



Shifting the Paradigm

In Workers' Compensation

DISCLAIMER

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What is a Paradigm?

- A standard, pattern, perspective, or set of ideas, a way of looking at something
- The source from which your attitude and behaviors flow
- Like a pair of glasses – affects everything you see

The background of the slide is a soft, blue-toned photograph of a misty landscape. In the foreground, there is a calm body of water reflecting the light. In the background, there are rolling hills or mountains, some of which are shrouded in a light mist or fog. The overall color palette is a range of blues, from light sky blue to deeper teal and green tones on the distant hills.

Paradigms of Old

Ancient History

- 2050 BC – Ancient Sumaria, “Law of Ur”
 - Allowed monetary compensation for specific injury to workers’ body parts
- 1750 BC – rewards for specific injuries and their implied permanent impairments

*All early compensation schemes consisted of some type of “schedules” meaning specific injury determined specific reward

Middle Ages/Feudalism

- Feudal lord determined what, if any, injuries garnered recompense
- Doctrine of noblese oblige – an honorable lord would care for his injured serf
- Often arbitrary

Early Industrial Revolution

- Late Middle Ages/Renaissance brought development English common law
- Provided legal framework – 3 Principles
 1. Contributory negligence
 2. “Fellow Servant Rule”
 3. Assumption of Risk

Contributory Negligence

- If worker in any way responsible for his injury, employer not at fault
- Martin vs Wabash Railroad - USA
 - Freight Conductor fell off his train
 - Inspectors blamed loose handrail
 - Conductor responsible to inspect train for faulty equipment on train
 - No compensation


“Fellow Servant Rule”

- Employer not liable if worker's injury resulted in any way from the action or negligence of a fellow worker
- Priestly v Fowler 1837 Great Britain – injured butcher boy (removed from law 1948)
- Farmwell v The Boston and Worcester Railroad Company 1842 USA

Assumption of Risk

- Employees know and assume inherent risks involved in job or at workplace
- If employee's own negligence contributed in any way to injury, barred from suing employer (even if employer also negligent)
- Usually formalized when employees forced to sign contracts
- “Workers’ Right to Die” or “Death Contracts”

Tragic Results

- Workers' only recourse – tort litigation
- Extraordinarily expensive - prohibitive to most workers
- Injured workers rarely successful against employer initially
- Eventually, few workers prevailed, slowly 



Beginnings of a Paradigm Shift

Progress in Prussia

- Marxism in Germany – political strategy maintain workers' loyalty by implementing social insurance
- Employers' Liability Law 1871 – limited protection, limited industries
- Workers' Accident Insurance in 1884 – first modern system of workers' compensation
- Public Pension Insurance – stipend for injured workers

Prussia to Great Britain

- Established “exclusive remedy” – injured workers could not sue employers in civil court
- 1880 Employer’s Liability Act – Great Britain
- Must prove employer negligence
- “Right to die” contracts still legal

Great Britain to ?

- 1897 The Workers' Compensation Act – Great Britain – only show injured on job
- Employers' Liability Acts 1906, 1908 USA - Only interstate trade workers
- USA slower - Labor regulation decentralized in USA

Finally to USA



- “Phossy Jaw” known condition, manufacturers wanted workers’ comp but only if uniform across states
- 1911 First comprehensive workers’ compensation law passed in Wisconsin
- 1948 Final state to adopt wc laws - Mississippi
- Dubbed “The Grand Bargain”

Resistance from Medicine

- Regulated physician fees included from beginning in USA
- Medical community feared attempts to “socialize medical profession”

Until . . .

Social Security Act

- 1935 creation of Social Security Insurance – insure those with non-work related injuries
-  need for physicians leads to  profits
- 1958-1970 AMA Guides to the Evaluation of Permanent Impairment



Our Current Paradigm

Are We Fulfilling the Grand Bargain?

