

Controlling Exposures in Workers' Compensation Litigation: Ten Areas of Consideration for Employers

By Michele R. Punturi, Esq.

In Pennsylvania, controlling exposure is the main focus in the workers' compensation claims and litigation process, and the process starts with knowing your workforce and your company's benefits and programs. It is imperative that this knowledge is effectively applied through strong communication, commitment, coordination, consistency and compliance. As in most types of litigation, there are certain legal issues that become most prominent and having a strong understanding of the facts, along with developing a strategy to address the issues, will prove most beneficial. It is also critical to continually assess exposure and conduct a cost-benefit analysis throughout this process to determine the degree of risk associated with every claim. There are ten key areas to focus on in claims handling that will presumably ensure success, including:

1. Maintaining and Documenting Personnel Files

Credibility and thoroughness are major factors in the workers' compensation arena, and therefore, the maintenance and proper documentation of employees' personnel files is imperative. In addition to standard identifying information, an employee's files should include: (1) any pre-employment physicals; (2) drug-testing results; (3) prior workers' compensation claims; and (4) all disciplinary actions. The employer who maintains accurate physical demand job descriptions, documentation regarding all benefits paid to the employee, accurate wage records, knowledge of an employee's co-morbidities, etc., is in a much better position to defend a claim should one arise.

2. A Well-Developed Return to Work Program

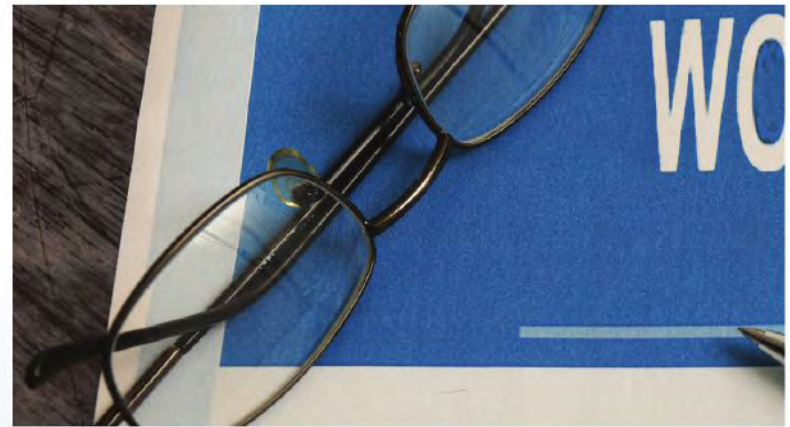
One of the biggest, yet most controllable, costs associated with workplace injuries and illnesses is lost time from work due to disability. The most effective way to have a favorable impact on these costs is to implement a Return to Work program. The major challenge for employers is getting employees released to return to work in some capacity by the treating physician and/or the IME physician, and then returning the employee back to work with a proper job offer. The best approach is a written job offer including:

- Verification that he or she is capable of returning to the workforce
- The occupational category to which he or she is released (sedentary/light/medium/heavy)
- Specific and accurate description of the job duties being made available with a formal job analysis attached
- Outline of the specific hours and salary and wages available for the position

- Contact person and phone number
- Date of return to work

3. Authorization for Medical Treatment

Under the Pennsylvania Workers' Compensation Act, employers have the right to control the medical treatment of an employee for a period of 90 days from the date of the first visit. This means that the employer has the option to establish a list of six healthcare providers — three shall be physicians and no more than four may be coordinated care organizations. This list must be posted in a prominent, readily accessible place at the workplace and the employer shall provide clear written notice to the injured employee of the employee's



rights and duties, and that that he or she understands these rights and duties by the employee's written acknowledgement. Should the employer fail to provide such notification, the employee shall remain liable for all vendor treatment. Written notice to the employee of the employee's rights and duties shall be provided at the time the employee is hired, and immediately after the injury or as soon as practicable under the circumstances of the injury.

4. Investigation and Reporting a Claim

The proper and timely investigation of a claim is critical given the often small window of time to gather the information to defend the claim. The employer's first step is to identify and train an investigative team. The training should emphasize timely reporting and accurately obtaining history of the alleged incident. It is imperative that the employer complies with reporting deadlines to the Department of Labor and Industry. Red flags to consider in the investigation and reporting of a claim include whether (1) the injured worker is disgruntled or on the verge

of being fired; (2) the accident is not reported promptly; (3) there are no witnesses to the incident in question; (4) discrepancies in the mechanism of injury; and (5) details of the accident are vague.

