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JULY 19, 2020

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Remote Work & Second Jobsites

BY MEG MATASCI
SENIOR ASSOCIATE ATTORNEY AT KEGEL, TOBIN & TRUCE

GEORGE THE BARTENDER'S DISPATCHES FROM ONLINE HAPPY HOUR: THE PERILS OF REMOTE WORK AND BEING YOUR OWN BARTENDER

FROM MY BAR AT HOME - With the Lobby Bar temporarily closed due to the ongoing COVID-19 pandemic, my nearest and dearest friends and colleagues met through a virtual happy hour to check in with one another and take the edge of off our collective anxiety. Left to fend as our own bartenders, my friends and I were enjoying drinks of varying quality. While I am not as adept at mixology as George, I was still sipping a decent version of my vice of choice, a Manhattan straight up with an extra cherry.[1]

Not all of my friends had such a well-stocked bar. One of my gal pals, Beth Emhoff, was drinking a concoction she made from gin, Ovaltine and chocolate coconut ice cream, the only ingredients she had on hand. I probably would have just opted for gin in a cup, but "judge not lest ye be judged," I suppose.

My friends and I were lucky enough to be able to transition our jobs to work remotely (I with relative ease thanks to our firm's adaptation to a paperless file management system several years ago). Our conversation shifted to the new challenges our change in work environment had created, from childcare and loud dogs to uncomfortable home office chairs and dining room areas re-purposed as office spaces.

Beth jumped in with her latest remote work mishap. "You guys, you won't believe it! My assistant called me today to let me know that she hurt her foot, and she thinks it is my firm's responsibility. When she shifted to remote work a few weeks ago, we sent

her home with a scanner, a printer and a computer. Evidently, she didn't clear off the table she intended to use for work, and she put her printer on top of a large stack of books. She told me that she was on her way to a quick bathroom break when she tripped over the printer cord, causing the haphazardly positioned printer to fall on her foot. She's convinced her foot is broken. She says that she also has headaches from the stress of seeking out medical treatment during a pandemic. What a story!"

Holly Hustler, the other participant in our virtual happy hour and a prominent applicant's attorney (everyone has to have friends), snickered at her response. "Sorry, friend, but you should send that nice lady a claim form. And my card while you're at it."

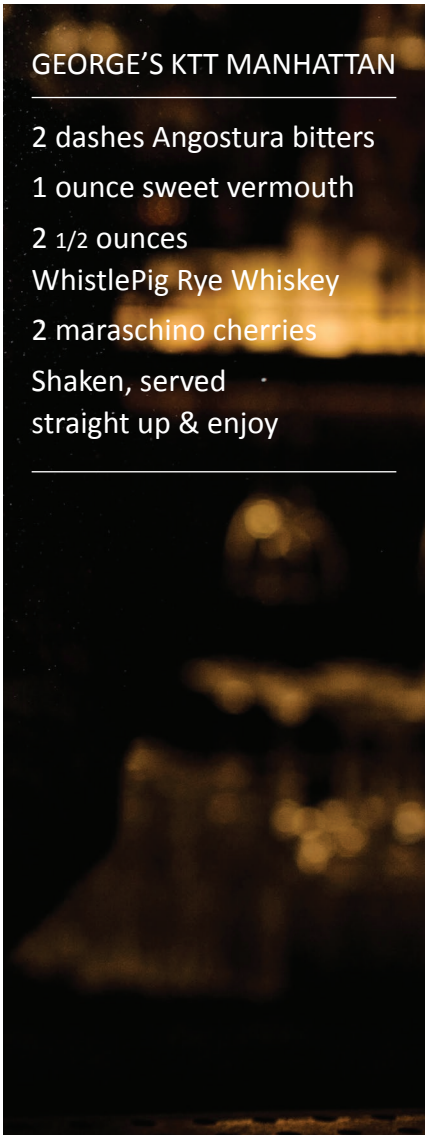
Holly went on to describe that if an employer requires that an applicant work from home, their home becomes a second jobsite. She pointed to the California Court of Appeal Denial of Writ dated August 16, 1996, in the case of *Detente Technology v. Workers Compensation Appeals Bd., Boehm & Assocs.*, 61 Cal. Comp. Cases 866. She said that in this case the applicant was not provided with an office or workspace by the insured, and thus it was reasoned that the applicant's home became a satellite office of the insured's company.

