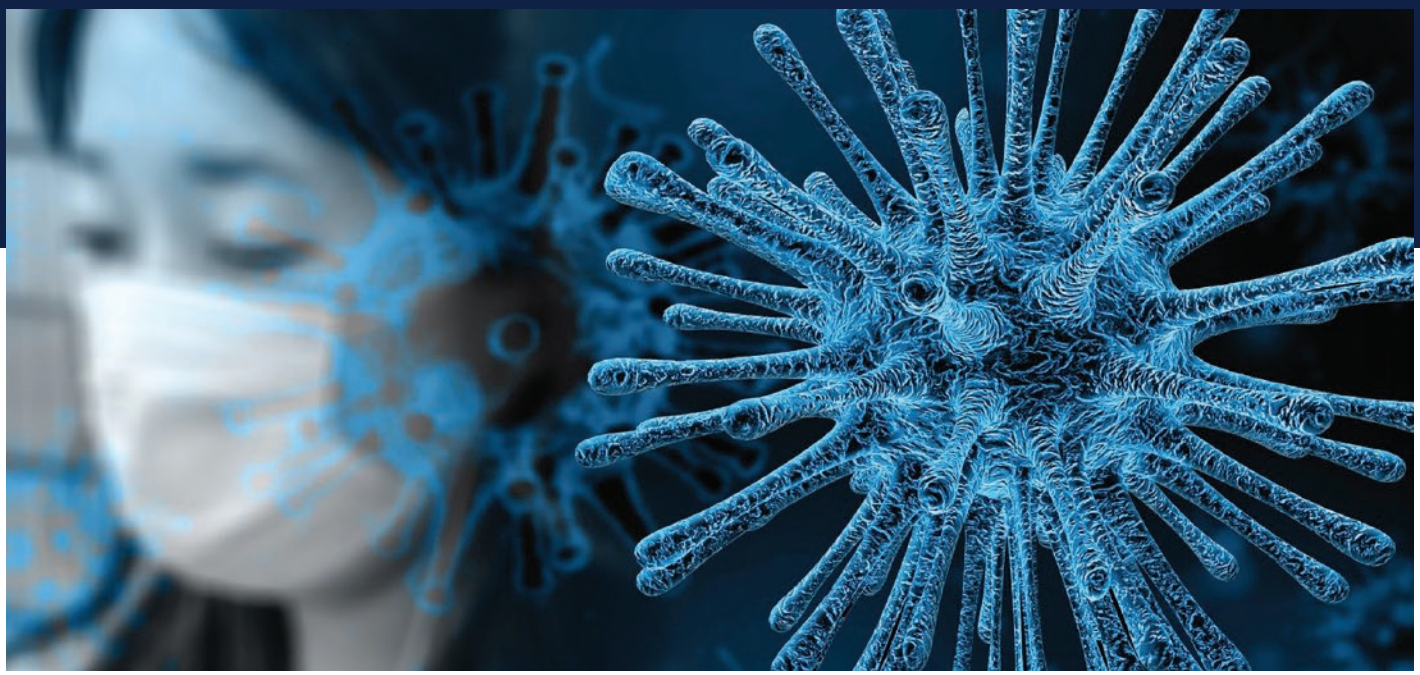
THE EXECUTIVES IN WORKERS' COMPENSATION

# EWC NEWSLETTER

*Resources to Help with Your Biggest Challenges, Insights from Industry Experts.*



# Utilizing Telehealth, COVID-19 and Brain Injury Can Be Treated Simultaneously

**BY KELLY LOPEZ, PUBLIC RELATIONS/COMMUNICATIONS MANAGER AT CENTRE FOR NEURO SKILLS**

COVID-19 has placed providers and insurers in uncharted waters. Its economic and health impact is profound. COVID-19 related claims have increased exponentially, as payors struggle to manage a tsunami of new cases. Vexing as this is, an added issue has emerged - the spread of COVID-19 while their clients are hospitalized. A patient becoming a vector and infecting others might result in litigation, and there is a risk that a delayed complication may trigger a secondary claim. As well, new revelations indicate that neurological complications may result from infection. Navigating these waters is the new normal.

Keeping patients safe and preventing permanent disability is paramount. These goals are achievable utilizing telehealth as a rehabilitation platform while adhering to strict safety guidelines in the clinical environment. Pre-admission screening and, when appropriate, testing is another key component, as is tailored rehabilitation focused on neurological symptoms that some patients endure post COVID-19.

SEPTEMBER 1, 2020

## In This Issue:

## Neuro Complications and Rehabilitative Care

COVID-19 has been observed as a biphasic disorder, meaning that after the first onset of illness it seems to get better, then a resurgence occurs, unlike monophasic illnesses. For insurers, this means that a claim may be closed once the patient "recovers." But weeks later, it is often reopened as complications of the virus resurface. Resurgence may include other complications caused by the infection, many of which may be delayed in onset, such as encephalitis, myopathy, neuropathy, anoxic/hypoxic brain injury, or neuropathy. PTSD-like symptoms are another complex layer that manifests as the result of prolonged ICU hospitalization, loss of status, and depression.

The most vulnerable populations for severe clinical manifestations of COVID-19 are those already at risk for iatrogenic complications - the geriatric population and those with preexisting comorbidities including cardiovascular or pulmonary disease, diabetes mellitus, cancer, and other autoimmune suppressing conditions.[1] This recovery-resurgence rollercoaster and associated damage may also cause cognitive deficits not identified in previous phases of the illness. Insurers then face compounded challenges as patients re-admit with the next phase of COVID-19. Returning to work, independence, and productivity can seem a distant hope.

