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MUSINGS FROM THE PRESIDENT



I can't believe it is already December – it seems such a short while ago that I was struggling with what to include in my first President's Letter and here we are in December, and it's time to write my last. This hasn't been the easiest year economically for Texas Public Entities. Budget cuts, layoffs, and doing more with less is never easy, and it has been especially difficult during the fiscal years that began in 2011. But despite these financial hardships, Texas PRIMA has continued to provide exceptional educational resources to our great members.

A ship full of pirates landed on Galveston Island for another successful Texas PRIMA annual conference. This year's conference was also a great success with over 500 attendees. And with 74 exhibitors and 76 participating vendor partners, we had a record breaker! This conference doesn't get planned on its own; it takes a crew of privateers working together to bring about a well chartered course. Thanks to those on the conference committee (chaired by yours truly) - all of whom worked incredibly hard to bring a remarkable conference together. Without this committee, we wouldn't have the fantastic opening night reception, golf tournament, awards luncheon, and exhibit hall. And without an awesome agenda, it wouldn't be worth attending, so thanks to the entire education committee for putting together another great schedule of sessions. And as always, thanks to our awesome sponsors and exhibitors. There is no way we could host this incredible event without their generous support.

As I think back over my years associated with this incredible organization, I realize how much I have relied on a variety of my Texas PRIMA colleagues for advice, counsel, and input. Making these connections and sharing this type of information is what Texas PRIMA is all about. While conference provides a great opportunity for networking with colleagues, Texas PRIMA also offers a variety of regional risk management seminars across the state each year. In 2011, we had wonderful turn-outs at our Austin, San Benito and Houston meetings with topics ranging from Law Enforcement Liability to Hurricane 101, and we're looking forward to offering more options for

educational opportunities in 2012. These regional risk management seminars are a great way of educating our current and future risk management professionals about the challenges facing public sector risk management.

Texas PRIMA enjoyed many other successes this year including a much improved newsletter, MyTexasPRIMA networking site (be sure to log on and make “connections”), and the addition of our very own Regan Rychetsky to the National PRIMA board of directors.

Nineteenth century English poet Robert Southey said “No distance of place or lapse of time can lessen the friendship of those who are thoroughly persuaded of each other's worth.” This quote is a perfect description of how I feel about the many people I have gotten to know over these short five years I have served on Texas PRIMA’s board. The friendships I have made will, in many cases, last a lifetime. To those of you wonderful people on the board, you know how I feel about each one of you. It has been my privilege and honor to serve this membership and anyone who is interested in doing so – don’t hesitate! Nominate yourself for the board, or volunteer for a committee, just get involved; I guarantee you won’t regret it.

It is with great pleasure and confidence that I welcome two new members to the board, and turn over the ship to a new Captain and President, Donna James-Spruce with the City of Corpus Christi. We’ve created a lot of momentum over the past few years, and Donna is going to be great at keeping that momentum moving forward. I look forward to serving under her leadership in 2012.

Wishing you all happy holidays and the best of luck in 2012,

Tracy Seiler

2011 Texas PRIMA President



To view more conference photos, visit:

<http://www.photorelect.com/pr3/store.aspx?p=1179>

Event: Texas PRIMA





MEMBERS ON THE MOVE



Jeremy Diller, MBA, ARM, CSRM earned his Masters in Business Administration (MBA) from Indiana Wesleyan University in May 2011. He received the CSRM designation in June from the National Alliance. Jeremy is a Risk Management Director for the Texas Association of Public Schools

Cheryl Johnson, was recently hired as a Vice President for Arthur J. Gallagher Risk Management Services, Inc. In that capacity she will be working as a producer with the public and private sectors. Prior to joining Gallagher, Cheryl spent 21 years at Dallas Independent School District before recently retiring. Prior to her service at Dallas ISD, Cheryl was the risk manager at Baylor Medical Center and Electronic Data Systems.



Colleen Martin, ARM has moved from Galveston County HD as HR/WC Coordinator to The City of Baytown as the new Risk Manager

Liz Ryan, SPHR, CSRM, Executive Director, Human Resources, Risk Management & Safety, El Paso Community College was designated a Certified School Risk Manager by the National Alliance for Insurance Education & Research in January 2010.



