

## BATTLING THE OPIOID EPIDEMIC

“At first they were a lifeline. Now they are a noose around my neck.”

By Reinaldo Alvarez and Kelly L. Kesner

The consequences of opioid abuse extend beyond the individuals and families directly affected. The following article argues that the workers' compensation system has a role in discouraging the misuse of addictive painkillers, and outlines some practical steps for limiting their use.

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Steve Rummier was a father, a fiancé, a successful financial advisor, and a well-liked member of a local band. In 2005, Steve was prescribed opioid medications for back pain. As advertised, the opioids did their job. It was the first time in a long time that Steve felt relief from his pain. By 2009, he was addicted. He sought out “pill mill” doctors who would easily dispense opioids in larger quantities without question. By 2011, he was dead from an overdose — despite seeking treatment for his addiction. Before his death, Steve wrote about his opioid usage, saying “at first they were a lifeline. Now they are a noose around my neck.”<sup>1</sup>

You probably don't know Steve, but stories like his happen all too often. Steve's story probably got no headlines, maybe at best a mention in the local paper. He was, like countless others, the victim of an ever-growing epidemic of opioid misuse. All too often the victims are thought to be solely responsible for their addiction, even though a significant number of those who overdose on opioids began using them with a legal prescription for a recognized condition.<sup>2</sup>

The addiction to opioid medications knows no social or economic barriers. It affects people you know and people you don't know. It affects the young and the old, the poor and the rich, the healthy and the sick and everyone in between. This article will focus on the overall

opioid epidemic and the efforts being made within the Florida Workers' compensation field to reduce the amount of opioid medications being prescribed, along with some practice pointers for the workers' compensation practitioner.

Florida Workers' Compensation statutes give the employer/carrier control of the claimant's medical care and treatment.<sup>3</sup> Along with that control, the employer/carrier has a major responsibility to ensure that injured workers receive the possible best medical care. That includes the prescription of medications, including opioids. Employer/carriers can no longer simply go just by what doctors prescribe. They need to question prescriptions; they need to question medical care. The statute allows for this within certain parameters.

### The Beginning

The opioid epidemic began in the mid-1990s. That was when the opioid OxyContin was approved by the FDA.<sup>4</sup> Opioids like Vicodin, Percocet, and Fentanyl had already been around for decades, but OxyContin, manufactured by Purdue Pharma, took over. The first year, the company amassed over \$45 million in sales.<sup>5</sup> By 2006, OxyContin generated profits of over 3 billion dollars and accounted for over 30% of the painkiller market.<sup>6</sup>

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The drug OxyContin was heavily pushed by Purdue Pharma. The company asserted that the potential for addiction was very small, even claiming that OxyContin was less than one percent addictive.<sup>7</sup> In 2007, Purdue Pharma pleaded guilty to charges that it had misbranded OxyContin as “abuse resistant.”<sup>8</sup> The company paid \$600 million in fines, one of the largest pharmaceutical settlements of all time.<sup>9</sup>

### The Epidemic’s Disturbing Facts

Whether it was the availability of OxyContin, competition from other pharmaceutical companies, a sign of the times or doctors or the patients or any combination of those factors, the prescription of pain killers became the go to item in a doctor’s black bag. From 1999 to 2010, the sale of painkillers to doctor’s offices quadrupled; unfortunately, the rate of deaths from prescription painkillers also quadrupled.<sup>10</sup> In 1999, 4,030 people died from an overdose involving opioids; by 2010, that number grew to 16,651 people.<sup>11</sup> In 2015, over 33,000 people died from opioid overdose.<sup>12</sup> That’s over 90 people per day that died from opioids in 2015 alone. Every day, more than 115 people in the United States die after overdosing on opioids.<sup>13</sup> Each day, over 1,000 people are treated in emergency rooms for misusing prescription opioids.<sup>14</sup>

The evidence is clear. Taking opioids can lead to misuse and addiction. Roughly 21% to 29% of patients who are prescribed opioids for chronic pain misuse them.<sup>15</sup> Four to six percent of those that misuse prescription opioids transition to heroin.<sup>16</sup> As opioid users become addicted, they seek out more drugs looking for pain relief. About 80% of people who use heroin first misused prescription opioids.<sup>17</sup>

