

## REVITALIZING RECOVERY: EXPLORING WORKERS' COMPENSATION COVERAGE OF ALTERNATIVE MEDICINE

### I. INTRODUCTION

Roland Romero, an aircraft mechanic, was tasked with cleaning the wings of multiple airplanes using a cleaning solution that contained toxic organic solvents.<sup>1</sup> After exposure to a toxic cleaning solvent, Romero began to experience “nausea, vomiting, early satiety, bloating, distention, and constipation,” for which he sought treatment from a neurogastroenterologist, Dr. Mathias.<sup>2</sup> During his course of treatment, he was diagnosed with organic brain syndrome and a neurogenic bladder.<sup>3</sup> After undergoing twelve weeks of “intravenous immuno gamma globulin” (“IVIg”) injections, as prescribed by Dr. Mathias, Romero experienced some improvement.<sup>4</sup> In addition to the IVIg injections, Romero received colon hydrotherapy and ear candling treatments to aid his symptoms.<sup>5</sup> Dr. Mathias also prescribed “manual lymphatic drainage” and “oxy-ozone sauna therapy treatment.”<sup>6</sup> After a lengthy dispute process between Romero and his employer over whether the treatments were reasonable and necessary to heal his ailments, a Workers' Compensation Judge (“WCJ”) ruled against Romero and ordered the discontinuance of the treatments.<sup>7</sup> In affirming the WCJ’s opinion on appeal, the court

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<sup>1</sup> See *Romero v. Northrop Grumman Corp.*, 952 So. 2d 855, 856-57 (La. Ct. App. 2007).

<sup>2</sup> *Id.* at 857.

<sup>3</sup> See *id.*; see generally Ann Logsdon, *Organic Mental Disorder Causes and Treatment*, VERYWELL MIND (October 12, 2023), <https://www.verywellmind.com/organic-mental-disorders-2162516> (explaining the symptoms of organic brain syndrome, which include “difficulty concentrating . . . or get[ting] confused when performing tasks that are routine . . . [and] trouble managing relationships and collaborating or communicating with colleagues, friends, or family”).

<sup>4</sup> *Id.*

<sup>5</sup> See *id.*

<sup>6</sup> *Romero*, 952 So. 2d at 857.

<sup>7</sup> See *id.* at 859-60, 867 (This was a unique case, as there were significant issues regarding Romero’s prescribing doctor, who was unable to sufficiently explain and support what some of the treatments were or why they were prescribed).

focused on the testimony of various medical providers who had never heard of the therapies or did not believe in alternative medicine.<sup>8</sup>

Mr. Romero's case highlights one of the many obstacles individuals must face in seeking alternative medical treatment for their workplace injuries. This paper proposes that state workers' compensation statutes should be broadened to allow employees to seek alternative medical care. First, this paper explains the public policy underlying the workers' compensation system as well as various limitations on the medical services an employer is required to provide. Second, this paper discusses the intricacies of alternative medicine and its rise in popularity. Third, this paper explores how various state courts handled disputes regarding compensation for alternative medical care. Fourth, this paper explains how those who follow spiritual healing, such as Native American communities, are left unrepresented under the language of workers' compensation regulations. Finally, this paper weighs the various arguments for and against the expansion of coverage for alternative medicine and suggests multiple ways states could expand coverage of CAM therapies under their workers' compensation statutes.

## II. OVERVIEW OF THE WORKERS' COMPENSATION SYSTEM

The workers' compensation system operates under the principle that because employers benefit economically from the services provided by their employees, employers "should bear the cost of [their employees'] injuries and deaths."<sup>9</sup> Following this principle, workers' compensation statutes create an exchange between the employer and employee, where the employee gives up their right to sue the employer in tort while the employer remains financially responsible for medical and other expenses associated with the employee's injuries.<sup>10</sup> Therefore, an injured employee's main, and usually only,

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<sup>8</sup> See *id.* at 862, 865-67.

<sup>9</sup> JOSEPH W. LITTLE ET AL., *WORKERS' COMPENSATION CASES AND MATERIALS*, 74 (7th ed. 2014) (explaining that the principle applies "irrespective of fault").

<sup>10</sup> See D. Paul Holdsworth, *Analyzing The Virginia Workers' Compensation Act's Governance Of Employer Non-Compliance*, 51 U. RICH. L. REV. 193, 197 (2016).

course of action is the rights and benefits provided under their state’s specific worker’s compensation statute.<sup>11</sup>

Additionally, workers’ compensation laws provide injured employees with money or other benefits “to mitigate the disastrous economic effects of a work injury.”<sup>12</sup> Benefits provided to employees with successful worker’s compensation claims may consist of “partial wage replacement . . . reimbursement for healthcare services and occupational therapy.”<sup>13</sup> Importantly, an employer is not required to cover all of the medical expenses an injured employee may incur as a result of a workplace injury.<sup>14</sup>

Furthermore, state workers’ compensation statutes provide minimal guidance as to the specific medical services an employer must provide.<sup>15</sup> These state statutes commonly require that an employer provide medical treatment that is either “necessary,” “required by the nature of the injury,” “medically prescribed,” or some other variation of “reasonable.”<sup>16</sup> For example, Pennsylvania’s statute states that “[t]he employer shall provide payment in accordance with this section for reasonable surgical and medical services . . . as and when needed.”<sup>17</sup>

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<sup>11</sup> *See id.*

<sup>12</sup> JOSEPH W. LITTLE ET AL., *supra* note 9, at 475.

