

# TRIAL

A man wearing a blue cap, glasses, a grey t-shirt, and dark overalls is working on a tire. He is using a long metal tool to work on the rim of the tire, which is mounted on a metal stand. He is wearing work gloves. In the background, there are several other tires stacked on shelves.

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## Workers' rights

*Ensuring fairness  
and safety on the job*

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## Workers' rights



### 18 Pursuing an FLSA claim

SCOTT H. PETERS AND R. BRENT WALTON

The Fair Labor Standards Act is supposed to ensure fair pay and decent working conditions for all Americans. But many employers have found loopholes in the law, and they're using them to undercut those protections and exploit their employees. You can help keep employers in line with the law, and give workers what is rightly theirs.

### 26 The products liability option

ROBYN GOLDENBERG

If your client was injured on the job, look beyond a workers' comp claim. Could a faulty piece of equipment—one with a manufacturing defect, an inadequate warning label, or a malfunctioning part—be at fault? If so, it could be the basis of a products liability claim. Investigate the case to see if this is an option worth pursuing.



### 32 Undiagnosed injuries in the workplace

LAURA CUNARD REIS

Complex regional pain syndrome can be the troubling effect of a workplace injury. A largely subjective illness, the pain can seem disproportionate to the injury, leading some doctors to think it's all in the sufferer's head. But the syndrome can be diagnosed with the proper assessment tools, and when it is, treatment for it should be part of a fair workers' comp recovery.

### 36 Representing the age discrimination plaintiff

WILLIAM R. AMLONG AND KAREN COOLMAN AMLONG

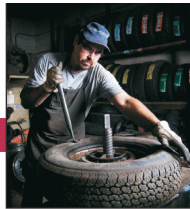
An age discrimination case is almost guaranteed to resonate with jurors: After all, everyone grows old, and older workers—who ask only the chance to continue being productive—are increasing in the workforce. Use federal and state antidiscrimination statutes to ensure justice for your client and fairness for all workers.



COVER PHOTO BY ADAM PAINE

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## WORKERS' RIGHTS

# Undiagnosed injuries in the workplace

*To maximize recovery for workers with upper and lower extremity injuries, it is essential to document symptoms, coordinate medical care, and ensure an accurate diagnosis of complex regional pain syndrome.*

LAURA CUNARD REIS

Workers often suffer from extreme and chronic pain as a result of workplace injuries. Unfortunately, the no-fault workers' compensation system precludes recovery for noneconomic damages. An injured worker will more likely obtain a just result with pain management records and proper medical documentation of permanent injury or disability. Complex regional pain syndrome (CRPS) is a pain disorder affecting the sympathetic nervous system and is usually caused by trauma to an upper or lower extremity.<sup>1</sup> In certain instances, pain spreads beyond the site of trauma to other regions in the body.

With CRPS, sympathetic nerve pain signals run from the extremities and then "jump ship," fanning out to other parts of the body, such as the cervical, thoracic, and lumbar regions of the spinal cord.<sup>1</sup> For example, pain signals from a crushed finger might travel to the neck, causing numbness in that area. It is estimated that 2 percent to 5 percent of patients with peripheral nerve injuries develop CRPS.<sup>1</sup>

A key characteristic of CRPS is that the pain is usually disproportionate to the original injury's severity. The injured areas are generally overly sensitive to touch, swell easily, and are subject to temperature variables. Spontaneous pain is often accompa-

nied by decreased range of motion.<sup>2</sup> Patients with CRPS may experience pain so severe that soft fabrics "burn" the skin and make even the lightest touch unbearable. While not all injury victims experience pain this severe, in most cases, it is intense enough to restrict daily activities such as sitting, walking, and standing for long periods of time.

In 2003, the Social Security Administration (SSA) developed guidelines for evaluating and diagnosing CRPS for Social Security Disability claims.<sup>3</sup> These guidelines are a valuable reference for the identification of CRPS symptoms, as there are a limited number of published legal documents on the subject. According to the SSA,

clinical studies have demonstrated that when treatment is delayed, the signs and symptoms may progress and spread, resulting in long-term and even permanent physical and psychological problems. Some investigators have found that the signs and symptoms of RSDS/CRPS persist longer than six months in 50 percent of cases, and may last for years in cases where treatment is not successful.<sup>4</sup>

Many workers diagnosed with CRPS become depressed and withdrawn. In extreme cases, an injured worker may even suffer from posttraumatic stress disorder.<sup>5</sup> Workers diagnosed with CRPS must receive treatment for both the physical and psychological compo-

nents of their injury. In addition to avoiding strenuous jobs, injured workers who suffer psychological damage should permanently avoid stressful workplace conditions.

Workers' compensation systems do not have comprehensive guidelines for evaluating CRPS claims. Therefore, the duty rests in the hands of the injured workers, their medical providers, and their attorneys to fully document these conditions.<sup>6</sup>

When an injured worker faces ongoing pain from CRPS, the lawyer can help by coordinating medical providers to establish a comprehensive treatment plan that includes thorough and timely documentation of the client's pain and an accurate diagnosis. This attention to detail is essential to ensure that the client receives a fair recovery.