The defendant *Detente Technology* had their Petition for Reconsideration denied by both the Workers' Compensation Judge (WCJ) and the Workers' Compensation Appeals Board (WCAB), after arguing unsuccessfully that the going and coming rule applied, as the applicant was injured in a single-vehicle motorcycle accident traveling between their home office and defendant's client's office.

Holly also highlighted the April 3, 1995 Court of Appeal decision in *Kidwell v. Workers' Compensation Appeals Bd.*, 33 Cal. App. 4th 1130, in which a California Highway Patrol officer's injury sustained while practicing at home for a physical fitness test was found to be job-related and a compensable injury, annulling the Appeals Board decision.[2]

Beth interjected, "But she was on a personal break when she was injured. Certainly that should not be the firm's responsibility?"

Holly gleefully reminded us that the "personal comfort doctrine" which provides



for coverage during certain break activities has been applied to work performed from home. This doctrine is based on the premise that "the course of employment is not considered broken by certain acts relating to the personal comfort of the employee, as such acts are helpful to the employer in that they aid in efficient performance by the employee." *(SCIF v. Workers' Compensation Appeals Bd. (Cardoza)* (1967) 32 CCC 525, 527).

Holly added that this doctrine was applied to work performed at home in the panel decision filed on July 5, 2017 in *Debora Tidwell v. Santa Clara Valley Transportation Authority*, 2017 Cal. Wrk. Comp. P.D. LEXIS 325. In Tidwell, the applicant sustained injury while transferring from their toilet to their wheelchair at their home during the work day. That injury was deemed industrial after it was found that the employer's extension of permission to the applicant to work from home turned their home into their "work station." The personal comfort doctrine was then applied to extend to the applicant's bathroom break.

Defendant's Writ of Review was denied by the Court of Appeal on November 1, 2017, after having their Petition for Reconsideration denied by both the WCJ and the Appeals Board, after arguing unsuccessfully the following:

(1) the employer did not require that applicant work from home; (2) applicant's workspace is limited to the area "around her workstation;" (3) applicant was not providing work-related services at the time of her injury; (4) the personal comfort doctrine has never been applied in a published decision where the alleged injury occurred at home; and (5) public policy dictates that injury arising out of and in the course of employment must not be extended to remote work situations.

Holly was by now on cloud nine, cracking open another can of White Claw, so I saw this as an opportunity to pour some cold water on her argument. I pointed out to Beth and Holly that there are limits to the ability to claim home as a second jobsite.

In a panel decision published on June 25, 2018 in *Edwin Raquedan v. Viola, Inc.*, 2018 Cal. Wrk. Comp. P.D. LEXIS 343, one of our firm's shareholders and managing attorney of our Ventura office, Chuck Maki, successfully defended against a death claim in which the applicant's widow claimed that an accident sustained while returning home, where the applicant had gone for lunch, should be considered industrial because the employee had taken work home with him. The applicant's attorney had attempted to argue that by taking work home, the employee had created the home as a second jobsite and thus circumvented the coming and going rule.

The applicant's widow filed a Petition for Writ of Review, which was denied on September 12, 2018. In their denial of the writ, the Court of Appeal found that there was no evidence that the applicant was required to work from home, as the ability to work from home

conferred no benefit upon the employer since the employee could have performed the same work from his office. Citing the March 1, 1978 Court of Appeal decision in *Bramall v. Workers' Comp. Appeals Bd.*, 78 Cal. App. 3d 151, it was emphasized that the "...'circumstances of the employment—and not mere dictates of convenience to the employee' must have required the work to be done at home."