The epidemic is not limited to one state or just big cities. Opioid misuse appears to be growing everywhere. Last year, opioid overdoses increased 30% from July 2016 through September 2017 in 45 states. The Midwestern region saw

opioid overdoses increase 70% from July 2016 through September 2017. Opioid overdoses in large cities increased by 54% in 16 states.<sup>18</sup>

### Prescriptions of Opioids on the Rise

Despite broad medical recommendations against long-term use of such painkillers, doctors are still prescribing opioids for both short-term and long-term pain management. The use of these medications has been on a steady incline. The vast majority of opioid usage worldwide takes place in the United States: 80% of all opioid consumption occurs in the United States yet only 5% of the world’s population lives in the United States.<sup>19</sup> The CDC reported that in 2012 alone, 259 million prescriptions were written for opioids.<sup>20</sup> That represents approximately 710,000 prescriptions written every single day. That is more than enough to give every single American adult their own bottle of pills.<sup>21</sup> One study estimated that prescription opioid dependence, abuse and overdose has cost the United States over 78 billion dollars.<sup>22</sup>

### Workers’ Compensation and the Epidemic

In workers’ compensation, the insurance company is usually in charge of the medical care and treatment of the injured party. The insurer provides the doctors that will take care of the injured worker’s treatment, including the prescribing of medications.

Over 60% of injured workers who are prescribed opioids become addicted.<sup>23</sup> That means if you are involved in the workers’ compensation world, you have run across a claimant that is or will be addicted to opioids.

Over 73% of the workers’ compensation cases in Florida involving pain medications including opioids.<sup>24</sup> It is estimated the prescription opioid abuse alone cost employers more than \$25 billion dollars in 2007.<sup>25</sup>

### What Workers’ Compensation is Doing to Slow Down the Epidemic

There have been noticeable decreases in the amount of opioids prescribed per workers’ compensation claim in a majority of states.

Several states, including Florida, have passed a “pill mill” bill requiring pain management clinics to be licensed and regulated, and requiring the owner of any such clinic to be a doctor.<sup>26</sup> However, this measure simply sent the pill searchers to nearby states looking for prescriptions. As a result, neighboring states have increased opioid drug dispensing.

Other states are trying different ways to combat opioid over-prescription. For example, in Illinois, a fee schedule was instituted capping the amount of money doctors could make on physician dispensing.<sup>27</sup>

In Washington, guidelines are being instituted for workers’ compensation medical providers that detail when opioids should and should not be prescribed, as well as consequences for failure to follow these best practices.<sup>28</sup>

In March 2016, the CDC issued a “Guideline for Prescribing Opioids for Chronic Pain” recommending, among other things, that opioids be avoided whenever possible, that alternative pain management options be considered, and that, if opioids are prescribed, they should be limited in both time and dosage.<sup>29</sup>

In March 2018 the federal Justice Department announced it would join forces with states

***Eighty percent of the world’s opioid consumption takes place in the United States; the cost of opioid misuse has been estimated at over \$78 billion.***

that are suing a number of opioid manufacturers for disingenuous marketing tactics by submitting a Statement of Interests in those lawsuits.<sup>30</sup>

### **CMS and Medicare Set-Asides**

An important aspect to Workers' Compensation settlements are Medicare Set-Asides (MSA). How the Centers for Medicare & Medicaid Services (CMS) review MSAs affects our settlements. As a result, as WorkComp practitioners, we need for CMS to revisit the way MSAs are reviewed. CMS currently requires prescriptions, including opioids, to be priced out for the claimant's life expectancy. While CMS is not indicating that the claimant will be taking opioids for life, CMS is requiring insurance companies to 'cover' the costs of opioids over the claimant's remaining life expectancy. This is a failure in the system that forces the insurance company to pay hundreds of thousands of dollars per case to account for opioid medications that we can only hope and pray the claimant will not be taking in the future. However, CMS is considering a rule that would limit the opioid doses available to Medicare patients to the equivalent of 90 milligrams of morphine per day.<sup>31</sup>