<sup>13</sup> Julia Kagan, *Workers’ Compensation: What It Is, How It Works, and Who Pays*, INVESTOPEDIA, <https://www.investopedia.com/terms/w/workers-compensation.asp> (last updated January 24, 2023) (“Most compensation plans offer coverage of medical expenses only related to injuries incurred as a direct result of employment”).

<sup>14</sup> Les Masterson, *How Does Workers’ Compensation Work?*, FORBES ADVISOR, <https://www.forbes.com/advisor/business-insurance/workers-compensation-insurance/> (last updated September 22, 2023).

<sup>15</sup> *See* Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017*, 69 RUTGERS L. REV. 891, 894 (2017).

<sup>16</sup> 2 MODERN WORKERS COMPENSATION § 202:5 (2023).

<sup>17</sup> 77 Pa. Stat. Ann. § 531 (West); *Compare* Colo. Rev. Stat. Ann. § 8-42-101 (West) (“Every employer . . . shall furnish medical, surgical, dental, nursing, and hospital treatment . . . as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury”), *and* Miss. Code. Ann. § 71-3-15 (West) (“The employer shall furnish such medical, surgical, and other attendance or treatment, . . . for such period as the nature of the injury or the process of recovery may require. The injured employee shall have the right to . . . select one (1) competent physician. . . to administer medical treatment”).

However, determining when medical services are “necessary and reasonable” under one of these standards continues to be a difficult task.<sup>18</sup> A Kentucky court, in determining reasonableness, considered whether the treatment was “outside the type of treatment generally accepted by the medical profession as reasonable.”<sup>19</sup> Alternatively, a Minnesota court considered the “effectiveness of the treatment, “cost of the treatment,” and “the length of time of treatment.”<sup>20</sup> Despite the uncertainty around what meets the reasonableness standard, alternative medicine is frequently contended as unreasonable or unnecessary medical care.<sup>21</sup>

An additional argument used to challenge alternative medical coverage under workers' compensation is that state statutes, like Pennsylvania's, only provide compensation for services “rendered by physicians or other health care providers.”<sup>22</sup> Although some statutes include chiropractors and naturopathic doctors in their definition of health care providers,<sup>23</sup> it is uncommon to see any other type of alternative medicine provider explicitly included in a state's workers' compensation statute. The exclusiveness of the definition of “health care provider” as well as the ambiguity of the “reasonable and necessary” requirement function as bars to compensation for many workers seeking alternative medical treatment.

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<sup>18</sup> See James Hoffman, *What Qualifies as Reasonable Medical Treatment Under Workers Compensation?*, LAW OFFICE OF JAMES M. HOFFMANN (August 5, 2021), <https://www.hoffmannworkcomp.com/what-qualifies-as-reasonable-medical-treatment-under-workers-compensation/>.

<sup>19</sup> *Square D. Co. v. Tipton*, 862 S.W.2d 308, 310 (Ky. 1993).

<sup>20</sup> *Hoffman v. Gopher State Silica*, 404 N.W.2d 279, 282 (Minn. 1987).

<sup>21</sup> See Hoffman, *supra* note 18.

<sup>22</sup> See 77 Pa. Stat. Ann. § 531.

<sup>23</sup> See generally Fla. Stat. Ann. § 440.13 (West) (defining “physician” as including “a chiropractic physician” licensed in the state).

### III. THE RISE OF ALTERNATIVE MEDICINE

Holistic medicine, as opposed to Western medicine, employs a full-body approach to healing.<sup>24</sup> Specifically, when evaluating a patient and determining treatment options, holistic medicine considers a “person’s psychological, emotional, and spiritual aspects” as well as physical condition.<sup>25</sup> In addition to healing existing conditions, holistic and alternative medicine also concentrates on preventative care, such as adjustments to a person’s nutrition and lifestyle.<sup>26</sup> Holistic, natural, and other alternative medicine is often grouped in a category called “complementary and alternative medicine” (“CAM”).<sup>27</sup> Despite its common association with herbal remedies, alternative medicine encompasses many forms of care including acupuncture, aromatherapy, massage therapy, osteopathy, chiropractic treatment, and more.<sup>28</sup>

Though many cultures in various areas of the world have utilized alternative medicine, also known as holistic medicine,<sup>29</sup> for thousands of years, it did not gain popularity in the United States until

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<sup>24</sup> See David Sol, *Holistic Medicine: A Guide For Beginners*, PACIFIC COLLEGE OF HEALTH AND SCIENCE, <https://www.pacificcollege.edu/news/blog/2021/05/20/holistic-medicine-guide-for-beginners> (last visited November 20, 2023).

<sup>25</sup> *Id.*

<sup>26</sup> See *Principles of Holistic Medicine*, AMERICAN HOLISTIC HEALTH ASSOCIATION, <https://ahha.org/selfhelp-articles/principles-of-holistic-medicine/> (last visited November 20, 2023).

<sup>27</sup> *Complementary and Alternative Medicine*, NATIONAL CANCER INSTITUTE, (June 12, 2023), <https://www.cancer.gov/about-cancer/treatment/cam>; see generally Michael Ruggio & Lauren DeSantis-Then, *Complementary and Alternative Medicine: Longstanding Legal Obstacles to Cutting Edge Treatment*, 2 J. HEALTH & LIFE SCI. L. 137 (“CAM therapies used in lieu of conventional Western medicine are considered alternative medicine. When used in addition to conventional medicine, CAM therapies are considered complementary medicine, and the combination of conventional and complementary medicine is integrative medicine”).