Reducing disability is always the objective, but we now know a chilling truth - COVID-19 has a virulent counterpunch.

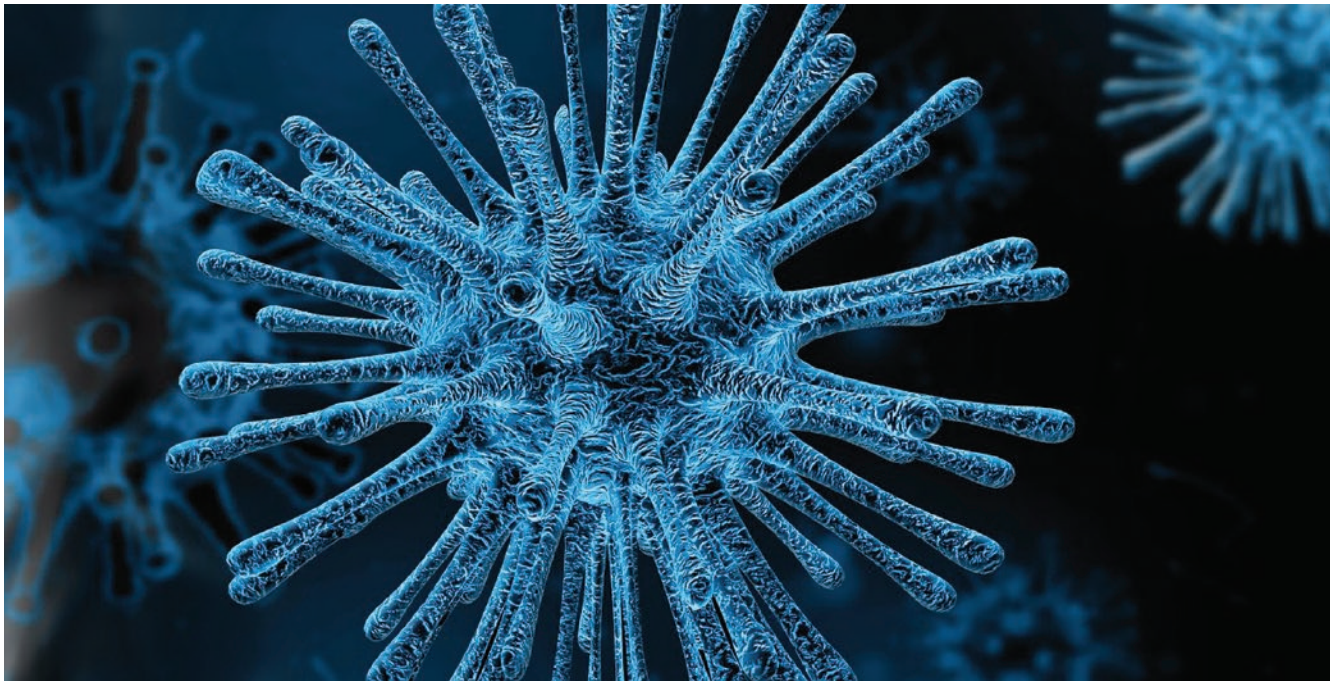
Most people do recover from COVID-19, but the presence of a virus-induced brain injury places patients in a position of greater risk. Traumatic brain injury itself has the potential of permanent disability, so for this population, rehabilitation is critical. The benefit for payors is ongoing COVID-19 care and intensive brain injury treatment in one facility. Telehealth helps to make that possible.

## Telehealth Provides Essential Therapy in a Safe Environment

Protecting staff and patients during the pandemic is crucial. Telehealth technology allows therapist and patient to work virtually while the patient remains in a protected environment. The risk of infecting others or of becoming re-infected is eliminated when patients receive therapy from home.

Because therapy is in real time, exercises and learning modules are conducted as they normally are in-clinic, with slight modifications. This model is also a cost-effective alternative to in-person treatment during a time of elevated risk. COVID-19 patients are not required to travel, a benefit to insurers as well. In addition, telehealth maximizes therapy; patients are not expending limited energy in transitioning to several clinical spaces.

One of the most compelling benefits of telehealth is that it helps practitioners intervene early, opening the possibility to maximize recovery and prevent harm or decompensation. As COVID-19 progresses, therapy can help mitigate potential complications associated with prolonged intensive care unit stay and ventilator management.[2]



[1] Rothan HA, Byrareddy SN. The epidemiology and pathogenesis of coronavirus disease (COVID-19) outbreak. J Autoimmun. 2020;109:102433. doi:10.1016/j.jaut.2020.102433. [PMC free article] [PubMed] [Google Scholar]

[2] J Acute Care Phys Ther. 2020 Jun 15; 11(3): 10.1097/JAT.0000000000000143.
Published online 2020 May 14. doi: 10.1097/JAT.0000000000000143 Applying Telehealth Technologies and Strategies to Provide Acute Care Consultation and Treatment of Patients With Confirmed or Possible COVID-19
Emelia Exum, Brian L. Hull, Alan Chong W. Lee, Annie Gumieny, Christopher Villarreal, and Diane Longnecker