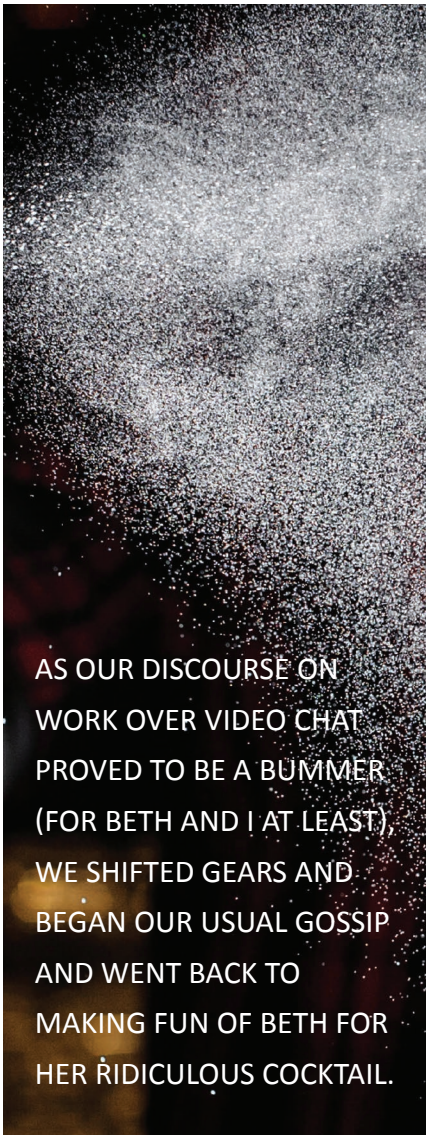
While these cases do not help Beth with her assistant, I explained to her that they can provide some relief to employers months from now whose employees may have found that they prefer to work from home as opposed to in the office. Unless the employer requires the injured worker to continue to perform their job from home, it may not be considered a second jobsite such that the going and coming rule would be overcome.

As our discourse on work over video chat proved to be a bummer (for Beth and I at least), we shifted gears and began our usual gossip and went back to making fun of Beth for her ridiculous cocktail.

DISCLAIMER: All characters at my home bar are fictional and the storyline is simply a product of my vibrant imagination.

While *Raquedan* lacks the designation "significant panel decision," Joe Truce, formerly a managing shareholder at our firm and creator of "George the Bartender," always liked to remind me of one of his favorite portions of the Labor Code, subtitled "Specific Additional Evidence Allowed," §5703(g) which states in relevant part as follows:

> *The appeals board may receive as evidence* ***either at or subsequent to a hearing****, and use as proof of any fact in dispute, the following matters, in addition to sworn testimony presented in open hearing: ... (g) Excerpts from expert testimony received by the appeals board upon similar issues of scientific fact in other cases and the prior decisions of the appeals board upon similar issues. (emphasis added)*



He would also draw our attention to California Evidence Code §452(d), which provides that judicial notice may be taken of "Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States."

Now that the initial rush to implement remote work has passed and everyone is settling into their respective roles, the tale of Beth's assistant is a reminder that employers should take a moment to check in with their freshly remote employees to ensure the appropriateness of their work-from-home stations. Since it appears we will all be working remotely for some time, employers may find it worth their while to ensure that their employees' work stations are safe and ergonomically sound.

The current push to remote work will likely result in longstanding changes to how remote work is approached. It is anticipated that many employees will continue to work from home even after the world is open for business once again. Employers who continue to require their employees to perform some work remotely could find themselves liable for motor vehicle accidents which occur while traveling between the two work locations.

I encourage everyone to have hope that things will return to the world as we once knew it and be prepared for what that means for workers' compensation defense, and of course to wash their hands often.

As for me, in between being a full-time parent and an attorney, I'll be making my own doubles for the time being. May George guide my hand.

The "George the Bartender" Series is a quasi-fictional op-ed originally created by W. Joseph Truce, formerly a managing shareholder at the law firm of Kegel, Tobin and Truce, A.P.C., which helps explain the latest changes to workers' compensation law in the state of California.

[1] Legend has it that the Manhattan was invented by New York City socialite Ms. Jennie Jerome, aka Lady Randolph Churchill, in the mid-19th century at a party for the newly elected Governor of New York, Samuel J. Tilden, held at the estimable gentleman's club called the Manhattan Club. Debatable perhaps because at the time Lady Randolph was in fact in England and very much pregnant with one Sir Winston Churchill, but I digress.