<sup>28</sup> See Sol, *supra* note 24; see generally Kathleen M. Boozang, *Western Medicine Opens the Door to Alternative Medicine*, 24 AM. J. L. AND MED. 185, 198-199 (1998) (“Alternative therapies include . . . aroma therapy, art therapy, biofeedback, bodywork/manual therapy, botanicals/herbs, environmental medicine, hyperbaric oxygen therapy, herb therapy, hypnosis, light therapy, magnetic stimulation, mind/body medicine, music therapy, nutrition, traditional Chinese medicine, yoga and supplements”).

<sup>29</sup> See Jennifer Huizen, *What is alternative medicine, and does it work?*, MEDICALNEWSTODAY (July 6, 2021), <https://www.medicalnewstoday.com/articles/alternative-medicine#definitions> (For purposes of this paper “alternative medicine,” is used as a catchall for “complementary,” “natural,” “integrative,” and “holistic” medicine, but it is important to note that where to draw the line between alternative and holistic medicine is widely disputed); see generally Doren Kalakov, *Main Differences Between Holistic and Alternative Medicine – 2023 Guide*, AMERICAN CELIAC, (June 17, 2021), <https://americanceliac.org/differences-holistic-and-alternative-medicine/> (explaining some of the differences between holistic and alternative medicine).

the 1960s.<sup>30</sup> According to a study conducted in 2007, “approximately 38 percent of adults in the United States” used a form of alternative medicine.<sup>31</sup> Additionally, in a study of out-of-pocket healthcare expenses, Americans spent 30.2 billion dollars on complementary health approaches.<sup>32</sup>

With more Americans deciding to explore alternative medicine, a need developed for increased oversight.<sup>33</sup> In 1993, the Office of Alternative Medicine (“OAM”), was created to monitor and research the increased use of alternative medicine.<sup>34</sup> The OAM was later changed to the National Center for Complementary and Integrative Health (“NCCIH”).<sup>35</sup> The removal of “alternative medicine” from the name reflects the notion that in current American society, alternative medicine is rarely used entirely on its own.<sup>36</sup> Whereas, integrative health care, which combines “complementary and conventional” medicine, is more commonly utilized by today’s population.<sup>37</sup>

Furthermore, the NCCIH is one of numerous centers within the National Institutes of Health (“NIH”).<sup>38</sup> The NCCIH is tasked with funding research opportunities to study what it calls “complementary approaches” to conventional medicine as well as the “usefulness and safety” of natural products.<sup>39</sup> These complementary approaches include “spinal manipulation, meditation, and massage.”<sup>40</sup>

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<sup>30</sup> See Sol, *supra* note 24.

<sup>31</sup> Press Release, National Institute of Health, According to a New Gov’t Surv., 38 Percent of Adults and 12 Percent of Children Use Complementary and Alternative Med. (December 10, 2008) (on file with author).

<sup>32</sup> See Press Release, National Center for Complementary and Integrative Health, Americans Spent \$30.2 Billion Out-Of-Pocket On Complementary Health Approaches (June 22, 2016) (on file with author).

<sup>33</sup> See Kristen J. Josefek, *Alternative Medicine's Roadmap to Mainstream*, 26 AM. J. L. AND MED. 295, 296 (2000).

<sup>34</sup> See *id.* (The OAM was tasked with providing research funding for “evaluat[ing the] safety and efficacy of alternative modalities”).

<sup>35</sup> See Press Release, National Institute of Health, NIH complementary and integrative health agency gets new name (December 17, 2014) (on file with author) (explaining the newest name change, which was implemented in 2014).

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> *Id.*

<sup>40</sup> See Press Release, NIH complementary and integrative health agency gets new name, *supra* note 35 (“The practices and products studied by the center are prioritized by four guiding principles: scientific promise, amenability to be

Additionally, through its research, the center also promotes methods for living healthier lifestyles.<sup>41</sup> The NCCIH accomplishes its goals by publishing its research and creating guides for the public to use when considering their healthcare options.<sup>42</sup>

#### IV. CASES COLLIDE ON WHAT IS COVERED CARE

##### A. *Babu v. Workers' Compensation Appeal Board*

In 2000, Rachel Babu suffered an injury while working for Temple Continuing Care Center.<sup>43</sup> Subsequently, Babu sought Ayurvedic treatment in India for the injury, for which she was denied workers' compensation benefits.<sup>44</sup> The workers' compensation judge, in denying benefits, reasoned that the treatment was not "under the supervision of or upon referral by a licensed practitioner" and the treatment was not "causally related" to the injury.<sup>45</sup> In 2008, Babu suffered another workplace injury to both of her shoulders and neck.<sup>46</sup> Benefits were denied for the second injury under similar reasoning as the first claim, that the "practitioners were not licensed providers in Pennsylvania;" . . . "the services provided were not under the supervision of a licensed Pennsylvania health care practitioner;" and the "medical certificates . . . [did not sufficiently] describe the treatment."<sup>47</sup>

In affirming the WCJ's decision, the Workers' Compensation Appeal Board ("WCAB") cited the *Boleratz* case.<sup>48</sup> In *Boleratz*, the commonwealth court denied compensation for services provided by a massage therapist because "massage therapist[s] . . . [are] not licensed or otherwise authorized by the

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studied using the highest quality research methods, use by the American public, and the potential impact on public health").

<sup>41</sup> *See id.*

<sup>42</sup> *See id.*

<sup>43</sup> *See Babu v. W.C.A.B.*, 100 A.3d 726, 727 (Pa. Commw. Ct. 2014).

<sup>44</sup> *See id.*

<sup>45</sup> *Id.*

<sup>46</sup> *See id.* at 728.

<sup>47</sup> *Id.*

<sup>48</sup> *See Babu*, 100 A.3d 727-28; *see generally Boleratz v. Workers' Comp. Appeal Bd.*, 932 A.2d 1014 (Pa. Commw. Ct. 2007).

