arise surrounds determining the appropriate length of the recuperative period. The question has usually been resolved by defining the end of the healing period as the time when maximum medical improvement has been achieved, as determined by the treating physician.

In theory, the underlying notion supporting workers' compensation systems is that the employee eventually will return to work; state compensation boards often attempt to impress upon the employee the value of rehabilitation. Willingness to participate in a rehabilitation program is usually not mandatory in order to qualify for benefits. However, a few states have instituted obligatory completion of a rehabilitation program after benefits have begun. There has been a trend towards the revision of state laws to provide for the expectation of a return to work rather than for the long-term receipt of benefits.

In state compensation systems, the emphasis is usually not on the continuing presence of pain but on the stabilization of the underlying disorder and the degree of functional limitation. Even if the pain fluctuates from time to time but the underlying condition is stable, it may be that there will be no finding of disability. When a claimant reports subjective complaints of unknown etiology the chances of receiving benefits may be less. However, there are almost always spurious diagnoses that can be used to legitimize a disease condition.

Although workers' compensation laws vary in the type of benefits received and in the process of achieving those benefits, for the most part both the various states as well as the federal government have similar core provisions. Almost all systems are compulsory as to public employees and most are compulsory of private employees as well through private insurance carriers. Medical care attributable to the injury is unlimited but financial compensation can vary. The minimum and maximum weekly benefits differ and the length of time to receive benefits can have caps. Often an employee who is deemed only partially disabled will have a much shorter duration of benefits so that insurance carriers push to have an employee reach that status. In some jurisdictions employers may be penalized for late payments or for violations of safety or health law regulations. While there is a general emphasis on vocational rehabilitation, some states specifically furnish a commission to arrange for this and/or establish a fund to pay for such services. There are also wide differences in how states treat second injuries and how they attribute workers' compensation liability to either the first injury, second injury, or some combination thereof.

COMPENSATION-DRIVEN DISABILITY

Over the last century, it has been acknowledged that patients who seek compensation for their injuries have a prolonged recovery period and a less satisfactory response to treatment. While the increase of industrial low back disability in the first part of the 20th century may be explained on changing workplace conditions, the epidemic that has followed is not so easily understood and is often attributed to availability of compensation. Military medical records of British forces in the first and second world wars show a five-fold increase of low back pain complaints and four-fold increase in the duration of disability for World War II versus World War I soldiers. In the United States, the incidence of disabling back pain between 1971 and 1981 increased 168%, or fourteen times that of the population growth. Clearly, increased disability initially created the need for compensation, but now compensation may be driving the disability.

Terms such as compensation neurosis or greenback poultice treatment have been pejoratively used to describe this phenomenon and have influenced many physicians in the course of their dealings with workers' compensation patients. Financial gain has been shown to be a powerful reinforcer of disability and common sense suggests that someone who is embroiled in litigation to prove damages may need to

have symptoms continue to make the point. Indeed studies have shown that patients who have back pain and are receiving workers' compensation benefits do poorly in treatment and are disabled longer. One author described these conditions as:

a state of mind, born out of fear, kept alive by avarice, stimulated by lawyers, and cured by a verdict.

However, this connection is not universally accepted, and in some studies patients receiving workers' compensation do just as well as those who do not. More importantly, it might be assumed that once compensation issues have ceased to exist or a financial settlement is reached, that symptoms of disability also improve. Interestingly, this is not the case. Studies have shown that even up to five years after settlement of a claim, there is no significant reduction in morbidity of patients with chronic back pain.

Where no objective organic pathology exists, psychological and psychosocial factors may be playing a major role. Here, the reinforcing effect of compensation is the greatest. In most cases it represents the phenomenon known as secondary gain, in which an original injury may have had unexpected environmental responses that assist in sustaining it. Examples include financial reimbursement through workers compensation, attention from the family, or avoidance of less than satisfactory work conditions. Less common but even more troublesome is the phenomenon of primary gain where a psychological conflict or need initiated the physical symptom in the first place. Here there may be an avoidance of an unpleasant or threatening personal situation, or a means to gain an important response from the environment. The physical symptom serves a significant psychological purpose and resolves a conflict with which the individual otherwise cannot deal adequately. The psychological issue is the main initiating and sustaining factor.

