



2021 Construction Conference

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New York Labor Law: Emerging Issues, Pitfalls and Strategies for Success

Summary

This panel will tackle head-on complex issues surrounding New York Labor Law claims, plaintiff strategies for maximizing value, jury trends and defusing large verdicts with sage practice pointers on how to address difficult claims and resolution strategies. Plaintiff's Strategies

We are seeing plaintiff's attorneys and their clients engage in new strategies that over the past several years has seen an increase in jury awards. In New York State, typically jurors are asked in all personal injury, including New York Labor Law matters, to render awards in six different areas including past pain and suffering, future pain and suffering, past loss of earnings, future loss of earnings and past medical expense and future medical care expenses.

A. Pain and Suffering

1. Increasing number of surgeries

We have been seeing a trend wherein plaintiffs have been increasing the number of surgeries they are having on matters in order to increase the potential severity of an accident and settlements and jury awards. This is most prevalent in matters wherein back injuries as a result of a construction site accident are alleged. We are now more increasingly and frequently, seeing back cases worked up more than ever in with numerous surgical procedures, frequent pain management and physical therapy treatments. The plaintiffs are medically working up these back injuries with more surgeries and treatment than ever before in an attempt to build up the values of these cases for settlement and jury awards if they proceed to trial.

We typically, see at the outset as plaintiff receiving cortisone injections as first line attempt to relieve plaintiff's back pain. After this initial "conservative" treatment, we now frequently see the plaintiff progress to a discectomy. This procedure is typically performed via surgery utilizing dilators and a microscope or endoscope. They will then frequently say this has not alleviated the plaintiff's pain and suffering and they need more invasive surgical procedures.

We are also seeing in our NY Labor Law matters increasing numbers of spinal decompression surgeries being performed. Many of the back injuries that occur in these Labor Law matters also involve allegations of nerve involvement. We frequently encounter allegations of a variety of symptoms, including pain, numbness, and muscle weakness. The more common decompressive procedures we frequently see in these matters include laminectomy and foraminotomy. Many times, we will also see a combination of all these procedures by skilled back surgeons, with an eye towards maximizing jury verdicts and making plaintiff is more sympathetic to juries.

The most significant injury and most frequent surgical procedure (as well as highest jury awards and settlements) that we encounter in back injuries are fusions. We frequently see them being performed on plaintiffs in the lumbar and cervical region of the injured claimant. This surgery is typically performed from screws and rods are placed between two or more vertebral levels. The intervertebral disc is removed, and a cage filled with bone is placed in that void with the goal of stabilizing the levels affected. The purpose of the surgery is supposed to be to alleviate pain and stabilize the affected area. Plaintiff attorneys though, frequently try to explain to juries that this procedure is rife with risk, did not turn out as expected and will leave the plaintiff facing an agonizing rest of life, with an inability to move and a need for frequent medication and potentially even more future surgical procedures.

In 2019, according to VerdictSearch the average back neck verdict in New York was \$6,828,765. That is why it is important that risk managers, claims professionals, and counsel all understand the back, surgeries for the back, and methods to potentially defend these matters if they proceed to trial.

Of interest and to help better defend these matters it is important to understand how prevalent these procedures are. According to the Healthcare Cost and Utilization Project (HCUP) 2008 Report there were 413,171 spinal surgeries performed in the United States in 2008. A good understanding of how prevalent these procedures are can help as matters proceed to trial in helping educate juries of them well established and common procedures to help individuals reduce pain and lead productive lives after a construction site accident. The plaintiff's bar is very good at trying to show juries these are rare, life altering, and have many bad outcomes. It is our job to show they are common, have low associated risks, and have typically very good surgical outcomes with low rates of lingering problems after the surgeries are completed.

2. The increased inclusion of TBI as a value driver

We have also seen the sudden proliferation of TBI (Traumatic Brain Injuries) in NY Labor Law matters. These injuries are being thrown in much more frequently than the past and plaintiffs are retaining skilled experts that can make compelling cases of permanency that are requiring us to have much deeper understanding of these injuries.

As with back injuries, we think it is important to understand what TBI is and what the frequency of it is in the United States. According to the U.S. Centers for Disease Control and Prevention Traumatic brain injury (TBI) is a major cause of death and disability in the United States. From 2006 to 2014, the number of TBI-related emergency department visits, hospitalizations, and deaths increased by 53%. In 2014, an average of 155 people in the United States died each day from injuries that include a TBI.

Plaintiffs are more frequently alleging in their Labor Law matters that their clients have significant effects of TBI that almost always includes impairments related to thinking or memory, movement, sensation (e.g., vision or hearing), or emotional functioning (e.g., personality changes, depression). These issues can significantly impact jury verdicts. According to VerdictSearch in 2019 the average TBI/ Brain related verdict in NY Labor Law matters was \$27, 362, 442. These clearly have become the most dangerous and highest value claims that are being made and require a vigorous defense that includes a good understanding and defense of these matters.

