

AGING GRACEFULLY?

The Impact of a Senior Workforce on Workers' Compensation

By Francis X. Wickersham, LaRonda Razor, and K. Martine Cumbermack

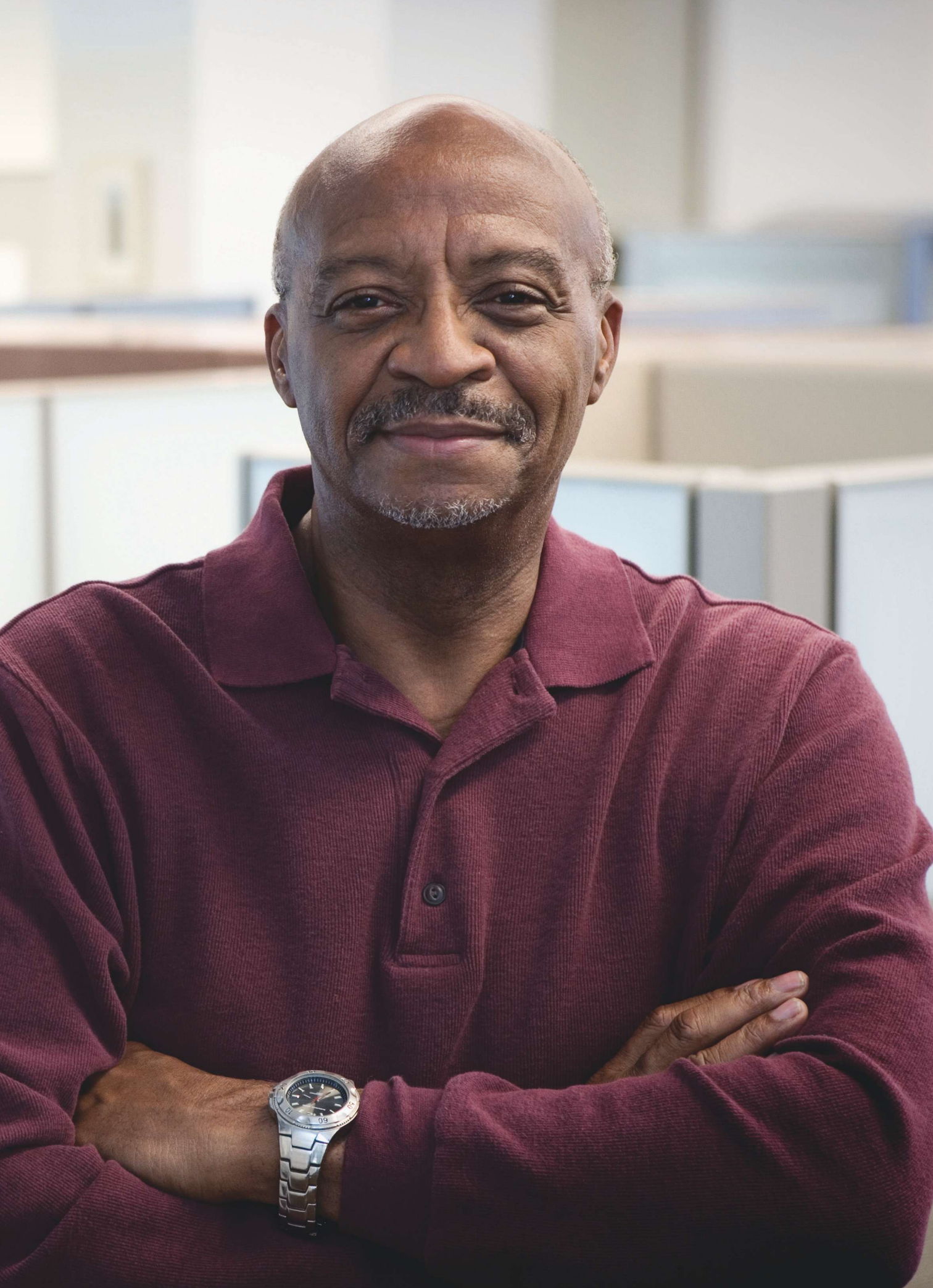
In modern America, people are remaining in the workforce longer, often well after the traditional retirement age of 65. According to the Bureau of Labor Statistics, employment of workers age 65 or older grew 101 percent between 1997 and 2007. During that same period, employment of individuals 75 and older increased by a whopping 172 percent. The Bureau of Labor Statistics projects that workers age 65 and over are expected to account for 6.1 percent of the workforce in 2016—an increase of 3.6 percent since 2006.


Additionally, the National Institute for Occupational Safety and Health (NIOSH) estimates that one in every five American workers is over 65. According to other NIOSH research, in 2008, there were 28 million workers

over the age of 55. Today that number is estimated to be almost 40 million, an increase of 43 percent.