[2] Joe's trusty briefcase is on sabbatical at the moment. However, we're happy to send you a copy of Detente Technology, Kidwell, Tidwell and Raquedan and Bramall via email request.

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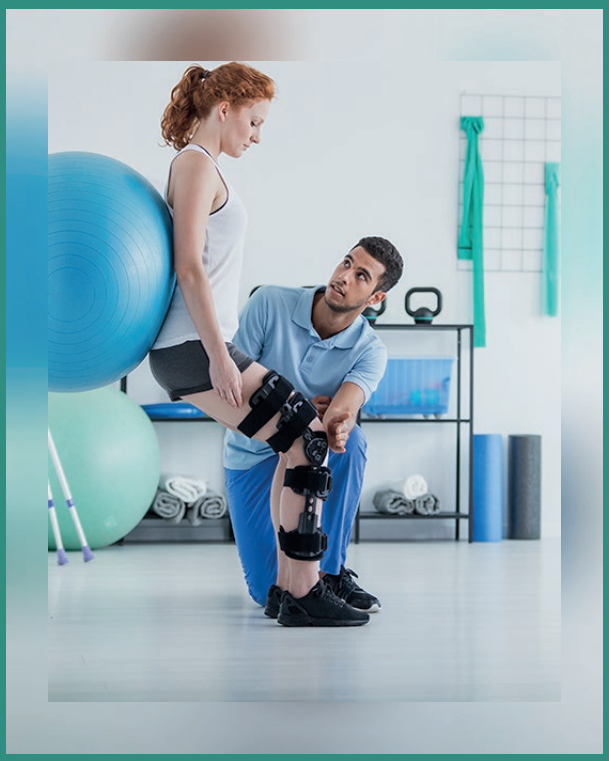

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Working From Home: Firing Up Litigation?

BY MICHELLE SEBRING AND TRISHA TOYNE, LAUGHLIN, FALBO, LEVY & MORESI, SAN DIEGO OFFICE

In the last several years, there has been an increase in the number of employers who offer a remote work environment (i.e., work from home). The benefits of working from home can range from increased happiness and productivity of employees to less turnover for companies. The number of employees working from home has recently increased *even more*, in the wake of the recent Governmental Stay at Home Order (Executive Order N-33-20) due to the COVID-19 global pandemic. To ensure businesses remain operational, most non-essential businesses were thrust into allowing their employees to work from home on a full-time basis. This sudden surge in remote workers now calls for examining various workers' compensation issues that will arise.

Generally, the home will be considered a second jobsite when the employee is unable to complete their usual work duties at their usual place of employment, and the employer authorizes the use of their home as a workplace (*Bramall v. W.C.A.B.* (1978) 78 Cal. App. 3d 158, 160). Courts have also concluded that performance of work at home involves an incidental benefit to the employer (*Santa Rosa Junior College v. W.C.A.B. (Smyth)* (1985) 40 Cal. 3d 345, 356).

Employees exclusively working from home due to the Stay at Home Order can argue their remote work was "required," thus supporting the argument that the employee's home is a second jobsite. In light of Bramall, it can be found that any injuries occurring

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while inside the employee's home are considered to be in the course and scope of employment. The fact that employees now only walk a few steps from their bedrooms to their in-home office or dedicated workspace to begin their day and can step in and out of that workspace to complete work as many or as little times as they desire brings about significant difficulty when determining what activities completed throughout the day are related to work.

The personal comfort doctrine holds that acts performed during work that are necessary for the personal comfort, convenience, or welfare of the employee are within the course and scope of employment, even if the act is not part of the employee's specified work duties. Activities such as visiting the restroom, obtaining a drink of water, or taking a coffee break have been found to be a part of the personal comfort doctrine *(Fireman's Fund Indem. Co. v. Industrial Acc. Com. (Elliott)* (1952) 39 Cal. 2d 529). Thus, any injuries that occur while employees are engaged in such activities are generally compensable *(Western Greyhound Lines v. Industrial Acc. Com. (Brooks)* (1964) 225 Cal. App. 2d 517). Also recall that all benefits are liberally construed in favor of the applicant (Labor Code Section 3202).

