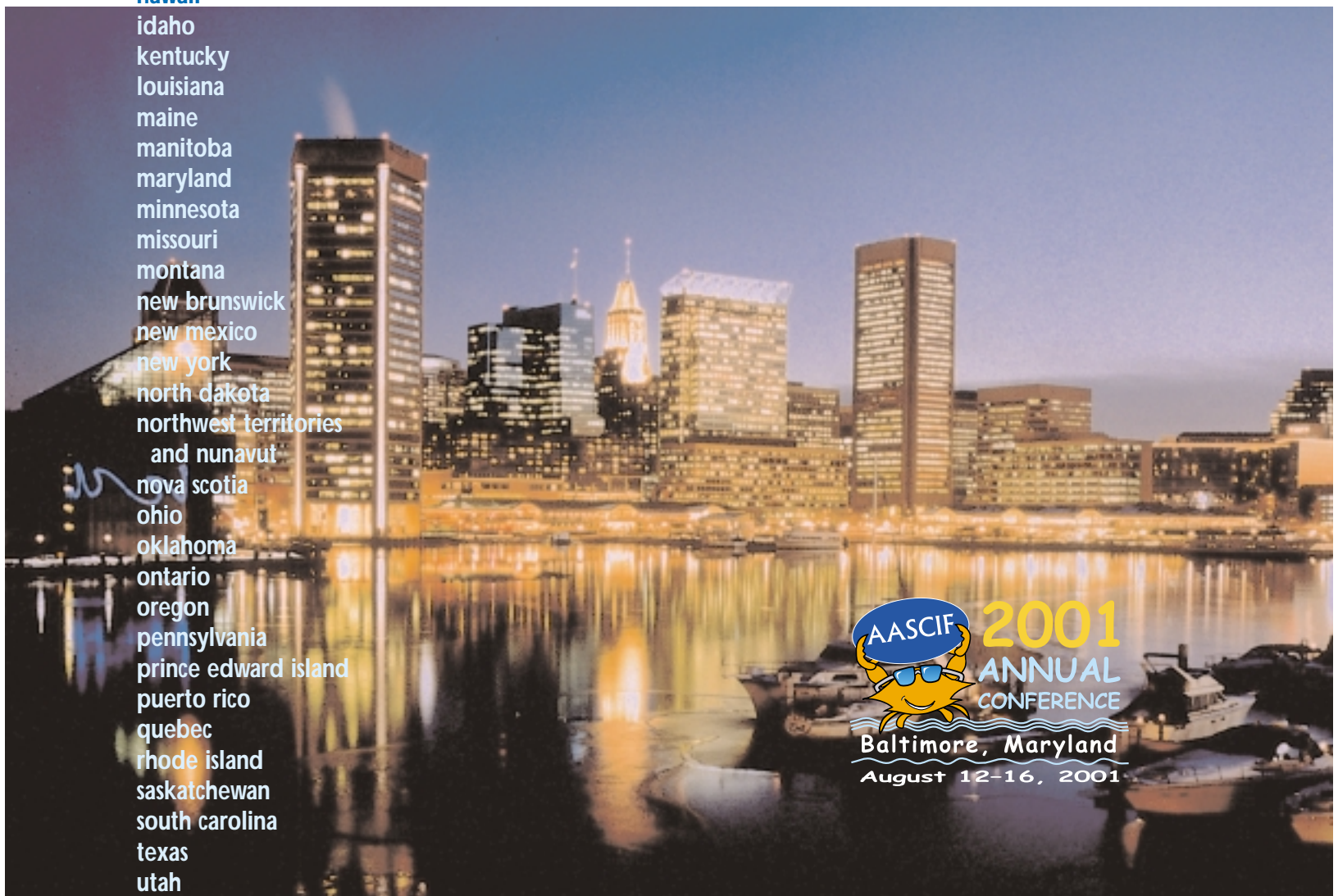




The Newsletter of the American Association of State Compensation Insurance Funds
Spring 2001 • www.aascif.org

aascif NEWS

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2001
ANNUAL
CONFERENCE
Baltimore, Maryland
August 12-16, 2001

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message from the president

Spring has arrived, ushering in the pleasures of warmer weather and vibrant new colors. For State Funds, the new season brings fresh challenges and assorted opportunities. Recently, these challenges have been the focus of the national press which has carried a number of stories on the 'hardening' workers' compensation marketplace and how various states are dealing with these realities. Sometimes the reporters get it right, sometimes they don't. They are certainly right about the trend of increasing losses and costs. What many reporters miss is our ability to deal with change. Over the years, State Funds have proven to be adaptable and creative. We are here for the 'long haul' and our collective experience is worth its weight in gold. We can grow leaner and meaner, we can adopt new strategies to deal with changing market conditions; and year in, year out, we can provide a stable and ready market at cost to employers. One thing we cannot do, is lose sight of our customer focus. To be truly successful we must not only meet client expectations; we must exceed those expectations. If we do, we all win.

Even though it's spring, I hope it's not too early for me to remind you to make plans to attend the Annual AASCIF Conference in Baltimore on August 12 through 16. The conference will focus on market trends and consumer behaviors, the future of the workers' compensation industry in North America and a forecast on the state of the economy in the U.S. and abroad. I don't want to give you the impression that the annual event is all work and no play. In fact, **Nancy Kellar** of Maryland details some of the historic and truly beautiful sights you may want to visit during your stay. Nancy shares some details regarding the upcoming conference beginning on page 4.

The expertise and diversity of knowledge possessed by Fund employees is certainly on display in this issue of the AASCIF News. We have a very lively debate about the impact of new U.S. medical privacy regulations on workers' compensation. **Charles Savage** of California begins his opening argument on page 12, while **Loris Gies** of Washington offers her rebuttal on page 15.

Joe Yurkovich of Texas and **Mark Kjeldgaard** of Colorado take us deep into the complexities of underwriting firms that lease employees to other companies, while **John Marr** of Maine alerts us to potential dangers of lump sum settlements and Medicare. Joe and Mark's work begins on page 18 and John's Medicare diagnosis can be found on page 7.

At the top of this column, I mentioned challenges faced by State Funds. On page 3, California's **Patrick Andersen** outlines how many of those challenges can vary from state to state.

On page 20 **Nina Brollier**, (no relation – I only have one 'r' in my last name) shares Utah's experience in implementing an orientation program for new employees. **Scott Walters** of North Dakota and **David Casto** of West Virginia share some examples of how our policy and claims departments can work together to improve our service to employers, in the form of premium discounts and safer workplaces (pages 22 & 23).

We introduce a new section on page 6 entitled, "Dim Sum." Like the dining custom of the same name, this new section serves up a tasty variety of items. We also have our regular "around AASCIF" column beginning on page 9 and other miscellany you can sample throughout the magazine. I would like to extend my thanks to everyone who contributed the fine articles contained in this issue. I wish all our readers a happy spring and a warm and delightful summer.



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Funds' Challenges vary from State to State

By Patrick Andersen – AASCIF News Editor

We recently received an inquiry from a Canadian businessman. It seems he plans to do business at a number of locations throughout the States, so could someone please give him just one or two minutes of time to explain the rules for workers' compensation here?

No, that would require more than two minutes.

The rules that govern workers' compensation vary widely from state to state. In some jurisdictions employers insure exclusively with a "state fund," while in others they can shop around with private insurance companies. In at least one state, workers' compensation is not even mandatory. Some state funds have a mandate to insure any employer; others can "cherry pick" the better risks and refuse to cover less profitable accounts.

AASCIF News contacted representatives of 26 state funds and found that each organization faces a unique set of circumstances and challenges.

Twenty of the funds compete with private carriers to offer workers' compensation coverage to private employers. Five – North Dakota, Ohio, Washington, West Virginia and Wyoming – cover the private market exclusively (i.e., without competition). One – South Carolina – does not offer coverage to private employers.

Twelve of the state funds provide exclusive coverage to state agencies; at least three serve as Third Party Administrators for state agencies. Many state, local and municipal governments self-insure, while relatively few insure with private carriers.

With prior state approval, private employers can self-insure in all of the states surveyed except Oklahoma, North Dakota and Wyoming.

State funds are expected to remain self-supporting, and most return surplus monies to their policyholders in the form of dividends. But some inherited huge deficits even at their birth. The West Virginia Workers' Compensation Division, for instance, was saddled with a \$1.8 billion debt. Other funds such as the Texas Workers' Compensation Fund and Missouri Employers' Mutual Insurance were founded with "seed money" from state bonds that had to be repaid.

Defining the nature of the various state funds can seem an exercise in semantic gymnastics: Nine describe themselves as state agencies, at least four use the term "quasi-agency," one is an "independent unit of state government," another is a state non-profit enterprise, two others call themselves private non-profits, six are mutual insurance companies, one is a "public company" and two are "independent companies." All share some degree of a public mandate to make workers' compensation coverage available to employers in their home states. Rhode Island, because of its small size, also gives marketing emphasis to its offer of multi-state coverage.

And while most do not consider themselves state agencies in a strict sense, some of their employees enjoy some degree of civil service status.

The nature of the state fund and its local business environment can combine to create unusual competitive challenges. For instance, because workers' compensation coverage is not mandatory in Texas, employers often need to be reminded that – without such coverage – their employees can sue them if injured on the job. Because the threat of liability suits by employees was one of employers' primary motives for supporting the very creation of workers' compensation insurance a century ago, most other state funds rarely need to fall back on this argument.

