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Building a Mandatory Collaboration Protocol Between Workers' Compensation and General Liability Claims – What Claims Professionals Need to Know

Many work injuries, especially construction injuries, often lead to two claims: a workers' compensation and general liability (civil) claim based on negligence. For example, in California, the Labor Law provides that a claimant can bring a claim against a third-party who was at fault for the accident, so the claimant can have a workers' compensation and a civil claim. *(CA Labor Code Section 3852)*. The employer is therefore required to defend two claims at once, which are both filed by the same employee (or estate), as in *Morales v. Zenith Ins. Co*., 152 So. 3d 557 (Fla. 2014) unless a Texas-style exclusivity can be invoked as in *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433 (Tex. 2009). If there is no exclusivity, the employer is left to defend the claims. This discussion focuses on the importance of building a collaboration protocol between workers' compensation and general liability claims in order to utilize the available tactics to reduce litigation costs, minimize exposure and reach global settlements. Real-life examples of where there is collaboration, and where same is lacking will also be discussed.

I. BENEFITS OF COLLABORATION BETWEEN WORKERS' COMPENSATION AND GENERAL LIABILITY CLAIMS

A. Utilizing available tactics to benefit the employer

Defending related claims in multiple jurisdictions creates special hazards for the employer. However, defending such claims, which have different litigation pacing, different disclosure tools, and (usually) two different counsel representing the claimant can create opportunities for the prepared employer. Specifically, the employer can have the opportunity to:

- Use the differences in litigation pacing to the advantage of the employer.
- Use differences in disclosure rules and timelines to the advantage of the employer.
- Leverage disparities in claimant/plaintiff's counsel motivations and domain competence.
- Create jeopardy for the claimant/plaintiff with regards to fraud.
- Get a "second bite at the apple" by repeating discovery tools in each jurisdiction.

B. Reducing litigation costs

Particularly where there is one ultimate indemnitor, counsel representing those interests in differing jurisdictions should be communicating to reduce overall litigation expense, wasted effort, unnecessary duplication of effort, and implications of incomplete or improper disclosure in either

jurisdiction. For example, the obtaining of evidence in one jurisdiction can oftentimes be used in the other jurisdiction, subject to different disclosure rules of course, whereby preventing the employer from having to independently conduct discovery in each jurisdiction.

C. Minimizing exposure and reaching global settlements

Collaboration helps with leveraging the litigation posture of both claims to get the best possible outcome for the client, which is usually global settlement of both the workers' compensation and general liability claim, which turns out to be to most cost-effective resolution of the claim.

II. CLAIM INFORMATION THAT BENEFIT EACH SIDE

A. Information general liability counsel should know about the workers' compensation claim

There is certain key information the general liability defense counsel should know about the workers' compensation claim, as they could potentially impact (either positively or negatively) the general liability claim. Workers' compensation claims move at a much quicker pace than the civil claim, and essentially "drives" the civil claim. The plaintiff in the civil claim always attempts to use the developments in the workers' compensation claim (e.g., a major surgery, or addition of an injured body part to the claim) to substantiate value in his civil claim. As such, general liability counsel should be kept apprised of the occurrences in the workers' compensation claim, as they can be used to combat the plaintiff's contentions in the civil claim.

Workers' Compensation Milestones

- Acceptance or denial of the workers' compensation claim
- Inclusion of additional body parts into the claim as it progresses
- Surgery approval
- Change in medical outcome (i.e., a finding of "maximum medical improvement")
- IME report received
- Medical depositions
- Claimant's testimony in proceedings
- Fraud findings

B. Information workers' compensation counsel should know about the general liability claim

Similarly, there are several milestones in the general liability claim that workers' compensation defense should be made aware of as the information can often be utilized in the workers' compensation claim.

General Liability Milestones

- Filing of Complaint or Notice of Claim, and Answer
- Any jurisdictionally-specific hearing for Public Employers (e.g., 50-H hearings in New York).
- Preliminary conference or other court listing
- Depositions
- Interrogatory responses
- Any medical records obtained – to compare to the records obtained or provided on the workers' compensation side of the litigation
- Surveillance or covert intelligence

- Mediation or any settlement conferences

C. Legal issues in collaboration

a. HIPAA

There is no problem with employers, workers' compensation insurance carriers, physicians, and other participants in the workers' compensation system sharing protected health information with each other in connection with workers' compensation claims and appeals because HIPAA specifically allows three exemptions for workers' compensation-related matters:

1. If the disclosure is "[a]s authorized and to the extent necessary to comply with laws relating to workers' compensation or similar programs established by law that provide benefits for work-related injuries or illness without regard to fault."[1]
2. If the disclosure is required by state or other law, in which case the disclosure is limited to whatever the law requires.[2]
3. If the disclosure is for the purpose of obtaining payment for any health care provided to an injured or ill employee.[3]

The employee's written authorization is not necessary for the disclosure where one of those exceptions applies, and the employee also would not be able to require the covered entity to withhold the information under 45 CFR § 164.522(a). The bottom line is that if any health-related information is being exchanged in conjunction with a workers' compensation claim or appeal, the HIPAA privacy rule will not stand in the way as between the claimant, medical care providers, employer, counsel representing any party (in the workers' compensation proceeding), third-party administrator, carrier, OCIP organizer, IME physician, etc.

What parts of the workers' compensation file should be considered as Protected Health Information ("PHI")?

- Health care payment and remittance advice
- Coordination of health care benefits
- Health care claim status - your notes as adjuster
- Enrollment and disenrollment in a health plan
- Eligibility for a health plan
- Health plan premium payments
- Referral certifications and authorization
- First report of injury
- Health claims attachments

b. Collateral Estoppel

Findings reached by a Workers' Compensation Law Judge may have a binding effect in the general liability litigation where the issue decided in the workers' compensation proceeding is identical to that

[1] 45 C.F.R. § 164.512(l).
[2] 45 C.F.R. § 164.512(a).
[3] 45 C.F.R. § 164.502(a)(1)(ii).

presented in the negligence action. This is called "collateral estoppel" and can be negative for the employer where findings of the workers' compensation court can remove or impair certain defenses.

What does "identical" mean? For a finding of a Workers' Compensation Law Judge to have binding effect in the civil action arising from the same loss there must be "identity of issue" between the prior administrative proceeding and the subsequent litigation. This accords with the general rule that the determinations of administrative agencies are entitled to collateral estoppel effect. ABN AMRO Bank, N.V. v MBIA Inc., 928 N.Y.S. 2d 647 (2011).

A checklist of situations where collateral estoppel could (or may not) apply.

- YES, collateral estoppel can apply where the Workers' Compensation Board has made a determination of working status. King v. Malone Home Builders, Inc., 28 N.Y.S.3d 511 (App. Div. 2016).
- YES, collateral estoppel can apply where the Workers' Compensation Board has determined there was an employee-employer relationship. Vogel v. Herk Elevator Co., 645 N.Y.S.2d 32 (App. Div. 1996).
- NO, collateral estoppel does not apply where nature and extent of injury is at issue. Sloth v. Constellation Brands, Inc., No. 11-CV-6041T, 2013 U.S. Dist. LEXIS 176389 (W.D.N.Y. Dec. 16, 2013).
- NO, not with regard to issues of pain and suffering. Auqui v. Seven Thirty One Ltd. P'ship, 980 N.Y.S.2d 345 (2013).

III. THE CULTURE OF COORDINATION BETWEEN WORKERS' COMPENSATION AND GENERAL LIABILTY DEFENSE – WHAT IT LOOKS LIKE

Where claims are proceeding in multiple jurisdictions, there are two common outcomes in terms of resolution:

- No coordination between the cases. Each party tries to maximize their outcome. As will be shown below, this nearly always will result in additional exposure or lost opportunity for the employer/carrier.
- The cases settling together, where lien waiver is offered on the compensation claim.

A. Example of exposure where there is no coordination

This is an example of where the workers' compensation and general liability case settle, but there is no coordination between resolutions.

The civil action is resolved for $1.5M. In the workers' compensation case, medical treatment and lost time compensation (temporary total or temporary partial disability) was issued totaling $50,000. A permanency award is entered, entitling the claimant to an additional $250,000 in benefits, payable over 300 weeks.

	Workers' Compensation	Civil Action
PAID	Medical $25,000 Indemnity $25,000 Permanency $250,000	$1,500,000
Attorney's fees and COL	$30,000 (paid by claimant from award)	$500,000 plus $0 in costs = 33.3% COL
Reimbursement/offset	$33,300 reimbursement, then weekly benefit reduction for 300 weeks	
Total Exposure to employer/carrier both jurisdictions.	$1,500,000 PLUS $83,333 paid at $277.78 per week for 300 weeks, Plus, unreimbursed medical & temp costs $16,700 = $1,600,033 PLUS open medical moving forward (at COLA rate)	
Total cash received by claimant at global settlement	$983,300 PLUS $83,333 (the LWEC award of $277.78 per week for 300 weeks) = $1,066,633 PLUS, open medical moving forward (at COLA rate)	