The reasons people are working beyond the usual retirement year of 65 are varied and layered. First, the official Social Security retirement age is now 67. Many are working longer out of financial necessity and for health care benefits. The lingering effects of the Great Recession still are being felt by many, and retirement account performance has been sluggish. Others are simply motivated by a desire to remain productive and to continue to be active. Although they have hit retirement age, they just aren't ready to permanently leave the workforce.

The good news for those of us in the workers' compensation claims industry is that, statistically, older workers continue to have the fewest





work-related injuries. Between 1994 and 2007, workers between the ages of 45 and 64 benefitted from substantial safety improvements and, as a result, injury rates for this age bracket dropped from 200 incidents per 10,000 workers to 93 incidents per 10,000 workers. That number holds steady today.

Despite this significant reduction, however, the incident rate of slips, trips, and falls for the 65 and older crowd is double that of workers 45 years and younger. More importantly, there is not necessarily a parallel reduction in costs for the injured older worker. The reasons for this vary, but are in large part due to the effects of the aging process on the types of injuries sustained and recovery times.

For instance, older workers tend to suffer injuries like rotator cuff tears and knee injuries, which are costlier than the strain/sprain injuries that typically are suffered by younger workers. Also, recovery time for injured older workers tends to be protracted and more complicated, and comorbidities play a larger role and result in longer treatment times. Diabetes and obesity can contribute to a delay in recovery from soft-tissue injuries. All of these factors have a profound impact on the costs associated with the workers' compensation claim of an older worker.

Effects of Aging on the Individual Worker

The aging population is not homogeneous; we all age differently. As a group, however, the elderly have more comorbidities such as diabetes, hypertension, heart disease, and dementia. On their own, these conditions can cause undesired effects in the lives and occupations of individuals. In addition, exercise and activity may delay or slow down some of the effects of aging, so an individual's function may vary significantly from age-matched controls. Nonetheless, certain generalities can be made about the effects of aging on the health of an individual, many of which may affect a worker's capacity to perform a job safely

and to recover after an injury or illness.

Musculoskeletal. As we age, muscle mass decreases, resulting in reduced strength. Muscles fatigue more easily and injured muscle heals more slowly. Decreased bone mass (osteopenia and osteoporosis) makes older bones more likely to fracture even after minor trauma. Injured bones heal more slowly and osteoarthritis, primarily of the knees, hips, and spinal column, can result in reduced range of motion, mobility, and pain. Ligaments and other connective tissues also become less pliant, resulting in stiffness.

Sensory. There are a variety of sensory functions that tend to decline as we age. Even without comorbidities such as diabetes, aging reduces visual acuity, depth perception, and light perception. Loss of hearing in the higher frequencies results in decreased speech discrimination and a diminished ability to localize objects by sound.

Balance is another issue, as it is predicated on a number of sensory inputs that may decline with aging: vision, hearing, vestibular function, and proprioception (the ability of the body to sense its spatial position). Reaction time also is decreased, and sensitivity to touch, especially vibration, also diminishes. Changes in the skin also are common and may include thinning, loss of elasticity, increased fragility, and slower healing. As we age, the ability to taste and smell also changes, and people of an advanced age are at higher risk for adverse drug reactions.

Impact on Claims Management

The most effective strategy for managing the worker's compensation claim of an older worker can best be summed up in four words: education, prevention, transition, and mitigation. The older injured worker must be educated on pre-existing conditions and comorbidities that may have an impact on the compensability of a claim.

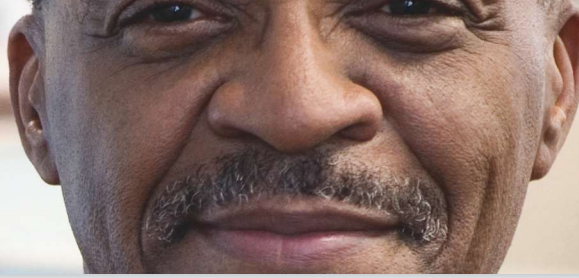
Likewise, employers will benefit from extracting and retaining medical data from their employees, via use of

pre-employment physicals and post-hire medical questionnaires. Background information concerning an employee's medical history, inclusive of pre-existing conditions and prior injuries, can be invaluable in mitigating the costs of a claim. The employer also should educate older workers on ways to prevent injuries when the employee returns to a light-duty job.

Investigating these claims should, in many ways, be tackled in the same manner as other routine claims. They need to be documented immediately and investigated from all perspectives. However, in the case of an older worker, additional consideration should be given to the depth and extent of their medical and employment history. Older workers generally will have longer medical histories, pre-existing conditions or diseases, and, possibly, previous work injuries. Development and retention of this information can be secured even prior to a work injury given proper employer education.

