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## Up in Smoke: Increased Medical Costs for Spinal Injuries in Long-Term Smokers

It is common knowledge that smoking is bad for one's health. Despite this, many American workers continue to smoke. When they become injured on the job, their daily habit can have a significant impact on the workers' compensation benefits they receive. This is especially true in cases involving back and neck injuries where surgery has been recommended.

In a 2001 study published in the *Journal of Bone and Joint Surgery*, researchers discovered that smoking had a significant negative impact on healing and clinical recovery after cervical decompression and fusion surgery.<sup>1</sup> This finding was based on a study of 190 patients who underwent cervical fusion surgery at Case Western Reserve University in Cleveland, OH. These patients either had herniated disks or spondylosis, a disease in which excess bone forms around disks of the spine. This study found that 81% of nonsmokers re-established a solid bone connection in the month after surgery, compared with only 62% of smokers. In addition, good or excellent overall results (assessed by pain levels and ability to return to normal daily living) were reported for 88% of nonsmokers and 76% of smokers.

One of the reasons that fusion success rates are lower in smokers is because nicotine causes decreased revascularization of the bone graft. Essentially, the bone graft does not get enough nutrients due to a lack of blood supply and, thus, does not grow and cannot form a fusion. In addition, it has been recently

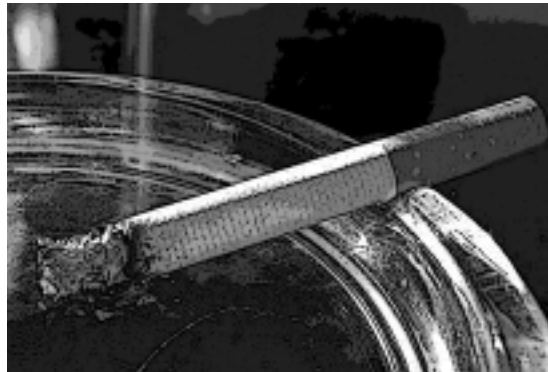
discovered that nicotine may have anti-inflammatory effects, which can also interfere with fusion healing.<sup>2</sup>

When dealing with injured workers requesting spinal fusion surgery, it is important to consider the possible effects that smoking may have on their claim for benefits. If a worker continues to smoke and does not obtain good results following surgery, then he or she is likely to require further costly medical treatment, which may include additional surgery in the future. In addition, they are less likely to be physically able to return to gainful employment within the normally prescribed period of time and thus may require longer periods of temporary total

or temporary partial disability benefits.

Minnesota courts have addressed the issue of whether to approve fusion surgery for smokers twice in the past five years. In *Montague v. Super America* (W.C.C.A. 10/14/03), the Workers' Compensa-

tion Court of Appeals upheld the compensation judge's determination that cervical decompression and fusion surgery was not reasonable and necessary to cure the effects of the employee's work injury at that time because he had failed to quit smoking. The employee smoked one pack of cigarettes per day. The judge's decision was based in part on the IME opinion that the possible complications of the surgery outweigh its possible benefits and that there is a higher rate



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<sup>1</sup> *Journal of Bone and Joint Surgery*. American Volume. 2001, vol. 83, no5, pp. 668-673 (30 ref.)

<sup>2</sup> "Reasons to Quit Smoking Before Spinal Fusion" By William W. Deardorff, PhD, ABPP Spine-Health.com 3/17/08

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## HDBOB Now Offers Family Law Services

HDBOB continues to expand into new areas of law to serve its established clients, as well as provide for changing needs. In January 2009, HDBOB welcomed an experienced family law legal team to create a new sector of service. Julie L. La Fleur and Amanda L. Hagen practice exclusively in the area of divorce and matrimonial law. They handle complex property and custody disputes, as well as child support, paternity and post-divorce matters.

### How can HDBOB's family law team help you?

Often times, we have family or friends going through difficult times in divorce or legal separation. Julie and Amanda will help sort through the complicated questions that come with family and life changes and provide innovative solutions for your future. HDBOB is proud to introduce Julie and Amanda and to incorporate their expertise into services for you.



Julie L. La Fleur (left) and Amanda L. Hagen practice exclusively in the area of divorce and matrimonial law for HDBOB.

## Coverage Disputes in Water-Intrusion Cases: When Does the Duty To Defend Arise?

In *Donnelly Brothers Construction Company, Inc. v. State Auto Property and Casualty Insurance Co.*, (January 26, 2009, File No. 27-CV-06-20371) the Minnesota Court of Appeals addressed the question of what constitutes a water-intrusion "occurrence" triggering an insurer's obligation to defend.

The plaintiff insured, a stucco company, is enmeshed in several lawsuits alleging that improper stucco application at a number of different properties over the course of several years led to water-intrusion damages. The plaintiff's various insurers over that period of time attempted to avoid liability by arguing that the "occurrence" triggering liability under the policy was the actual application of the stucco. According to this argument, the insurer at the time of the application would be on the hook for any water-intrusion even if the damages might not actually occur or be discovered until years later.

The Court of Appeals, however, disagreed, stating that "[p]roperty damage does not necessarily occur when defective stucco work is performed; rather, the insurer's duties depend on when the defective work causes damage to the property." The Court reasoned that an insurer's duty to defend arises when the insurance policy arguably provides coverage for claims made against the insured. The Court recognized that, in cases where the triggering event may be impossible to discern, allocation among the various insurers may be appropriate.