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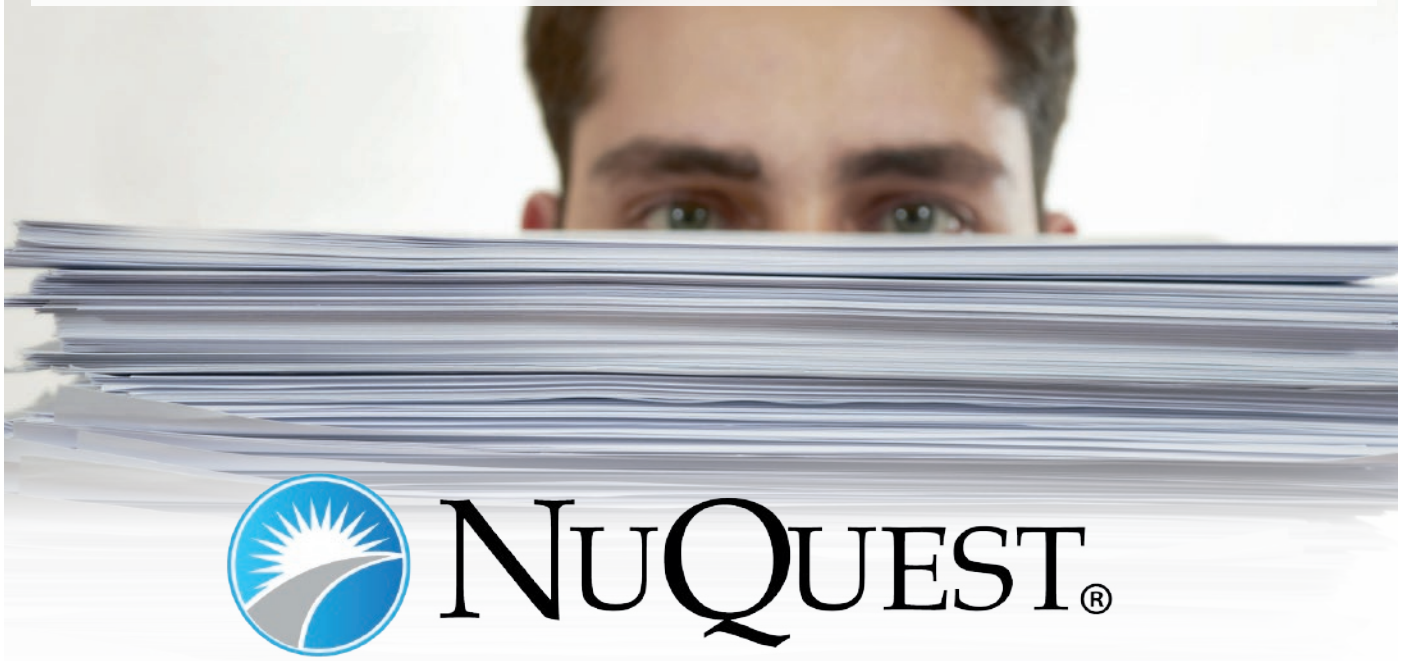

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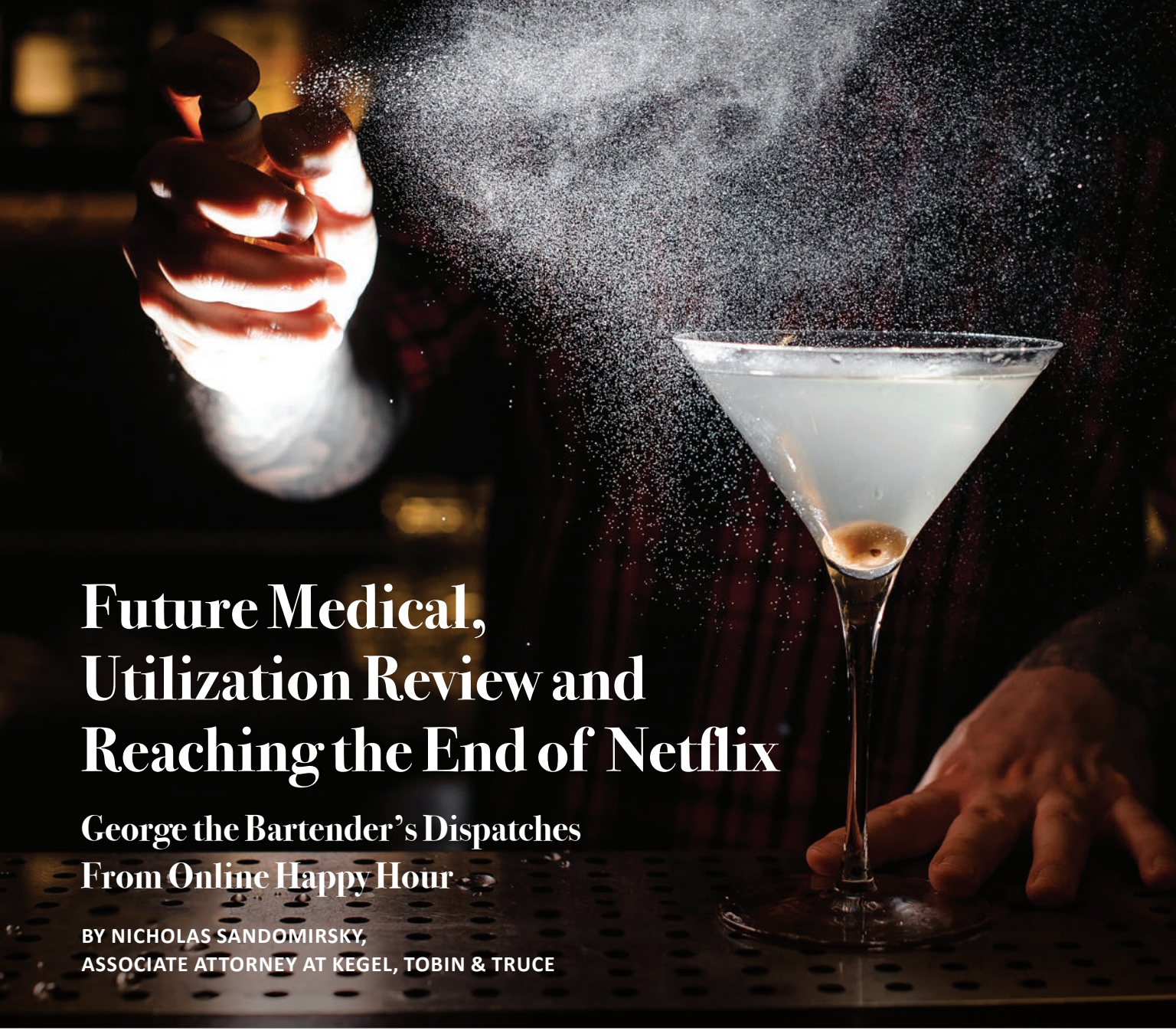


