

Litigation: Deposing Adjusters Without a Basis

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Talk to any business owner and they will tell you that consumer spending power is down and insurance costs have gone up. According to the FBI Insurance Fraud Division, the estimated cost of insurance fraud that is not health insurance-related is approximately \$40 billion per year. The impact on the individual consumer is \$400 to \$700 per year in the form of increased premiums. Ask your average American family or small business owner if they could use that extra money in their bank account, and the answer would be a unanimous, "yes."

The Pennsylvania Workers' Compensation Act, which is akin to workers' compensation acts in other states, delineates specific rules and guidelines for employers and insurance carriers regarding the acceptance and denial of claims. These rules are specific and deliberate in guiding the players from the beginning of a claim. Since the inception of the act, the injured worker has had the burden in a claim petition to prove that he sustained a work injury in the course and scope of their employment. The injured worker must also establish the duration and extent of his disability. This is the cornerstone of the act. The claimant must prove by substantial competent evidence that an injury occurred or benefits should not be awarded. It is of the utmost importance for the claims professional to work together with counsel to make sure that the burden in these situations does not arbitrarily shift to the employer.

The Pennsylvania Workers' Compensation Act is remedial in nature, which means that it is slanted toward injured workers. Therefore, the carrier must thoroughly investigate all claims from the onset. This requires cooperation between the employer and the insurance adjuster. As soon as an employee is injured, the employer can assist

the adjuster by making witnesses available and by conducting a thorough internal investigation that can be used by the carrier in defense of the claim. Employers should take detailed witness statements, require incident reports be completed by the injured employee and be an active participant in the investigation process. When this is achieved, the employer is in the best possible position to defend the claim. This is the ultimate goal, as a properly denied claim can save thousands of dollars and prevent future fraudulent claims from being filed.

Once a claim is accepted by the insurance carrier, the claimant is entitled to ongoing benefits until altered by law. The act gives the claimant the upper hand here, in that his or her claim will continue to remain open unless and until the insurance carrier can present some evidence to alter its obligation to continue to be responsible. Generally, carriers are forced to enter into the litigation process to change or alter the employee's rights to ongoing benefits. Even when a carrier has obtained an opinion from a medical doctor that an injured worker has fully recovered, a claimant who obtains counsel can delay the suspension or termination of their benefits for years as the litigation process drags on. Meanwhile, the employer's insurance rating is increased, raising the cost of workers' compensation insurance for them in the future and straining their bottom line.

Subpoenaing adjusters to testify in the early stages of litigation of a claim petition is a new tactic recently introduced by the claimants' bar. By doing so, claimants' attorneys are improperly attempting to shift the burden of proof in a claim petition to the employer. Their goal is to plant seeds of doubt about the integrity of the adjuster who has denied the claim.

Since Pennsylvania requires that state forms be issued, this situation usually occurs when a claimant's attorney wants to interrogate an adjuster regarding the issuance of the requisite bureau forms. If a claimant's counsel is attempting to subpoena or call the insurance adjuster to testify, defense counsel should be very diligent in making the right arguments to prevent this from occurring.

First of all, if the testimony of the adjuster is being sought for questioning with regard to the timing of the issuance of the forms, or to make the argument that the correct forms were not used, the defense can enter the forms into evidence and argue to the judge that the date of the form and the language used on it are the best evidence to detail what occurred from the onset. In this instance, the adjuster as witness would only be identifying the forms, which obviates the need for that testimony.

Secondly, if the purpose of the adjuster's testimony is to explain the facts of how the injury occurred, the testimony of the adjuster is not relevant. Since the adjuster did not witness the event, a witness from the employer is the appropriate person to testify. Additionally, the adjuster is not the appropriate person to explain or comment on the employer's internal investigation or the veracity of the claimant's allegations regarding the specific injury. The adjuster simply takes the report of the claim from an employer representative and follows the directive of the act.

We would argue that the adjuster's testimony is not necessary when the documentary evidence speaks for itself. Deposing adjusters is being used as an intimidation factor and as a means of shifting the burden in an initial claim petition to the defendant. Deposing insurance adjusters for intimidation tactics should not be permitted as it flies against the legislature's strict guidelines

regarding the handling of workers' compensation claims in the state.

Of course, the claimant's bar does have recourse if it believes that the adjuster did not handle the claim correctly. The attorney may file a penalty petition in a situation where it is believed that a violation of the act has occurred. This is the appropriate path for the claimant's bar rather than launching an attack on the adjuster by issuing a subpoena when only a claim petition is pending.

In a penalty petition, the claimant maintains the burden of proving that a violation occurred. The testimony of an adjuster is more appropriate once a penalty has been filed; however, even in these situations we would argue that the documentary evidence will speak for itself and would actually be the best evidence. The claimant would be able to make an argument to the judge regarding any violations they allege by arguing from the documentary evidence, if necessary.

The defense bar should remain diligent and not allow the claimant's bar to subpoena adjusters in an attempt to shift the burden in claim petitions settings to the employer. The legislature wrote the act with a specific and deliberate purpose, and it is not within the purview of the claimant's bar to change that—the integrity of the system demands better.



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