The Good

- “No Fault” system
- Defined benefits
- Medical care generally available (some limits geographically and with specialists)
- Wage replacement laws
- Appeal rights required by law
- Legal representation (NAIW) available at no cost to injured employees (limited)

More of the Good

- Vocational rehabilitation
- Permanent Partial Disability awards
- Death benefits
- Lifetime claim reopening (NV)
- Employers transfer risk to insurers
- Decreased lawsuits for employers – budget expenditures, stay in business

The Bad

- Increased system complexity
- Injured employees expect the worst
- Employers Opting Out (nationally)
- Increased litigation – multiple issues
- Continued increases in medical costs
- Aging work force – shifting costs

. . . and the Ugly

- Communication - increased frustration in the electronic age
- Distrust and antagonism commonplace at all levels
- Competing voices all claiming to be the workers' advocate, but are they?



Shifting the Paradigm

Simple Truths

- Continuing to do the same things that once brought success, is not enough for continued success today
- Paradoxically, the more technology-driven communications become, the less effective we may be at communicating

What Are We Advocating?

Goals

- Return injured workers to work/productivity
 - “If injured employees are not returned to productivity, we’ve failed.” C. Luna
- Minimize disruption at work, home
 - ↑ availability of light duty
- Provide appropriate benefits timely

“Ungoals”

- Perpetuating the status quo of the workers' compensation industry itself
- Positive outcomes described primarily as cost savings – human beings are more than \$
- Validating only one's own perspective – inability to acknowledge value of others' views
- Personal gain at all costs = loss of integrity

Higher Level of Balance

- At a higher level of balance, everyone wins!
- Instead of antagonism, balance each other's perspectives
- How?
 - Listen
 - Validate
 - Move forward with overarching goal of returning injured employee to work/productivity

Balance as Employers

- Facilitate communication with injured employee (IE)/employer
 - Keep open channels of communication
 - Valued employee vs. you're not valued
- Protect investment in employee – rehiring and retraining is expensive
- Provide light-duty work when needed, keep injured employees invested in job

Balance as Employers

- Work with insurer/TPA – complete/submit forms timely
- Asking questions much better than avoiding issues
- Be wise regarding disciplinary or termination issues
- Document, document, document

Balance in Medical Treatment

- Health care providers essential drivers of care – what messages given to IEs?
- RTW essential component of return to life before injury/illness
- Medical Treatment Guidelines
 - Use ACOEM Guidelines - as a treatment (tx) guideline, maintains scientific base
 - May go beyond when medically necessary – not cookie cutter medicine

Balance in Medical Treatment

- Use Drug Formulary
 - Part of ACOEM Guidelines
 - Consider use of opiates carefully
 - Easiest way to avoid opioid dependence
 - ➡ avoid prescribing them in the first place
- Teach coping skills/reasonable expectations
 - Goal – heal acute injury, not no pain
 - Pain expected when injured, expect gradual ↓

Balance in Medical Treatment

- Address biopsychosocial issues
 - Return to work impediments
 - Delaying intervention → downward spiral
 - Recognize when IE not progressing
 - Invest in understanding “why” /ask IE
 - Throwing more tests/physical tx at a non-physical impediment likely not successful
 - Workers’ comp not a panacea – cannot “fix everything wrong”

Balance in PPD Evaluations

- Objectivity – no advocacy
- Apply Guides to Permanent Impairment consistently
- Don't work backwards!
- All PPD evaluations require D-35 submitted to DIR/WCS

Balance as Payers

- Communicate often and respectfully
 - Master the art of building rapport
 - Cooperation doesn't happen in a vacuum
- Utilize resources
 - ACOEM Guidelines including drug formulary
 - Know the NV Medical Fee Schedule (NMFS) – prior auth requirements
 - Notify out of state providers reimbursement per NMFS

Balance as Payers

- Address biopsychosocial issues
 - Return to work impediments may not be physical
 - Delaying intervention → downward spiral
 - ↓ trust – antagonism, fight to validate disability instead of working together toward overarching goal
 - Time alone may exacerbate biopsychosocial issues
 - Increases claim cost, diminishing returns

Balance Summary

- Consider overarching goals of obtaining appropriate benefits and returning IE to productivity
- Not everything that is permissible is beneficial
 - Investing in disability is poor investment indeed
- Cooperation preferred to antagonism – bullying unprofessional behavior inappropriate wherever it arises, decreases credibility