# Future Medical, Utilization Review and Reaching the End of Netflix

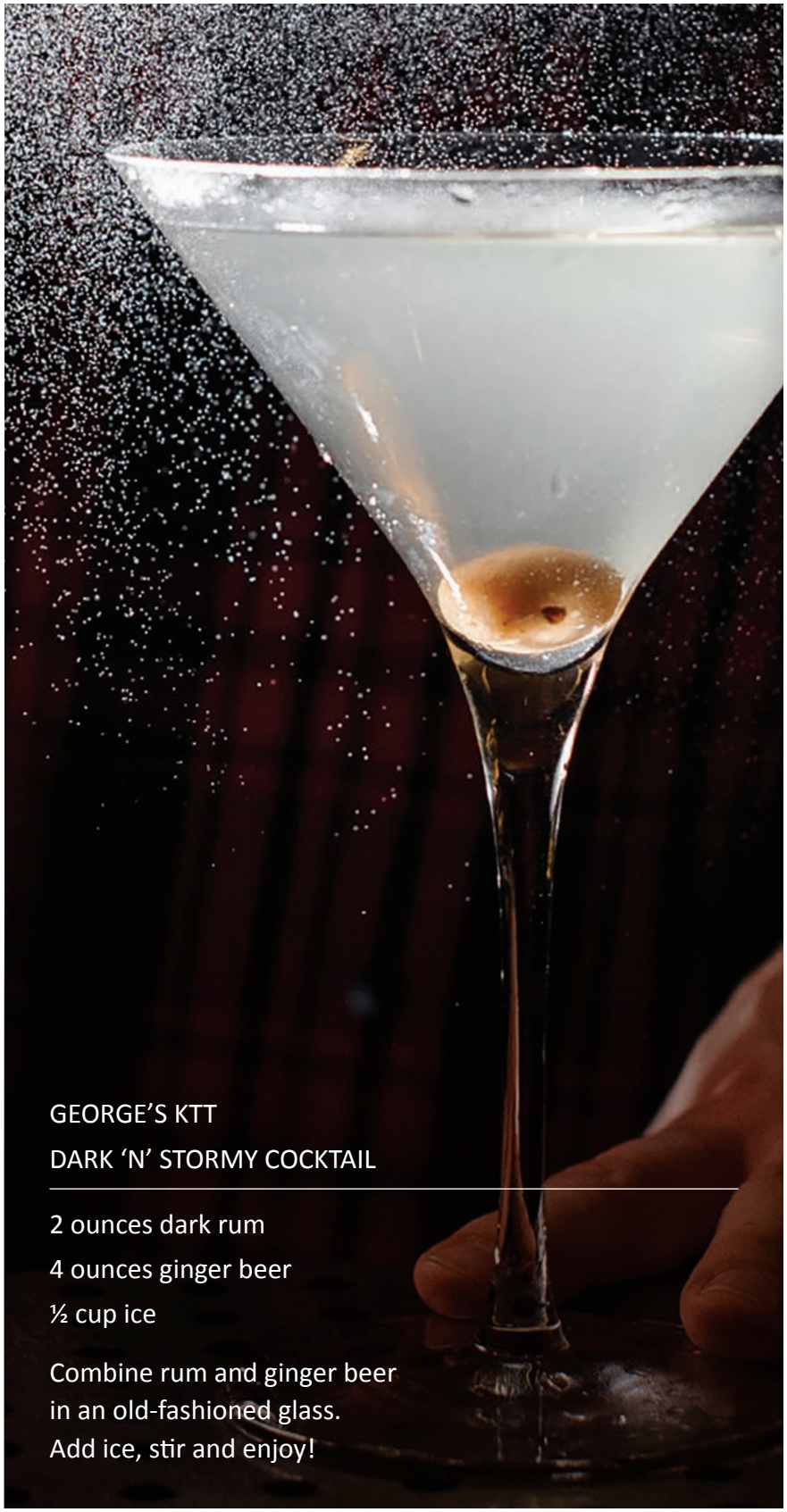
## George the Bartender's Dispatches From Online Happy Hour