B. Example of exposure where there is coordination

a. Example where workers' compensation claim is extinguished by lien waiver

This is an example of where the workers' compensation and general liability claims settle at the same time, and there is some coordination between resolutions. The civil action is resolved for $1.5M. In the workers' compensation case, medical treatment and lost time compensation (temporary total or temporary partial disability) was issued totaling $50,000. A permanency award is entered, entitling the claimant to an additional $250,000 in benefits, payable over 300 weeks. Parties then agree to a lump-sum dismissal of permanency award, but instead of money moving, a lien waiver is negotiated (whole lien). There is no Medicare eligibility or entitlement.

	Workers' Compensation	Civil Action

PAID	Medical $25,000 Indemnity $25,000 Waiver of current reimbursement, which is the permanent disability value ($250,000 over 300 weeks) in exchange for "no pay" waiver and release.	$1,500,000
Attorney's fees / COLA	$0 (This can be a barrier)	$500,000 plus $0 in costs, 33.3% COLA
Reimbursement/offset	Waiver of $200,000 reimbursement	
Total Exposure to employer/carrier both jurisdictions.	$1,600,000, no future medical exposure.	
Total received by claimant at settlement.	$1,100,000	

IV. EXECUTING THE COLLABORATION

A. Collaboration on wrap-up projects

1. Assembling the team

The best practice is to develop a "go-to" team of professionals to engage immediately upon notice of a workplace loss. Consider whether the following should be part of the "initial alert" team:

- Broker
- Employer's litigation manager
- Project stakeholder with knowledge of the project or workplace
- Carrier representative (if not self-insured)
- Safety personnel
- On site nurse or healthcare provider
- Third Party Administrator(s)
- General Liability Defense Counsel
- Workers' Compensation Defense Counsel
- Investigators (outside).
- Key vendors, including surveillance providers, nurse case management, MSA vendors, and any other vendors required by the project owner or carrier.

As soon as a claim is reported, the employer should get the team together formally or informally to discuss the program/project goals. The team should be familiarized with following:

- Physical aspects of the worksite, including any obstacles or hazards
- Names and types of contractors on site
- Union affiliations of various labor groups involved
- The phase of the project
- The project's expected completion dates (when various labor groups "phase out" of project)
- Project contract numbers/contract references.
- The "lingo" of the project, any special terms or descriptions.
- Correct identities of various labor actors, i.e., "walking boss" etc.
- Location of first aid, on-site health, and closest urgent care locations

2. *Actions to be taken at the time of loss*

The immediate onsite investigation is key to defense of the claim. Where there is injury involving fall from height, an immediate investigation must be conducted to preserve evidence and document witness statements. The key is to develop a minimum standard that balances the need to preserve information against the cost and distraction inherent in any onsite investigation.

- Selection of vendors and team members on a "per loss" basis: most large projects will have a panel of assembled vendors, with multiple choices offered to the claims professionals for workers' compensation and general liability defense counsel. It is key that where there are multiple choices for counsel in each jurisdiction, one is quickly selected. Set forth a plan in advance for how new claims will be assigned.

- Documentation: have a clear plan for preserving reports, photos, video, witness statements, etc., and disseminating same to the correct team members. The typical default method is email, which may not be the best avenue in every litigation.

- "Cloaked" or attorney driven investigation.

- Setting goals and parameters of investigation: it is important that we set minimum standards for an investigation in advance. For example, a statement that:

    - Every catastrophic loss will be investigated by a specific vendor;
    - Every catastrophic loss will result in an investigator's report, directed to counsel;
    - Every catastrophic loss requires the collection of the following:
        - Witness statements
        - Images of the work accident location
        - Sequestration of the tools or devices involved
        - Emergency Response Report

B. Scheduling conference calls around milestones or developments, especially mediation

Every time there is a major development in either the workers' compensation of civil claim, the team should have a scheduled conference call to discuss the development, analyze how it will impact

either or both claims, and revise collaborative strategies for moving forward. Furthermore, a mandatory conference should be held at least one week prior to any scheduled mediation so that defense counsel can coordinate. As a general rule, workers' compensation counsel should be present at or available by phone for mediation proceedings whether to negotiate the global settlement, discuss the reimbursement posture of the employer/carrier in the workers' compensation action, or (often) to explain workers' compensation law to the mediator and opposing counsel. This last point is important as most times the attorney representing the plaintiff in the civil action will have an incomplete understanding of workers' compensation litigation and reimbursement and try to sway the mediator accordingly.