



2021 CLM Workers Compensation and Retail, Restaurant & Hospitality Conference
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Experts: The Impact that Your Choice Can Have on Your Worker's Compensation Claim

I. Worker's Compensation Coverage

Licensing in correct states, allowing certain endorsements, having claims personnel who can handle complex claims. Certain Work Comp carriers are better suited to risks with insureds who have exposures above what "Main Street" America would involve. Agent or broker link insured with a work comp partner. Many agents and brokers specialize in certain areas - construction, transportation, energy, etc. They also have access to carriers who write coverages specific to those types of industries. The coverage purchased may direct coverage for experts later. Specialty carriers have relationships with those who are experts in the exposures their programs and coverages insure. Imperative to ensure coverage will allow for retention of experts within litigation. Insurance carriers need to establish partnerships with legal counsel who are well versed in both work comp laws and accident investigation.

II. Types of Experts

Social Media and Medical Canvassing

Social media canvassing which may provide information of violating restrictions, physical activity, or alternative employment. Obtain medical canvass if you expect a history of long-standing problems.

Field Based Nurse Case Manager

The eyes/ears of onsite treatment. Be cautious of State Board requirements. Notice: The Indiana Worker's Compensation Board has issued the following guidelines for the use of Nurse Case Managers ("NCM") in the administration of compensation claims: A NCM may be involved in a claim to schedule appointments, help facilitate care suggested by the medical provider, and to report back to the employer and/or carrier. However, a NCM should not express opinions, to either the injured worker or the medical provider, regarding an injured worker's course of medical care or otherwise attempt to influence the process. Additionally, a claims adjuster should not attempt to direct the care provided to an injured worker by the authorized treating doctor.

Surveillance

Best practices of timing or use of report. Suggestions/Questions if Plaintiff was working toward negotiation.

Psychological Expert

May consider psychiatrist or psychologist as an expert. Consider using psychologist expert if the treatment plan does not seem right.

Functional Capacity Evaluation

Functional Capacity should be considered when return to work is a possibility. Also, when claimant's declared capacity is not compatible with the declared injury. With the caveat, that claimant might give less than optimum effort and results might be biased. Most Physical Therapists will declare in their report less than optimum effort that is a red flag for secondary gain.

Peer Review/Utilization Review

Use Peer Review to get pointed in the right direction know the right questions to ask the doctor. May obtain clarification on medication needs or treatments for future medical allocation.

National Expert

Use National Expert on extraordinary cases, i.e., dermatology, chemical exposures, pulmonologist, cardiologist, etc. Use network of CLM Fellows if you need recommendations.

Vocational Expert

If Plaintiff is claiming permanent total disability, may need assessment by expert who can review Plaintiff's education, physical abilities, and geographic location to analyze ability to work. May need to have your orthoped work in concert with vocational expert to describe physical abilities and available employment.

III. Claim Medical's Approach to Impact Files**Smart Mitigation**

Smart mitigation reduces costs on appropriate areas and ensures spending early rather than later the appropriate tools.

Always think Settlement.

Always think settlement if possible, early settlement is good if the case is stable and further mitigation not likely or possible.

Different Approaches to Different Kinds of Cases

Different approaches to different kinds of cases may include: Classic Catastrophic Cases (Burns, Spinal Cord Injury, Brain Injury, Amputations) – engage as early as possible with an onsite NCM. Build bridges with hospital and family. Prepare for discharge and long term needs and plan return to work on day one or as early as possible. Complex Pain cases detect signs as early as possible for potential increase in costs and worsening of medical and legal situation. Use

predictive modeling, start addressing each problem associated with the file, even if not part of the initial injury. Make sure if treating unrelated issues, you are not legally bound to the claim. Global analysis of the claim includes premedical history, psychosocial issues, previous legal or claim issues, and jurisdiction's idiosyncrasies.

IV. Impact of Experts on Litigation

Pre-litigation Retention

The involvement early on of an expert can assist in both strategy and risk assessment and mitigation. It is imperative that proper vetting of experts occur. While litigation is never really wanted, it must be assumed when retaining experts. Getting experts involved in examinations, evaluations and early review also puts you ahead of the game in the event litigation is the route chosen.

Expert Throughout Litigation

Once Litigation has begun, be mindful of the local rules and scheduling orders that may be present. Nothing is worse than having an expert but then not being able to use them for missed deadlines.

Incorporate your experts in your defense strategy and your evaluations. You spent the money for their opinion. While they may not have every aspect of the case down from a strategic sense, they do have valuable information. If you are headed to mediation make sure they know and are available to participate if it is a case that warrants it. Be mindful of what you send to the expert as some jurisdictions allow for a broader discovery.

Rebuttal Expert

If a Rebuttal Expert is warranted be sure to timely identify them. By the time you are in litigation you will have a good idea whether a rebuttal expert is needed and if it will be different than your original expert. There is nothing wrong with having more than one expert and it can sometimes be advantageous if the area of expertise is very narrowly tailored and you want to get a specific point across. The rebuttal expert can also be a bit more aggressive if necessary, in the opinions presented.

Trial Testimony

Trial testimony is expensive, so a decision must be made for in person vs. video testimony. Each has its pros and cons, so weigh the cost and benefit with your team and the expert. Today more and more trials are push the button and play videos of experts and witnesses. It is anticipated that more and more trials will take on a made for Television feel as we re-enter the trial world as COVID restrictions subside. Live testimony from an expert can really send the message effectively especially if they present well in person or the expert opinion is central to your position. Consider how the jury will react to hearing or seeing the expert in person. Will that be persuasive, or can we get the same point across with a video?