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Top 10 Tips for Defending Workers' Compensation Claims

I. Multi-jurisdictional Claims, Natural Selection, and Safe Releases

When handling a claim, a primary matter that must be considered is the jurisdiction where the claim could be litigated. Although this issue normally rests with the Claimant, the employer and the carrier / TPA may argue against the Claimant/Plaintiff's choice of jurisdiction. Those considerations that must be contemplated when determining the proper jurisdiction include: (1) Employers benefit from opening their claim in whichever state has the most Employer friendly statute; (2) ethical considerations and potential conflicts between the employer and carrier / TPA; and (3) some Judges will use the "WALSH" test to determine the proper venue for the claim to be brought. This may be worth litigating if one of the plausible venues is a Carrier-oriented state such as Texas.

Under the "WALSH" test, Courts will analyze the following: Worked—what state did the Claimant work in predominantly? Accident—in which state did the accident occur? Lives—in which state does the Claimant reside? Salary—where is the corporate office that issues the Claimant's paychecks? Hiring—where was the contact of hire entered into?

Also relevant is ensuring that the release of claims is properly drafted. Ensuring that the release of claims has the correct language to prevent the Claimant from re-litigating the matter in a different forum or for a separate mechanism of injury that relates to the original cause of action will save the employer and the carrier / TPA time and money.

II. Claimant Lawyer Tricks: Mill law firms and the wolf in sheep's clothing

- Behind the scenes coaching prior to filing an appearance.
- Hidden pleadings.

As attorneys, we all seek to obtain any legal and ethical advantage available to further the interests of our clients. Unfortunately, some efforts by Claimant's counsel has gone beyond

this principle that although legal, may not be considered ethical. For example, often when common vacation times such as the holidays come around, Claimant's attorneys will file their requests for one-time change of physician. And when these requests are made, they are either sent to counsel's assistant, paralegal, associate, or other individual that may not be as well versed in Workers' Compensation law to determine what must be done to comply with or respond to the request for a one-time change. That said, it is incumbent upon partners, business owners, and the like to educate their subordinates and their staff on what to look for when Claimant's attorneys submit a request for a one-time change and to otherwise educate their subordinates and their staff on what tricks opposing counsel may use to gain an advantage.

- Improper contacts with adjusters on represented Claimants.

- "Special" relationships with Claimant oriented providers.

III. Doctors—Attorney relationships with medical providers.

Knowing the conservative physicians in your state is a vital part of defending Workers' Compensation claims. However, you may not always want to go with the most conservative physician in the Claimant's area. The Judges are generally aware of which doctors are Carrier or Claimant friendly. Knowing thy doctor is as key as the old adage of knowing thy Judge. Doctors, like Judges, and attorneys, have a reputation in the community for their work. As some are liberal in providing permanent impairment ratings or recommending surgery, others are more conservative in their recommendations and medical conclusions. That said, it is wise to always consider which doctors a Claimant is sent to when litigating a case. The right opinion could change the outcome of a case.

- Panels.

Choosing the right providers and that have an effect on exposure consists of reviewing a doctor's history and reputation in the community. For example, say that the case before you consists of a Claimant who injured his lumbar spine and claims to have experienced trouble with conservative treatment and is now seeking surgery. As the employer and the carrier / TPA, it may be prudent to schedule that Claimant with a conservative doctor who will determine if there are any other alternative treating methods before recommending a lumbar fusion surgery. Alternatively, for example, if a Claimant suffered a recent injury, begins treating with a doctor who liberally recommends surgical procedures, and the Claimant obtains a surgical recommendation without extensive medical evidence to support same, then it may be wise for the employer and the carrier / TPA to order an IME with a conservative treating doctor to supplement and compare with the liberal doctor's opinion.

IV. Docks—Don't Forget about the Longshore Act

Any employee whose job is in "navigable waters" is not covered by Florida Workers' Compensation, and would instead be covered by the Longshore and Harbor Act, 33 U.S.C.A. § 901. To be covered under the Longshore Act, the Claimant must meet a three prong test, which is very similar to Florida's arising out of and in the course and scope of employment test. The test analyzes: (1) Situs—where the accident happened (acceptable locations include navigable waters, piers, wharfs, docks, marine railway, etc.); (2) status—what the Claimant was doing at the time of the accident; and (3) employment—whether the Claimant's job was maritime in nature. If the case meets the three prongs above, then the Longshore Harbor Act applies, which may alter the strategy and outcome of a given litigation.

V. Drugs—Opiates, Xanax, Weed oh my!

Avoiding long term opiates to treat chronic pain should be an aim of every doctor when treating a Claimant's injuries. Unfortunately, some medications, although helpful, could lead to addiction and drug abuse if not properly managed. Choosing the right provider who is able to ascertain the Claimant's proclivity to addiction, if any, and their discipline to ensure proper use of the medications is vital. However, there are new treatments that are being used more often and are proving to be as effective, if not more effective, than current medications.