At the federal level, a number of legislators have recognized the urgency of this issue and are introducing legislation to attempt to curtail the availability of opioids. In May 2018, for example, the Strengthening Partnerships to Prevent Opioid Abuse Act was introduced with bipartisan support. According to co-sponsor Jim Renacci (R-OH), the bill will improve coordination between CMS and sponsors of Medicare plans "to combat fraud, waste, and abuse and the overprescribing of opioids within the Medicare Part D Program."<sup>32</sup>

### **How to Limit Opioid Usage as Part of Your Case**

A proactive, no-fault, team approach is best. Everyone involved

in the workers' compensation case carries a responsibility — claimants, doctors, and insurers. It is everyone's responsibility to question the prescription of opioid medications. We have a responsibility to question the amount, the longevity, the need for opioids and anything centering around opioids.

If a claimant is prescribed opioids, a nurse case manager should be attached to the case. The prescribing doctor should be contacted immediately to determine the reason for the opioid medication. The doctor should be questioned about the length of time that the claimant is to be on the opioid. The doctor should also be questioned about the possibility of prescribing alternative medications or, even better, non-pharmaceutical treatment. The doctor should be asked to document the reason behind the medications. Best practices should be used. Doctors need to work together and conduct teleconferences to ensure there are no concerns with the pharmaceutical treatment.

While there is no standard length of time that a opioid can or should be prescribed, there are warning signals of dependency. Should a nurse case manager, attorney, or another person feel that the claimant is showing increased anxiety, depression, increased energy, abandonment of important activities, or another sign of a dependency on prescription medication, this should be reported to the prescribing doctor for follow-up.

Before an insurance company approves an opioid, the company should question its use. The insurer should seek out independent medical opinions on the need for the opioids. Insurance companies have to investigate the claimant's background, pre-existing conditions, personal medical history, and pharmaceutical records. Insurers should mandate that physicians check prescription drug monitoring programs. Insurance may need to broaden the use of alternative medications or treatment to alleviate

pain. Sometimes opioids are prescribed when the subjective complaints of pain do not match the objective medical findings. These prescriptions need to be addressed before they get filled. If a claimant is on opioids, they should be blood tested frequently.

Sometimes a doctor needs to be confronted. Sometimes an insurance company needs to be more aggressive. Sometimes a claimant's attorney needs to question why his client is on opioids. Sometimes, a defense attorney will need to be more aggressive with his client regarding the opioid prescription. But at all times, the use of opioids should be questioned to some extent.

When more than 90 people are dying from opioid overdoses each day, the cost of instant pain relief is too high. The pill manufacturers need to take more responsibility for their products, as well.

Numerous factors have paved the way for this epidemic. The time to end the over-prescribing of these powerful, addictive medications has come. This will come at a cost to the industry in the short term but, in the long term, it will save money and more importantly, lives.

Steve died over seven years ago — that is seven birthdays his daughter has had without her dad. How do you place a price on that?

<sup>1</sup> Steve Rummler Hope Network, *Steve's Story* (May 24, 2017), <https://steverummlerhopenetwork.org/steves-story/>; Maxwell Newfield, *Prescription Drug Deaths: Two Stories*, (CNN Nov. 19, 2012), available at <https://www.cnn.com/2012/11/15/health/deadly-dose-jackson-rummler/index.html>.

<sup>2</sup> Newfield, *supra* n.1.

<sup>3</sup> See generally § 440.13, Fla. Stat. (2018).