In contrast, injuries sustained by employees performing activities strictly for personal purposes are not within the course of employment when the activity is not incidental to the employment, and there is no employment-related benefit to the employer (*Elliott* at 531-532; *Liberty Mut. Ins. Co. v. I.A.C. (Dahler)* (1952) 39 Cal. 2d 512, 516; *Hinkle v. W.C.A.B.* (1985) 175 Cal. App. 3d 587, 591; *Osbun v. W.C.A.B.* (1979) 93 Cal. App. 3d 163, 168; *Dalgleish v. Holt* (1952) 108 Cal. App. 2d 561, 565–566).

While there is not much case law on point in California, we anticipate any rulings will be very fact-specific when determining whether the activity the remote worker was engaged in at the time of the alleged injury falls under the personal comfort doctrine or was strictly for personal purposes.

In order to determine the industrial nature of the activity engaged in by the remote employee when they claim to have been injured, we consider it crucial to obtain a detailed statement from the employee or even consider deposing potential witness(es) who resided with the applicant at the time of the alleged injury.

> IT IS IMPORTANT FOR THE EMPLOYER TO HAVE AN OPEN DIALOGUE WITH THEIR REMOTE EMPLOYEES ABOUT THEIR WORKSPACE, AND IF ANY COMPLAINTS ARE MADE, QUICK ACTION SHOULD BE TAKEN TO MITIGATE POTENTIAL INJURY. IT IS RECOMMENDED THAT YOU HAVE YOUR EMPLOYEES COMPLY WITH THE HEALTH AND SAFETY POLICIES OF YOUR BUSINESS AND THAT SUCH POLICIES BE WRITTEN AS PART OF YOUR EMPLOYEE MANUAL.

Despite the challenges and legal battles of industrially-related actions, the most challenging difficulty with working from home starts with the employee's workstations. Simple ergonomics can have a significant impact on injuries. It is difficult for an employer to ensure an employee's workstation is ergonomically correct when they are working from home, as the task of setting up an ergonomic workstation is in the hands of the employee. The biggest concern is the potential for a cumulative trauma injury stemming from working from home without ergonomics, such as back pain from sitting all day, neck pain from looking down at a computer, carpal tunnel due to use of a keyboard or mouse, etc.

It is important for the employer to have an open dialogue with their remote employees about their workspace, and if any complaints are made, quick action should be taken to mitigate potential injury. It is recommended that you have your employees comply with the health and safety policies of your business and that such policies be written as part of your employee manual. You can also have your employees fill out a working-from-home safety survey that describes their workspace, equipment and conditions. Pictures of the workspace can also be requested to confirm the safety of the workspace. It is recommended to do a check-in every six months or so, to ensure up-to-date compliance with your policies.

In light of COVID-19, the issue of remote workers is undoubtedly a topic of consideration for many employers. Governor Gavin Newsom's Executive Order N 62-20, issued on May 6, 2020, created a rebuttable presumption of occupational exposure for workers diagnosed with COVID-19. Of importance, however, the Executive Order requires that an alleged injured worker satisfy a four-part test. One of the requirements of the four-part test specifically indicates that in order to meet the presumption, the place of employment must not be the employee's home or residence. Of course, the presumption only pertains to the diagnosis of COVID-19. An employee who suffers unrelated afflictions due to cumulative trauma while working from home may not be afforded the presumption of the Governor's order – but nevertheless, the usual investigation on the part of defendants will be necessary to address what will undoubtedly be a rise in claims of injury occurring while working from home.

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The Impact of the COVID 19 Pandemic on Utilization Review

BY LESTER L. SACKS MD, PHD, MEDICAL DIRECTOR AT ARISSA COST STRATEGIES

As the Medical Director of a physician-driven utilization review organization, I can attest our reviewers understand the business of medicine and how the virus has impacted the utilization review process in workers' compensation.

In the process, the reviewers can concentrate on the issue to be discussed. This article focuses on the gap of elective procedures resulting in fewer hospital stays, surgical center use and the income deficiency identified by surgical specialties.