(continued on next page)

ABCs of Workers' Comp in States from A to W

	COVER PRIVATE SECTOR?	COVER STATE AGENCIES?	COVER LOCAL GOVTS.?	CAN ERS SELF-INSURE?
Arizona	C	S	C	Yes
California	C	TPA	C	Yes
Colorado	C	TPA	C	Yes
Hawaii	C	S	S	Yes
Idaho	C	E	E	Yes
Kentucky	C	No	C	Yes
Louisiana	C	S	C	Yes
Maine	C	S	C	Yes
Maryland	C	TPA	C	Yes
Minnesota	C	S	C	Yes
Missouri	C	C	C	Yes
Montana	C	E	S	Yes
New Mexico	C	S	S	Yes
New York	C	E	C	Yes
North Dakota	E	E	E	No
Ohio	E	E	E	Yes
Oklahoma	C	E	No	No
Oregon	C	E	C	Yes
Pennsylvania	C	C	C	Yes
Rhode Island	C	S	C	Yes
South Carolina	No	E	C	Yes
Texas	C	S	C	Yes
Utah	C	E	C	Yes
Washington	E	E	E	Yes
West Virginia	E	E	E	Yes
Wyoming	E	E	E	No

C = COMPETITIVE; E = EXCLUSIVE; S = SELF-INSURED;
TPA = THIRD PARTY ADMINISTRATOR

Funds' Challenges vary from State to State

(continued from previous page)

Competition can come in many forms.

The SAIF (State Accident Insurance Fund) Corporation of Oregon sometimes finds itself besieged by private insurers who claim the former state agency has an unfair advantage. "But unlike the private carriers," said a spokesman, "we are a mono-line insurance company that can't diversify its risk like they do. Also, our board meetings are open and our files are public records," thus making competition difficult. One private insurance company recently backed a legislative effort to siphon off SAIF's surplus funds to bail out the state's budget, according to the newsletter *Workers' Comp Executive*.

When faced with similar charges from private carriers, Maine Employers' Mutual Insurance Company brushes off the allegation of unfair advantages. MEMIC even pays federal income taxes.

If associations of employers self-insure in Kentucky or Louisiana, they may not be subject to the same degree of regulatory oversight as insurance companies, according to spokespersons for Kentucky Employers' Mutual Insurance and the Louisiana Workers' Compensation Corporation.

The public mandate itself can present challenges. In California, for example, the competitive pricing introduced in 1995 has resulted in a number of private carriers retreating from the workers' compensation market. This has led to a huge surge of business for State Compensation Insurance Fund. State Fund's mission is to make coverage available, so the organization now sells 26 percent of all workers' compensation insurance in California. The rapid expansion requires increased focus on training employees, monitoring results and controlling expenses.

New York's greatest challenge also, according to a spokesman, is "the sheer size of the market."

A similar situation besets New Mexico Mutual Casualty Company. "We have to guard against over-extending ourselves," commented Chris Krahling, NMMCC's government affairs officer. "A number of (workers' compensation insurance) companies are either leaving the market, increasing their rates or growing far more conservative in regard to underwriting risks. So, many more employers are coming to us."

While the Pennsylvania State Workers' Insurance Fund theoretically competes with private insurers, "we only compete passively. We make no effort to market or advertise," commented Ralph Chase, director and CEO of the state agency.

"Most AASCIF members are competitive. Pennsylvania is not. As a result, we experience wide premium fluctuations depending on the hardness of the market," Chase added. "The private sector can write or not write at will with the certain knowledge that the Fund will always be there to pick up the pieces. If the private sector were to pick a State Fund for their ideal model, it would be Pennsylvania."

Welcome
to Baltimore,
Hon!



This warm welcome will greet hundreds of AASCIF representatives and guests this year, as the Injured Workers' Insurance Fund (IWIF) of Maryland prepares to host the AASCIF 2001 Annual Conference in Baltimore on August 12 through 16.

By Nancy Kellar, Conference Coordinator
Injured Workers' Insurance Fund

Baltimore is located on the beautiful Chesapeake Bay in the mid-Atlantic region of the United States. It is known by many as "Charm City" because it has a lot to offer. AASCIF representatives and guests will have ample opportunity to see many of Baltimore's famous attractions, including the National Aquarium, the Maryland Science Center, Disney's Port Discovery Museum, Oriole Park at Camden Yards, and the new Ravens' Stadium, home of the 2001 Super Bowl Champions.

AASCIF attendees and guests will also have a chance to visit historic Annapolis, the capital of Maryland, as well as our nation's capital, Washington, D.C. — both within an hour's drive of Baltimore. And, of course, attendees and guests will also be able to sample the Chesapeake's region's famous delicacy — hot steamed crabs.

The conference itself promises to be informative and challenging. Its theme, "Grasp the Future of Workers' Compensation Insurance," is woven throughout the week's agenda. General sessions include discussions by:

- Frank Wrenn, of Yankelovich Monitor Client Services, on market trends and consumer behaviors;
- Bill Schrempf, president and CEO of NCCI, on the future of the workers' compensation industry in North America; and
- Dr. Robert Hartwig, vice president and chief economist for the Insurance Information Institute, on the future of the economy in the U.S. and abroad.

Motivational speakers include Baseball Hall of Famer Brooks Robinson, personal excellence expert Dr. Sheila Murray Bethel, and former Vietnam War POW Charlie Plumb.

Baltimore to host AASCIF Annual Conference



Attendees and guests are encouraged to stay at the majestic Hyatt Regency hotel in downtown Baltimore, in the city's famous Inner Harbor area. Baltimore's Inner Harbor is especially well known for its shopping, food, and cultural activities. The Hyatt Regency is centrally located within walking distance to most of our conference events. The hotel is linked by a skywalk to Harborplace and The Gallery, Baltimore's two premier shopping complexes. The hotel's six-story atrium lobby commands a spectacular view of the harbor. Special discount rates have been negotiated for Conference attendees, and a special block of rooms has been reserved — at reduced rates — especially for AASCIF delegates and guests. Please call the hotel directly at 1-800-233-1234 to make your reservations.

"We know you will find this upcoming conference to be informative and entertaining," says Preston D. Williams, President and CEO of IWIF. "It will also be a good opportunity for all of us to network with our colleagues from other state funds and from the Canadian provinces."

There are still many sponsorship and exhibitor opportunities available; for more information on these opportunities or on the conference in general, please call the special AASCIF Conference Hotline at 1-800-925-9420, or check the IWIF web site at www.iwif.com (and click on the "AASCIF" link).

We look forward to seeing you in Baltimore this summer, hon!



Photo credits: Top: Inner Harbor, Rick Lippenholz; center: Inner Harbor, Middleton Evans; lower left: Pride of Baltimore II, Rick Lippenholz; lower right: Oriole Park at Camden Yards, Middleton Evans. Cover: Baltimore skyline at night, Rick Lippenholz. Photos courtesy of Baltimore Area Convention & Visitors Association.



Oregon Court Says Workers Can Sue

SALEM – The Oregon Supreme Court ruled that in some cases employees have the right to sue for damages when workers’ compensation benefits are denied, the Associated Press reported.

At issue were provisions in state law requiring workers to establish that a job-related condition was a “major contributing cause” of their illness or injury. The unanimous court ruling cited an 1857 law granting every citizen a “remedy by due course of law for injury done him.”

Senate President Gene Derfler said the ruling could affect up to 40 percent of workers’ compensation claims, and added that a special legislative session may be needed later this year to deal with the matter.

Fingers Favored Over Needles, Study Says

SEATTLE – Therapeutic massages are better for chronic lower back pain than acupuncture or self-help remedies, it was reported.

A study in *Archives of Internal Medicine* reported that researchers from the Group Health Center here studied results for 262 patients aged from 20 to 70. They put the patients into three separate treatment groups: traditional Chinese acupuncture, therapeutic massage, and self-care educational materials.

Investigators allowed up to 10 massages or acupuncture visits during the 10-week study period. Telephone interviewers assessed patient symptoms and ability to function at four, 10 and 52 weeks.

According to the report, acute back pain lasts less than four weeks while chronic pain usually continues for more than 12 weeks.

The study concluded that therapeutic massage was effective for persistent low back pain, while acupuncture was relatively ineffective.

DIA Taps Griffin

BOSTON – The Department of Industrial Accidents recently announced the appointment of Thomas J. Griffin III as commissioner, effective March 12, 2001. Griffin named Priscilla J. Conant as deputy commissioner.

CDC: Workplace Deaths Dropping

ATLANTA – The frequency of deaths caused by on-the-job injuries has dropped by nearly half in the past two decades, the Centers for Disease Control reported. In 1980 the rate of workplace deaths was 7.4 per 100,000 workers. In 1997 the rate was 4.1 deaths per 100,000 workers.

Men accounted for 93 percent of all workplace deaths since 1980. Car crashes caused one-fourth of the deaths; homicides accounted for 14 percent, and machinery accidents for 13 percent.

Mining was the most dangerous sector, followed by agriculture and forestry.

The CDC’s figures may be lower than more definitive statistics compiled by the U.S. Department of Labor.

Frostbitten Drunk Wins WC Benefits

MADISON – In a sharply split decision, the Wisconsin Supreme Court ruled that a man who got drunk on a business trip and suffered severe frostbite after passing out in the cold was entitled to workers’ compensation, the Associated Press reported.

Upholding a ruling of the Industry Review Commission, the court voted 4-3 to award benefits to the man, whose fingers and thumbs on both hands were amputated due to the frostbite. The man’s benefits were reduced by 15 percent, however, because he was injured while intoxicated.

Insurer Shocked As Sheriff Sheds Shirt

WASHINGTON, PA – The Associated Press reported that a former sheriff’s deputy was convicted of workers’ compensation fraud for working as a stripper while collecting benefits for a back injury.

The deputy left work on disability in March 1997, but the next year was spotted dancing under the stage name “Dimitri” at a nightclub in suburban Pittsburgh. He was sentenced to 12 months in prison and ordered to pay restitution.



MEDICARE SECONDARY PAYER ACT: TIME BOMB or LADY FINGER ?