Medical marijuana is a new arena for Workers' Compensation. Cases involving the relationship between medical marijuana and Workers' Compensation are just starting to come out of the Courts. One of the first cases to deal with this issue was Cockrell v. Farmers Insurance and Liberty Mutual Insurance Company, 2012 Cal. Wrk. Comp. P.D. LEXIS 456. An injured worker suffered an industrial injury to his low back, right elbow, and heart. The workers' compensation judge awarded reimbursement to the applicant for the cost of the marijuana. The Workers' Compensation Appeals Board reversed the Judge's order since the Health and Safety Code, stated "nothing in this article shall require a governmental, private, or any other health insurance provider or health care service plan to be liable for any claim for reimbursement for the medical use of marijuana."

By extension, Florida's medical marijuana statute makes it abundantly clear that Carrier's will not be responsible for reimbursement of medical marijuana. "Marijuana, as defined in this section, is not reimbursable under chapter 440." Fla. Stat. § 381.986(15). This makes it impossible for Claimant's to request reimbursement of their medical marijuana from their Workers' Compensation Carrier.

However, it is likely that as medical marijuana becomes legalized throughout the United States, more Courts interpret the applicable laws, and more doctors begin prescribing medical marijuana as a treatment for the conditions of their patients, the law may change in this area to require medical marijuana treatments to be reimbursable under Workers' Compensation law.

- DeTox issues.

- Doctor shopping / EFORCE.

VI. Subrogation—Show me the Money

- Effect of subrogation on settlements.

- Some statutes allow independent right of action.

- Future offsets.

The Florida Supreme Court declared that Carriers may recover a percentage of its Workers' Compensation lien from the tortfeasor. *Manfredo v. Employer's Ca. Ins. Co.*, 560 So.2d 1162 (Fla. 1990) operates to limit what the Carrier can recover from its Workers' Compensation lien from the tortfeasor for the industrial accident based on the percentage that the Claimant recovered for the full value of the Claimant's claim. The *Manfredo* Court set forth the following calculation to determine the monetary amount for which the Carrier can recover from their Workers' Compensation lien as to the proceeds of any third-party claim that arises out of the same accident. Generally, the Carrier will recover approximately 10% of the settlement proceeds of the from the third party claim using the formula illustrated below:

$$The\ \%\ Value\ of\ the\ WC\ Lien = \frac{Third\ Party\ Settlement - (Attorney's\ Fees + Costs)}{Value\ of\ Entire\ Case}$$

For example, in *Manfredo*, the Court determined that the full value of the Claimant's claim was $1,500,000.00. The Claimant's actual recovery was $900,000.00. After subtracting the attorney's fees and costs of the Claimant's attorney, amounting to $409,500.00, the Claimant's net recovery was $490,500.00. The Court in *Manfredo* then took the $490,500.00, the Claimant's actual recovery, and divided it by $1,500,000.00, the full value of the Claimant's claim. The resulting number was 0.327 or 32.7%. The Court held that the Carrier could recover only 32.7% of what it had already paid. And in addition, the Court held that the Carrier could reduce future benefits by 32.7%.

An issue arises, however, when there is no verdict issued by a Court to determine the full value of the Claimant's damages and the third-party claim is settled before the trier of fact determines the "full value" of the Claimant's damages.

Under section 440.39(3)(b), Fla. Stat., the JCC has no jurisdiction to resolve a dispute over a third-party tortfeasor's lien. Instead, the parties must go before a circuit court of competent jurisdiction to adjudicate the matter. *Id*.; *see also University of Cent. Florida v. Gleaves*, 586 So.2d 458, 459 (Fla. 1st DCA 1991). Also, should the matter be litigated, the parties should be prepared with expert testimony about the value of the claim. Under *Arone v. Sherwood*, 561 So.2d 1269, 1271 (Fla. 4th DCA 1990), the Claimant's attorney qualifies as an expert witness to testify as to the full value of the Claimant's claim and such testimony qualifies as competent substantial evidence, which the Court may consider as dispositive to decide the issue. *See also American States Ins. Co. v. Rozier*, 450 So.2d 547 (Fla. 4th DCA 1984). Therefore,

the Carrier may have to consider hiring its own expert witness to support its argument in determination of the full value of the Claimant's claim.

VII. Continuity of Adjuster and the Impact on Claim Exposure

Changing adjusters can cause multiple issues, especially depending on the timing of the change. For example, suppose that a new adjuster is assigned to a claim and notice is immediately sent out to the Claimant and their attorney. In response, the Claimant carefully submits a request for a one-time change. And because the adjuster is busy reviewing the claim file, the adjuster misses the one-time change request, despite being reminded by counsel, and fails to honor the request within the requisite time window. As a result, the Claimant becomes entitled to fees and obtains the right to choose the new doctor. This increases the Carrier's exposure and prolongs the claim.

Also, no matter how experienced an adjuster may be, getting up to speed on a catastrophic claim is a difficult task. Changing adjusters could also lead to missed PFB responses and lead to increased attorney's fees. However, regardless of how many times the adjuster changes, it is wise to always treat the adjuster with respect, kindness, and empathy. The adjuster is our partner when working on a case and they will always provide us with the necessary information to litigate our cases and if we are successful, to refer future business.