As a Medical Director dealing with utilization review during this "reopening phase," I have frequently seen an increased use of surgery centers for elective procedures. Because the financial gap created by the pandemic has impacted the practice of the surgical specialties and narrowed their scope to emergency procedures only, providers requesting procedures tend to "overstate" the case for procedures to be performed.

Now, as the restrictions have relaxed and the "flood gates" are open, the surgical specialties are looking to complete their delayed elective procedures. Although there is no problem with this as most elective procedures have been medically necessary, the continued delay has been a burden on the workers' compensation system because of the rule of presumption exercised by many states associated with disability time resulting in the "no work" mentality.

From the standpoint of the utilization reviewer, the request for the procedures must be viewed extremely carefully and focused on details of the history, examination and testing prior to the decision for any surgical procedures to be certified. Theoretically, the reviewer always does this, but I am suggesting a second look at decisions for surgery when other methods of treatment are or can be available. Yes, guidelines are viewed and used as a tool for decision making, but my concern is that the history might be somewhat exaggerated to fit the need. It is difficult for reviewers to discern how much is real and how much is not because the reviewer does not see the patient and must rely on what is written and/or the discussion with the requesting provider.

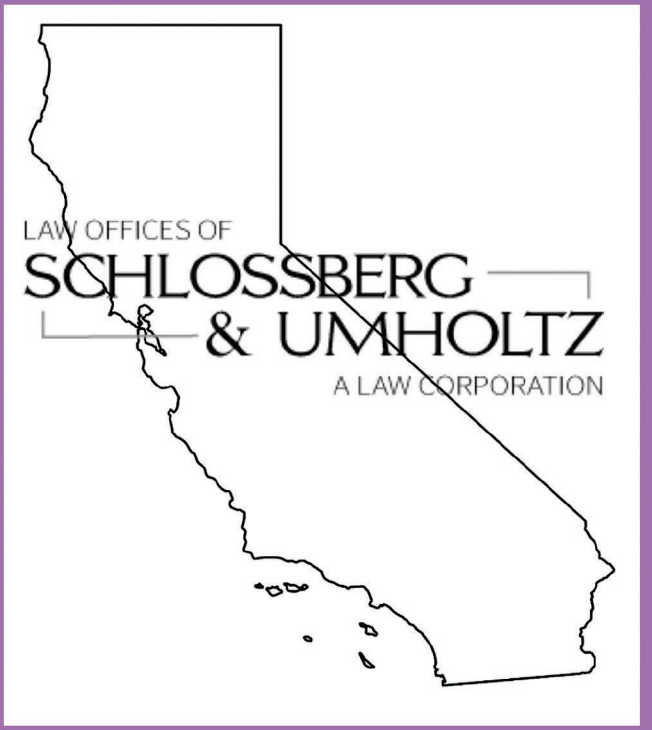
I do not believe that there is any real conscious motivation by physicians to do any unnecessary procedures, but providers in surgical specialties are faced with the dilemma of office management and cost issues for operation of their facilities/offices. There has been a dry spell in these specialties, and there has been a greater number of providers retiring or leaving their practices because of the diminished fiscal return. Those that have and will survive may tend to look at the need to accelerate the surgical schedule.

Reviewers must be extra discerning in the evaluation and decision to certify surgery. Make an extra effort to discuss the case with the requesting provider, and make certain that all avenues of conservative care are being tried or have been tried prior to the certification of an elective procedure.

This article is focused on the reviewer's responsibility in being extremely careful and aware of his/her decision making.

TIPS AND TAKEAWAYS:

- Review the evidence carefully, making certain that the guidelines support the decision
- Make additional effort to discuss with the requesting provider
- Look at the pattern of the requesting provider in regards to past decisions
- If the surgery was delayed because of the pandemic, review how the patient is currently doing and if the time lapse actually improved injured worker condition without the surgery



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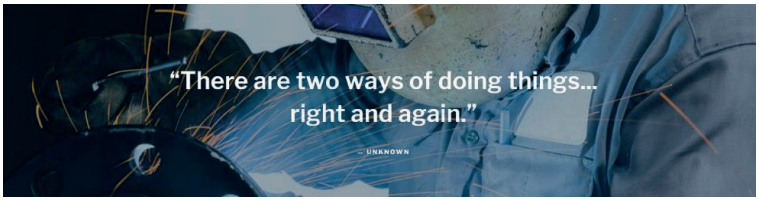
Which one are you?