Commonwealth to provide health services, . . . even if the services are prescribed by a health care provider.”<sup>49</sup> Following this reasoning, the WCAB affirmed the denial of benefits to Babu because there was no evidence that the ayurvedic treatments were provided “under the supervision of, or upon referral or prescription from, a licensed Pennsylvania health care practitioner.”<sup>50</sup> Lastly, the WCAB rejected Babu’s argument that she, as a licensed nurse, fit within the definition of “health care practitioner” and could prescribe or oversee her own care.<sup>51</sup> The WCAB reasoned that there was insufficient evidence “that [Babu] was trained in massage therapy or that she exercised supervisory control over the practitioners in India or in any way guided them during the provision of Ayurvedic treatments.”<sup>52</sup>

*B. White v. Hattiesburg Cable Company*

Chiropractic care, despite falling within the category of alternative medicine, has a longer history of being found to be “reasonable and necessary” care under some states’ worker’s compensation statutes.<sup>53</sup> For example, in 1986, Earnestine White suffered an injury to her back and shoulder after falling at work.<sup>54</sup> White received various conventional treatments for the injuries, as well as care from a chiropractor.<sup>55</sup> After seeking benefits for all of the medical services, an administrative law judge denied compensation for the chiropractor’s services.<sup>56</sup>

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<sup>49</sup> *Babu*, 100 A.3d 727-28.

<sup>50</sup> *Id.* at 730.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *See generally* *Fitzpatrick v. Freightliner Corp.*, 678 P.2d 771, 772 (Or. Ct. App. 1984) (holding an employer liable for the chiropractic services the injured employee received); *Clark v. Municipality of Anchorage*, 777 P.2d 1159, 1162 (Alaska 1989) (remanding a denial of compensation for chiropractic services back to the Alaska Workers’ Compensation Board “with directions to determine whether Clark’s chiropractic expenses are reasonable and necessary and related to her compensable injury”).

<sup>54</sup> *See White v. Hattiesburg Cable Co.*, 590 So. 2d 867, 868 (Miss. 1991).

<sup>55</sup> *See id.*

<sup>56</sup> *See id.*



The court began by acknowledging that chiropractic care “is a specialized field in the art of healing,” with both a state licensing board and licensing requirements.<sup>57</sup> The court then moved on to the purpose of the state workers' compensation statute, which is the “‘rehabilitation or restoration to health and vocational opportunity’ of an injured worker.”<sup>58</sup> Further, the court explained that the broader purpose of the statute is to “provide, without financial limitation, the injured worker with whatever medical treatment his condition requires.”<sup>59</sup>

Additionally, the court reasoned that if a chiropractor provides needed treatment that is “not ordinarily provided by physicians, it would be anomalous indeed to exclude such benefits” from the statute.<sup>60</sup> In remanding the case back to the Mississippi Workers’ Compensation Commission (the “Commission”), the court directed the Commission to focus its investigation on whether the treatment was necessary and the charges were reasonable.<sup>61</sup> Lastly, the court noted that if the answer to both questions was “yes,” then White could not “be denied benefits solely because the service was rendered by a licensed chiropractor.”<sup>62</sup>

## V. WORKERS’ COMPENSATION IN HEALING COMMUNITIES

“[C]ulturally competent healthcare,” as used by a division of the Center for Medicare and Medicaid Services when discussing Native American beneficiaries,<sup>63</sup> is a fascinating concept that when applied in a workers' compensation context, reveals a group of people often left unrepresented – those who use healers for their primary medical care. Although it is less frequently discussed, spiritual healing

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<sup>57</sup> *Id.* at 869 (citing a separate Mississippi statute, which recognized the practice of chiropractors).

<sup>58</sup> *Id.*

<sup>59</sup> *White*, 590 So. 2d at 869.

<sup>60</sup> *Id.*

<sup>61</sup> *See id.* at 870.

<sup>62</sup> *Id.*

<sup>63</sup> *See American Indian/Alaska Native*, CENTERS FOR MEDICARE & MEDICAID SERVICES, <https://www.cms.gov/training-education/partner-outreach-resources/american-indian-alaska-native> (last visited December 14, 2023).

falls within the category of complementary and alternative medicine.<sup>64</sup> According to one study by Mental Health America, “[i]ndigenous workers with . . . [mental health] disorder[s] are more likely to receive treatment from a spiritual or traditional healer” than conventional medical sources.<sup>65</sup> Additionally, Native Americans look to tribal healers to “prevent or cure” ailments related to their mind, body, and spirit through herbal remedies, touch, ceremonies, and more.<sup>66</sup> Despite its frequent use, spiritual healing is rarely accounted for in workers’ compensation statutes.

Moreover, two states address religious or spiritual healing in their statutes, Connecticut and Minnesota. Under Connecticut’s workers’ compensation statute, the definition of “[m]edical and surgical aid or hospital and nursing service” includes “treatment by prayer or spiritual means through the application or use of the principles, tenets or teachings of any established church without the use of any drug or material remedy.”<sup>67</sup> While on its face, this statute might appear to be inclusive of religious or spiritual healers, its application is fairly limited by the requirement of there being an “established church.”<sup>68</sup> Additionally, the statute defines a “physician” as someone “licensed and authorized to practice a healing art,”<sup>69</sup> and defines the “practice of the healing arts” as the “practice of medicine, chiropractic, podiatry, naturopathy and, . . . the practice of optometry.”<sup>70</sup> Because of the restrictive language employed by these sections of Connecticut’s statute, the services of a tribal healer would be excluded from coverage.