Tracy Seiler, Manager of Risk Finance, Office of Risk Management, has been selected as a member of PRIMA's Chapter Relations Committee. The Chapter Relations Committee works with all PRIMA chapters to assist them with their chapter activities and provide resources that may strengthen their chapter. Tracy has also been appointed to National PRIMA's Leadership Development Committee. Congratulations Tracy!

Tell us about your new position, promotion or designation.
Send submission to info@texasprima.org.



DRIVING SAFETY TIPS

A variety of industries and occupations require employees to drive or to be exposed to hazards associated with driving. Transportation incidents have been the leading cause of work related fatalities in Texas for the past ten years. Data from the U.S. Department of Labor, Bureau of Labor Statistics illustrates the significance of these hazards in Texas.

- Of the 456 occupational deaths in 2010, 43 percent (196 cases) involved transportation incidents. In these cases, 134 were highway incidents, 14 were non-highway incidents, 25 involved a worker struck by a vehicle, and 17 were aircraft incidents. Six were other transportation incidents.
- The service providing sector had a total of 119 transportation-related fatalities, with the majority of those in the trade, transportation and utilities subsector.
- The incidence rate of non-fatal transportation accidents in Texas in 2009 was 5.8 per 100 full-time workers.

- The incidence rate of non-fatal cases where vehicles were the source of injury was 10.5 per 100 full-time workers.
- An estimated 4,270 non-fatal transportation accidents involved days away from work.

To minimize the occurrence of these types of transportation-related incidents in the workplace, the TDI-DWC encourages employers to implement effective accident prevention plans that address driving and vehicular hazards. In addition, the TDI-DWC encourages employers to implement and enforce written safety programs and policies for working in and around motor vehicles.

Policies

- Assign a key member of the management team the responsibility and authority to set and enforce a comprehensive driver safety policy.
- Enforce mandatory seat belt use.
- Do not require employees to drive irregular hours or far beyond their normal working hours.
- Adhere to state and local laws regarding cell phone use when operating motor vehicles.
- Discourage employees from conducting business on cell phones while driving.
- Develop work schedules that allow employees to obey speed limits and to follow applicable hours-of-service regulations.

Fleet Management

- Adopt a structured vehicle maintenance program.
- Provide company vehicles that offer the highest possible levels of occupant protection.

Safety Programs

- Teach employees strategies for recognizing and managing driver fatigue and in-vehicle distractions.
- Provide training to employees operating specialized motor vehicles or equipment.
- Emphasize to employees the need to follow safe driving practices on and off the job.

Driver Performance

- Ensure that employees assigned to drive on the job have a valid drivers license that is appropriate for the type of vehicle to be driven.
- Check driving records of prospective employees, and perform periodic rechecks after hiring.
- Maintain complete and accurate records of employees' driving performance.

The TDI-DWC offers a variety of free downloadable driving safety publications, available on the TDI website at <http://www.tdi.texas.gov/wc/safety/videoresources/targtransrltd.html>, including:

Driving and Avoiding Roadway Crashes Fact Sheet

Driving and Being Prepared Checklist

Driving and Being Road-Wise Fact Sheet

Driving at Work Quiz

Driving Distractions Fact Sheet

Driving and Merging Collision Prevention Fact Sheet

Driving & Tailgating Fact Sheet

Driving & Using Cellular Telephones Safety Training Program

Driving Fatigue Prevention Take-5
 Driving in Highway Construction Zones Take 5 for Safety
 Driving in the Fog Fact Sheet
 Driving in the Rain Take-5
 Driving in the Winter Fact Sheet
 Driving Safety - Take 5 for Safety
 Driving with Anti-Lock Brake Systems - Fact Sheet

All of the safety publications listed above are available both English and Spanish.

The TDI-DWC features a free occupational safety and health DVD loan library. Call 512-804-4620 for more information or visit the TDI website at www.tdi.texas.gov/wc/safety/videoresources/avcatalog.html.