By now, we've all heard the arguments, seen the numbers, and even seen the damage opioids can do. Still, change comes slowly. Now more than ever, we should be taking advantage of new technologies. One approach is to test injured workers early to see who will respond effectively and who runs the risk of addiction. One size does not fit all. An individual medication regimen for each injured worker can save thousands. But it's not just about the financial savings. More importantly, it's about keeping our employees healthy and getting them back to work as valuable and productive team members. Innovative solutions like our *Drug Compatibility* test can help us move in the right direction.



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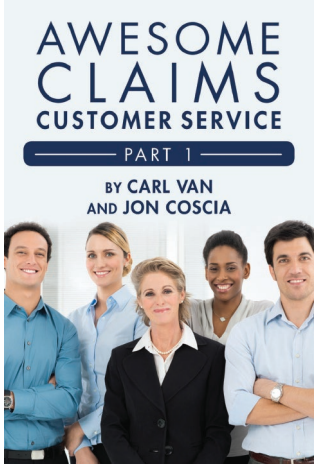

Q&A

Get to know author and claims training guru Carl Van as he and EWC Director Debra Hinz enjoy a virtual coffee chat upon the release of Carl's latest book, *Awesome Claims Customer Service - Part 1*. To get your copy of this collection of tips, strategies and recommendations for claims professionals, order here.

Debra: Carl, you have been President & CEO of International Insurance Institute (III) for 22 years now, is that correct?
Carl: Yes, it has been a wonderful time. We have incredible customers, some of which just joined us last year and some have been with us the entire 22 years.

Debra: In a nutshell, can you describe the services of III?
Carl: Our main focus has been in-person training for claims organizations, usually soft skills such as Customer Service, Time Management, Negotiations, Critical Thinking, those kinds of topics. We travel to our customer's location so the customer doesn't have to travel to us.

Debra: Where do you go?
Carl: Anywhere in the world. Most of our business is in the U.S. and Canada, but we have been to England, Mexico and a few other locations. My favorite was when I taught a Negotiations Skills course in Sydney, Australia a couple of years ago.

Debra: What other services do you provide?
Carl: We have eight claims books that we sell at ClaimsProfessionalBooks.com, we have videos at ClaimsEducationOnline.com, and we have an annual claims conference at ClaimsEducationConference.net. For these services and products we have customers in 32 countries around the world.

Debra: How has the Coronavirus impacted your training?
Carl: We have shifted for the time being to a webinar-based delivery of our courses. It is nice because people can attend from their homes just by logging in to our website. It is pretty interactive. Students can see both me and my PowerPoint. They can ask questions which I can answer live, and since I have the names of the people who signed up, I can call on individuals to answer questions during the session. I can play videos like I do in class, and give them exercises just like in class. They get all of the same workbooks and desk reference cards as the in-person class.

Debra: And how has that new service been going?
Carl: It has been going great. Some of my customers have enjoyed the webinar so much, they have asked to purchase the recording so they can install it on their LMS for others in the company to watch. One customer purchased their recording so they can have all new employees view it as part of their orientation training on customer service.

Debra: Are these open enrollment courses?
Carl: No, we only do webinars for individual companies. That way, we can use their company logo, use their company terminology, and make it specific to their line of business. That makes the recording even more valuable to them.

Debra: How can people get a hold of you to learn more?
Carl: I am available anytime at CarlVan@InsuranceInstitute.com or 504-393-4570.

Carl Van is President/CEO of International Insurance Institute. He is co-author of *Negotiation Skills for the Claims Professional,* based on his full-day workshop for insurance companies in the U.S. and abroad. Carl can be reached at 504-393-4570 or carlvan@insuranceinstitute.com.

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