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<sup>64</sup> See Michael H. Cohen, *Holistic Health Care: Including Alternative and Complementary Medicine in Insurance and Regulatory Schemes*, 38 ARIZ. L. REV. 83, 105 (1996).

<sup>65</sup> Caroline Hroncich, *How to Update Benefits Policies to Better Support Indigenous Workers*, SHRM (November 28, 2023), <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/how-to-update-benefits-policies-to-better-support-indigenous-workers.aspx>.

<sup>66</sup> Holly T. Kuschell-Haworth, *Jumping Through Hoops: Traditional Healers And The Indian Health Care Improvement Act*, 2 DEPAUL J. HEALTH CARE L. 843, 843 (1999).

<sup>67</sup> Conn. Gen. Stat. Ann. § 31-275(12) (West).

<sup>68</sup> *Id.*

<sup>69</sup> Conn. Gen. Stat. Ann. § 31-275(17) (West).

<sup>70</sup> Conn. Gen. Stat. Ann. § 20-1 (West).

Conversely, Minnesota’s workers’ compensation statute addresses both CAM remedies and Christian science.<sup>71</sup> Specifically, the statute permits an employee to elect to pursue “Christian Science treatment in lieu of medical treatment.”<sup>72</sup> In a later section, the statute prohibits compensation for “[a]ny service, article, or supply provided by an unlicensed complementary and alternative health care practitioner.”<sup>73</sup> A separate Minnesota statute, referenced in its workers’ compensation statute, includes “culturally traditional healing practices,” “energetic healing,” and “healing touch” in its definition of “complementary and alternative health care practices.”<sup>74</sup> Thus, it seems as though these healer services could be compensable under Minnesota’s workers’ compensation statute if the healer could meet the statute’s licensing requirements,<sup>75</sup> which is unlikely in the case of a Native American healer.

## VI. OVERLY RESTRICTED REMEDIES: WEIGHING THE ARGUMENTS FOR EXTENDING WORKERS’ COMPENSATION INSURANCE TO COVER ALTERNATIVE MEDICAL CARE

### A. *Reconsidering Reasonableness Under Daubert to Better the Bargain*

As discussed above, workers' compensation rests on a “balance” between the employer retaining financial liability for employee injuries and employees giving up their tort rights to sue the employer.<sup>76</sup> However, there is no real balance at all, as the scale tilts heavily in favor of employers. This is particularly problematic in American society where the right to sue is not one to be waived lightly. To ensure the system is functioning as intended, and to balance out the employees’ side of the bargain, measures must be taken to address the unduly burdensome restrictions placed on employees as well as the insufficient benefits they receive.

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<sup>71</sup> See Minn. Stat. Ann. § 176.135 (West).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* (noting that an employer can opt out of coverage for Christian Science treatment by filing a notice with the commissioner of the Department of Labor and Industry).

<sup>74</sup> Minn. Stat. Ann. § 146A.01 (West).

<sup>75</sup> See *id.* (The statute defines “unlicensed complementary and alternative health care practitioner” as one who is “not licensed or registered by a health-related licensing board or the commissioner of health” or is licensed by a “health-related licensing board . . . but does not hold oneself out to the public as being licensed”).

<sup>76</sup> See Spieler, *supra* note 15, at 981-982.

The Supreme Court in *N.Y. C. R. Co. v. White* noted that employers are to bear the burden of providing reasonable benefits,<sup>77</sup> reasonable being the operative word. What constitutes reasonable benefits varies from state to state and person to person creating a struggle between what the medical community determines is objectively reasonable and what the patient subjectively believes is reasonable and necessary care. Additionally, with medical care costs increasing, employers have looked for ways to decrease their financial responsibility, arguably pushing the bounds of reasonableness.<sup>78</sup> In actuality, many employees are receiving insufficient benefits compared to their total medical expenses or no compensation benefits at all.<sup>79</sup>

The insufficient benefits employees receive can also be attributed to the many requirements an employee must account for when seeking compensation. For example, some states have implemented physician requirements, which limit the employee to receiving care from “a panel” of just a few employer-selected providers.<sup>80</sup> Florida takes their restrictions even further with various employer-approval requirements, including limiting employees, subject to approval, to only one change of physician during their treatment.<sup>81</sup> Further, Florida’s statute prohibits authorized providers from referring patients to other providers or treatment centers without first obtaining approval from the employer’s insurance carrier.<sup>82</sup>

Employer-approved physician requirements coupled with the ambiguity around when treatment is considered “reasonable and necessary,” and by whose definition of “reasonable,” are some of the biggest

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<sup>77</sup> *See id.* at 1006 (citing *N.Y. C. R. Co. v. White*, 243 U.S. 188, 203-04 (1917)).

<sup>78</sup> *See id.* at 1006-07.

<sup>79</sup> *See Spieler, supra* note 15, at 1007.

<sup>80</sup> *See* 77 Pa. Stat. Ann. § 531 (West) (Under Pennsylvania law, an employer may establish a panel of “six designated health care providers . . . [and] the employee [sic] shall be required to visit one of the physicians or other health care providers so designated . . . for a period of ninety (90) days”); Ala. Code § 25-5-77 (“If the employee is dissatisfied with the initial treating physician selected by the employer and if further treatment is required, . . . the employee shall be entitled to select a second physician from a panel or list of four physicians selected by the employer”).

<sup>81</sup> *See* Fla. Stat. Ann. § 440.13 (West).