**BY NICHOLAS SANDOMIRSKY, ASSOCIATE ATTORNEY AT KEGEL, TOBIN & TRUCE**

FROM MY BAR AT HOME - Having exhausted all available programming in the vast depths of Netflix,[1] I was grateful for a different kind of on-screen experience at my latest virtual happy hour with my work comp pals, fellow defense attorney Gerry Lane and prominent applicant's attorney Holly Hustler. After each of us fixed our drink of choice (an old-fashioned for Gerry, a White Claw for Holly, and a Dark 'n' Stormy for yours truly), the chat turned to how we were managing our cases during the COVID-19 era.[2] Although the Workers' Compensation Appeals Board (WCAB) district offices remain closed for hearings for the time being, the WCAB had recently decided to hear at least some trials via conference call. So it only took a few minutes for Holly to start taunting Gerry about the likely outcome of a trial the two of them had coming up the following week.

The case involved Holly's client, Martin Barrett, who had been injured while working as a university librarian in the 1990s. The case had previously settled by Stipulated Award with open future medical care, and it had been closed for 20 years, but Gerry's client had asked him to reopen the file in order to deal with a treatment dispute raised by the applicant.

Holly was confident. "Sorry, Gerry, but you'll be paying for my client's massages forever. It doesn't matter what your utilization review (UR) says. This time I've done the research!" Holly was waving a piece of paper in front of her camera. I was squinting at the screen, trying to figure out what she was talking about when she announced, "*Bertrand*, baby. Read it and weep." She's a friend, but boy can she be smug at times.



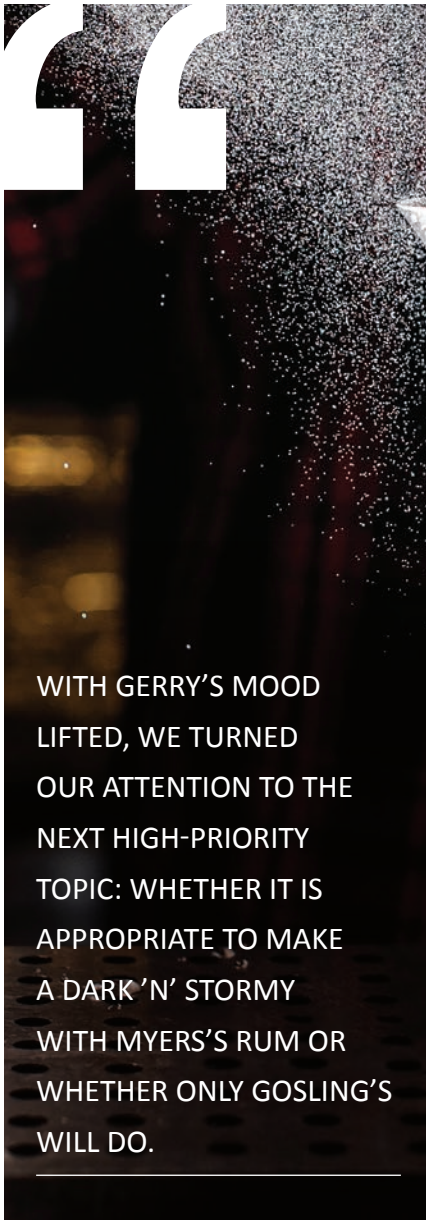

The case Holly was referring to was *Carolyn Bertrand v. County of Orange*, 2014 Cal. Work. Comp. P.D. Lexis 342, a panel decision published on July 28, 2014.[3] In *Bertrand*, it was determined that the parties had waived the right to use the independent medical review (IMR) process to resolve treatment disputes because the parties had included a stipulation in their settlement agreement stating that future medical care would be determined by the agreed medical examiner (AME) and that the parties would return to the AME to resolve any treatment disputes.

Holly planned to use *Bertrand* in her own case with Gerry since the Stipulated Award between Mr. Barrett and the university had stated that future medical care would be provided by defendant "in keeping with the 10/5/99 report of primary treating physician Dr. Boyd." Dr. Boyd remained the primary treating physician (PTP) and had recently written some prescriptions for massage therapy, which defendant's utilization review had not certified as medically necessary. Still, Holly was taking the position that the dispute was not subject to UR/IMR and that Dr. Boyd's opinion was all that mattered. "Massages. For. Life!" Holly declared.

Gerry was none too pleased. "It's not my fault. I would never agree to something like that, but the Stip was done 20 years ago by whoever was the university's attorney at the time. This was how things were done back then. What am I supposed to do about it?"

If a classic 10-ounce highball glass could talk, mine would have been reassuring Gerry that he had nothing to worry about. "Hey guys, check your email," I suggested. I sent them each a copy of the recent panel decision in *Nancy Archibald v. Spelling Entertainment*, 2020 Cal. Work. Comp. P.D. LEXIS 45, filed on January 29, 2020.

In *Archibald*, the applicant and defendant had settled the case, leaving medical care open, with a stipulation that future treatment would be in keeping with the permanent and stationary report from the PTP. Applicant argued that this stipulation meant that the PTP, not IMR, would control any treatment disputes. The Workers' Compensation Judge (WCJ) disagreed. After a Petition for Reconsideration was filed by the applicant, the Appeals Board affirmed the WCJ's decision in the defendant's favor.




