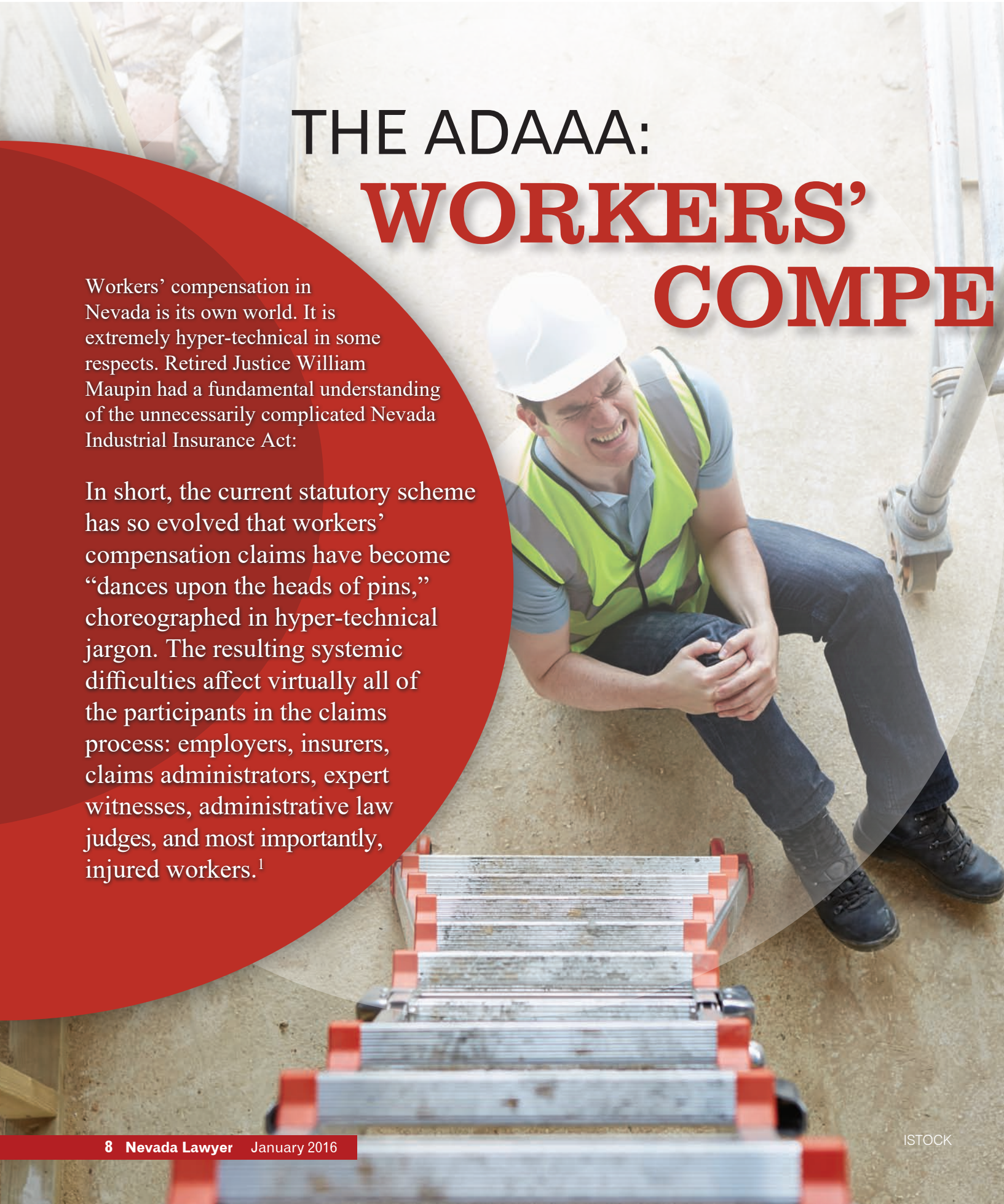
THE ADAAA: WORKERS' COMPE

Workers' compensation in Nevada is its own world. It is extremely hyper-technical in some respects. Retired Justice William Maupin had a fundamental understanding of the unnecessarily complicated Nevada Industrial Insurance Act:

In short, the current statutory scheme has so evolved that workers' compensation claims have become "dances upon the heads of pins," choreographed in hyper-technical jargon. The resulting systemic difficulties affect virtually all of the participants in the claims process: employers, insurers, claims administrators, expert witnesses, administrative law judges, and most importantly, injured workers.[1]



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BY J.P. KEMP, ESQ.

On top of this complicated system lie repercussions to the employment relationships of injured workers. The historical practices of some employers' treatment of injured workers have led to evolution in the law. Notably, the first recognized exception to the at-will employment doctrine in Nevada was in *Hanson v. Harrah's,*[2] where the Nevada Supreme Court recognized an action in tort against employers for firing a workers' compensation claimant in retaliation for the employee having pursued his rights under the Nevada Industrial Insurance Act.