These are not easy issues to decipher and simply the presence of symptom magnification should not lead to the conclusion that the condition is psychological. Chronic back pain syndrome does not represent a single entity, and can include heterogeneous conditions which have different and complex causes. The diagnosis of malingering may be even more difficult to make, and it is often used by physicians who are frustrated with a difficult to treat patient. It is doubtful in many cases whether the label is valid, since it is usually given after a limited period of observation or examination. Frequently, clinicians say that a patient hobbled into the office but then was seen in the parking lot walking without any difficulty at all. While that could be some evidence of malingering, it falls short of being sufficient for the diagnosis since patients with back pain can have variable symptoms, and some pain behaviors can easily present with inconsistencies but may not indicate intentional falsification. The use of private investigators by insurance companies can be extremely disconcerting to suffering patients, but often produces evidence of major discrepancies in claims of functional impairment.

CONFLICTS IN MANAGEMENT

Patients who receive workers' compensation benefits for chronic back pain disability are often in conflict with the insurance company that pays the bills. They may see the insurance company as being only concerned with money and quotas, rather than their injury which they feel was caused by the employment. They feel pain and frustration with their limitations, and face adjustors who appear to doubt the sincerity of their suffering. Often, the workers' compensation payments are the only source of income for an injured patient and his family, so when an adjustor stops payment, the personal

consequences are devastating. Not invariably, but frequently, animosity between the patient and the insurance company or employer grows and becomes an additional source of stress that complicates recovery. The patient may feel unrealistic pressure to return to work in a capacity that even his physician may not yet allow. If an adjustor is incredulous of the patient's claim, even medical care may not be reimbursed without a legal battle at an industrial board hearing.

From an insurance company's standpoint, chronic back pain that does not show clear organic pathology is often regarded as bogus. Adjustors do become incredulous of a patient's complaints and the lack of progress in treatment, and may fight the claim through hearings. They see redundant treatment by various practitioners leading to no greater results. When the tremendous cost of chronic low back pain is taken into account with such poor results, it is not surprising that this type of reaction would occur on the part of the insurance company. Too many clinicians offer me too solutions that use endless resources with little gain. Sometimes, expensive treatments such as surgical procedures even complicate the course of recovery with untoward effects that lead to longer and more expensive treatment. Insurance companies hire investigators who can document greater functional ability than the patients' claim, and adjustors lose faith in clinicians who blindly support such workers and knowingly or unknowingly foster continued disability.

Physicians are also caught in a conflict because of more than one role that they are asked to play. The first, of course, is that of clinician to the injured patient who comes to them in distress. When physicians, because of cynicism or frustration, lose that perspective they are rarely effective and perpetuate the frustration of their chronic patient. Yet, paradoxically, in chronic back pain the healer is really the patient himself who must take ownership of the problem and actively participate in the rehabilitation. A paternal stance by the physician that allows patients to maintain invalidism inadvertently reinforces disability. It is a fine line that physicians must walk between empathic caring and mobilizing the patient to greater functional activity.

The other role of the physician is that of an expert who determines impairment and gives opinions about disability. For the treating physician this is particularly conflictual since he must decide whose agent he actually is, i.e. the patient's or the insurance company's. In either case, objectivity can easily be lost. Where the physician is an independent medical evaluator and not treating the patient, objectivity may also be impaired through bias or over-involvement with an insurance company which pays for service. At times opinions are sought on causality that are beyond medical determination and best left to the legal arena. The ideal position is for the physician to remain a facilitator who sees the patient's and society's interests as similar, and who tries to promote those interests through comprehensive understanding of the patients within their milieu. No matter which side is correct, the hostility that develops between all of these conflictual interests has a negative effect on the recovery and rehabilitation of the patient. Unknowingly the various parties can reinforce the conflict that already exists. As a consequence, there is significant waste of resources within the workers' compensation system. Unnecessary treatment may be repeated, or necessary care may be withheld for the sake of cost containment. Knowledge of the nature of potential conflicts can help decrease artificial polarization and destructive fragmentation in therapeutic rehabilitation