### Diagnosis and treatment

Occupational physicians, who treat injured workers exclusively, are often discouraged from exploring new treatment options. These "defense doctors" often misdiagnose or overlook CRPS. Consequently, an injured worker should rely on his or her attorney for assistance in obtaining a proper diagnosis and appropriate medical care.

Because many CRPS symptoms are subjective, it can be helpful for the client

to document his or her pain in a journal. The SSA guidelines state that if just one characteristic symptom is consistently documented, the client may qualify as disabled. Some characteristic symptoms may include

- pain out of proportion to the accident or injury
- burning or aching pain
- swelling, joint tenderness, or edema in the painful area
- decreased motor function
- muscle atrophy
- changes in skin temperature, skin color and texture, or abnormal hair or nail growth in the affected extremity
- muscle spasms or involuntary movements

■ localized bone softening (also called osteoporosis).<sup>10</sup>

Because CRPS is largely a subjective condition, physicians use a complex process of elimination called "differential diagnosis" to determine that a patient is suffering from it. Early diagnosis and treatment inhibits development of residual symptoms that are difficult and costly to treat effectively. Failure to timely diagnose CRPS may even subject the physician to a malpractice action.<sup>11</sup>

Certain medical tests can help lend credibility to an injured worker's complaints of pain. These include bone scans; electromyograms (EMGs) that evaluate nerve and muscle function; and thermography, in which a heat-sensing infrared camera records body-surface heat.

A bone scan pinpoints abnormalities in bone growth and shows deterioration in CRPS sufferers. An EMG identifies neural transmission rates and abnormal neural activity in the affected extremity. Thermography gives the most concrete evidence of CRPS because it provides a "pictorial representation of heat emissions from the body."<sup>12</sup>

In another test, a physician may use injections, such as sympathetic nerve blocks, to investigate the patient's response to the interruption of the nerve signals; if pain decreases after the nerve block, CRPS is confirmed.<sup>13</sup>

Treatment for CRPS consists of extensive physical therapy, psychological

counseling, sympathetic nerve block injections, pharmaceutical intervention, and the implantation of neurostimulators. A last resort is surgical sympathectomy, where a portion of the stellate ganglion, a nerve cluster in the neck, is removed.<sup>14</sup> Pharmaceuticals used to treat CRPS include antidepressants; muscle relaxants; and anti-epileptic, anti-inflammatory, and narcotic pain medications. Even after the original injury heals, workers who take significant

cause, as indicated, objective evidence is often minimal, and employers will naturally look for other explanations.<sup>15</sup>

Workers' compensation decisions usually are not formally reported. Therefore, many significant rulings on claims related to CRPS come from third-party personal injury actions in which the injured worker sued a tortfeasor other than the employer for negligence.

An example is a 2004 decision by the Wyoming Supreme Court that held that

*Many workers diagnosed with CRPS become depressed and withdrawn and, in extreme cases, suffer from posttraumatic stress disorder.*

medication for pain may not be able to return to work, as their ability to react promptly, drive, operate machinery, or concentrate may be affected.

### CRPS and the courts

Proving that the injured worker suffers from CRPS and establishing the extent of the pain he or she lives with are the most significant challenges facing the attorney. Judges often are unfamiliar with CRPS and may discount an injured worker's complaints of chronic pain. Medical documentation, including expert reports and testimony, is indispensable for educating a trier of fact.

Traumatic injuries are not the only cause of CRPS; musculoskeletal disorders, as well as otherwise successful surgeries, drug exposure, strokes involving partial brain paralysis, and postural defects may also precede this condition.<sup>16</sup> The lawyer must analyze the client's medical history to properly address arguments by opposing counsel that CRPS was caused by one of these conditions and not by the workplace injury.

The SSA briefly addresses workers' compensation claims as they pertain to workplace injuries in its ruling on CRPS: "In any workers' compensation case, the claimant's credibility is very important to the outcome. So, too, is the weight of conflicting medical evidence. This is particularly true in [CRPS] cases be-

cause, as indicated, objective evidence is often minimal, and employers will naturally look for other explanations."<sup>15</sup>

Other CRPS-related decisions have been handed down in cases appealed from workers' compensation systems. In 1993, the Georgia Court of Appeals held that an administrative law judge (ALJ) did not err in placing substantial weight on the claimant's testimony when the ALJ held that the claimant suffered from CRPS.<sup>18</sup>

In 1995, however, the Georgia Court of Appeals ruled against another claimant. Although he had presented evidence of disability from CRPS, the ALJ found that the evidence presented was insufficient and did not support a finding of disability. The appellate court affirmed the ALJ.<sup>19</sup>

In both of these cases, the higher court upheld the ruling of an ALJ, the trier of fact. Thus, it is crucial for the attorney to present convincing evidence

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of CRPS at the trial level.