5. Forms and Proper Procedures

Pennsylvania is a form-intensive commonwealth. Timing is a critical factor for certain forms, and failure to adhere to the rules pertaining to the forms may negatively impact the claim and create exposure to potential penalties. The forms also provide avenues to obtain information from employees on a fairly regular basis. A few time-sensitive forms are: (1) Notice of Temporary Compensation Payable/Notice Stopping Temporary Compensation; (2) Notice of Workers' Compensation Denial; Notice of Compensation Payable; (3) Employee's Report of Wages/Verification of Employment, (4) Self-Employment or Change in Physical Condition/Notification of Suspension/Notification of Reinstatement; (5) Notice of Ability to Return to Work/Notification of Suspension or Modification Pursuant to Section 413(C)(D)/Insurer's Affidavit Pursuant to Section 413(C)(D); and (6) Utilization Review Request/Petition for Review of Utilization Review Determination.

6. Credits and Subrogation

The Pennsylvania Workers' Compensation Act provides various offsets against an employee's workers' compensation benefits. It is vital that employers communicate all offset situations so that the appropriate credit can be preserved. Some of the offsets include (1) Unemployment Compensation; (2) Social Security Retirement; (3) Sickness and Accident Payments; (4) Pension Benefits; and (5) Severance Payments.

With regard to subrogation, Section 319 of the Pennsylvania Workers' Compensation Act provides as follows: "Where the compensable injury is



caused, in whole or in part, by the act or omission of a third party, the employer shall be subrogated to the right of the employee, to the extent of the compensation payable under this article by the employer..." As such, subrogation rights are virtually absolute and immediate. There is no specific requirement to provide notice of a lien to the employee's attorney, the employee or a third-party, but it is recommended that lien letters be sent to periodically update the parties as to the amount of the lien, as well as monitoring of the third-party case. This section also gives a third party the right to recover benefits that were paid to the employee that are ultimately deemed to be related to the work injury.

7. Defenses and Mitigating Exposure

While the Pennsylvania Workers' Compensation Act enables employees to receive workers' compensation benefits, including medical and indemnity (wage loss), for injuries sustained while in the course and scope of employment, it also provides employers with avenues to control costs and limit exposure. These

pathways revolve around (1) the jurisdiction where the accident occurred; (2) determination of the employment relationship; (3) causal relationship; (4) notice of the injury; and (5) mechanism of the injury. There are exclusions to consider which are as follows:

- Self-inflicted injury or death
- Employee's violation of the law
- Employee's violation of a positive work order
- Personal animosity of a third party
- Injuries caused by intoxication

8. Controlling Medical Expenses

Under the Workers' Compensation Act, when a claim is accepted, the employer or insurer is to make payment of medical expenses within 30 days of receipt of the bills and corresponding report from the health care provider. In light of the financial exposure with respect to payment of medical expenses, it is critical to carefully and closely monitor the extent and nature of medical treatment, and constantly obtain any and all updated medical records. Employers should also consider independent medical examinations every six months with the appropriate expert(s) to evaluate the accepted injury.

9. Assess Exposure and Cost-Benefit Analysis

In defending a claim, it is always important to assess exposure, as well as litigation costs. A good approach is for the employer, claims professional and workers' compensation attorney to conduct a cost-benefit analysis regarding the defensibility of the case and other settlement considerations. If rapid resolution is desired, perhaps mediation should be considered. Open communication with all players provides an opportunity to resolve some issues, if not the whole claim.

10. Termination of Benefits

The employer bears the ultimate burden of terminating an employee's workers' compensation benefits either by proving the employee's disability has ceased or that any current disability arises from a cause unrelated to the employee's work injury. Such action requires several elements including (1) identifying the exact nature of the accepted injury; (2) a thorough review all prior IMEs and medical records; (3) securing strong medical evidence from the treating physician and an appropriate board-certified expert who performed a comprehensive physical examination; (4) reviewed records and diagnostic studies, and (5) an analysis of evidence supporting a lack of disability. At all times, in order to limit exposure, the employer should maintain contact with the employee, or, if represented, the employee's counsel, to continually assess exposure, medical status and case value.

For employers, the ultimate goal is to defend the workers' compensation claim to the fullest while at the same time maintaining costs at an appropriate level. Providing careful consideration to the 10 key areas above will be beneficial to maintain this balance between litigation and costs. At the onset of the claim, identifying all of the key players to carry out these tasks and roles is an important part of managing your claim. Conducting regular claims reviews will also serve as another method to ensure that opportunities are not missed, and that the claim is given the appropriate attention and care necessary to provide the best defense. ■

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