

CLM 2016 Atlanta Conference
May 19-20, 2016 in Atlanta, GA

**Claims Resolution Strategies in Workers' Compensation – The Partnership between
the Employer, Broker, Adjuster, and Legal Counsel**

I. Key Claims Drivers determine the Strategy to Take
A. Understanding Key claims drivers

One of the first steps is to determine the issue(s) that created the claim, keep the claim alive, and could possibly evolve and lengthen the life span of the claim. These issues are not always clear and easily viewed, they may also be hard to understand. As an example, a claim at first notice, will be an injured back with high subjective complaints. It is easy enough to view the back as the body part and reason for the claim, as that is the body part claimed on paper and what the medical reports address. However; upon a good initial investigation, the etiology of the claim is uncovered. It is a hidden deeper reason for the injury, and in some cases the cause is long before the actual claim is filed. Another example, a warehouse man who is of muscular build and stronger than fellow co-workers, may often be chosen for the more physical tasks. He or she, may start out performing the tasks, absent any complaints. However; after several harder tasks over a period of time, this individual may become resentful of having to perform more heavy duty physical duties than others. He/she may then talk with the supervisor, give subtle complaints, or just get fed up and file a claim to ensure the employer is aware of condition and should avoid giving him more arduous work duties.

Understanding the issues both seen and unseen are necessary to expedite claim recovery and closure. These elements are often found when truly listening and speaking with the injured employee. A simple vague question, such as, “what caused the injury” and staying quiet while allowing the injured employee to talk may give clues as to how to quickly close the claim.

Key drivers are usually grouped in several categories. Indemnity, medical, accepted indemnity with probable dispute on temporary disability, and/or permanent disability? Is medical treatment, or the diagnosis a key driver? Is lack of return to work the key driver (i.e. loss of wage earning capacity)? Is a large Medicare Set Aside the key driver? Is endless litigation a key driver? Identifying the key drivers will help determine which “strategy” to take.

The risk manager, TPA claims team/examiner, attorney, and/or broker consultant can all help identify the key drivers on the claim. Often most issues are defined within just two groups, indemnity and medical.

II. Strategy Development and implementation

A. Mitigate the Indemnity

When the key driver is indemnity (i.e. California: Permanent Disability, US Longshore: Loss of Wage Earning Capacity, Louisiana: Supplemental Earning Benefits, Etc.) can an early return to work, or offering a permanent modified job mitigate the indemnity exposure? Many jurisdictions have vocational rehabilitation benefits with VR plans (schools, training, job placement). Strategize to offer a temporary modified job, temporary employment through a charitable organization, or offer a permanent modified job. Or evaluate the cost-effectiveness of getting the injured worker early into a vocational rehabilitation plan.

B. Mitigate the Medical

Always evaluate the cost of a Medicare Set Aside, or perhaps only a medical cost projection is needed. If medical is the key driver, can you incorporate Peer reviews, pain management programs, or a direct nurse case manager to doctor conference to mitigate the treatment plan, or prescription medication plan. For prescription-driven pain management programs, are their innovative programs (i.e. Personal Metabolic Evaluations) that can assist the treating doctor in his/her prescription program opinion.

C. If Litigation is the Strategy

Ensure you have the right team members on your program, whenever possible. One of the valued team members are your defense attorneys. Absolutely, without a doubt there are different levels of attorneys, so picking a calm, insightful, friendly mannered attorney may prove valuable to enticing settlement, yet at the opposite, a to the point, no non sense, aggressive attorney may also entice settlement. Either way, they are often more valuable when they understand client goals and objectives. This allows them to understand the strategies and develop tactics to attain desired outcomes.

As an example, using California (southern California) post termination claims. It is no secret these types of claims are often filed in retribution with the hope of attaining income while off work or gaining a lump sum of cash.

A strategy example – Closing out claims as soon as possible before they expand through defense costs (indemnity and medical), expense (litigation) costs, defense on additional body parts, etc.

Negotiations for resolution begins at Day 1. Obtain all relevant information from the employer immediately and continue to assess value as information is obtained. Make initial contact with opposition immediately and probe for information and opportunity to resolve. Do not be afraid to make the first offer. Have an offer at the deposition.