Source: Texas Department of Insurance Newsletter

HEALTHY CHOICES AT YOUR FINGERTIPS

We all have good and healthy intentions when it comes to choosing foods that are healthy for us. However, sometimes, the foods that may seem healthy can be misleading. So, what's a person to do if they aren't a nutritionist or have quick access to one? Use a smart phone app!

Technology has advanced so that we can have this type of information at our fingertips. In addition to nutrition information, many of these apps have calorie counters, food diaries, and physical activity diaries. Many people are even successfully using these applications to help with weight loss. And, with obesity on the rise in our country, most Americans need simple instant feedback on the choices that they are

Recommended iPhone Apps:

Lose It!
 My Fitness Pal

Recommended Android Apps:

Calorie Counter by Fat Secret
 Noom



making. Below are some great apps for the most popular smart phones.

In addition to these apps, most smart phones offer a free GPS type app that can track distance traveled when walking, running, or biking and even give the user details on calories burned during the activity. What's a person got to lose when they can get free help to get healthy? Only weight and chronic disease risk factors!

Lynzee Clark, MS, RD, LD

Wellness Coordinator, City of Waco

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PART THREE: PURSUING THE SUBROGATION CLAIM

As discussed in parts 1 & 2 of this series, you have identified a subrogation potential, you properly investigated your claim, now it's time to play ball and recover the money.

DOWN, SET, HUT!

- Place the parties on notice. A courtesy phone call is a good start, but you must make your request in writing. Document, document, document!



- Notify EVERYONE! Notify everyone even if the party seems insignificant to the claim. Make sure everyone is aware of the subrogation monies you want to recover.
- Keep in touch. Don't just "send it and forget it." Parties can and WILL settle the claim if you are not actively involved. It is much easier to recover money while the claim is active instead of pursuing money from a claimant who took the money and ran.

BE PREPARED TO PLAY DEFENSE

- You've done your investigation, be prepared to show your work to the other side.
- Parties can request to see medical and billing records to justify the reimbursement you are seeking.
- Know your rights!
- Right of first recovery in a third party lawsuit to recover damages.
- Right to Intervene.
- Right to pursue claim in place of the injured worker.
- Right to subrogation recovery. Recovery should not be attempted until benefits have matured or are close to maturing.

TOUCHDOWN!

- Retain an attorney! The claimant most likely has one, so you should too. Our firm only collects attorney fees if you recover your lien.
- Know what your case is worth. Be realistic and flexible.
- Any amount recovered that exceeds reimbursement required shall be treated as an advance against future benefits.
- If advance is adequate to cover all future benefits, the insurance carrier is not required to resume the payment of benefits.
- If the advance is insufficient, the insurance carrier shall resume payment of benefits when the advance is exhausted.

We hope you have enjoyed our three part series on identifying, investigating and pursuing subrogation. By following the recommendations provided, you will be on the right track to recovering your lien.

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FEES PLEASE! NO? NO WAY!

One major difference in how typical Directors & Officers (D&O) and Professional Liability (or E&O) litigation work – in contrast to ERISA fiduciary matters – is in the way plaintiffs' legal fees are addressed. In U.S. D&O and E&O litigation, plaintiffs' legal expenses are usually paid out of any award or settlement that the plaintiffs may receive, assuming they succeed with their claim. But the Employee Retirement Income Security Act (ERISA) sets out a different regime. Under ERISA, a court, may, in its discretion, award reasonable attorneys' fees and costs to either party. In legal actions involving delinquent contributions to a plan, when brought by a fiduciary, the court has no discretion but must award reasonable attorneys' fees and costs where the plaintiff prevails.[i]



EXAMPLE OF LEGAL FEES IN A D&O/E&O CLAIM: A dispute results in a \$100 court award. Plaintiff's legal fees are generally paid out of the award. Assuming a 25% rate for legal fees, the plaintiffs' recovery

is reduced to roughly \$75 or 75% of their award.