However, what many employers seem to ignore or fail to realize is that, in addition to state law obligations regarding relationships with their injured employees, are their obligations under federal statutes, notably the Family and Medical Leave Act of 1993 and, the subject of this article, the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). This is workers' compensations' "blind side," and it presents challenges for attorneys who are advising employer-clients and opportunities for attorneys who are looking for avenues through which to protect employee-clients who have been injured on the job.[3]

First, some important limitations exist. Small employers having fewer than 15 employees are not covered under the ADAAA. However, it is important in a close case to follow the statutes and regulations in the counting of employees and to consider that some very large national employers may only have a small contingent of employees in Nevada; that could mean that the ADAAA would apply, but not state statute NRS 613.330. Further, while there may be other statutes or sources of law that might provide protection, these statutes do not apply to all employers, such as the federal government, Native American tribes and some non-profit organizations.[4] For purposes of this article, it is assumed that we are discussing a covered entity employer who must comply with the ADAAA and NRS 613.330.

Our focus is on the federal ADAAA and federal cases, because the Nevada Supreme Court expressly relies on federal court interpretations of federal anti-discrimination statutes in construing state anti-discrimination statutes such as NRS 613.330.[5] The remedies are, at present, more expansive under federal law; thus, whenever an issue of disability discrimination or retaliation arises, a plaintiff will likely rely on the ADAAA.

What many employers seem to ignore or fail to realize is that, in addition to state law obligations regarding relationships with their injured employees, are their obligations under federal statutes, notably the Family and Medical Leave Act of 1993 and, the subject of this article, the Americans with Disabilities Act Amendments Act of 2008 (ADAAA).

We also assume that a represented workers' compensation client has a disability under the definition contained in 42 U.S.C § 12102. This is a safe assumption under the ADAAA. A typical workers' compensation attorney's business model relies on earning a contingency fee from a Permanent Partial Disability (PPD) award under NRS 616C.490. If the attorney did not believe that the injured worker would eventually qualify for a PPD award, he or she would likely not take on the injured worker as a client. A person has a disability under 42 U.S.C § 12102 (1) where he or she has: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3)[6])." A major life activity under 42 U.S.C § 12102 (2) is as follows:

(2) Major life activities

(A) In general

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.

(B) Major bodily functions

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.

It's doubtful there exists a workers' compensation claimant who was awarded

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a PPD and yet did not have a disability substantially limiting one of the above listed major life activities. There is no bright-line definition in terms of severity or duration of the term substantially limiting in the statutes or the Equal Employment Opportunity Commission (EEOC) regulations adopted to aid in interpretation of the ADAAA. The basic guidance is in 42 C.F.R. § 1630.2(j), which states in part, at subparagraph ii the following:

> An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

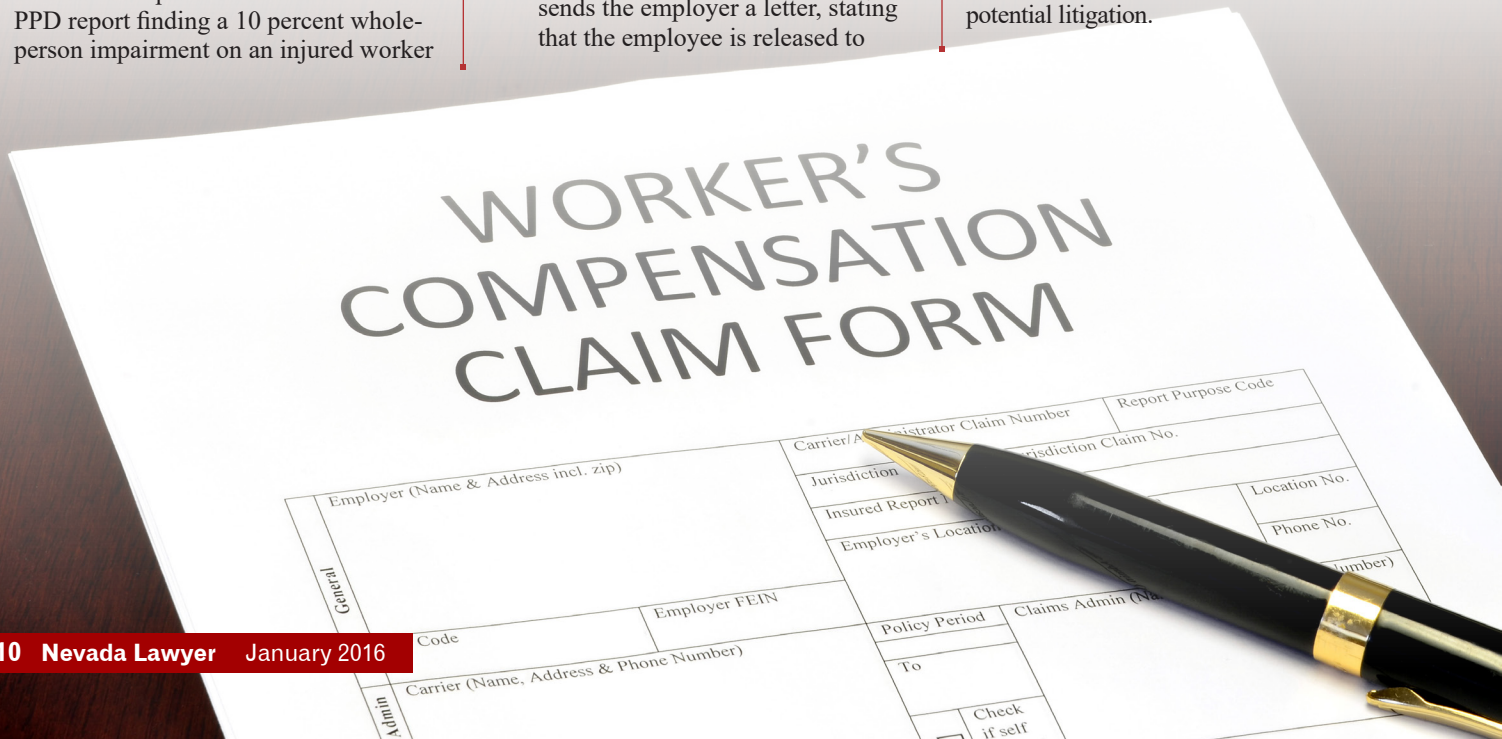
Further, the "record of" and "regarded as" prongs of the definition in 42 U.S.C § 12102 also apply to most workers' compensation claimants. A PPD report finding a 10 percent whole-person impairment on an injured worker who has undergone lumbar spine surgery has a record of impairment. So does an injured worker who had a back sprain/strain with a 5 percent PPD and a Functional Capacity Evaluation (FCE) showing a permanent 30-pound lifting restriction. Likewise an injured worker who has a PPD and a valid FCE showing an impairment who is not allowed to return to work by an employer unless the employee provides a medical release to 100 percent full duty is being "regarded as" disabled. In such a case the employer is committing a per se violation of the ADAAA, because the employer is not engaging in an interactive process to determine whether or not the employee can perform the essential functions of the job with a reasonable accommodation. The EEOC provides the following example of when an employer is on notice of a request for an accommodation that invokes its duty to engage in the interactive process toward a reasonable accommodation:

> **Example B:** An employee has been out of work for six months with a workers' compensation injury. The employee's doctor sends the employer a letter, stating that the employee is released to return to work, but with certain work restrictions. (Alternatively, the letter may state that the employee is released to return to a light duty position.) The letter constitutes a request for reasonable accommodation.[7]

Employers have a duty to engage in an interactive process with the injured worker to attempt to put that person back to work with a reasonable accommodation.

So, now we know that most workers' compensation claimants will have a disability under the ADAAA. We also know that employers have a duty to engage in an interactive process with the injured worker to attempt to put that person back to work with a reasonable accommodation. However, the injured worker will still need to be able to perform the essential functions of the job. This can be problematic for some positions in fields like construction and other types of heavy labor. In those cases, the injured worker may need to undergo retraining through vocational rehabilitation and truly change careers.

However, there are many cases where employers simply wash their hands of the injured employee without following the law with respect to the interactive process and reasonable accommodation. Such employers are setting themselves up to be blindsided by an EEOC charge and potential litigation.



Attorneys on both sides of the employment relationship should be aware that employers have duties under the ADAAA and should advise their clients about the potential for injured workers to enforce their rights under the act if they truly want to get back to their pre-injury job, or even another job with the pre-injury employer, as in some cases a transfer to another position can constitute a reasonable accommodation. **NL**

1. *Grover C. Dils Med. Ctr. v. Menditto*, 112 P. 3d 1093, 1103 (Nev 2005) (Maupin, J, Concurring).
2. 675 P.2d 394 (Nev. 1984).
3. In the interests of full disclosure, the author represents injured workers' and plaintiffs, so this article may reflect some bias.
4. NRS 613.310; 42 U.S.C. § 12111(5).
5. *Pope v. Motel 6*, 121 Nev. 307, 311 (2005).
6. 42 U.S.C. § 12102 **(3) Regarded as having such an impairment** for purposes of paragraph (1)(C):
   - **(A)** An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.
   - **(B)** Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.
7. http://www.eeoc.gov/policy/docs/accommodation.html Enforcement Guidance.

J.P. KEMP is Managing Partner of Kemp & Kemp, Attorneys at Law, representing employees in employment matters, workers' compensation and debtors in consumer bankruptcy cases. He is a 1988 graduate of Northern Arizona University with a B.S. in Broadcasting Management. He worked as a radio air personality until entering law school in 1994. He is a 1997 graduate of Quinnipiac University School of Law in Hamden, Connecticut. He is presently Chair of the State Bar of Nevada Labor and Employment Law Section.