It is important that in the defense of these matters, you enlist the proper experts, testing, and strategy to defend these matters. Additionally, it is important to read and educate oneself on the tests, symptomology, causation and long-term prognosis and treatment of these matters. This area is where the plaintiffs are heavily emphasizing and what is leading the onslaught of large verdicts in the New York Labor Law arena.

B. Loss of Earnings Claims

1. Experts pushing more borderline cases to being never able to return to work

When many of us started handling NY Labor Law matters, vocational rehabilitation specialists were being utilized on mainly the most significant of matters. We are now seeing loss of earnings claims and the use of vocational assessments and experts in almost every matter. It is extremely rare to see a Labor Law matter that does not have a claim for past and future lost wages attached to it.

The other driver to this occurring now on almost every matter is that also the benefits and wages that construction workers make in NY are extremely high, and they add extremely large amounts that need to be properly evaluated and defended in these

types of matters. In New York, many union workers have benefit and wage packages that exceed \$150,000 and are approaching \$200,000 per year. These can add several million dollars to a potential settlement and much more if juries award these damages.

We are also seeing an increasing number of claimants being found permanently and totally disabled and receiving Social Security Disability payments by the time the matter is proceeding to mediation or trial. This finding does have significant sway over Judges and mediators and many times it is used to almost rubber stamp a past and future earnings claim, as they will remind us of this in order to stress the claimant should recover for these alleged damages.

2. Vocational rehabilitation specialists administering more tests to delineate to decreased vocational aptitude of claimants.

In order to sell these loss of earnings claims to jury the plaintiff rely upon many tests that are administered by plaintiff's designated experts in matters. Almost every one of these tests are very subjective tests and largely rely upon the truthfulness and effort of the claimant in order to assess the scope of injuries sustained and employment capabilities of the claimant.

There are several areas that are frequently tested in our litigated matters. Vocational evaluation tests are used to integrate standardized test data from measures of ability, personality, and interest. The most frequently employed test of this ability being measured in occupational assessment is the Vocational Aptitude Battery. Tests that we also frequently see in litigated matters include the Bennett Mechanical Comprehension Test, the Career Ability Placement Survey (CAPS), Differential Aptitude Test (DAT), the General Aptitude Test Battery (GATB), The Wonderlic Personnel Test , The Minnesota Clerical Test (MCT), the Wechsler Adult Intelligence Scale, Wide Range Achievement Test-Revision3 – The Wide Range Achievement Test-Revision3 (WRAT-R3), Peabody Individual Achievement Test-Revised – The Peabody Individual Achievement Test-Revised (PIAT-R), Kaufman Brief Intelligence Test (K-Bit), General Ability Measure for Adults (GAMA), Slosson Intelligence Test, and the Wechsler Adult Intelligence Scale-III - (WAIS-III).

The plaintiff's vocational experts are very adept and skilled at selecting tests to be administered to claimants that they will use to show that workers are not able to return to work in meaningful employment at pre-accident levels due to lack of education, intelligence, or psychological aptitude due to a vast myriad of reasons. It is important the claims professionals and the attorneys defending these matters select experts that can help them properly defend the matters by explaining to them the biases in each of the respective tests and try to administer tests that truly reflect the post-accident capabilities of the claimants.

It is also important to note what languages these tests are and can be administered in. Some of them come in limited language formats. We have seen some less than truthful experts attempt to render testing understanding the claimant will perform very poorly on the test if not given in their primary language, and they deliberately do so in order to build up the claimant's potential future loss of earnings claim.

The plaintiffs will also frequently try to deploy market analysis or review of available jobs showing that there are no jobs available in the competitive workplace that would allow for hiring the plaintiff either with or without occupational training. The defendants need to be aware of this and utilize experts that realistically select jobs and fields that the claimants can work in. There is nothing worse than selecting a job that a jury does not believe that a claimant can work in. This is a factor that can lead to a lack of jury credibility and can be a factor in high jury verdict awards.

C. Life Care Plans

1. Increased claim for future home health aides

Historically, claims for future home health aides were reserved for the largest of cases. We are now also seeing plaintiffs seeking future costs for home health aides ten to twenty years in the future as a potential cost and request to a jury to award claimants in New York Labor Law matters. Plaintiff's doctors frequently will say they believe they are necessary with "a reasonable degree of medical certainty", thereby allowing it to proceed to a jury.

It is important to defend these matters and claims by showing and developing evidence the plaintiff can achieve all their Activities of Daily Living (ADL). Almost every organization and expert agree that the Activities of Daily Living are typically found to be: 1. Personal hygiene, bathing/showering, grooming; 2. Dressing - the ability to physically dress/undress oneself; 3. Eating - the ability to feed oneself; 4. Maintaining continence - the capacity to use a restroom; 5. Transferring/Mobility- moving oneself from seated to standing, getting in and out of bed, and the ability to walk from one location to another. If this can be shown, it is typically quite illuminating to juries and can successfully lead to them not believing this claim and awarding monies for this component of life care plans.