EXAMPLE OF LEGAL FEES IN AN ERISA FIDUCIARY CLAIM: A dispute results in a \$100 court award. Plaintiff's legal fees are generally paid as an additional remedy or form of damages. Assuming a 25% rate for legal fees, the settlement value is increased to \$125.[ii]

While the relevant statute is written in an unbiased manner, "a court...may allow a reasonable attorney's fee and costs of action to either party," in actuality, it is a very rare instance where defense costs are recovered from the plaintiffs.[iii] So it is gratifying to see courts apply a rigorous examination to the issue of fee awards in an ERISA matter. The initial request was for \$2.5 million in attorneys' fees and nontaxable costs, this was then later reduced to roughly \$410,000, or less than 20% of the amount initially sought.[v]

In a recent case, a district court agreed that the plan's fiduciaries had breached their fiduciary duties, but went on to dismiss the bulk of the participants' claims. When considering the plaintiffs' request for attorneys' fees, the court significantly downsized this amount because the plaintiffs had succeeded only "minimally" in their action.[iv]

[i] 29 U.S.C. § 1132(g)(1) and 29 U.S.C. § 1132(g)(2).

[ii] Apologies for the simplistic nature of these examples which were intended to demonstrate the potential inflationary impact of fees in ERISA matters. In fact, courts have generally calculated fees by starting with a "lodestar" calculation, multiplying a reasonable number of hours by a reasonable rate rather than using a flat percentage.

[iii] Also note that one does not have to prevail to receive a reward of fees.

[iv] *Tibble v. Edison International* (CV 07-5359 SVW, July 8, 2010), from the U.S. District Court for the Central District of California.

[v] "Court Denies Attorneys' Fees in Institutional versus Retail Shares Case," August 29, 2011 (PLANSPONSOR.com). The complaint had alleged that a breach of fiduciary duty arose when plan fiduciaries selected retail-class mutual funds for the plan's investment options rather than attempting to secure institutional-class mutual funds.

Source: Willis Executive Risk Practice Newsletter

OSHA ISSUES COMPLIANCE DIRECTIVE TO ADDRESS WORKPLACE VIOLENCE

The Occupational Safety and Health Administration (OSHA) recently issued a directive on Enforcement Procedures for Investigating or Inspecting Incidents of Workplace Violence, which can be found on the OSHA website at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=5055. The directive establishes uniform procedures for OSHA field staff for responding to incidents and complaints of workplace violence and conducting inspections in industries considered vulnerable to workplace violence, such as health care and social service settings, and late-night retail establishments.

Workplace violence is a serious recognized occupational hazard, ranking among the top four causes of death in workplaces during the past 15 years. More than 3,000 people died from workplace homicide between 2006 and 2010, according to the Bureau of Labor Statistics (BLS). Additional BLS data indicate that an average of more than 15,000 nonfatal workplace injury cases was reported annually during this time.

Studies by the National Institute for Occupational Safety and Health and other organizations show that employers who implement effective safety measures can reduce the incidence of workplace violence. These measures include training employees on workplace violence, encouraging employees to report assaults or

threats, and conducting workplace violence hazard analyses. Other methods such as using entrance door detectors or buzzer systems in retail establishments, and providing adequately trained staff, alarms and employee "safe rooms" for use during emergencies in healthcare settings can help minimize risk.

OSHA has launched a new webpage entitled Preventing Workplace Violence at <http://www.osha.gov/SLTC/workplaceviolence/index.html>. OSHA also offers several workplace violence guidance documents including Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments, which can be found at <http://www.osha.gov/Publications/osha3153.pdf> and Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers, which can be found at <http://www.osha.gov/Publications/osha3148.pdf>.

Source: Texas Department of Insurance Newsletter



US FIFTH CIRCUIT UPHOLDS DISMISSAL OF BAD FAITH SUIT; COMMENTS ON RUTTIGER

The United States Court of Appeals for the Fifth Circuit upheld a trial court's dismissal of a bad faith suit alleging the carrier's wrongful denial and delay of workers' compensation benefits based on a peer review constituted bad faith under Texas common law, the Texas Insurance Code or the Texas Deceptive Trade Practices Act.