In its discussion, the panel distinguished the facts in *Archibald* from those in *Bertrand*. In both cases, the parties had made an indication that the scope of future medical care was in some way shaped by the findings of one of the doctors in the case. However, in *Bertrand*, the parties had specifically stipulated that they would return to the AME to resolve treatment disputes. In *Archibald*, there was no explicit agreement about how to handle treatment disputes. Since the parties did not make a special agreement about treatment disputes, the normal rules still applied, and treatment disputes would be governed by the IMR process.

The bad news for Holly (and saving grace for Gerry) was that their case fit the same pattern found in *Archibald*. The parties' agreement from 20 years ago to provide treatment "in line with" a doctor's report was simply too vague to constitute the type of waiver of IMR that had been found in *Bertrand*. In short, although COVID-19 has changed many things, words still have meaning!

So, even though Gerry had inherited some sloppy settlement language, his client would be spared from a future of endless massage therapy, at least so long as the IMR process determined that Dr. Boyd's requests were not medically necessary.

With Gerry's mood lifted, we turned our attention to the next high-priority topic: whether it is appropriate to make a Dark 'n' Stormy with Myers's rum or whether only Gosling's will do. I look forward to asking George's opinion on the matter.

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

While *Archibald* lacks the designation "significant panel decision," Mr. 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."

We are starting to slowly see our lives return to some semblance of "near normal," which is encouraging. Overcoming hardship is never easy, but if we have hope, determination and some good moisturizing hand soap, we'll come out the other side of this soon enough.

We're still making our own doubles for now. May George guide my hand. Bottoms up, friends.



[1] Getting to the end of Netflix isn't as exciting as one would think. Turns out, it is just a clip from a board meeting of Netflix execs after they started producing their own content where one asks, "Hey, what do we think we should put at the end of Netflix?" and another responding, "Like anybody would ever have enough time to stream all of the content and get to the end." Laughter breaks out. Fade to black.

[2] 'Tis an ol' maritime tale that the Dark 'n' Stormy originated from a ginger beer factory in Bermuda that was run by the British Royal Naval Officer's Club, not too long after World War I. There, sailors discovered that a strapping splash of the local Gosling's Black Seal rum was an excellent complement to ginger beer. As for the name, it is alleged that a sailor enjoying the cocktail, perhaps two to three sheets to the wind, commented that it was, "The color of a cloud only a fool or a dead man would sail under." But I digress.

[3] Joe Truce's trusty briefcase is on sabbatical at the moment. However, we're happy to send you a copy of *Bertrand* and *Archibald* via email request.

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# The Impact of the COVID-19 Pandemic on Temporary Disability

**By Neelu K. Khanuja, Esq.,**
***Founding Attorney at Khanuja Law***

The California Employment Development Department estimated there to be approximately 2.8 million unemployed individuals in California in June 2020. The state unemployment rate significantly increased after Governor Newsom issued Executive Order N-33-20, mandating all individuals to stay at home due to the COVID-19 pandemic unless they are essential critical infrastructure workers. Thousands of non-essential businesses statewide closed or downsized resulting in laying off or furloughing millions of workers.

In consequence, there has been a substantial economic impact on the workers' compensation industry in regards to liability to pay laid off, disabled workers temporary disability benefits. Specifically, a non-essential employer who accommodated a worker's restrictions prior to the stay-at-home order will no longer be able to provide accommodations if the employer closes business and lays off the worker due to the COVID-19 pandemic. Injured workers demand temporary partial disability benefits, the difference between full wages and wages working modified duty, or temporary total disability benefits, total wage loss, based on the inability of closed businesses to offer modified work. In *Manpower Temporary Services v. Workers' Compensation Appeals Board (Rodriguez)*, the Board found that when an injured worker is terminated while on modified duty, the injured worker is entitled to temporary disability benefits post-termination if the employer does not prove that the termination was for "good cause." *Manpower Temporary Services v. Workers' Compensation Appeals Board (Rodriguez)* (2006) 71 Cal. Comp. Cases 1614 (writ denied). Therefore, when an injured worker is terminated for "good cause," he or she is not entitled to receive temporary disability benefits.

Whether or not the injured worker is entitled to temporary partial disability benefits or temporary total disability benefits post-termination depends on the fact pattern. If the defendants do not show modified work within the injured worker's capabilities is available, it is arguable that defendants will be liable for temporary total disability benefits for total wage loss.

When an injured worker on modified duty is laid off, he or she may be entitled to temporary disability indemnity if the non-essential business's closure due to the COVID-19 pandemic is not considered "good cause" for the layoff. The Board in *Rodriguez* found that termination for any reason beyond the injured worker's control is not a termination for "good cause." Injured workers argue that a layoff due to the COVID-19 pandemic is beyond their control and not from an unwillingness to work modified duties. Accordingly, pursuant to the holding in *Rodriguez*, a mass layoff due to the COVID-19 pandemic is arguably not considered "good cause" and injured workers may be entitled to temporary disability benefits.

On the other hand, an employer argues that the laid off worker is not entitled to receive temporary disability benefits on the basis that the injury did not cause the temporary disability pursuant to Labor Code Section 4650. The Board in S*ignature Fruit Co. v. Workers' Compensation Appeals Board (Ochoa)* found that "the essential purpose of temporary disability indemnity is to help replace the wages the employee would have earned, but for the injury, during his or her period(s) of temporary disability." *Signature Fruit Co. v. Workers' Compensation Appeals Board (Ochoa)* (2006) 71 Cal. Comp. Cases 1044. Here, the laid off worker is not losing wages due to the injury but he or she is losing wages as a result of the COVID-19 pandemic.