One tactic utilized – set and settle depositions. Depositions are required more times than not. It's the only way to evaluate the opposing party and an opportunity to settle. Timing of the deposition is the key. These are often effective in dealing with bogus claims as the injured party is placed in an uncomfortable position of being questioned under oath, with an audience. Additionally, it is time consuming for the applicant, invasive to their privacy, and an

uncomfortable feeling of the uncertainty of what's ahead. At the end or even halfway through the deposition – the defense attorney or even the injured worker's attorney may call for a break to discuss claim resolution. One other example is settling claims pre-MMI (Maximum Medical Improvement). Some jurisdictions allow this and it is a good strategy on some cases to mitigate the ultimate cost.

These depositions also have a reverse effect of giving the insight to defense on a true injury, and the need to get the claimant the appropriate treatment or other attention necessary. Surveillance should be considered only when it fits within the planned strategy. Timing is everything. Social Media investigations should be considered immediately.

Consider private mediation. Depending on your state, this is a viable alternative. Some benefits are choice of mediator, objective analysis of case for client, and timeliness of mediation. One negative is cost and lack of finality.

III. Claim Reviews vs. Case Resolution/Strategy Reviews.

A. Strategy vs. Tactics

File reviews to understand the claim, get updated status, and review the reserves, are not useful to reducing claims costs or to moving claims to some resolution. It is a waste of time for all involved.

If your strategy is to move claims along in order to reduce claim costs, then the format of normal claims reviews need adjustment. This adjustment in focus supports the strategy, and the tactics include the following:

- Claims strategy reviews and include your TPA examiner, supervisor, broker consultant, defense counsel, and even nurse case manager.
- Analyze the cases to decide on the tactics including, type of action plans, target dates and holding the partners accountable.
- Going back to earlier discussion, the team should determine the key drivers, then lay out the plan to that would effectively move the case towards resolution.
- Of important note, tactics don't always have to focus on settlement and closure of claim, they are also developed for such things as, cost mitigation, or even an end to litigation.

B. Recommendations for effective litigation strategies and tactics.

- Litigate Case fully
 - Further discovery
 - Depositions
 - Surveillance
 - Independent Medical Evaluator
 - Mediation, Hearing, Trial
- Settle "NOW" -- estimate a range of outcomes
- Mitigate the indemnity

- Return To Work
- Early vocational rehabilitation
- Mitigate the medical
 - Is Medicare (MSA) a factor
 - Control the medical
- Discuss and know the players:
 - Claimant
 - Applicant Attorney
 - Judge
 - Board
 - Mediator
 - Witnesses
 - Doctors
 - Your business unit

IV. Claim Partners / Team Members.

A. As Good as the weakest link.

As the old saying goes, “you are only as good as your weakest link,” this holds true in workers comp programs. In progression of the claim program from a higher level to the lower level, team members play an important role and are interdependent on each other to achieve goals. Having the appropriate personnel at the various positions, is key to successful strategy and tactic implementation.

Here are highlights of roles by claim partners/team members:

- Client – ensure timely reporting, injured are given professional courtesy, treated fairly and quickly, adherence to modified work duties, internal policies, guiding injured to appropriate network treatment, etc.
- The producer claims consultant has the main role of putting the members together. Recommending claim offices, vendor partners, etc. Having active oversight in guiding the program from both a higher level to viewing the day to day progress.
- Defense attorneys’ not just for actively progressing litigated claims, but to also be a reference for strategies and updates on ever changing legal guidelines.
- Nurse Case Managers to pro-actively work with employee and treating partners for expedited recovery and case resolution.
- Claims team for effectively managing the provision of benefits, medical evaluations, and oversight of other team partners that report directly to them, such as medical set-aside evaluators, treatment facilities, physical therapy, consultative evaluations, etc.

B. Evaluation and Selection process

There are numerous ways to evaluate and select key role members, and here are a few:

- Thorough and complete interviews with potential personnel/team members.
- Review history and experience in great detail.
- Ask industry partners about their experiences of candidate, whether it is the TPA, file handler, defense attorney, nurse case managers, broker consultants, etc.
- Trial runs, assign specific tasks, and view results.
- Advise or request a process that is incorrect, and review the quality of response.