Dennis Thompson injured his knee on November 3, 2007, while working as a welder for Zachry Construction. The initial diagnosis was a sprained knee and ankle, and he was returned to work on light duty. He alleged his knee continued to hurt and subsequently quit his job. His treating doctor diagnosed a torn meniscus based on the results of diagnostic testing and referred Thompson to an orthopedic surgeon.

The carrier, Zurich North American Insurance Company (Zurich), had the claim handled by Special Risk Services (SRS). SRS hired Dr. Alan Strizak to conduct a review of the records and issue a peer review opinion. Strizak concluded the torn meniscus predated the injury and was not related to the work related incident. The Division of Workers' Compensation (Division) ordered Thompson be examined by Dr. Derry Crosby who disputed that the torn meniscus was preexisting. At a Contested Case Hearing, the Division found the injury to be compensable, and Zurich promptly instituted Thompson's benefits.

Thompson filed suit against Zurich, SRS and the adjuster for breach of the duty of good faith and fair dealing. The district court granted a summary judgment in favor of the Appellees on all grounds and imposed costs on Thompson. He appealed.

The Fifth Circuit found that Thompson relied on three arguments that Zurich acted unreasonably: Zurich should not have relied on Dr. Strizak's report because he had relied on 14 pages of medical records and had not examined Thompson or the MRI films.

Dr. Strizak's opinion was unreasonable because it was not supported by medical evidence.

Dr. Strizak was biased because he was "handsomely" paid by SRS which used him exclusively for peer reviews.

The court disagreed with Thompson and found:

Conflicting medical opinions by themselves do not establish that an insurer acted unreasonably.

Thompson did not establish Dr. Strizak had done, or failed to do, anything that a peer review doctor is required to do.

There was no evidence of bias by Dr. Strizak even though he worked extensively for insurance companies and was the only peer review used by SRS. Further, it would be impractical to require insurers to hire a different doctor for each peer review.

The Fifth Court noted that the Texas Supreme Court's recent decision in Ruttiger casts doubt on a claimant's future ability to bring a claim against a workers' compensation carrier based on a breach of the common law duty of good faith and fair dealing. According to the four Justices representing the Ruttiger plurality, amendments to the Workers' Compensation Act eliminated the need for a common law action by addressing the power imbalance inherent in the workers' compensation system. In their view, an extra-statutory cause of action "distorts the balances struck in the Act and frustrates the Legislature's intent to have disputes resolved quickly and objectively." The three dissenting Justices concluded the Act does not reflect legislative intent to abrogate the good faith cause of action, and they would thus maintain the common law duty. Two Justices declined to rule as the matter had not been first considered by a court of appeals. "Because a majority of the court has not yet eliminated the common law duty of good faith and fair dealing at this time, we address the claim here."

Randall McNeel

This bulletin and any attachments are intended for general information only. It is not to be considered legal advice or a legal opinion. Any specific statute, rule or document referenced should be read. Should you desire a legal opinion, please contact our office.

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SPONSOR HIGHLIGHT

McGriff, Seibels & Williams of Texas, Inc. (MSW) is proud to be a long time sponsor, supporter, and partner of Texas PRIMA.

MSW is a division of BB&T Insurance Services Inc., the 7th largest insurance brokerage firm in the world. The MSW/BB&T family has over 30,000 employees and over \$157 billion in assets. BB&T is currently ranked #220 on the Fortune 500 list. MSW/BB&T are one of the largest providers of insurance and risk management service to Public Entities in the U.S. with offices in 32 states.

The MSW Texas operation specializes in providing Commercial Property & Casualty, Employee Benefits, and Risk Management consulting services for Public Entities. The staff dedicated to Public Entity accounts has a broad range of experience including former Public Entity risk managers and Texas PRIMA board members who have "walked in the shoes" of Texas public entity risk professionals.

MSW has a reputation that precedes them – a high level of professionalism, outstanding technical skills, inventive problem-solving abilities, and above all, the highest level of integrity. The experienced professionals at MSW work with some of the world's largest companies to design state-of-the-art solutions for a full range of risk management and benefits needs. The goal of McGriff, Seibels & Williams is to establish long-term partnerships with their clients by providing top-notch service, inspiring customer confidence and trust.



