2018 CLM Business Insurance & Workers' Compensation Conference
May 22-24, 2018
Chicago, Illinois

# Alternative Fee Arrangements (AFA)

Course objectives: Re-engineering Litigated Claims because the grand bargain of WC is broken. Nearly all WC claims will be resolved by settlements between worker and employer. In the environments of the organizations that Bruce has, a small number of claims dominate total cost. Some recent research, concludes that as few as 3% of claims account for 60% of total cost (these are the jumper claims). Our panel agrees with the practical reality of this cost concentration. Those claims deserve and, likely receive, high attention from employers and aggressive representation from employees. Claims that exceed one million dollars are not unusual. External regulations such as Medicare reimbursements add significant complication for rapid settlement.

Here our focus is at the other end of the claim spectrum. Where employers can pay, large relative defense costs to settle for less than $50,000 in payments claimant. The current practices also bring disadvantages and risks to the employee as well. Workers don't benefit when they are encouraged to sit at home or risk the consequences of marginal and risky surgeries.

## Defense Counsel Role

The initial contact with most injured workers is by their supervisor. The quality and speed of that contact have huge significance in the setting the tone for the entire claim. Learning how to do this right is a huge educational opportunity for the employer. The next contact in this process is typically the TPA adjuster (or in insured programs, the insurer's claim adjuster). Again, their ability to explain and allay fear is an essential downstream success factor. Finally, the Defense Counsel has commonly is not involved at all unless it is a reaction to the worker's decision to obtain legal representation. Then it's a new ball game.

## Re-Engineering Actions

First, you must evaluate your organization litigation experience based on its culture, jurisdictions and claim structure. This calculation allows the employer to peel the financial 'onion' of overall claims and make clear the amount of expense incurred on small claims

We believe the opportunity is to reduce the expense of settlement for claims, speed settlement, and reduce significant other often unmeasured costs for collateral, loss development risks, replacement labor and training expenses.
We do so by changing employer attention from defense (reaction) to the offense. In the first three months of a claim, there is a triage opportunity to settle the claim. Of course, the early settlement will not occur for all claims. Investing in early and serious negotiations is justified and recommended by a most claim professionals. Experience shows that doing so increases Return to Work. Workers and unions need to understand that the longer a worker is out of work, the greater the probability that they will never return to any employment.
Data analysis and access to your data are essential. Employers must have Information system management of claims and exposure and competence in using them. The core idea here is that there is high value in obtaining information because it leverages success in finding quicker fairer and reduces the role of legal expense on both workers and organization.

Implementation
Why is there such ignorance when the payoffs are clear? One basic reason is conflicting business models of the TPA and Defense firms. We will explain why these current models are not aligned with the interests of the employer. There is a host of factors. Top management fears that aggressive claim defense is needed to avoid explosive litigation volume. The matter will not be solved by discussion but requires an honest effort to pilot a major Division or State. The return will be open the opportunity and generate a rate of return between 15 to 30% of the cost of claims. The strategy is more than saving money. It also protects workers from following those unethical plaintiff attorneys whose tactics put the worker at risk for never returning to work.