By John Marr, Maine Employers' Mutual Insurance Company



In business and in politics it is always wise to follow the source of payment, or reward, if you want to understand the motive. Certainly, the insurance industry is a business and, far too often, business regulation involves politics.

Of late, many of us in the claims world have been alerted to a time bomb ticking in our midst, to wit: liens originating from the Medicare Secondary Payer Act. Purveyors of protective policies, a.k.a. annuities and similar policies, have suggested that we best come to them before we dare settle any long-term case or risk double jeopardy. It has been suggested that one must get a sign off from the Feds to assure the propriety and full protection of a claim settlement involving long-term exposure that might lead the injured worker to seek Medicare protection.

42 USC §1395y, enacted in 1977, is part of the Medicare Secondary Payer Act, which is contained within the Social Security Act. Medicare is the secondary payer (MSP), and will not make payments if payments are being made or will be made under a state workers' compensation act [§1395y(b)(2)(A)(ii)]. If Medicare pays, and then workers' compensation is deemed liable, Medicare must be reimbursed within 60 days of when the primary payer (the comp insurer) receives notice that the benefits should have been paid under the Workers' Compensation Act. If Medicare makes a "conditional payment" (Medicare as secondary payer pays while a workers' compensation action is pending) and, if the workers' compensation carrier is later deemed liable, HCFA (on behalf of Medicare) can recover either the amount Medicare paid or the amount the insurer is obligated to pay, whichever is less.

Sections 411.46 and 411.47 concern lump sum settlements. If a workers' compensation lump sum settlement "stipulates that the amount paid is intended to compensate . . . for all future medicals . . ." Medicare payments for future medicals "are excluded until medical expenses related to the injury or disease equal the amount of the lump sum payment" [§411.46(a)]. §411.46(b) provides that a lump sum compromise settlement is "deemed a workers' compensation

payment even if the agreement stipulates that there is no liability under workers' compensation law." Moreover, if a settlement "appears to represent an attempt to shift to Medicare the responsibility for payment of medical expenses for the treatment of a work-related condition, the settlement will not be recognized."

However, this only affects medical treatment incurred before a lump sum settlement. If the settlement forecloses the possibility of workers' compensation benefits, including medical expenses, then expenses incurred after the settlement are payable under Medicare [§411.46(d)(1)]. If the settlement allocates an amount for future medical benefits, then Medicare pays nothing until that amount in future medical expenses is reached [§411.46(d)(2)].

In short, Medicare is becoming more involved in recovering monies it pays which are later deemed to be the responsibility of a third party (such as a comp insurer) and protecting itself from paying for work-related medical expenses. The statute and code sections outlined above give Medicare that authority. However, at this point Medicare is not vigorously seeking recovery, and you will only owe money when (1) the employee is receiving or has been deemed entitled to Medicare; (2) Medicare asks for its money back in a timely manner; and (3) a lump sum settlement includes the settlement of already incurred medical expenses. If a settlement includes an amount for future medical expenses, the employee may have a holiday before Medicare will pay.

Nonetheless, the protectors caution us that failing to get a sign-off from Medicare as part of a settlement could lead to further payments later on if the Medicare system has to step in and make payments. Certainly the warning they offer is not without merit.

(Continued next page)

around aascif is a regular feature of the AASCIF News. It briefly covers items of interest submitted by AASCIF members or gleaned from their websites, newsletters and other published news sources. To ensure that your organization is included, send information to Patrick Andersen, c/o Communications—15th floor, State Compensation Insurance Fund, P.O. Box 420807, San Francisco, CA 94142-0807, (415) 703-7013, Fax (415) 703-7028, pwandersen@scif.com. Final deadline for submission is the first Friday of the second month of each quarter.

Alberta

Twenty-seven workers a day were injured in their first six months on the job in Alberta last year. Of the 118 workplace fatalities, 13 were workers aged under 25. These statistics prompted the Workers' Compensation Board to launch Heads Up, a \$300,000 safety awareness campaign aimed at inexperienced workers. "Inexperience, regardless of age, plays a major factor in the number of injuries resulting in time lost from work," said WCB President and CEO **Mary Cameron**. "Of the injured workers WCB sees, we know that one out of two workers under the age of 25 were injured during their first six months on the job and for those over 25, one out of four were injured during their first six months on the job."

Arizona

In January 2001 the State Compensation Fund began offering a premium credit of 5 percent to employers who established an alcohol and drug testing program to comply with the requirements of a bill that was signed into law by the state legislature in July of 1999. This bill provides that an employee's alcohol or drug related injury may not be entitled to compensation if the employer has established an alcohol and drug testing program that complies with the statute's requirements. This 5 percent premium credit came about following a change in the law that shifted the burden of proof to the employee to prove that intoxication or impairment did not contribute to the accident that resulted in injury. If an employer has a certified drug and alcohol testing program in place and if an employee tests positive or refuses to take a drug test following an accident, the law now presumes that the employee was impaired and the impairment contributed to the industrial accident.

The State Fund declared a loss-sensitive dividend of \$50 million to policyholders in March, following a thorough review of its 2000 performance. The Fund serves more than 48,000 businesses whose premium payments exceed \$175 million.

British Columbia

The Panel of Administrators of the Workers' Compensation Board has strengthened controls of workers' exposure to second-hand tobacco smoke in hospitality establishments, and long-term care and provincial correctional facilities. Studies have linked exposure to second-hand smoke to increased rates of various diseases. An economic analysis found that there was a significant drop in liquor sales in hospitality establishments during the first month of smoking restrictions, but the impact for the most part dissipated after the first month. There was no other long-term economic impact caused by this regulation.

California

In a significant published opinion for the State Fund and all Employee Assistance Programs (EAPs), the Ninth Circuit Court of Appeals has concluded that the federal psychotherapist-privilege extends to communications with unlicensed counselors in State Fund's EAP. Many companies, public employers and labor organizations have established EAPs to provide confidential counseling and referrals to their employees whose personal issues and/or substance abuse problems may be interfering with their work. The plaintiff had sought EAP's confidential files in order to support an allegation of a pattern of sex and race discrimination and retaliation by State Fund's management. EAP opposed the production of confidential files and the Federal District Court denied the plaintiff's motion to compel production. On appeal, the Ninth Circuit addressed the question as to whether the psychotherapist-patient privilege extends to unlicensed counselors employed by SCIF's EAP and held that it does. In conclusion, the Court observed that:

"EAPs work to address serious national problems, from substance abuse and depression to workplace and domestic violence. Given the importance of the public and private interests EAPs serve, the necessity of confidentiality in order for EAPs to function effectively, and the importance of protecting this gateway to mental health treatment by licensed psychiatrists, psychologists, and social workers, we hold that the psychotherapist-patient privilege... extends to communications with EAP personnel."

The court also noted that a growing number of states recognize that unlicensed EAP counselors should be protected under the psychotherapist-patient privilege. These states include Connecticut, Indiana, New Hampshire, New Mexico, Oregon, Rhode Island and Tennessee. According to the court, "The availability of mental health treatment in the workplace helps to reduce the stigma associated with mental health problems, thus encouraging people to seek treatment."

(continued next page)

Colorado

Diedra A. Garcia and **James E. Scholl** were appointed to the board of directors of Pinnacol Assurance. Garcia, who was appointed to complete a former board member's term ending January 1, 2002, is the owner of DRG & Associates Inc., a commercial construction company. She serves on the board of directors of the Hispanic Chamber of Commerce. Scholl is chairman of the board of Scholl Oil & Transport Co., a family-owned corporation founded in 1932. He is also a pilot for the Civil Air Patrol and manager of the Holyoke Municipal Airport.

Kentucky

Karen H. Hardin, executive vice president of Kentucky Employers' Mutual Insurance, was appointed chief operating officer. A native of Stanford, Kentucky, she joined KEMI in 1995 as manager of information services. She earned her B.S. in computer science from the University of Kentucky. Prior to her arrival at KEMI, she served at Rand McNally for 11 years.

KEMI received a rating of A- (Excellent) from A.M. Best in March. The rating reflects KEMI's profitability, capitalization, loss reserving patterns and market presence. Also in March, KEMI launched its improved website with heavy emphasis on e-commerce and online services. You may visit it at <http://www.kemi.com>.

Louisiana

The Louisiana Workers' Compensation Corporation has introduced NOWComp, a disability insurance plan that combines with workers' compensation to provide 24-hour protection from accidents. LWCC officials say the product will remove the incentive to report off-the-job injuries as work-related. It will also give greater focus to return-to-work initiatives.

Maine

Recognizing the impact that workplace injuries can have on employees' families, Maine Employers' Mutual Insurance Company launched the Horizon Scholarship Program. This will provide awards of up to \$5,000 for the educational pursuits of children or spouses of seriously injured workers. A scholarship award is not intended as a replacement for any benefits for which an injured worker is already eligible.

Maryland

The Injured Workers' Insurance Fund announced several appointments to its board and senior management staff. **Queen Logan Gladden**, **Paul M. Rose**, and **Leonard G. Schuler** have filled three positions on IWIF's Board of Directors. **Thomas W. Cleary** was named Executive VP of Corporate Services. He was cofounder and managing principal Meridian Insurance Services; VP of regional operations for AmTrust Financial Services; Insurance Service Offices; Insurance Data Resources (IDR), and NCCI. A graduate of the University of Connecticut, he earned his MBA from Pepperdine University. **John Egan**, CPCU, is VP of Corporate Services. His insurance and professional experience spans more than 20 years. He holds masters' degrees from Syracuse and Johns Hopkins Universities and is currently pursuing a doctoral degree in HR Development at the George Washington University. **Jerry Landsman**, director of Premium Fraud, has 14 years of leadership in law enforcement. Previously, he worked at the St. Paul and USF&G insurance companies for nine years as Premium Fraud Manager. **Candace Osunsade**, Human Resources director, is a graduate of Cornell University. She brings more than 13 years of HR experience.