Employers also should give serious consideration to utilizing measures that would reduce the likelihood of workplace injuries suffered by older employees, such as slip and falls. This can be accomplished by ensuring that there is adequate lighting and flooring, that spills and slippery surfaces are promptly cleaned, and that obstructions that can contribute to falls are removed. Additionally, ergonomic changes to an older worker's job, such as reducing or eliminating the lifting, pulling, or twisting required of a position, may decrease the risk of injuries that are caused when a pre-existing condition is aggravated, such as arthritis of the knee or degenerative disc disease.

Employers typically view the older worker as a valuable employee, considering the breadth of their skills and experience. Transitioning an older injured employee back to the workforce with a robust return-to-work program is another invaluable tool that can contribute to a decrease in claims costs. Diligent monitoring of the injured em-



ployee's progress in recovery is essential, and modified work made available must be meaningful and commensurate with the skill level of the injured worker. It also is critical that employers reinforce return-to-work programs with injured workers during the healing process. Effective communication with injured older workers is a vital component for returning them back to work.

Impact on Litigation

More often than not, an employee's pre-existing condition or disease—particularly with regard to degenerative changes that may have naturally caused an injury—becomes a primary issue in a workers' compensation claim. In some cases, it may be a reason to completely deny a claim. But in most, the issue will become whether and to what extent the pre-existing condition caused the injury or was aggravated by the work or a work injury. This tends to be a commonly litigated issue in cases of older workers injured on the job. The extent of the medical evidence and claims investigation performed prior to litigation can help answer these questions. Additionally, longer recovery times post-injury will result in increased exposure for indemnity benefits as well as medical expenses.

Securing concise and favorable medical opinions on these issues is key to evaluating a particular claim for ongoing medical and indemnity exposure. Medical opinions are only as thorough as the information that they are based on. Providing a current treating provider with the claimant's relevant medical history and prior medical records will help the physician answer questions related to causation and/or aggravation and help determine whether an aggravation has resolved. Comprehensive medical data also will help the selected IME physician to provide an opinion on the issues of causation and disability that is medically sound.

When evaluating claims for settlement, litigation management professionals should consider the injured employee's age, life expectancy, and any

comorbidities because they can affect the value of future medical and indemnity exposure substantially. If an employee is injured near his planned retirement date, it may change the discussion when it comes to offering a return to work, evaluating future indemnity exposure, settlement negotiations, and whether or not a Medicare Set-Aside is needed.

Medicare considerations typically are more common concerns when the employee is over 55 years of age. The current federal law mandates that Medicare payments not be made for any item or service to the extent that payment "has been made or can reasonably be expected to be made promptly...under a workers' compensation law or plan of the United States or a state or under an auto or liability insurance policy or plan (including a self-insured plan) or under no-fault insurance."

Further, the federal law provides that if a workers' compensation settlement "stipulates that the amount paid is intended to compensate the individual for all future medical expenses required because of the work-related injury or disease, Medicare payment for such services are excluded until medical expenses related to the injury or disease equal the amount of the lump sum settlement."

Additionally, if Medicare should determine that it has paid for medical expenses of an individual that are related to an on-the-job injury, the Centers for Medicare & Medicaid Services (CMS) may bring direct action against an employer and insurer to recover payments made by Medicare that should have been the primary responsibility of other insurance.

Lastly, attorneys also may be found liable if settlement funds are disbursed to an employee without consideration of Medicare's interests or if reimbursement to Medicare for conditional payments was made previously.

As such, when considering settlement of an older worker's claim, employers and insurers must be certain that Medicare's interests are protected.

This is usually accomplished by obtaining a Medicare Set-Aside allocation agreement, which is then submitted to CMS for approval. If the individual is of particularly advanced age, he is likely already a Medicare recipient or has a reasonable expectation of Medicare enrollment within the foreseeable future. Of course, there are additional costs involved in enrolling the services of a company to prepare the Medicare Set-Aside agreement and, ultimately, submitting the proposal to CMS for approval.

There has been a significant demographic shift in the modern American workforce. In the last 20 years, employment of workers age 65 or older has grown 117 percent and by the same percentage for workers age 75 or older. These are dramatic indicators that people are working longer than they ever have before. If an employee between the age of 55 and 65 (or older) is hurt on the job and it generally takes longer to recover from the injury because of age, there is an increased risk of higher claims and litigation costs. Employers, claims professionals, and attorneys can all do their part to help mitigate these potential expenses along the way. Proactive management of these claims through education, prevention, transition, and mitigation is key to cost reduction. ■

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