<sup>4</sup> Michael Mariani, *How the American opiate epidemic was started by one pharmaceutical company*, *The Week* (March 4, 2015), <http://theweek.com/articles/541564/how-american-opiate-epidemic-started-by-pharmaceutical-company>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Jesse Hyde, *The untold story of how Utah doctors and Big Pharma helped drive the national opioid epidemic*, *Deseret News* (October 26, 2017), <https://www.deseretnews.com/article/900002328/the-untold-story-of-how-utah-doctors-and-big->

- pharma-helped-drive-the-national-opioid-epidemic.html.
- <sup>11</sup> United Nations Office on Drugs and Crime, World Health Organization, *Opioid overdose: preventing and reducing opioid overdose mortality* (2013), <https://www.unodc.org/docs/treatment/overdose.pdf>.
- <sup>12</sup> National Institute on Drug Abuse, *Opioid Overdose Death Data* (last updated December 19, 2017), <https://www.cdc.gov/drugoverdose/data/statedeaths.html>.
- <sup>13</sup> National Institute on Drug Abuse, *Opioid Overdose Crisis* (revised March 2018), <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis>.
- <sup>14</sup> Lisa Esposito, *Opioid Epidemic: What Brought Us Here? How the best intentions to improve pain treatment went awry*, U.S. News & World Report (Jan. 24, 2018), <https://health.usnews.com/health-care/patient-advice/articles/2018-01-24/opioid-epidemic-what-brought-us-here>.
- <sup>15</sup> See *supra* note 11.
- <sup>16</sup> See *supra* note 11.
- <sup>17</sup> See *supra* note 11.
- <sup>18</sup> See *supra* note 11.
- <sup>19</sup> AllGov, U.S.: *5% of World Population; 80% of Opioid Consumption* (Dec. 15, 2014), <http://www.allgov.com/news/controversies/us-5-percent-of-world-population-80-percent-of-opioid-consumption-141215?news=855100>.
- <sup>20</sup> Centers for Disease Control and Prevention, *Opioid Painkiller Prescribing: Where You Live Makes a Difference*, CDC Vital Signs (July 2014), <https://www.cdc.gov/vitalsigns/opioid-prescribing/index.html>.
- <sup>21</sup> *Id.*
- <sup>22</sup> Wolters Kluwer Health: Lippincott Williams and Wilkins, *Costs of US prescription opioid epidemic estimated at \$78. 5 billion*, Science Daily (Sept. 14, 2016), [www.sciencedaily.com/releases/2016/09/160914105756.htm](http://www.sciencedaily.com/releases/2016/09/160914105756.htm).
- <sup>23</sup> *Opioid Abuse Impact on Workers Compensation Insurance Costs Highlighted by Insurance Agency*, PRWeb (Sept. 13, 2013), <http://www.prweb.com/releases/2017/08/prweb14641872.htm>.
- <sup>24</sup> See *supra* note 19.
- <sup>25</sup> Optum, *Counting the cost of opioid abuse: Claims costs to treat dependence grew 100% in 5 years*, <https://www.optum.com/resources/library/counting-cost-of-opioid-abuse.html>.
- <sup>26</sup> § 458.3265, Fla. Stat. (2018). In 2018 the Florida Legislature further amended this statute in a bill that created additional limitations on the prescription of opioids. See Chapter 2018-13, Laws of Florida.
- <sup>27</sup> Denise Johnson & Don Jergler, *Opioid Epidemic Plagues Workers' Comp*, Insurance Journal (May 17, 2013), <https://www.insurancejournal.com/news-national/2013/05/17/292528.htm>.
- <sup>28</sup> *Id.*
- <sup>29</sup> Centers for Disease Control and Prevention, *CDC Guideline for Prescribing Opioids for Chronic Pain — United States, 2016* (March 18, 2016), <https://www.cdc.gov/mmwr/volumes/65/rr/rr6501e1.htm>.
- <sup>30</sup> Justin Mckibben, *Opioid Makers Will Soon Face New Justice Department Task Force*, Palm Healthcare (Mar. 1, 2018), <http://palmhealthcare.com/opioid-makers-justice-department/>.
- <sup>31</sup> Lev Facher, *Proposed Federal Limits to Opioid Prescriptions Draw Opposition From Physicians and Patients*, STAT (Mar. 28, 2018), <https://www.statnews.com/2018/03/06/cms-rule-limits-opioid-prescriptions/>.
- <sup>32</sup> Press Release, *Renacci Introduces Strengthening Partnerships to Prevent Opioid Abuse Act* (May 10, 2018), <https://renacci.house.gov/index.cfm/2018/5/renacci-introduces-strengthening-partnerships-to-prevent-opioid-abuse-act>.