The Legislature passed a bill eliminating Maryland's requirement that insurers writing workers' compensation coverage maintain an office in the state. According to *National Underwriter*, this will make the Maryland market more attractive to out-of-state insurers.

Minnesota

State Fund Mutual now offers employers a Preferred Chiropractors program to help control workers' compensation treatment costs. According to *Companion*, SFM's newsletter, the chiropractors included on the program's list are all board-certified, have met performance and training requirements, and are monitored to ensure they continue to meet high standards. The chiropractors also understand work injuries and the importance of return-to-work programs.

Companion reported that the No. 1 mistake leading to state penalties for policyholders is failing to report the first date of lost work time when making a first report of injury.

Missouri

Missouri Employers Mutual Insurance reported four fraud convictions this year related to workers' compensation coverage thanks to the efforts of its Special Investigative Unit.

MEM consistently makes the most allegations to the state's Fraud and Noncompliance Unit. There were 154 allegations made to the Fraud and Noncompliance Unit between May 1999 and February 2001. One hundred one of those came from MEM – or 66 percent.

Dick Dare, manager of the Special Investigative Unit, estimates that 1.5 percent of all workers compensation claims are fraudulent. In 1997, for instance, he says there were 220,000 workers' compensation claims filed in Missouri, totaling \$660 million in benefits. If 1.5 percent of these were fraudulent, it costs insurance companies, employers and Missourians \$6 million a year, or \$61,000 a day.

Montana

In March 2001 Montana State Fund's Board of Directors declared a \$5 million dividend to approximately 13,300 policy year 1999 policyholders. Combined with the \$17 million in dividends returned to policyholders in the last two years, MSF has returned a total of \$22 million to its customers in just three years.

Montana's biennial legislative session came to an end in April, and MSF successfully requested a bill to address personnel issues and other general policies. The new legislation frees MSF from a legislatively imposed administrative expenditure limit; allows MSF to expend money for scholarship, educational and charitable purposes; gives the Board the ability to offer United States Longshore and Harbor Workers' Compensation Act coverage, Jones Act coverage, and Federal Employment Liability Act coverage; and allows MSF to design an alternative personal leave program for its employees that closely matches that of private industry.

While MSF's bill was being considered by the Legislature, an attempt to amend the bill surfaced that would have appropriated \$15.5 million from MSF over two years to help fund Montana's education system. After lengthy discussion in the House of Representatives, legislators killed the proposed amendment, noting that it would unfairly fund education on the backs of businesses that insure with MSF. The move would also have limited distribution of dividends, resulting in higher premiums for MSF customers. Montana State Fund actively opposed this amendment to its bill.

New Brunswick

New Brunswick observed the annual Day of Mourning on April 28 to remember all the men and women who died or were injured or disabled in workplace accidents. The WHSCC noted that, on average, one in every 21 workers is injured each year. Also, one out of every three compensated accidents in Canada involves a worker aged 15 to 24. The WHSCC and New Brunswick Federation of Labour jointly published a commemorative poster.

New York

Effective June 1, 2001, New York State Insurance Fund will no longer use paper files in handling claims. Instead, case managers will use NYSIF's Claims Handling System (CHS) and electronic files to access claims information. On that date hearing representatives must be able to defend the interests of policyholders before the Workers' Compensation Board without a paper claims file, said Claims-Medical Director **Edward Hiller**. NYSIF auditors will be able to make a reasoned judgment on adjudicating payments without referring to a paper file.

"Paperless" is not really an adequate term, but "folderless" is more precise. "We can't stop the papers from coming," Mr. Hiller said, but claims personnel will no longer rely on paper folders. "Managing claims will involve accessing electronic records stored in CHS, NYSIF's CompPay and MedPay systems, and the Workers' Comp. Board electronic case file known as e-Case, which is available to NYSIF over the Internet," he said.

NYSIF announced the arrests of three suspects for workers' compensation fraud as part of 13 arrests in a fraud sweep in upstate Rensselaer County. One suspect allegedly owned and operated an Albany moving company while collecting workers' compensation benefits from NYSIF. A second suspect allegedly used fraudulent certificates of insurance to hire a sub-contractor for janitorial work. NYSIF auditors uncovered the phony certificates during a premium audit of the subcontractor, a NYSIF policyholder. In the third case, a claimant allegedly collected \$21,543 to which she was not entitled following the death of her father.

(continued on page 16)

FEDERAL PRIVACY REGULATIONS FOR WORKERS' COMPENSATION

President George W. Bush announced that regulations ensuring the privacy of medical information promulgated by the Department of Health & Human Services (HHS) would take effect on April 14, 2001.

The HHS regulations, entitled Standards for Privacy of Individually Identifiable Health Information ("Privacy Rule"), establish the first comprehensive federal standards for medical privacy and will affect virtually every individual, health care provider, health care plan, insurer and employer in the United States. In making the announcement, Bush stated, "I believe that we must protect both vital healthcare services and the right of every American to have confidence that his or her personal medical records will remain private."

The regulations were promulgated by HHS following passage of the federal Health Insurance Portability and Accountability Act (HIPAA) of 1996. The first draft of regulations in 1999 drew over 52,000 comments and the final version issued December 28, 2000 drew an additional 24,000 comments. Recognizing the public's interest in securing the privacy of medical records,

Bush approved the regulations but asked for modifications in response to criticisms raised by the healthcare industry, insurers, third party risk managers and employers. The regulations allow the HHS Secretary to make changes to the rules for up to a year after they take effect. The entities covered by the regulations will have until April 14, 2003 to be in full compliance.

Penalties are provided for if a patient's right to privacy is violated. Penalties for negligent disclosures range from \$100 up to \$25,000 per year. Criminal penalties for certain violations that are done knowingly range from \$50,000 and one year in prison for obtaining or disclosing protected health information, to \$100,000 and five years in prison for obtaining or disclosing protected health information under "false pretenses," and up to \$250,000 and 10 years in prison for obtaining protected health information with the intent to use it for commercial advantage or malicious harm. The regulations will be enforced by HHS' Office for Civil Rights.

No Consensus On Privacy Rules' Impact On Workers' Comp

EDITOR'S NOTE: We have all known many occasions in which reasonable people can reach divergent conclusions from the same set of facts. It doesn't necessarily mean that one side is "right" and the other "wrong." It means that there is more than one viewpoint.

The expression, "point of view," indicates that the view in question originates from a particular point of observation. In a two-dimensional world there would be 360 points (or degrees) from which to observe; in our three-dimensional world we often are confronted with far more than 360 opinions on any given subject.

A case in point: The recently enacted federal rules to maintain the privacy of medical records.

On this page you will find an article prepared for AASCIF's National Issues Committee. It was principally written by Charles Savage, assistant chief counsel for civil litigation at the State Compensation Insurance Fund of California, in cooperation with William Carney of the Pennsylvania State Workers' Insurance Fund, both of whom are members of the committee. Suzanne Mager, the third committee member working on this project, shared the draft article with Loris Gies of Washington's Department of Labor and Industries, who has also studied the new regulations. Ms. Gies disagreed with several points in the article; her own essay is on page 15.

To facilitate further discussion of this important issue, **aascif News** is devoting extra space in this edition in order to print both articles. We do this because the regulations could potentially have a substantial impact on the operations of every U.S. member of AASCIF. As is often the case, the courts will probably provide clarifications where necessary.

MAY POSE NIGHTMARE

By Charles Savage, Esq., California State Compensation Insurance Fund;
and William Carney, CPCU, ALCM, Pennsylvania State Workers' Insurance Fund



Charles Savage

While privacy advocates consider the rules a victory for consumers, the 140 pages of regulations (along with a 1,400-page preamble which attempts to explain the Privacy Rule) pose an operational nightmare for covered entities and those non-covered entities seeking to secure medical information. According to the HHS, implementation of the regulations is estimated to cost in excess of \$17.6 billion.

Significance for Workers' Compensation

The HHS regulations include a specific exemption for the disclosure of protected health information in order for workers' compensation programs to comply with workers' compensation laws under 45 CFR section 164.512(1):

A covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation or other similar programs, established by law, that provide benefits for work related injuries or illness without regard to fault.

The preamble to the HHS regulations provides the following explanation for 45 CFR section 164.512(1) under "Disclosures for Workers' Compensation":

Under HIPAA, workers' compensation and certain other forms of insurance... are "excepted benefits." Insurance carriers that provide this coverage are not covered entities even though they provide coverage for health care services. To carry out their insurance functions, these non-covered insurers typically seek individually identifiable health information from covered health care providers and group health plans.

In the final rule, we include a new provision in this section that clarifies the ability of covered entities to disclose protected health information without authorization to comply with workers' compensation and similar programs established by law that provide benefits for work-related illnesses or injuries without regard to fault. Although most disclosures for workers' compensation would be permissible under other provisions of this rule... we are aware of the significant variability among workers'

*compensation and similar laws, and include this provision to ensure that existing workers' compensation systems are not disrupted by this rule. **We note that the minimum necessary standard applies to disclosures under this paragraph.***

Under this provision, a covered entity may disclose protected health information, regarding an individual to a party responsible for payment of workers' compensation benefits to the individual, and to an agency responsible for administering and/or adjudicating the individual's claim for workers' compensation benefits.

*...We have included a general authorization for disclosures under workers' compensation systems to be consistent with the intent of Congress, which defined workers' compensation carriers as excepted benefits under HIPAA. **We recognize that there are significant privacy issues raised by how individually identifiable health information is used and disclosed in workers' compensation systems, and believe that states or the federal government should enact standards that address those concerns.***

(emphasis added)

– Preamble to the new federal regulations,
45 CFR Parts 160 to 164, at pages 340-343

Although the exemption for workers' compensation and the explanation provided by the preamble attempt to clarify the obligations for covered entities, ambiguities remain because covered entities have discretion in responding to a non-covered entity's request for protected health information. The disclosure provisions under section 164.512 are permissive rather than mandatory. Benefit providers will encounter privacy safeguards established by covered entities to ensure that the information sought is necessary for compliance with workers' compensation laws. Significantly, the states' workers' compensation systems are subject to the "minimum necessary standard" that covered entities must adhere to.