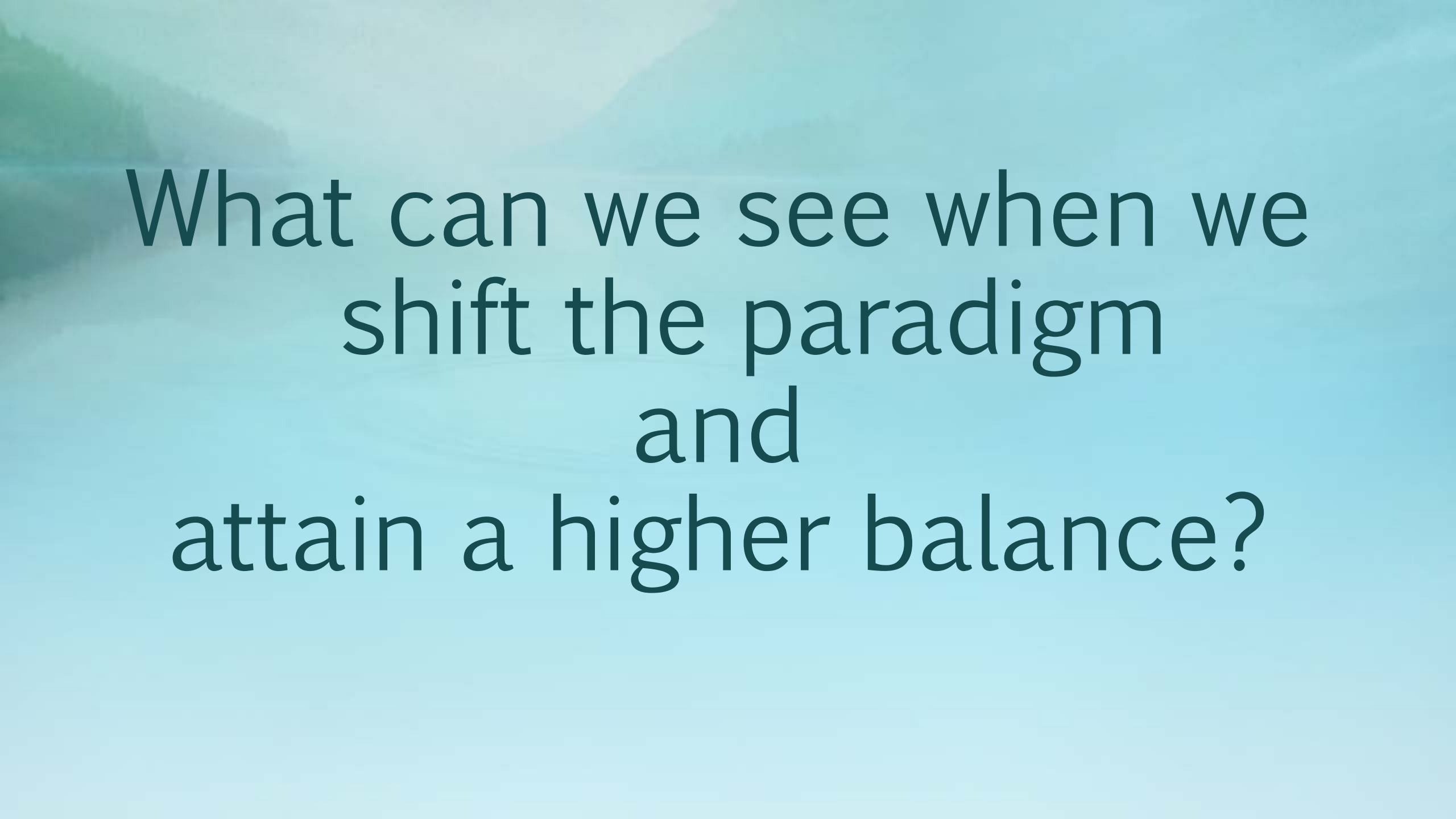
One beautiful view . . .