From a practical standpoint, the Court's decision makes it far less likely that coverage disputes in water-intrusion cases will be subject to summary judgment. While coverage dates are usually clear and not in dispute, the date that water first caused damage to a property will almost always be a factual determination for a jury.



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### COMING SOON

## hdbob.com gets a new look

Hansen, Dordell, Bradt, Odlaug & Bradt, P.L.L.P. contracted with Minnesota web design firm Five Technology to enhance their web presence at hdbob.com. The project involves a focus on improving the user experience by providing a clean and progressive interface design with user friendly navigation. As a growing and dynamic firm, the "new" hdbob.com gives the firm the ability to manage their own web content to announce firm news, events and more.

Please check out the  
"new" hdbob.com going LIVE soon!

## A Road Bump on the Rush to Retraining

In *Christine A Hamren v. City of Minnetonka* (October 21, 2008), the Minnesota Workers' Compensation Court of Appeals addressed the issue of whether it was appropriate to amend a rehabilitation plan to include the exploration of retraining before the employee ever actually searched for employment. The decision in favor of the self-insured employer is encouraging in light of the seemingly never-ending requests to leap right into the costly realm of retraining.

The employee, a police officer for the City of Minnetonka, sustained a personal injury in May 2001, which was deemed to be compensable. The employee was found to be eligible for rehabilitation services and a plan was created calling for job seeking, skills training and direct job placement. However, the QRC then instructed the employee to explore possible vocations, using the internet, networking, and informational interviewing to gather information about potential employment. The employee complied and decided she wanted to be a French interpreter.

A rehab plan amendment was drafted, calling for an assessment of the employee's French language skills, vocational counseling services, vocational testing, and a labor market survey. The self-insured employer refused to sign the plan

and insisted that the employee conduct a job search first.

The employee filed a Rehabilitation Request and a hearing was held. At the hearing, the employee established that she cannot return to work as a police officer and that she had earned over \$50,000 per year in that capacity. It was also established that the employee had not worked since 2002. The employee had a bachelor's degree in psychology and she had no computer skills. The self-insured employer argued that the employee never looked for work and that there was no evidence that the plan to be a French interpreter could be successfully brought to fruition.

The WCCA accepted the testimony of the self-insured employer's vocational expert, who testified that the employee's best opportunity for employment was to perform a full-time job search in areas that would use her past work experience. Note that the employee had done no job search, there was no JPPA prepared, and no evidence that the employee was ever provided with job seeking skills training or job leads. In a word, amending the rehabilitation plan was premature.



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### UP IN SMOKE CONTINUED FROM PAGE 1

of nonunion and nonhealing in someone who smokes. The judge's opinion was also based on the employee's treating physician's acknowledgement that his smoking contributed to his low bone density, which could have a detrimental effect in the healing process. The court did state that the employee could file a medical request for surgery at a later date should he quit smoking.

Similarly, in *Anderson v. Proforce* (W.C.C.A. April 8, 2004), the Workers' Compensation Court of Appeals once again upheld the compensation judge's determination that spinal fusion surgery was not reasonable and necessary due to the fact that the employee smoked a pack of cigarettes per day and had made no attempts at quitting. The judge's decision was based upon the opinion of two different IME doctors who agreed that there was a high risk of failure due to the employee's smoking. In *Anderson*, the court was careful to state that it was not creating a new rule that smokers are not eligible for fusion surgery. Instead, it is up to a compensation judge to make its determination based on the unique facts of each case.

HDBOB attorneys Jason Schmickle and Stacey Sorensen have dealt with two workers' compensation cases in the past year involving this issue. In one case that went to hearing, Jason successfully obtained a denial of the employee's requested spinal fusion surgery because he failed to quit smoking. In the other, Stacey settled the case with the requirement that the employee quit smoking and pass a nicotine test before undergoing surgery.



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*Provided by the law firm of Hansen, Dordell, Bradt, Odlaug & Bradt, P.L.L.P. Quarterly is only a general summary of the topics discussed here and is not a substitute for legal advice. If you have any questions regarding these topics, please call us at (651) 482-8900.*

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## Join Us For Our Annual Mid-Winter Seminar Friday, March 13, 2009

HDBOB's 2009 Mid-Winter Seminar is fast approaching. We are switching locations this year to the Sheraton Bloomington Hotel at the intersection of I-494 and Hwy. 100.

Once again, our Seminar will be devoted exclusively to Minnesota workers' compensation issues and we have prepared an exciting program.

Seminar registration and a continental breakfast begin at 7:45 a.m. At 8:15 our Seminar begins with the Honorable Carol Eckerson who will be discussing proposed changes at the Department of Labor and Industry and the Office of Administrative Hearings. Judge Eckersen will be followed by Dr. Jack Drogt, who will address issues relating to ongoing liability for knee injuries.

### ***Other topics to be addressed include:***

- Complicated Wage Calculations
- The Impact of Economic Layoffs on Wage Claims and Rehabilitation/Retraining
- Spotting Subrogation Claims
- Minnesota Case Law Update

A delicious lunch and friendly conversation will follow the Seminar. Also, our workers' compensation attorneys will be available to answer questions.

*HDBOB will be applying for approval of CLE credits.*

**RSVP as soon as possible: (651) 482-8900 or [plenke@hdbob.com](mailto:plenke@hdbob.com)**

We look forward to seeing you on March 13th!