(continued next page)

Federal Privacy Regulations May Pose Nightmare for Workers' Compensation

(continued from previous page)

Minimum Necessary Standard

Under 45 CFR §§ 164.502(b) & 164.514(d) covered entities must limit uses and disclosures of "protected health information" (PHI) to the "minimum necessary to accomplish the intended purpose of the use for disclosure." This standard, which applies to disclosures to all workers' compensation insurers, self-insured employers, and third party administrators that provide workers' compensation services, creates the potential for interference with the need to provide expeditious medical treatment and benefit delivery. Covered entities are placed in the untenable position of safeguarding PHI while at the same time having to determine what is relevant for a workers' compensation proceeding. While the covered entity is not obligated to seek the written or verbal authorization of the individual whose medical records are being sought, it must provide notice to the individual that a PHI request has been made and what PHI will be provided. The individual may then object and demand to review records that covered entities propose to disclose.

What should a covered medical entity do when it discloses to an injured worker that certain information has been sought and the injured worker exercises his or her right to refuse disclosure of the information?

In the past when blanket authorizations were obtained by workers' compensation insurers, self-insured employers and third party administrators, extensive medical information could be collected. Under the HHS regulations individuals will be able to insist on adherence to the minimum necessary standard whether or not authorization is provided. Disclosure of medical information on prior and concurrent medical conditions may not in the opinion of a covered health care provider be necessary to accomplish the intended purpose for use in defending a workers' compensation claim. The medical information sought, however, may be essential to determine whether the injury is compensable as work-related. Further, there may be a pre-existing condition which the injured has not disclosed which must be taken into consideration when treating an industrial injury.

Public entities responsible for public safety and emergency response are currently faced with invasion of privacy suits when they seek medical histories of public employees who claim to have work-related exposure to individuals infected with hepatitis or who are HIV positive. Covered entities under the HHS regulations would face the potential of administrative penalties or invasion of privacy suits if they failed to adhere to the minimum necessary standard when requests for PHI are made.

What, for example, should a covered medical entity do when it discloses to an injured worker that certain PHI has been sought and the injured worker exercises his or her right to refuse disclosure of the information? The non-covered benefit provider may then halt both payments for medical treatment and disability benefits until the information is released. The covered entity would have to review its obligations under HIPAA and state workers' compensation laws to determine whether to: a) withhold the requested information, or b) to apply the permissive minimum necessary standard and provide limited PHI. All concerned will be caught in a clash of laws which will increase the difficulty of resolving contested cases.

According to the International Association of Industrial Accident Boards and Commissioners, workers' compensation accounts for less than 4 percent of the volume of medical claims. Covered health care providers will have difficulty setting up compliance procedures to deal with the HHS regulations that also create exceptions for workers' compensation. Workers' compensation adjusters will have difficulty in justifying their requests for PHI when covered entities may believe that the PHI sought is not relevant to the claim.

Competing Privacy Legislation

The HIPAA of 1996 was followed in 1999 by passage of the Graham-Leach-Bliley Financial Services Modernization Act, commonly referred to as the GLB. Under GLB financial institutions are required to develop detailed policies for handling nonpublic personal financial information and to communicate this policy to consumers. Consumers are given the right under GLB to direct that their financial information not be shared. GLB also requires that insurance regulators develop privacy regulations that would allow consumers to control the exchange of medical information between insurers and financial institutions. Mortgage lenders, for example, would not have access to medical information maintained by insurers, especially in those circumstances where the lender and insurer have the same corporate parent.

States have responded to GLB by passing legislation that responds to the public's concern for privacy of both financial and medical information. The National Association of Insurance Commissioners has also proposed a model regulation for both financial and health information to be adopted by July 1, 2001, the date fixed by GLB for privacy compliance. In addition, the National Conference of Insurance Legislators has proposed model regulations for states to adopt to implement GLB's medical privacy requirements.

To further complicate matters, the HHS regulations (in Section 160.203) provide for preemption of state law when there is a conflict.

(continued on page 21)

ANOTHER VIEW OF FEDERAL PRIVACY REGULATIONS

By Loris Gies, HIPAA Project Manager, Washington Department of Labor and Industries

Washington's Department of Labor and Industries (L&I) conducted a feasibility study of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) regulations on transactions, privacy and security. The department analyzed the potential impacts these regulations might have on its operations and determined that it was not bound by the regulations based on the broad exemption for workers' compensation (WC) programs. Nevertheless, L&I might choose to comply with some HIPAA rules for business reasons, for example, converting its electronic medical payment systems to accept HIPAA compliant transactions.

Based on its study, L&I's interpretation of the impact of HIPAA privacy rules differs from the one expressed in the accompanying article.

The overarching concept is that WC programs are exempt from compliance with the HIPAA regulations. The exemption is broad. HIPAA penalties and regulations apply to "covered entities." While providers fall within the definition of covered entities, they step outside the HIPAA umbrella when they exchange information with WC programs. Thus, both the provider and the WC program are exempt from the privacy regulations for this exchange. This removes all disclosures, transactions and activities performed for WC purposes from the purview and requirements of the HIPAA regulations. Since WC programs are not covered entities, neither they nor the providers releasing information to them under WC laws, would be subject to HIPAA penalties.

Minimum necessary standards define the use and disclosure of protected health information (PHI). Covered entities are to make "reasonable efforts" to limit use and disclosure to the minimum necessary to accomplish the intended purpose of the use, disclosure or request. This standard does not apply to disclosures between providers for treatment purposes. Nor does it apply to the exchange of information between providers and health plans for treatment, payment or health care operations. The covered entity sending the PHI determines minimum necessary. Thus, the rule allows the covered entities—the provider and the health plan—to define minimum necessary. Patients do not define minimum necessary.

Under the new HIPAA rules, patients may request providers to restrict access to PHI to plans and others. However, the provider does not have to agree to the requested restriction. In addition, if a state, federal or local law mandates disclosure, the covered entity can provide PHI without the patient's authorization.

Most WC laws allow the employer of record access to claim information. Claimants may want to restrict employer access rather than WC carrier access. It may be advantageous for WC programs to develop rules and/or policies about employer PHI safeguards for use, storage or destruction of PHI.

In the HIPAA consent process, the provider must advise the patient that PHI will be disclosed to health plans. If the patient does not sign the consent, the provider is not required to treat the patient.

The health plan is not required to obtain consent. Again, the exemption for WC is broad and arguably the notice requirements do not apply to disclosures in the WC context. In other words, providers are not required to put patients on notice that WC disclosure may be one of the disclosures made.

Authorization is required if a health plan requests PHI for psychotherapy notes, non-mandated research or disclosure to other parties. Authorization would also be required to obtain records pertaining to conditions other than those covered by the health plan.

While laws vary between states, the requirements set forth in the HIPAA regulations are very similar to the manner in which consent and authorization works now in the Washington WC program. Under Washington law, the filing of a claim entitles the WC program to all medical and other information related to the condition(s) for which the claim was filed. It also allows the WC program to access any medical or other information that might have bearing on the benefit decisions for the claim. Operationally, the WC program obtains a signed authorization for medical and other records when a claimant requests coverage for additional conditions or when other conditions which might impact the covered condition(s) are discovered. However, as with the HIPAA regulations, the WC program may terminate benefits if the claimant refuses to provide the requested authorization.

Given WC's litigious setting, workers rarely reveal any damaging medical history to their providers until or unless it is discovered via other avenues or the worker wants coverage for a pre-existing or new condition which is impacting the covered condition(s). This is not a new problem.

As a result, the requirements set forth in the HIPAA regulations would not dramatically change the process currently existing in the Washington WC program. What would change would be the elements contained in the consent and authorization forms as well as a requirement for a privacy notice if WC was a covered entity.

As HIPAA is implemented, providers and workers may be confused about the WC role. Positive, pro-active provider and worker education efforts will ensure that WC programs continue to receive complete health-care information from providers in a timely manner so that they may continue to administer benefits in a timely manner.

The overarching concept is that WC programs are exempt from compliance with the HIPAA regulations. The exemption is broad.

North Dakota

Paul Kramer, executive director and CEO, announced that North Dakota Workers' Compensation will construct a new office building in north Bismarck. Total cost is projected to range between \$6 million and \$7 million, which will be funded by employer premiums rather than general fund tax dollars. "When you take a long term perspective, there is no comparison between owning and leasing," Kramer said.

The NDWC Board of Directors approved a rate that will result in a 5.7 percent reduction of premium collections for fiscal year 2001. The net decrease takes into consideration changes to the experience rating structure and a 3.6 percent increase in the payroll cap. Employers pay premium on wages up to the payroll cap, which is equal to 70 percent of the state's average annual wage.

The NDWC Board of Directors also approved a \$12 million dividend, which will be awarded to employers who have had exceptional safety records in the past five years.

Jim Berg, vice president in charge of claims, announced in April that NDWC is now accepting online claim filings. This will allow NDWC to receive claim information faster and more timely, which in turn can reduce claim costs by as much as 15 percent.

Northwest Territories and Nunavut

The WCB has launched an extensive review of the laws and regulations governing the workers' compensation system. A review panel comprised of representatives of workers, employers and the general public will work with the Departments of Justice for the two provinces to draft new legislation. This work is targeted for completion by April 2003. A review of the General Safety Regulations will take place in the fall of 2003.

The WCB has recognized the benefits of presenting written material in clear, plain language. Recognizing that one-third of adults in the North have literacy problems, the WCB has rewritten its Worker's Handbook in understandable terms.