A scenic view of a lake with mountains in the background. The water is calm, reflecting the surrounding landscape. The mountains are covered in green vegetation, and the sky is a clear, pale blue. The overall atmosphere is peaceful and serene.

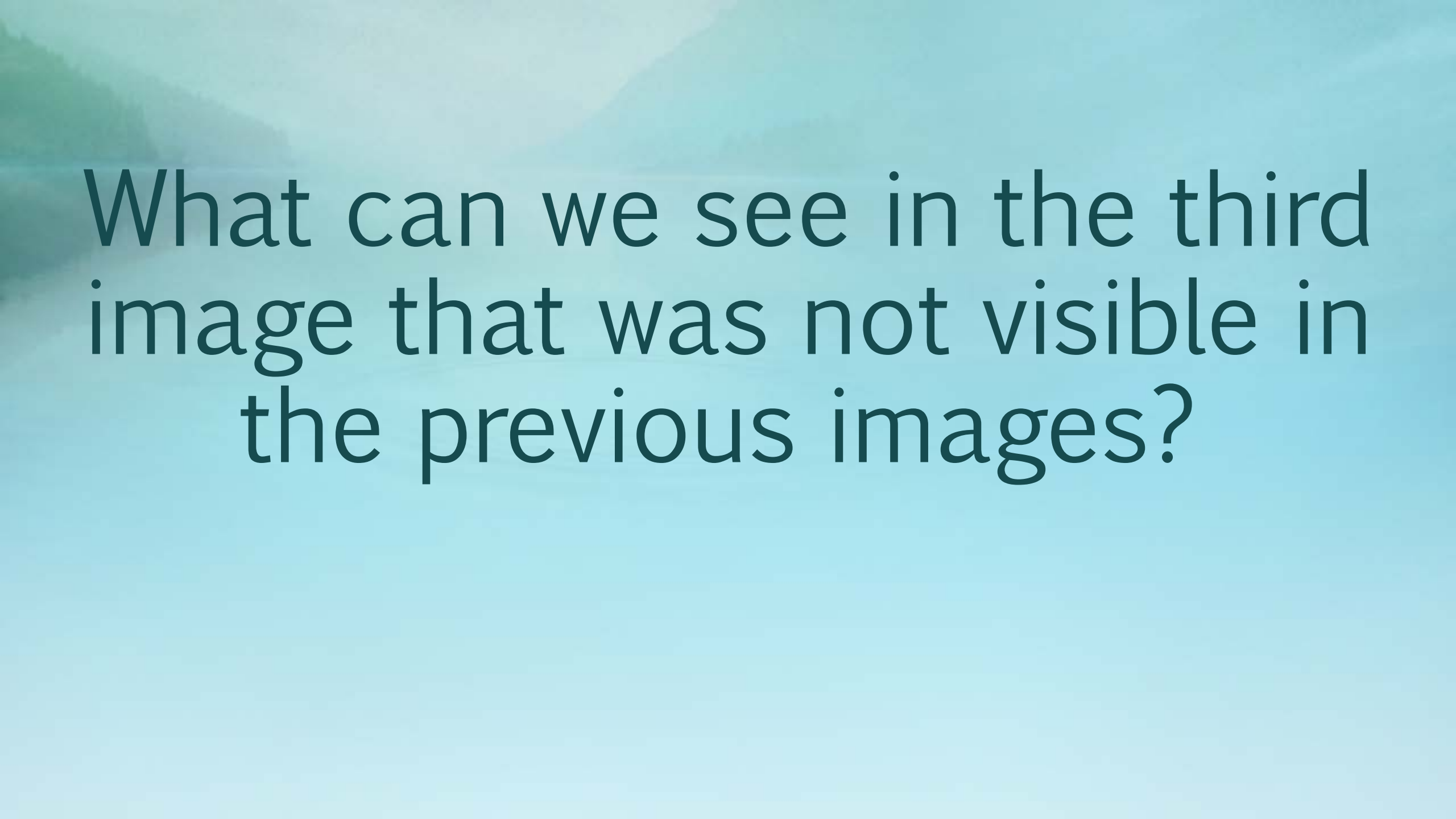