<sup>82</sup> *See id.*

roadblocks for any employees seeking alternative medical care. A patient electing to receive CAM treatments, if not outright prohibited under their state's statute, would likely have to find a physician to both prescribe and oversee the treatment like in the *Babu* case.<sup>83</sup> The odds of meeting this requirement are considerably reduced when a patient must first see a few hand-selected doctors, who as seen in the *Romero* case, may have never heard of the alternative remedies nor would consider prescribing them.<sup>84</sup> The numerous restrictions employees must comply with have pushed the system beyond providing “reasonable” care to providing mainly employer-approved care.

One option to remedy the imbalance is for state legislatures to provide more guidance on when CAM treatments, other than chiropractic care, fall within the “reasonable and necessary” category. When determining the reasonableness of CAM treatments, there must first be some consideration of the patient's culture and beliefs. This is not to say that patients should get unfettered compensation and benefits for whatever alternative medicine they choose. To prevent a situation like the one presented in *Romero*, where one of the treatments he received was not known to treat any of the symptoms associated with his workplace injury,<sup>85</sup> the employee must continue to be required to present evidence that the CAM treatment they would like to pursue is known to treat, cure, or decrease symptoms that are related to the employee's workplace injury.

An additional way to measure the reasonableness of CAM treatments for a specific worker is to look to the federal rules of evidence (“FRE”) as a guide. Specifically, Rule 702 of the FRE, which governs expert witness testimony.<sup>86</sup> Under FRE 702, a qualified expert witness may testify if their testimony would be helpful to the fact-finder, is based on “sufficient facts or data,” was produced from “reliable principles and methods” and those principles were reliably applied to the case.<sup>87</sup> Although not

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<sup>83</sup> See *Babu v. W.C.A.B.*, 100 A.3d 726, 728 (Pa. Commw. Ct. 2014).

<sup>84</sup> See *Romero v. Northrop Grumman Corp.*, 952 So. 2d 855, 856-57 (La. Ct. App. 2007).

<sup>85</sup> See *id.* at 866.

<sup>86</sup> See Fed. R. Evid. 702.

<sup>87</sup> Fed. R. Evid. 702 (An expert witness can be qualified by “knowledge, skill, experience, training, or education”).

codified, courts also use the *Daubert* factors to determine the reliability of expert testimony.<sup>88</sup> The *Daubert* factors consider whether the expert is relying on a tested theory, whether the theory has “been subject to peer review and publication,” the theory’s error rate, whether there are standards in place that control the theory’s application, and whether the theory “has been generally accepted in the relevant scientific community.”<sup>89</sup>

Further, the *Daubert* factors could assist the state’s workers compensation commission, appeal board, or courts when considering the reasonableness of a worker’s CAM treatment. The first two factors, whether the expert is relying on a tested theory and whether the theory has been peer-reviewed or published,<sup>90</sup> pose somewhat of an obstacle to alternative medicine treatments due to lack of research compared to conventional medicine. However, the NCCIH’s research and other publications are available for review and could be sufficient if considered on their own, instead of in comparison to the expansive research within the medical community of conventional treatments.

Additionally, the last factor, acceptance in the relevant scientific community,<sup>91</sup> highlights that the “relevant” community must not solely consist of conventional medicine. When evaluating the acceptance of a CAM treatment, consideration must be given to the community that specializes in the study and practice of a specific treatment, not the entire CAM community. This is particularly important because many different categories fall within the scope of CAM. Similarly, physicians who only practice Western medicine, and who are more likely to be biased toward conventional medicine, should not be given more weight than alternative medicine providers who study, research, and administer alternative treatments. Giving more weight to the opinions of conventional medicine practitioners, like those in *Romero*,<sup>92</sup> does

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<sup>88</sup> See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593-94 (1993).

<sup>89</sup> DEBORAH JONES MERRIT & RIC SIMMONS, *LEARNING EVIDENCE FROM THE FEDERAL RULES TO THE COURTROOM*, 786-87 (5th ed. 2021) (summarizing the *Daubert* factors); See also *Daubert*, 509 U.S. at 593-94.

<sup>90</sup> *Daubert*, 509 U.S. at 593-94.

<sup>91</sup> *Id.*

<sup>92</sup> See *Romero v. Northrop Grumman Corp.*, 952 So. 2d 855, 856-57 (La. Ct. App. 2007).

not provide an accurate opinion on the reasonableness of such treatments, as many of the providers have not studied the CAM treatments at issue.

While it is reasonable for an employer to place some restrictions on their employee's selection of care, the measures taken cannot be so restrictive as to greatly minimize the benefits to employees that the system was created to provide. As worker's compensation currently stands, most patients seeking alternative medical care, either as a substitute to or in conjunction with conventional medicine, are provided minimal to no benefits due to the extensive restrictions under state statutes. With increased legislative guidance and a more inclusive test for determining the reasonableness of alternative medicine, the worker's compensation system could be one step closer to ensuring the fulfillment of the employee's side of the bargain.

#### *B. Patient Choice Versus Patient Protection*

Like workers' compensation, the field of medicine is heavily governed by state laws and medical boards.<sup>93</sup> The underlying policies behind the heightened regulation of medicine are to protect "the public from the dangers of unskilled practitioners and unsound treatment or advice" and to protect "the public from reliance on unskilled practitioners, and directing them to proper medical care."<sup>94</sup> The lack of licensing and supervision is one of the more common arguments against expanding insurance coverage to alternative treatments. This is a circular argument when considering the healthcare system's resistance to alternative medicine providers.

One alternative medicine provider, chiropractors, have earned respect in the medical community, and now have their own licensing board and state regulatory committees.<sup>95</sup> To become a licensed chiropractor, one must complete an undergraduate degree, a Doctorate of Chiropractic degree, and pass a

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<sup>93</sup> See Cohen, *supra* note 64, at 85.