Generally, permanent bodily impairment is the only noneconomic damages for which claimants are allowed to recover. For example, in Georgia, an amputated index finger is statutorily valued at 40 weeks of income benefits (a portion of the worker's income defined by state statute) based on the claimant's permanent partial disability (PPD). Therefore, an injured worker would receive that money, plus the weekly income benefits he or she receives while out of work.

*A client may have to depend on his or her attorney for help in obtaining a proper diagnosis and appropriate medical care.*

In cases where CRPS is not identified and there is no other catastrophic injury, the PPD rating will be relatively insignificant. The diagnosis of CRPS, however, can significantly increase the PPD rating because losing the use of an appendage can be compared with an amputation.<sup>21</sup>

A 2007 Kentucky Supreme Court case illustrates why it is important that CRPS and residual psychological injuries be included in the PPD calculation. The claimant had a crush injury with an open fracture to his right distal finger.<sup>22</sup> He received less than a month of total disability and a 1 percent PPD rating. Less than four months later, the worker sustained a crush injury to his left foot and developed CRPS.

Treatment for the foot injury included implantation of a neurostimulator and pain medication. The worker was later diagnosed as suffering from depression, requiring psychological treatment. The treating physician assigned permanent work restrictions—and a 30 percent PPD rating based on the foot injury and a 20 percent PPD rating based on the depression.<sup>23</sup>

The doctor who treated the claimant's foot injury heeded his complaints of pain and performed additional tests to diagnose CRPS. Without these tests, the worker would not have been fully com-

pensated for his foot injury.

A federal circuit court ruling in a Federal Employers' Liability Act case demonstrates how a CRPS diagnosis can ensure that the injured worker is fully compensated.<sup>24</sup> In January 2002, a worker on an offshore drilling vessel crushed his big toe, inflicting the personal nerve. Although the fracture healed in about three weeks, he continued to experience tremendous pain and sought treatment with a neurologist, who diagnosed CRPS and performed sympathetic nerve blocks.

*A client may have to depend on his or her attorney for help in obtaining a proper diagnosis and appropriate medical care.*

As the worker's condition continued to deteriorate, he was prescribed nerve pain medication in such high doses that he was unable to continue working. In 2004, he was treated by a pain management physician who ordered installation of a sciatic nerve catheter and a peripheral nerve stimulator.

The worker finally received full compensation for his injuries when a trial court awarded him a significant judgment for medical care, income benefits, and vocational rehabilitation. Had the doctors failed to properly diagnose CRPS, the injured worker would not have been fairly compensated.

CRPS symptoms often appear after the original injury, thereby posing a statute of limitations issue. However, this delay can also work in the plaintiff's favor, tolling the statute of limitations on an otherwise precluded claim.<sup>25</sup>

Identification, diagnosis, and treatment of CRPS position your client to be made whole from both a medical and monetary standpoint. However, clients are often unwilling to pursue lengthy workers' compensation claims for many reasons, including reduced income and insurance carrier intervention. Presenting a clear picture of future costs may convince both the carrier to make a fair offer and the court to award just compensation.

Treating physicians and pain management specialists usually provide documentation of future medical costs. However, nurse practitioners and other medical professionals also are knowledgeable and often better equipped to provide this future cost analysis—for example, they consider not just the doctor's charges, but also costs for medication, anesthesia, inpatient treatment, and other expenses.

If the injured worker is heavily medicated or has mobility restrictions, the cost of home-care attendance and transportation expenses should be included in the evaluation. If CRPS permanently precludes the worker from returning to the job, include vocational rehabilitation costs. This evaluation is similar to assessments used to develop life plans in catastrophic injury cases.

Documenting the present value of future treatment gives the insurance carrier a tangible monetary value rather than allowing a claims adjuster to write off future treatment expenses as vague or noncompensable. These reports are also helpful in settlement evaluation and mediation.

The attorney plays a valuable role in resolving CRPS cases successfully. He or she can document symptoms and treatment, ensure that a proper diagnosis is made, and help bolster the claim with expert reports and testimony. A good record of these essential factors helps the judge, attorneys, and client reach a speedy and just resolution.

### Notes

1. CRPS may be called reflex sympathetic dystrophy (RSD), sympathetically maintained pain, Sudek's atrophy, and causalgia. Allen H. Ford & Linda H. Wang, *Complex Regional Pain Syndrome in Practical Pain Management: A Practical Approach* ch. 33, at 590 (C. David Tallon et al. eds., 3d ed., Lippincott, Williams & Wilkins 2002). In 1994, the International Association for the Study of Pain adopted CRPS as the preferred term. *Id.* Today, most physicians agree that CRPS is the correct term.

2. Symptoms affect the sympathetic part of the autonomic nervous system and involuntary (reflex) operations, such as body temperature, respiration, heart rate, and blood pressure. This system is also responsible for the body's "fight or flight" defense mechanism, and some physicians believe a defect in the panic mechanism is the source of pain in CRPS sufferers.