Pursuant to the reasoning in Ochoa, employers argue that they offered modified work prior to the layoff thus the injury was not causing the wage loss. The worker has the capacity to work following the layoff so he or she is not entitled to temporary disability indemnity for wage loss. Many closed businesses believe the remedy for a laid off worker's wage loss is unemployment benefits from the Employment Development Department.

Due to the current novelty of the workers' compensation issues arising from the outbreak of COVID-19, we will have to wait and see how courts rule on the issue of temporary disability following layoff in the absence of any existing case precedent addressing it.


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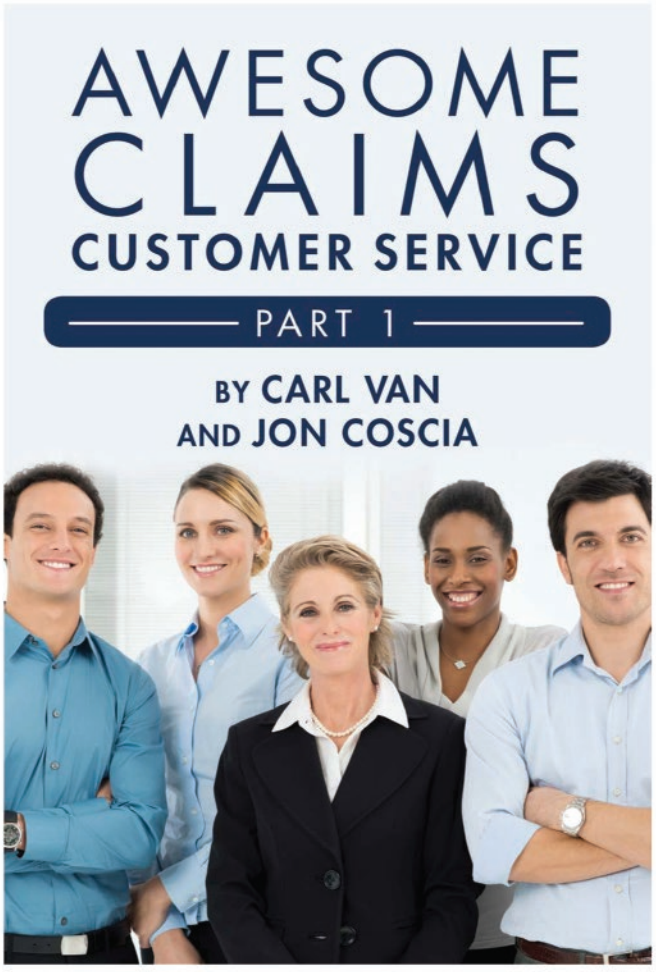
# Listen to Customers: You Might Learn Something

## PART 2 OF A 2-PART SERIES

### BY CARL VAN, ITP AND JON COSCIA




In claims discussions, we have very high expectations of what we think claimants are going to say, don't we? We could sometimes even finish our customer's sentences. We're sitting and talking to a customer, and we're trying to listen, but we're really just waiting for them to finish talking so we can (of course) jump in with "Yes, but, you know….Yes, but..." Sometimes it might be them complaining about something. Sometimes we know they are going to demand something. We're just waiting for them to finish so we can tell them what we have to tell them. If we have a high expectation of what a customer is going to say, there's a good chance we're hearing what we're expecting, even if it's not what they are actually saying. When Carl monitors phone calls as part of claims training, he observes this phenomenon quite frequently. A claims professional will respond to a customer based on what they think they heard because they had a specific expectation - even though that's not exactly what the customer said.

In part 1 of this series (*EWC Newsletter*, August 15), we indicated that we would give you an exercise to illustrate the law of expectations. So let's get started. We're going to give you a sentence and then give you a task that might challenge you. The first challenge we're going to give you is so basic, so easy that there's no way you could get it wrong. Then we're going to make it more complicated and see if a difference exists between what you think you see and what is actually there.

The sentence below doesn't mean anything; don't try to find any inherent value. We know it's a tongue twister. Read it out loud, and then count the number of Fs you see.

**Frequently files of Fred's**
**are the first of all of the**
**fat files to go to litigation.**

How many did you come up with? Six? Seven? Eight? Maybe nine? There's a good chance that everyone is going to come up with a different answer. When we do this exercise in our class, we use it to show that everybody sees things differently. We come up with different answers every time. Some people will say six, while others may say seven, eight, or nine. The point is that people can look at

Carl Van, ITP is President & CEO of International Insurance Institute, Inc. Carl and Jon Coscia co-authored *Awesome Claims Customer Service*, available here. Carl can be reached at CarlVan@InsuranceInstitute.com.

Jon Coscia is President and COO of Latitude Subrogation Services. Jon and Carl co-authored *Awesome Claims Customer Service*, available here. Jon can be reached at JCoscia@latitudesubro.com.