<sup>94</sup> *Id.* at 85-86, 90 ("Each state licenses medical doctors, defines the "practice of medicine," and makes the unlicensed practice of medicine a crime").

<sup>95</sup> See *Certification and Licensure*, NATIONAL BOARD OF CHIROPRACTIC EXAMINERS (NBCE), <https://www.nbce.org/about-nbce/chiropractic-care/certification-and-licensure/> (last visited December 15, 2023).

state-administered exam.<sup>96</sup> Acupuncturists and naturopathic physicians undergo similar degree and certification processes.<sup>97</sup> Although there has been some movement towards licensing alternative medicine providers, other providers who fall outside the scope of chiropractic care, acupuncture, and naturopathy are left to fend against the presumption that the care they provide is unacceptable.<sup>98</sup>

The policy concerns that patients need to be protected from unskilled practitioners and poor treatment advice is nullified with the increased regulation of alternative medicine providers. While a new licensing board for alternative medicine providers is a possible solution, until states show interest in forming such a board, provider licensing should not be a bar to compensation for workers seeking alternative care. The “regulatory environment favors a healthcare system dominated by orthodox medicine,” and has long resisted providers who go against the norm of “accepted” medical care, therefore, inhibiting innovation in the field of CAM.<sup>99</sup> Workers should not have to bear the burden of the medical community’s resistance to license or fund research of alternative medicine.<sup>100</sup>

Furthermore, while there may not be as much research on the efficacy of CAM treatments compared to conventional medicine, some forms of CAM are “supported by extensive clinical practice.”<sup>101</sup> In other areas of the world, CAM has been used for thousands of years, such as Traditional Chinese herbal medicine or Ayurvedic medicine.<sup>102</sup> Although their long historical use does not rise to the

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<sup>96</sup> *See id.*

<sup>97</sup> *See How to Become an Acupuncturist*, NORTHWESTERN HEALTH SCIENCES UNIVERSITY, <https://www.nwhealth.edu/blog/how-to-become-an-acupuncturist/> (last visited December 15, 2023); *How to Become a Naturopathic Doctor*, AANMC (May 24, 2020), <https://aanmc.org/naturopathic-news/become-licensed-naturopathic-doctor/>.

<sup>98</sup> *See generally* *Schnider v. Schnider*, 449 N.W.2d 171, 172-73 (Minn. 1989) (explaining the uncertainty of whether a masseuse had to be licensed by the state’s board of medicine to provide compensable services under the state’s workers’ compensation statute).

<sup>99</sup> Cohen, *supra* note 64, at 86.

<sup>100</sup> *See id.*

<sup>101</sup> Ryan Abbott, *Treating The Health Care Crisis: Complementary And Alternative Medicine For PPACA*, 14 DEPAUL J. HEALTH CARE L. 35, 55 (2011).

<sup>102</sup> *See id.* at 47-48, 55.



level of extensive research and clinical studies, it does provide evidence of the safety and efficacy of these CAM treatments.<sup>103</sup> Further, although research on alternative medicine in the United States is lacking compared to conventional medicine, there is extensive research on the efficacy of CAM treatments in other countries.<sup>104</sup> If protecting patients from harmful medical care is a main concern when expanding workers' compensation coverage, states could consider the research in other countries, especially those that incorporated CAM treatments into their regular healthcare system, when determining what CAM treatments to cover under their statutes.<sup>105</sup>

Moreover, the medical communities' discrimination towards alternative medicine<sup>106</sup> negatively impacts patient autonomy. Patient autonomy, including the opportunity to accept or reject a specific treatment or medical care, is a tenet of the American healthcare system.<sup>107</sup> Additionally, included in patient autonomy is a patient's right to choose their physicians and other healthcare providers.<sup>108</sup> These principles of patient choice must be moved to the forefront when determining what treatments and other care an employer is required to provide to an injured employee. The mere fact that an employer is responsible for the medical bill should not decrease the injured worker's autonomy and control over the medical care they receive. The Mississippi court's reasoning in *White* that the worker's compensation statute was intended to provide whatever medical care an employee needs, without financial limitation,<sup>109</sup> also supports putting more emphasis on patient choice than employer costs.

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<sup>103</sup> *See id.* at 55.

<sup>104</sup> *See* PETER CURTIS, ASSESSING THE EFFECTIVENESS OF COMPLEMENTARY & ALTERNATIVE MEDICINE 5-7 (Susan Gaylord et al. eds., 2004).

<sup>105</sup> *See id.*

<sup>106</sup> *See* Cohen, *supra* note 64, at 86.

<sup>107</sup> *See* Megan S. Wright, *Resuscitating Consent*, 63 B.C.L REV. 887, 891 (2022).

<sup>108</sup> *See Patients Have the Right to Choose their Healthcare Provider*, MID-MICHIGAN RADIOLOGY ASSOCIATES (September 17, 2017), <https://mmrad.com/patients-right-choose-healthcare-provider/>.

<sup>109</sup> *See White v. Hattiesburg Cable Co.*, 590 So. 2d 867, 869 (Miss. 1991).