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WELCOME NEW BOARD MEMBERS

Donna Parker Stirman
Risk Safety Specialist
Travis County



Donna has been employed by Travis County for 29 years and is currently a Sr. Risk/Safety Specialist. She attended Austin Community College and maintains a Texas All Lines Adjuster License. She received various risk management training throughout her career at the County. Donna's achievements at Travis County include the Human Resource Management Director's Award in 2010 and 2011. She is responsible for updating the County's vehicle safety policy and is on the selection committee for the County's Third Party Administrator and Risk Management Systems.

Donna has been a member and has attended every Texas PRIMA conference since 2004. She has volunteered for different committees for several Texas PRIMA annual conferences. Donna states that, having attended the past (8) conferences, she truly understands the value and opportunity membership in Texas PRIMA brings. She knows how this has helped her and her colleagues in doing a better job and believes that her experience and success serving other boards, volunteer activities and participation as a member, will help keep Texas PRIMA a leader in progressive risk management education.

Norma Jean Rivera
Human Resources Director
San Patricio County



Norma has been employed by San Patricio County for 22 years and serves at the Human Resource Director. She has received a certificate in Advanced Human Resource Management, as well as various training from the Texas Engineering Extension Service (TEEX), the Texas Association of Counties, the Texas Municipal League, Texas DPS and other Associations. Her achievements at the County include implementation of a return to work program, annual health fairs and recognition by the Texas Association of Counties for their Gold Star Safety awards.

Norma has been a member of Texas PRIMA conference since 1996. She coordinated regional meetings and served on the conference and member service committees. Norma has also participated in volunteer service for National PRIMA. Her commitment to Texas PRIMA includes attendance at every conference since becoming a member. Norma states that her leadership skills and willingness to work with others will make her a great team player and supporter for other entities and that being on the Board would provide a great opportunity to help others in keeping the Chapter united.



2011 TEXAS PRIMA AWARD WINNERS

Congratulations to the recipients of the 2011 Texas PRIMA Awards. Awards Recipients were recognized during the Annual Business Meeting and Awards Luncheon on November 19th at Moody Gardens Hotel and Convention Center. Program awards and Risk Management Awards, sponsored by Texas PRIMA, recognize an individual, project, program or product that contribute to successful risk management programs and provide an opportunity to share these accomplishments and promote the value to risk management public entities. The winners are distinguished Texas PRIMA members and their efforts are recognized by 300 public entity members and 500 overall members.

We applaud the award recipients as they work to further the purpose of Texas PRIMA:

- To increase the proficiency of risk management in governmental agencies, political subdivisions thereof and school districts;
- To strengthen the quality of risk management through continuing education;
- To be an educational and research organization for the benefit of governments, governmental agencies, political subdivisions thereof, school districts and other special district units through the State of Texas;
- To provide the members the opportunity to exchange ideas, to consult with one another, to meet persons in or associated with public risk management, and to supply members with information concerning their organization;
- To act in any manner which will further the best interests of governmental agencies, political subdivisions, schools and other special districts in their risk management activities.

Do you have a program or individual that you would like recognized? Please email info@texasprima.org and we will make sure you receive a nomination form for the 2012 awards program.



Risk Manager of the Year:
Cecil Tatum, Northside ISD



Risk Management Associate of the Year:
Billy Moore, City of Grand Prairie



Program Award: City of Dallas
Innovative Strategies & Reducing Costs Through a 1305
Certified Health Care Network & Risk Mgt Evaluation Program



DFW Airport
Integrated Disability Program

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About This Newsletter

This newsletter is published quarterly for the benefit of Texas PRIMA members. However, the opinions expressed in the newsletter are those of the writers and do not necessarily represent the views of Texas PRIMA. The aim of this newsletter is to provide information to our members about Chapter events and risk management issues. Please send news, information, comments, etc. to the editor via email, info@texasprima.org.