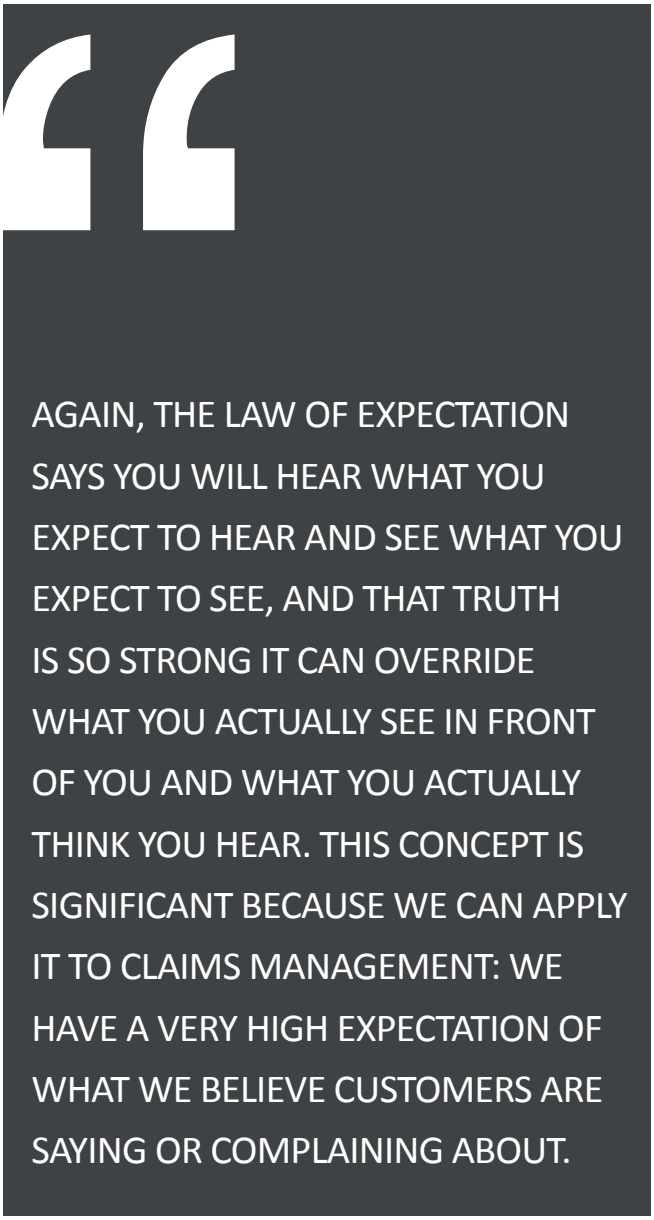
the same thing but see it differently. Why? Because of the law of expectations, which we will demonstrate shortly. We can see things differently if we have different expectations and, believe it or not, we led you down this path. Before we get to the right answer, try it one more time. Look at the sentence again. See how many Fs you think there are.

**Frequently files of Fred's**
**are the first of all of the**
**fat files to go to litigation.**

Did you get a different number this time? Some people probably did. If you got six, seven, or eight, we have bad news for you. The answer is nine. Some of you might have gotten it. Some of you are still convinced it's seven, eight, or who knows. We'll go through it together, but we want to make the point: if you didn't see nine, it's because you fell into the trap of the law of expectations. You see, we tend to read phonetically, and when we read something out loud, the words *frequently*, *files*, and *Fred*, sound like an F, but when we get to the word *of*, that sounds like a V. When you read this aloud, *frequently files of Fred's*, what you heard phonetically actually planted a seed in your mind where there are and aren't Fs. And some of us, even though we looked at the word *of*, even though our eye made contact with the letter F, we didn't actually see it because our expectation was that it wasn't there.

Let's go through this right now. ***F***requently ***f***iles o***f F***red's are the ***f***irst o***f*** all o***f*** the ***f***at ***f***iles to go to litigation. Well, did you finally get nine? Don't feel bad if you didn't. It's very common. People can stare at this for half an hour and sometimes not get it because their expectation is very high. Again, the law of expectation says you will hear what you expect to hear and see what you expect to see, and that truth is so strong it can override what you actually see in front of you and what you actually think you hear. This concept is significant because we can apply it to claims management: we have a very high expectation of what we believe customers are saying or complaining about.

We'll give you another example. Carl heard a conversation between a workers' compensation adjuster and a customer in which the adjuster was explaining the medical authorization form. About halfway through the conversation, the customer said, "Well, I don't understand why I have to sign that dumb form," and the adjuster responded, "Well, you have to sign it because of…" this and that, etc. The customer continued with, "Well, I still don't understand why I have to sign that stupid form" and the adjuster was getting a little irritated, and repeated, "Well, we've got to have it. It's not stupid and …" blah, blah, blah, and they went back and forth. The adjuster eventually got irate with this customer and took it out on him. Afterward, when Carl conferred with this claims adjuster, Carl asked, "Why did that customer upset you so much?" The adjuster replied, "Well, because the customer was calling me dumb. They called me stupid." Carl said, "No, they weren't calling you stupid. They were calling the form stupid." "No, they were calling *me* stupid" the adjuster insisted. "No, they called the form stupid," Carl persisted. "Do you want to hear the tape?" Carl had to play the tape back for this workers' compensation adjuster. Why? Because what that adjuster *heard* was "You're stupid." What the customer actually *said* was "The form is stupid." This exchange is a perfect example of hearing things because we *expect* to hear them.




If we want to do an outstanding job of listening to our customers, we have to drop any expectation of what we think the customer will say. That's not easy when you've been doing this job for a long time. If you're at the point you can already finish customers' sentences, there's a good chance you're hearing what you expect to hear. So how do we stop having these types of expectations? Well, it's not easy, but it's not impossible. As we said, we have to drop any expectation of what we think the customer will say. It just takes practice.