### *C. Insurance Companies Cover CAM*

Sixty-six percent of Americans reported that they would like their health insurance companies to cover some form of alternative medicine.<sup>110</sup> Despite its popularity and the wants of many Americans, insurance companies were slow to follow in expanding coverage.<sup>111</sup> In recent years, however, there has been increased movement towards covering certain categories of CAM.<sup>112</sup> One survey revealed that fourteen out of eighteen large insurance providers “covered at least eleven of the thirty-four alternative treatments studied.”<sup>113</sup> While these insurance companies had the option to expand their coverage, some states mandated insurance coverage for certain CAM approaches.<sup>114</sup> Because many injured workers “do not have access to alternative health insurance or disability benefits” outside of their employers’ workers’ compensation insurance, the system must be sufficient to ensure the employee has the resources they need to recover from their injuries.<sup>115</sup> Insurance companies that have moved towards covering some forms of CAM therapies could be used as a model for state workers’ compensation statutes and programs when implementing their form of coverage.

### *D. Controlling Costs*

Another argument against expanding the scope of medical services is that the costs of medical services are already overburdening the system.<sup>116</sup> However, another way to look at these high costs is that they actually “indicate a movement toward fulfilling the terms of the original bargain, not a deviation

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<sup>110</sup> See Kamaron McNair, *66% of Americans Want Health Insurance Companies to Cover Alternative Medicine*, VALUEPENGUIN (June 21, 2021), <https://www.valuepenguin.com/alternative-medicine-survey>.

<sup>111</sup> See Josefek, *supra* note 33, at 297.

<sup>112</sup> See Chelsea Stanley, *The Patient Protection and Affordable Care Act: The Latest Obstacle in the Path to Receiving Complementary and Alternative Health Care?*, 90 IND. L.J. 879, 881 (2015).

<sup>113</sup> *Id.*

<sup>114</sup> See *id.* at 885-86.

<sup>115</sup> See Spieler, *supra* note 15, at 1009.

<sup>116</sup> See Martha T. McCluskey, *The Illusion of Efficiency in Workers’ Compensation “Reform”*, 50 RUTGERS L. REV. 657, 681 (1998).

from that bargain.”<sup>117</sup> In other words, the high medical costs show that the system is doing what it was intended to, alleviating the financial burden of injuries on workers.<sup>118</sup> Moreover, most categories of alternative medicine exist to address whole-body health, with a focus on preventative care.<sup>119</sup> Although there is some dispute over whether preventative care decreases costs, one study revealed that general preventative health care, which included CAM treatments, reduced personal health care costs by \$3.7 billion.<sup>120</sup> Because CAM therapies and treatments rely more on natural products and less on expensive high-tech equipment, they tend to be a cheaper option compared to conventional medicine.<sup>121</sup> Furthermore, one study found that “acupuncture, chiropractic, and integrative care are likely to be cost-effective” alternatives to conventional care.<sup>122</sup> Depending on the injury, CAM therapies could provide a low-cost treatment to employees as opposed to expensive conventional care. Thus, expanded coverage for CAM therapies may reduce medical costs for employers.

#### *E. Proposals*

Increased coverage of alternative medicine under workers' compensation statutes can be implemented without handing over total control to the employee. First, fee schedules are commonly seen in workers' compensation statutes relating to the services of physicians, chiropractors, and other hospital care.<sup>123</sup> Using Colorado's statute as an example, which makes it “unlawful, void, and unenforceable [to] . . . charge any party for services, . . . which are or may be in excess of said fee schedule unless such

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<sup>117</sup> *Id.*

<sup>118</sup> *See id.*; *see generally* N.Y. C. R. Co. v. White, 243 U.S. 188, 203-04 (1917).

<sup>119</sup> *See Abbott, supra* note 101, at 45.

<sup>120</sup> *See id.*

<sup>121</sup> *See id.*

<sup>122</sup> *Id.* at 57-58 (“[T]herapies that may be considered cost-effective . . . acupuncture for migraine, manual therapy for neck pain, spa therapy for Parkinson's, . . . chemotherapy, pre-and post-operative oral nutritional supplementation for lower gastrointestinal tract surgery, . . . and guided imagery, relaxation therapy, and potassium-rich diet for cardiac patients”).

<sup>123</sup> *See* Colo. Rev. Stat. Ann. § 8-42-101 (West) (“The director shall establish a schedule fixing the fees for which all surgical, hospital, dental, nursing, vocational rehabilitation, and medical services, whether related to treatment or not, pertaining to injured employees under this section shall be compensated”).

charges are approved by the director,”<sup>124</sup> fee schedules could be used to minimize costs of CAM therapies. Fee schedules or maximum fee amounts could be implemented beyond chiropractors, to include the services of naturopathic doctors, acupuncturists, and other alternative medicine providers.

Alternatively, states could implement mandatory periods where employees are permitted to receive care from a provider of their choosing. In Pennsylvania, for example, employees are required to see an employer-provided physician for ninety days before seeing a physician of their choice.<sup>125</sup> Applying Pennsylvania’s statute in the reverse, an employee could see a physician of their choice, including alternative medicine providers, for a set period, such as ninety days. If the employee cannot show that their condition is improving from the alternative medical treatment, the employer could then require the employee to see a conventional medicine provider either in addition to or in replacement of the alternative medicine provider.

## VII. CONCLUSION

As complementary and alternative medicine becomes a new mainstream in the United States, the workers' compensation system cannot be exempt from this shift in society. Many injured workers have unsuccessfully sought alternative medical care under their state’s workers’ compensation programs. As the system currently stands there are numerous barriers to an injured worker’s access to care and little consideration for an employee’s autonomy to choose CAM treatments. Although the idea of a fully balanced system that benefits employees and employers equally may be unrealistic<sup>126</sup> injured workers, at a minimum, must be provided with the medical care of their choice, whether that be alternative medicine, conventional medicine, or both.

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<sup>124</sup> *Id.*

<sup>125</sup> *See* 77 Pa. Stat. Ann. § 531.

<sup>126</sup> *See* McCluskey, *supra* note 116, at 682.