Nova Scotia

The WCB reported that the new Assessment Payment Plan implemented last year won the 2000 Technology in Government Bronze Award. The new system allows employers to pay their workers' compensation premiums on a periodic basis throughout the year based on actual payroll, rather than a lump-sum payment at the beginning of the year based on estimates of total payroll. The new system has proven less burdensome for employers.

Ontario

To publicize the need for increased workplace safety, the Workplace Safety & Insurance Board hosted a number of seminars at various locations featuring speaker **Rob Ellis**. Mr. Ellis, a small business owner and father of four, lost his son David in a workplace accident. David was killed on his second day of a temporary job when he became entangled in a dough mixer at a local bakery.

Oregon

According to a recent study by ECONorthwest, workers' compensation rates for all Oregon employers are lower because of SAIF Corporation's participation in the marketplace. According to a SAIF press release, in 1999 SAIF helped reduce premium rates by approximately \$43 million and was responsible for paying about 95 percent of the \$223 million in dividends returned to Oregon employers by all insurers.

Pennsylvania

A study by the Workers' Compensation Research Institute found that the average cost per medical claim in Pennsylvania was \$4,633. This was typical for the eight largely higher-cost states examined in the study. The eight states – California, Connecticut, Florida, Georgia, Massachusetts, Minnesota, Pennsylvania and Texas – together account for 40 percent of the benefits paid in the nation's workers' compensation systems. The study found that higher utilization of medical services was offset by lower than average payments for these services. The median claim cost for the eight states was \$4,671.

Rhode Island

Beacon Mutual is making plans, with several neighboring businesses and schools, to create a 1-1/2-mile “Path to Health,” and holding a health screening for its employees in cooperation with the National Kidney Foundation. The Path to Health, for which a grant to help cover expenses is being sought, will be open to all local residents and employees and will offer a combination of rural and “city” walking spaces. The health screening, part of the Kidney Early Evaluation Program (KEEP), was held at the company office, was completely voluntary on the part of employees, and detected problems related to blood pressure, cholesterol, diabetes and kidney function. A physician was on hand to discuss with each employee any immediately available results. According to **Jeff Johnson**, Beacon’s vice president of community relations, “This was the first KEEP screening in the four-state region (Massachusetts, New Hampshire, Vermont, Rhode Island) covered by the Kidney Foundation affiliate.”

In addition to these projects, Beacon has sponsored Weight Watchers and smoking-cessation classes during the employee lunch hour. Employees who met their goals were reimbursed for all program expenses. Beacon’s premises – both indoors and out – are designated smoke free, and the building has an employee gym. Beacon has been recognized for its efforts with an “exemplary” (top level) employee wellness award from the Greater Providence Chamber of Commerce and Blue Cross & Blue Shield of Rhode Island.

Saskatchewan

Workers’ Compensation Board Acting Chairman **Norm Brown** announced plans to rebate \$36 million from the WCB’s 2000 operating surplus to Saskatchewan employers.

Texas

FBI Director Louis Freeh awarded **Mitch Sherrod**, a senior investigator for the Texas Workers’ Compensation Insurance Fund, a certificate of recognition recently. Sherrod assisted the FBI in a six-year investigation in the case of *USA v. Arthur C. Bieganowski, MD, et al.* This involved a wide network that defrauded insurers and the government of an estimated \$43 million over nine years, according to *Insurance Journal*.

Utah

The Workers’ Compensation Fund’s computerized fraud detection system saved Utah businesses \$2.8 million in prosecution, limitation or denial of liability in 2000, while total savings from investigations reached \$6.8 million, the WCF reported. WCF’s fraud detection software analyzes claims and determines the likelihood of fraud. Using multiple factors such as the number of prior claims, the length of time the claim is open, and the number of medical providers involved, the software alerts adjusters to irregular activities.

The WCF launched a vocational rehabilitation loan program to provide new opportunities for injured workers. Jointly funded by the WCF and Morgan Stanley Dean Witter Bank and managed by the Utah Microenterprise Loan Fund, the program makes loans of up to \$20,000 (at prime plus 2 percent) for claimants receiving vocational rehabilitation services or their spouses. The loans may be used by start-up or existing businesses for facility improvements and expansions, equipment purchases, and operational expenses such as advertising or supplies.

West Virginia

The Bureau of Employment Programs announced that **Clinton Dailey** of Saint Albans was appointed executive director of the Workers’ Compensation Division. Dailey previously served as human resources director for the Charleston Area Medical Center managing employee benefit programs. BEP also announced **Timothy Leach** was appointed chief administrative law judge for the Workers’ Compensation Office of Judges. Leach was an associate of the law firm of Green, Ketchum, Bailey & Tweel for 10 years, representing workers’ compensation claimants.

Aides to Governor Bob Wise, reversing the stance of the previous administration, reinstated the apostrophe in workers’ compensation. The BEP’s *News & Views* online newsletter took pains to remind readers that the term “...is both plural and possessive. The apostrophe goes after, not before the s.”



FOR DUMMIES (NOT!)

By Joe Yurkovich & Mark Kjeldgaard, Texas State Fund and Pinnacol Assurance Company

If you're faced with writing employee leasing companies – aka "PEOs" or "Professional Employer Organizations" for the purposes of this article – you're probably faced with one of the more difficult underwriting tasks in any marketplace and in any state. This article will not answer the myriad of questions and situations you may face in underwriting a PEO. Hopefully, however, you'll find some helpful sources of information.

A PEO is an employee leasing company that provides workers to client employers along with additional human resource and benefits services such as payroll administration, employee screening, group purchase of benefits, workplace safety consultations, etc. An employee leasing company generally only provides employees to client employers on a long term basis without the extra services. Often, these workers were originally employed by the client company on a direct basis; were terminated by the client employer and then hired immediately by the PEO and "leased" back to the client employer.

A PEO is not a temporary employment agency. PEOs lease employees to client companies for extended periods of time, not for the short time temporary employment agencies do. Also, temporary agency clients do not terminate their employees and lease them back.

There are three main reasons why a client employer chooses to lease employees through PEOs:

- Lower workers' compensation insurance rates – The PEO usually combines payroll from many client companies under one large policy. This usually means lower workers' compensation rates due to more favorable terms for larger accounts.
- Experience modification relief – A client company that leases its employees from a PEO can often assume the experience modifier of the PEO, which usually is lower than its own. Some states require the client company to keep its own experience modifier for a period of time even after it begins leasing.
- Volume buying of related HR services – A large PEO with a great number of employees can negotiate favorable terms for health insurance, pension vehicles and other benefits.



Analyzing that one on your desk

Consider the following questions before proceeding with any PEO:

Is this PEO owned or managed by the same principals or executives who may have run a former unsuccessful or distressed PEO? How long has the current principal owned this PEO?

How does this PEO qualify its client companies? These efforts range from an in-house underwriting department to PEO salespersons qualifying client company safety practices, governing class codes, payrolls, etc.

Is the PEO's primary client company business white collar? gray collar? blue collar?

Does the PEO properly classify its clients? Take a sampling and review the class codes before a lot of underwriting is done.

Does the PEO follow sound underwriting principles? Does it have anyone on staff from the workers' compensation industry?

Does the PEO have loss prevention representatives or premium auditors?

Does the PEO's staff make any visits to client sites during their underwriting process?

Does the PEO gather loss histories and complete applications?

Does the PEO require its client companies to perform pre-hiring drug screens?

Does the PEO require its client companies to provide light duty/alternative duty work for injured workers? Does the PEO provide this alternative work?

What other services does the PEO offer to its client employers? Offering affordable health care coverage, for example, tends to reduce the number of workers' compensation claims presented.

How are the PEO salespersons compensated? If incentives are not based upon writing profitable classes of business, an incentive exists to write any business, regardless of its potential profitability.

Primary state law considerations

Does your state treat PEOs as co-employers along with the client employer or does the PEO become the statutory employer (employer of record)?

Does your state require you to issue one policy in the name of the PEO or do you have to issue separate policies for each client company?

Does your state law require you to include or exclude executive officers of client employer companies? While executive officers' treatment is prescribed in your state law, most likely, the law may treat PEOs' inclusion or exclusion of those client companies' executive officers differently.

How does your state law handle uninsured subcontractors working for a client company? Some states treat them as employees of the client company while some states treat them as employees of the PEO. Some other states do not treat them as employees of either.

How does your state handle those employees of the client employer who are not leased through the PEO?

What are your state laws regarding application of the PEO's experience modifier for newly acquired and long term client employers? Some states require the client company to retain its own modifier for a period of time under a leasing arrangement while other states allow the client employer to take the PEO's experience modifier immediately after the leasing arrangement takes effect.

Pricing a PEO

Treat each client employer as an individual submission by collecting payroll by class code for each client and developing an overall payroll and manual premium.

Sort the client employers by hazard group and analyze for percentage of employers in each to enable you to "weight" your pricing to handle the increased risk of severity for a heavily weighted hazard group 3 book of business, for instance.

"Loss rate" the PEO by assessing the loss history of the sum of the client employers and determining the appropriate rate to be charged to contain the anticipated losses of the PEO.

Further consider any credits or debits available to you after reviewing the answers to your questions in "Analyzing that one on your desk" above. If you cannot obtain what you consider high quality, complete information about the PEO's client employers, you should proceed with extreme caution.

Managing the PEO and client employer data

Use a unique identifier for each PEO written so your automated systems can retrieve data about your PEO as a group. If your state requires you to write individual policies for each client company, you will also have to carry that unique identifier over to each individual client company.

Make sure you capture each client employer's name, Federal Employer Identification Number (FEIN), and any other data required by your state for proper statutory reporting purposes. Does your state require you to individually report each client company for statutory reporting or can you report the aggregated client companies' experience as the PEO's experience?