2. Increased pricing for life plan components

Health care costs have been rapidly rising over the past 25 years. Most every chart has shown that for over 50 years the annual rise in health care costs have outpaced inflation. Plaintiff economic experts will proudly recite these facts and figures for juries and utilize them to predict that future medical costs for plaintiffs will be astronomical. New York is one of the few states that allows this data to be presented and determined by a jury. This is another one of the reasons of increasing jury awards.

It is important that defense attorneys understand the numbers and can show that since ACA has been enacted health care costs have been increasing more slowly than they had over the preceding 40 years. Additionally, they will go through the different medical cost indexes to contrast the inflationary percentages by type of treatment in order to try to undermine the credibility of plaintiff's expert. It is critical that a life care planner and economist be enlisted to help adequately prepare for the cross examination of plaintiff's experts in these areas. Careful analysis can illustrate hundreds of thousands of dollar discrepancies in the amounts being claimed to the juries.

II. Defusing and Defending Complex Claims

A. Proper Investigation

1. Comprehensive criminal searches and procurement of certificates and records

It is important that in a good investigation that your investigator performs a comprehensive criminal search of claimants in NY Labor Law matters. Many claimants have criminal convictions that when properly utilized can significantly reduce settlement values of a matter and if it is the right type of criminal conviction, it will potentially reduce the amount a jury will award to a claimant at trial.

Notably, New York differs from the federal standard, in that pursuant to the NY CPLR, it freely allows for the introduction of criminal convictions for crimes committed by plaintiffs in civil matters. A crime is defined as a misdemeanor or a felony. It is important to make sure that your investigator procures certified certificates of conviction for any criminal conviction so that it can be entered into the record at a trial.

2. Use of algorithmic social media searches to pinpoint what the plaintiff is up to and determine if there is loss of enjoyment of life

Investigators are utilizing more sophisticated social media searches than ever before. It is important to perform these important searches several times throughout the pendency of every NY Labor Law matter. These searches can show plaintiff engaging in life and activities that undermine their claims that the injuries sustained in the matter have caused them grievous harm and prevents them from having any decent quality of life.

As a practical matter best practice would be to have social media searches at the outset of the matter, prior to the deposition of the matter, and at the latter stages of the matter such as prior to mediation and definitely prior to the onset of trial.

3. Rapid Response Team deployment to investigate and defend liability.

New York and in particular, New York City has the greatest number of active construction projects globally. In handling of New York Labor Law matters it is important that Rapid Response Teams (RRT) are created and able to be deployed for construction and insurance companies. Many of these rapid response teams include investigators, attorneys, liability experts, public relations companies and potentially other relevant experts that can become involved into matters on a moment's notice to help investigate and handle accidents that occur in New York.

The ability of these teams to rapidly deploy can help immediate investigation of an accident which can help immediately understand the cause and severity of injuries. They also allow for the proper preservation of evidence, statements of witnesses and photographs of accident scenes. Additionally, with an ever-present media in NYC, the need for savvy media professionals can also help shape public perception and eventual outcomes of matters.

B. Designation of the right experts for the matter

The sophisticated plaintiff's bar utilizes many experts in order to properly work up there NY Labor Law matters and put them on a pathway for large settlements and jury verdicts. The typical NY Labor Law matter now routinely sees the plaintiff's use the following experts on most significant matters: orthopedist, neurologist, radiologist, liability expert, vocational rehabilitation specialist, life care planner, and economist.

It is important in the defense of these matters that risk managers, claims professionals, and attorneys all understand the typical experts involved and that from the onset of matter handling there is preparation for the retention of experts to help defend the matter and to help in the mission to defend liability and damages to achieve a favorable outcome in the handling of the matter.

III. Labor Law in Post-Pandemic world

A. Mediations: Trends and tips to procure favorable settlements

Since the Pandemic has occurred, we have seen the beginning of a new era with regards to ADR. We are now seeing virtual mediations that we have never really seen or encountered before. We are utilizing different programs in order to set up mediations in virtual worlds. Moving forward it will be seen if this is the way of the future in conducting which had historically been an in-person process.

This presents a new challenge to all parties involved and it will be seen if it changes outcomes and mores in the litigation process for the handling of New York Labor Law matters.

B. Trials: How we think it will look in NY State Courts

Currently, NYS courts are not conducting trials. There does not appear to be any indication that jury trials as we have known them throughout our careers will be starting until late in the year. There is starting to be discussions as to what the future of trials will be, and will they drastically differ from what we have known.

As of writing this several courts in the United States are working on conducting virtual trials. Courts are contemplating how virtual trials will look, jurors will be assembled and how trials will be conducted in order to produce fair and just outcomes that the U.S. legal system is known for.

Virtual trials will potentially be the newest frontier of lawyering and with it there will be challenges that will require defense attorneys to adapt new strategies to present matters in a virtual world.