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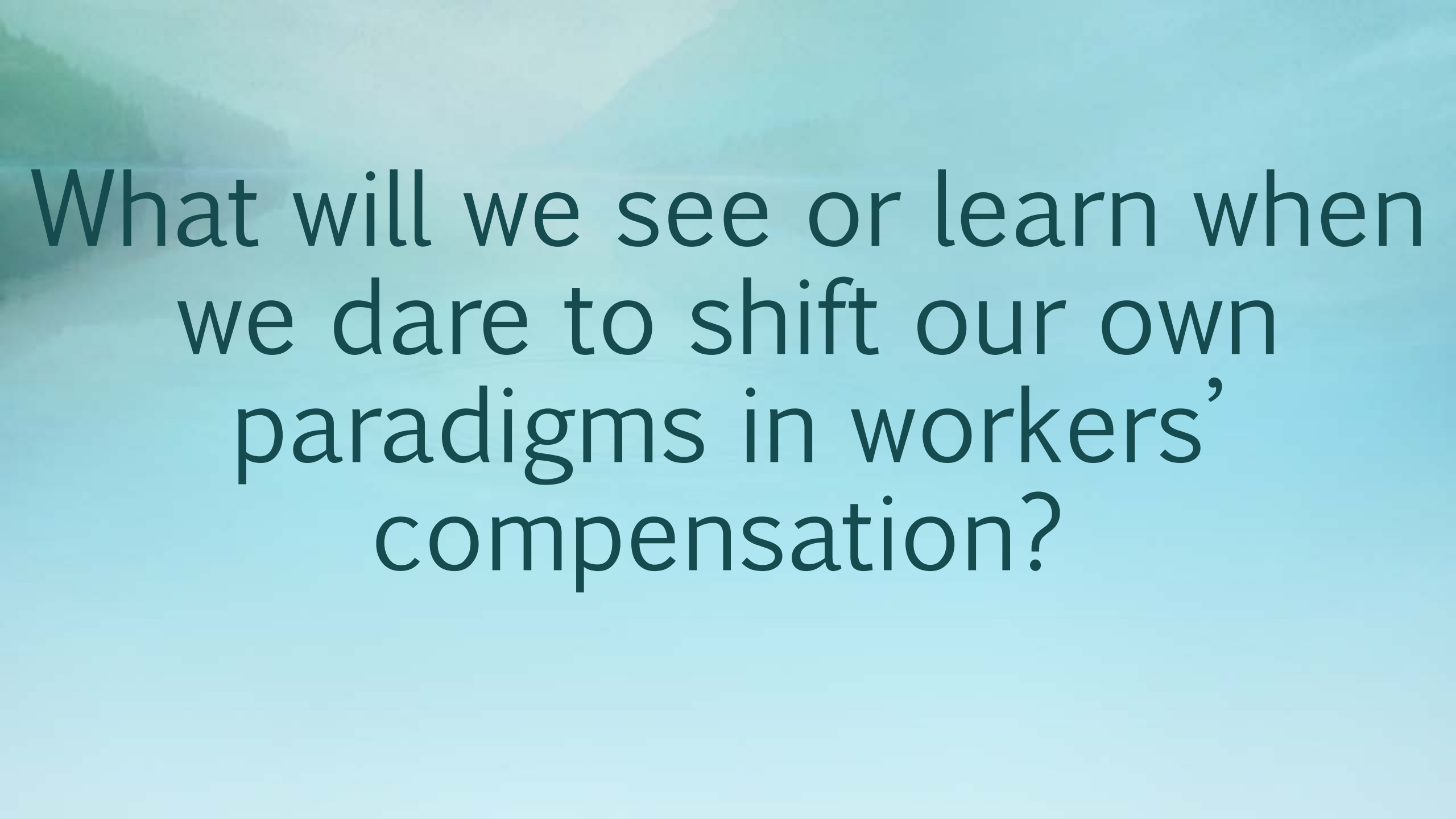


What can we see when we
shift the paradigm
and
attain a higher balance?





What can we see in the third image that was not visible in the previous images?



What will we see or learn when
we dare to shift our own
paradigms in workers'
compensation?