Require that the PEO report to you any new clients or terminated clients within a certain abbreviated reporting period after they begin leasing.

Create a pre-qualification list of class codes or occupations or specific accounts which you must approve before coverage will be granted. This will help maintain the PEO in a condition you can manage throughout the policy term.

Likewise, agree with the PEO upon a list of class codes, occupations or specific accounts that are prohibited from coverage within the PEO policy.

Servicing PEOs

Hold at least quarterly account reviews, with the first one held at six months into the policy term. Bring the underwriter, claims person and the loss prevention representative and make this an account review, rather than just a review of open claims above a certain threshold. These meetings afford a great opportunity to discuss issues from both sides regarding all services you offer as well as areas needing improvement.

Consider appointing an account manager for each PEO who will take ultimate responsibility for management of the relationship with the PEO. This is a great opportunity for one of your front line staff to practice top tier customer relationship management.

Require "unattended" loss prevention surveys (i.e., without a PEO representative present) at client sites where you identify loss frequency or severity or just feel uncomfortable with the nature of the risk you are assuming.

Gather all client location information before the policy is written so you can provide location-coded loss runs to the PEO as a risk management tool during and after the policy term.

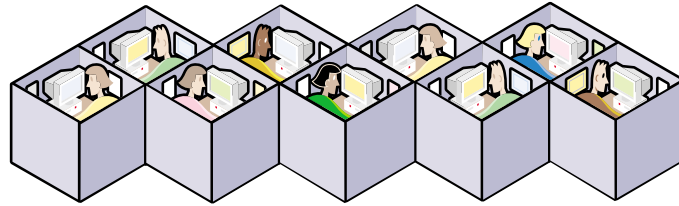
Place the PEO on interim audit reporting to assure you stay current with their client acquisition and termination, are adequately reporting payrolls and appropriate class codes and to stay apprised of their payroll growth. These accounts can grow very quickly and leave you surprised about what you are insuring.

Monitor certificates of insurance being issued. A PEO that has a large number of client employers can inadvertently issue certificates for terminated clients or new clients who have yet to effect coverage.

FOR FURTHER INFORMATION WE RECOMMEND THE FOLLOWING RESOURCES:

- National Association of Professional Employer Organizations (NAPEO) website – www.napeo.org
- International Risk Management Institute (IRMI) Workers' Compensation Reference Manual

Bingo!



You're a New Employee!



By Nina Brollier,
Workers' Compensation Fund, Utah

What do your new employees experience the first few weeks on the job? How do you know when your new employee hits that “aha” moment when they know whom to call, how to answer queries, and say, “Yes, I’m getting it!”

Are you hiring warm bodies and dropping them into a caseload of work or are you hiring qualified people whom you expect to contribute to the success of your department and company goals?

If you answered “qualified people,” let me ask another question – how are you integrating these new employees into the business so that they can add value at an earlier point? Whether your organization is a state agency, quasi, privatized or private, we all share this common and somewhat time consuming concern.

Our company has evolved over the past seven or eight years from an almost bankrupt state agency to a leading edge quasi-public competitive organization with the confidence of our state legislative system and governor. While we grew and changed our business strategies as a company, our employees were losing that small family, know-everyone environment. Every focus group and employee opinion survey brought the same statements from employees. “I would like to know how my job affects other departments.” “I wish I could learn more about what other areas do.” “How does my job fit into the total picture?”

We had to answer the employees’ concerns in order to help them better understand their role and how they could contribute to the company’s success so that we could continue to achieve our business goals and needs of those we serve.

We put together focus groups consisting of employees with less than two years service, and managers, to determine what new employees need, when they need it, what helps them connect to the company as a whole (not just their own group) and what they wish we had provided to them when they were new. We made amazing discoveries, from the minor things you just don’t think of like, “How should I dress on the first day?” to critical issues such as reviewing the job description with the manager and understanding performance standards early on. Another issue for employees was getting information about the company to their families or others important in their lives.

The focus group results noted some very interesting findings. These included specific needs under the following categories:

- What we want new employees to feel
- Preparation for arrival
- Department responsibility
- Manager’s responsibility
- Human Resources’ responsibility
- Informational materials
- Security needs
- Telephone, e-mail, internet, intranet etiquette, and communications policy
- Suggestions for follow-up

Our HR generalist and project leader, Sally Wilking, then put together the focus group findings and five proposals versus our current quarterly 3.5 hour orientation meeting with representatives from all departments doing presentations. We presented all options and made our recommendation to our CEO for review

We adopted a proposal called Orientation Bingo. Each new employee gets a bingo card with scheduled dates of training with the various departments. The employees attend these training sessions and get their card “stamped” by the trainer of that department. In addition, our CEO and President, Lane Summerhays, meets with the new employees quarterly and presents a corporate overview of the business and our company’s place in the industry. When the bingo card is completed, the employee gets a prize.

From the summarized focus group results or wish list, Sally prioritized the new employees’ needs, department, manager and HR responsibilities, and prepared materials for a New Employee Manual and a Manager Checklist.

(continued on page 23)

Federal Privacy Regulations May Pose Nightmare for Workers' Compensation

(continued from page 14)

State laws which provide privacy protections to medical information in workers' compensation are diverse and there is potential for ambiguity where state laws, HHS regulations and GLB regulations overlap and conflict. While HHS regulations concerning PHI should prevail, disputes over access to medical records will have to be resolved in courts or before administrative workers' compensation tribunals. HHS concedes in its preamble that they have not addressed all the privacy concerns unique to workers' compensation systems and recommends "that states or the federal government should enact standards that address those concerns."

The AIA has submitted a draft of proposed amendments to the HHS regulations which would eliminate the minimum necessary standard and the individual's right to restrict access to PHI in workers' compensation proceedings.

Further Action Necessary

In his April 12, 2001 statement regarding the immediate implementation of the HHS's Privacy Rule, Secretary Tommy Thompson acknowledged that his staff had received 24,000 comments and that many concerns would have to be addressed in the coming year.

One of the primary concerns involves the sharing of information between covered entities so that treating physicians will be able to consult with other physicians and review medical records. Under regulations that essentially make the patient the gatekeeper of his or her medical information and require covered entities to limit access to PHI under a minimum necessary standard, treating physicians as well as consulting physicians may encounter obstacles in obtaining the necessary medical information to comply with their obligations under states' workers' compensation laws. How would a physician be able to determine if an injured employee is permanent and stationary or what work restrictions should apply with only a selective review of medical records? Further, how can a physician properly report on factors and disabilities if they are precluded from making reference to pre-existing conditions that they are barred from disclosing?

Although a concerted lobbying effort by the American Insurance Association (AIA) and a coalition of nearly 50 insurance and employer associations caused the HHS to exempt workers' compensation from the regulations, the HHS retained the minimum necessary standard to restrict access to PHI under pressure from the AFL-CIO and pro privacy advocates. According to AIA's Assistant General Counsel Bruce Wood, "it may place

healthcare providers in the position of making what is effectively a legal determination of the relevancy of information that a workers' compensation carrier requires." Under the final regulations a covered entity requesting protected health information from other covered entities must limit its request to what is reasonably necessary to accomplish the purpose for which the request is made. These limitations in response to requests for information from workers' compensation administrators will inevitably delay the process of determining eligibility for benefits, vocational rehabilitation and return-to-work restrictions.

The AIA has submitted a draft of proposed amendments to the HHS regulations which would eliminate the minimum necessary standard and the individual's right to restrict access to PHI in workers' compensation proceedings. The contact people for these proposed amendments are: Bruce C. Wood, Assistant General Counsel, American Insurance Association, 1130 Connecticut Ave. N.W., Washington, D.C. 20036, (202) 828-7157; and Eric J. Oxfeld, President, Strategic Services on Unemployment and Workers' Compensation, 1202 New York Ave. N.W., Suite 750, Washington, D.C. 20005, (202) 682-1515.

AIA will continue to work with HHS to modify the regulations and it is likely that Congress will hold hearings to amend the rules under the authority of HIPAA. The HHS was required by HIPAA to draw up the regulations in 1999 when Congress failed to act as required by the 1996 Act and Congress may also create a new Privacy Rule that would supercede the HHS regulations.

There is enough concern that AASCIF's National Issues Committee will continue to monitor the progress of efforts to modify HHS regulations and will provide a status report at the National Issues Conference in San Antonio, Texas set for October 24-26, 2001.

Spike in Mississippi Comp Payments

Workers' compensation benefits in Mississippi increased 8 percent from 1998 to 1999, it was reported. The National Academy of Social Insurance found that payments for medical care and cash payments to injured workers increased from \$234.7 to \$253.5 million, according to a report in the newsletter *Insurance Journal*.

Nationally, total workers' compensation benefit payments increased 2.6 percent from \$42.3 billion in 1998 to \$43.4 billion in 1999. Total costs to employers rose 3.4 percent from \$52.8 billion to \$54.6 billion.

Return-to-Work Incentives Drive Premium Discount Programs

By David Casto, West Virginia Workers' Compensation Division



return-to-work

In January of 2000, the West Virginia Workers' Compensation Division developed a program to reward companies that establish an effective Return-to-Work Program. An effective return-to-work program ensures quality medical care for the injured worker, reduces workers' compensation costs, and returns the injured employee back to gainful employment.

The return-to-work program rewards participating companies with a premium credit ranging from 1.6 percent to 5.4 percent, depending on their class. The safety staff at WV Workers' Compensation initiated this program in order to improve the employers' attitudes and perception about Return-to-Work Programs. Our state is primarily dominated by industries such as coal, timber, construction, and manufacturing. Management was generally under the perception that employees should not return to work until they are 100 percent recovered from an injury.

We have found that many employers do not understand how an effective safety program and return-to-work program can significantly lower their rates and make them more profitable.