To assist the adjuster with their transition when coming onto a claim, it would be prudent for counsel to consider having a summary of the claim that is consistently updated as new information for the claim arises. For example, when the claim file is received and counsel drafts its initial evaluation of the claim, it would be prudent for counsel to consistently update that evaluation when new medical records or indemnity records are received. Then, reduce this evaluation to its main points for a concise summary. Having such a summary on file will assist not only the adjuster when getting up to speed on a claim but also the attorneys in defense counsel's office will be able to more quickly ascertain the latest developments in a case or learn the main points of the case if they have been newly assigned to it.

VIII. MSAs—To submit or not to submit, that is the question?

- Generally, we should only consider submission of an MSA for approval under two scenarios:
    - The Claimant is 65 or older and the settlement is more than $25,000 inclusive of attorney's fees and costs.
    - The Claimant is 62.5 years old and the settlement is more than $250,000 inclusive of fees and costs.
- The MSA reduction strategies.
- Movement toward non-submission.

IX. Defense Fees

Defense fees, like all other areas of exposure need to be taken into consideration when deciding how to handle a claim. However, sometimes the Carrier or the Insured may want to litigate a claim in order to show they are willing to fight frivolous or fraudulent claims. For example, suppose the Carrier has settled scores of claims in the past quarter that it should have denied but because it wished to simply close the claims, it settled each of them. As a result, Claimant's attorneys were able to collect their fees with doing much less work than they anticipated. And then this Carrier's reputation begins to become that even when a claim lacks sufficient merit to be litigated, it is worth filing anyway against this Carrier because they have shown a history of settling.

Should this reputation fester, it may cause the Carrier to receive an influx of similar claims from Claimants and their attorneys believing that they will be able to recovery monies that they normally would not be entitled to. To combat this, and ultimately prevent same from happening, it would be prudent to litigate a case, or cases, such as this to preclude such a reputation from forming. A Carrier should not roll over simply because it has too many claims or because it simply wishes to close a claim quickly—doing so would set the incorrect precedent. That said, it would be wise to consider whether litigating a matter, even when it may be costly to do so, would help show that the Carrier does not roll over on claims.

However, even when litigating to set a precedent, it is still prudent to consider the defense fees that may be spent to do so. For example, suppose that there is authority to settle a case for $10,000.00 and at a state mediation the Claimant demands same. But suppose that the claims representative would prefer to settle the claim for $5,000.00. You tell the claims representative that the $10,000.00 is the Claimant's bottom line. You offer $5,000.00. However, the Claimant denies your offer and walks away from the negotiation. And because the parties are at an impasse, the case does not settle and litigation continues.

At this point in the case, it is likely that the Carrier has already expended several thousand dollars in attorney's fees. And because the parties could not agree on a number to settle the case, the Carrier will now have to spend several thousand dollars more to continue fighting the case. The lesson is that it may be wiser to counsel the claims representative that spending a few thousand more to settle the claim now, instead of spending more money later to settle the claim at a more preferable number, ultimately saves the Carrier more money.

X. Adjuster Ethics—Be alert, be smart, and have a loving heart

It is imperative to maintain professional and ethical standards when communicating with any individual or legal entity, such as the JCC or their JA. However, it is of utmost importance to maintain such standards when communicating with unrepresented claimants.

Because these claimants do not have legal counsel representing them, one must be careful not to communicate any legal advice to the claimant.

Maintaining a thorough medical history throughout the litigation will assist all parties involved in your case (e.g., paralegals, secretaries, claims representatives, etc.) in managing your case. Also, maintaining such a medical history will allow for quicker file review to provide more value to the Employer/Carrier as a client to ensure that the client is receiving their money's worth. Moreover, a thorough medical history will open up additional defenses against the Claimant: Misrepresentation, pre-existing condition, and aggravation of a pre-existing condition to name a few.

Having medical releases on file will expedite any and all medical records requests that may need to be made throughout the litigation. As paralegals can explain, requesting medical records is easier said than done—often, the requests are delayed, backlogged, or ignored. Having all of the information that the medical provider needs, such as a medical release from the Claimant on file, will expedite the request to ensure that it is processed as quickly as possible.

A thorough review of medical records will shed light on additional defenses such as those previously described above. However, medical records may also serve factual purposes as well. For example, if the issues of a case are bifurcated and only compensability is at issue, medical records, questionnaires, or any other documents that relate may shed light on whether the alleged industrial accident occurred in the course and scope of employment.

With everyone that you communicate, being kind opens more doors, ensures more fluid and free flowing communication, and makes everyone's job easier. Always consider whether it is wiser to argue over something when simply complying or avoiding an argument will result in getting what you need more quickly. A tip from Dale Carnegie: Always think in the position of the other person and consider what they would want and position your request as such. For example, if a medical records custodian at a medical provider's office is backlogged with requests and you call in demanding the records that you need and that you are pressed for time on, it is unlikely that the custodian will help you. Instead, if you approach the custodian with kindness, inquire about what information they need and what you can do to make their job easier, then it will multiply the chances of you receiving the information you need in a quicker timeframe.