This premium discount program has allowed our safety staff to meet with the employer community and explain the importance of returning an injured employee back to gainful employment as soon as possible after the injury occurs. The majority of the employers with whom we meet do not have a true understanding of how an insurance company sets reserves and calculates rates. Furthermore, we have found that many employers do not understand how an effective safety program and return-to-work program can significantly lower their rates and make them more profitable.

This program has been very successful during the past year. To date we have had 367 applicants for the premium discount program. Of those, 298 have been approved for the discount, 60 denied, and nine applications are still pending. This has resulted in a \$2.9 million credit for West Virginia employers.

This program has been a success because of our experienced staff of Safety and Loss Control professionals. Many discount programs do not work and are only as successful as the management team that is behind them. The West Virginia Workers' Compensation Division has a very limited number of discount programs available to employers. Therefore, our Department has been able to manage the program very tightly to ensure that the requirements are being met. Other private sector entities may offer too many discount programs to their clients and then not manage the programs properly.

To have a successful credit program, you must establish a set of clear guidelines and then make certain that the participants are following those guidelines. The employers that have been approved to receive the discount will receive three to four follow-up visits during the year from our Safety and Loss Control Staff. As part of our follow-up review, we will review each accident and injury that occurred since our last visit to determine what the employer did to return that employee back to his/her regular or modified job. A lack of effort on the part of the employer can result in that account being taken out of the credit program.

In the early stages of this program, most employers only see the benefit of the premium discount. However, as our staff educates the employer over time, they begin to realize the true benefits of the program. They not only see a reduction in their Experience Modification Factor but also an improvement in morale because of the return-to-work program.

Discount programs can be very rewarding to the insured and insurer if properly managed. Stringent but attainable guidelines need to be set for all participants. The guidelines must be closely measured and monitored. As insurers, we need to take the time to educate our clients about the long-term benefits of the program instead of focusing only on the credit. Working together as a team and getting the employer to take ownership of the program produces a "win-win" situation for everyone.

North Dakota finds Discount Programs can reduce Accidents

By Scott Walters, North Dakota Workers Compensation

North Dakota Workers Compensation (NDWC) introduced its first premium discount safety program in January 1994, called the Risk Management Program (RMP). The RMP has been widely accepted and has helped many employers reduce their losses and, as a result, lower their premiums.

In the initial year of the program, 67 employers enrolled in the RMP. Currently, there are about 1,125 employers participating in the RMP. "Although we actively recruit employers on a continuous basis, we're very happy with the current number of employers who have taken an interest in the RMP," said Wally Kalmbach, Loss Prevention Manager. The RMP is comprised of employers of all sizes, from companies that have only a couple of employees to those with several thousand. Because most of the larger employers in the state are participating in the RMP, over half of the state's work force is now covered by this effective program.

Employers enrolled in the RMP can earn a 5 percent premium discount by meeting the 11 basic program requirements. Premium discounts totaled \$2.6 million for fiscal year ending June 2000. In January 2000 two optional enhancements were made to the RMP allowing employers to earn up to a 10 percent discount on their annual workers' compensation premiums. Participants can now earn an additional 3 percent premium discount by implementing an approved substance abuse program, and another 2 percent can be earned by utilizing a designated medical provider and reporting claims promptly. The financial impact of the RMP's two new enhancements will not be evident until fiscal year ending 2001.

The initial 67 RMP participants have seen their average experience rate go from a plus 28 percent surcharge in 1994 to a minus 22 percent discount in 1999, a 50 percent turnaround. This savings is in addition to the safety premium discounts mentioned above. The same 67 participants have shown tremendous improvement in reducing their number of time-lost claims by 43 percent from 1992.

In January 2000 NDWC introduced the Small Account Safety Incentive Program (SASIP). This program is specifically tailored to suit the needs of smaller businesses that don't have the resources available to manage and implement a formal safety program such as the RMP. Employers whose gross annual premium for the most recently reported payroll period is less than \$10,000 have an opportunity to earn an 8 percent discount on their annual workers' compensation premium.

"This is a program that we believe will have a positive impact on reducing the number of work related injuries. If you follow the program guidelines properly, the benefits that both employers and employees receive can be quite substantial," Kalmbach noted. Since this program is relatively new, no statistical information is available for the SASIP participants.

If an employer participates in either the SASIP or RMP, they may experience a reduction in workplace injuries as well as a significant reduction in the number of days a worker is away from work – resulting in reduced claims costs. This reduction may have a positive impact on their experience rate, ultimately reducing the total cost of their workers' compensation premiums.

Bingo! You're a New Employee! *(continued from page 20)*

With the help of our Communications group, we selected a HR graphic standard for all materials and forms and enlisted their help in converting all of the forms to meet that standard. The result was a manual with an organization chart, benefit information and forms, parking lot layout, glossary of insurance and benefit terms, brief description of each department functions, pictures of senior management and board members, overview of workers compensation, annual report, list of opportunities, birthday lunches, service awards, educational assistance and phone lists.

Coordinating the Bingo schedule and reminding managers and new employees to follow the calendar was a challenge in the beginning. It has improved because of the popularity of the departmental sessions but will always be a challenge to some.

As a follow up, Sally sends out a periodic survey to new employees and managers to evaluate the effectiveness of the program. New employees tell us that they are able to perform more effectively because they understand the intra- and inter-departmental aspects of job functions and they can understand customer questions and offer help much earlier than they could in other jobs. Several employees who have been with our company for a period of time ask to go through the Orientation Bingo program because of the way they see new employees working. Managers tell us, for the most part, that they have also benefited from meeting the new employees of other departments, and they are better able to relate to the needs of their own newer employees. As stated earlier, the disadvantage is accommodating the monthly schedule but the investment and commitment is worth it

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Upcoming Events

June 3-6, 2001

Annual Conference of the Western Association of Workers' Compensation Boards. Bahia Resort Hotel, San Diego, California. Contact Bob Wong for information at (415) 703-4676, bwong@dir.ca.gov.

August 12-16, 2001

AASCIF Annual Conference. Baltimore, Maryland. Call Nancy Kellar at (800) 925-9420 for information.

September 10-11, 2001

AASCIF joint Audit & Statistics and Finance & Investment Workshop. Cheyenne Mountain Resort, Colorado Springs. Contact Committee members for details.

September 27-28, 2001

AASCIF Human Resources Workshop. French Quarter, New Orleans, Louisiana. Chateau Sonesta Hotel. Contact Pam West for information at (225) 231-0508, pwest@lwcc.com. Deadline for registration is August 1.

October 18-19, 2001

AASCIF joint Information Technology and Communications Committee Workshop. Lexington, Kentucky. More details available later.

October 25-26, 2001

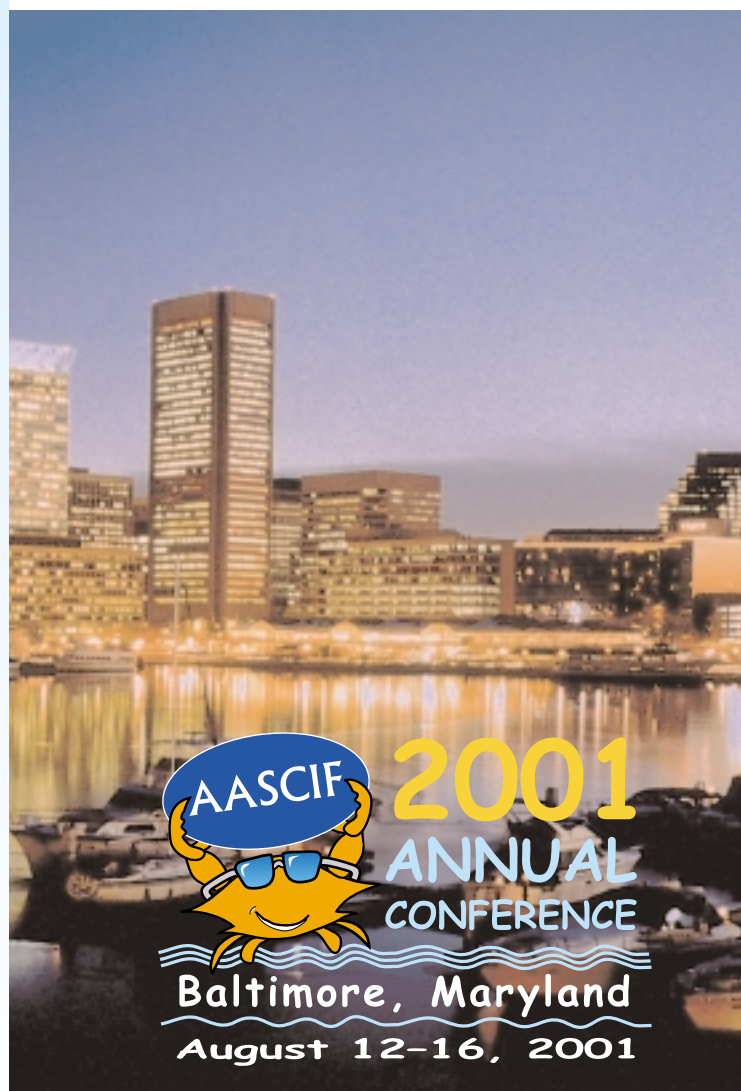
AASCIF Committee Seminar jointly sponsored by the **National Issues, Law, Claims/Rehab, Policyholder Services, and Safety & Health** committees. Holiday Inn Riverwalk Hotel, San Antonio, Texas.

November 18-20, 2001

Association of Workers' Compensation Boards of Canada public forum on **Knowledge Transfer, Safety & Health**, Westin Harbour Castle Hotel, Toronto, Ontario, Canada. Call (416) 495-8723 or e-mail base@onramp.ca for information.

August 4-8, 2002

AASCIF Annual Conference. New York, NY. For information call (518) 437-6151.



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