2020 Annual Conference
March 18-20, 2020
Dallas, TX

File A Claim, Win A Prize — Same Old Game with All New Questions

I. Understanding how we got here

Since its inception, the workers compensation system is founded on the Great Bargain: employees would not have to establish their employer's negligence in order to receive medical benefits, wage continuation (or replacement) and, in many jurisdictions, payment for either loss of function or loss of earning power. In return, the employer's financial exposure would be limited. Since that bargain was cast, the way we work has changed into something never imagined by the drafters of the original concept. Society has evolved from company owned towns to independent contractors to now the emerging Gig Economy. Medical costs now account for more than 50% of financial exposures in most workers compensation programs and both employers and workers (who may or may not be an employees) feel that the law does not protect them.

Recent legislative attempts at updating statutes have proven to be difficult at best and futile in many situations leaving it to the courts to try, through judicial fiat, to reinterpret the laws to apply to unanticipated scenarios. The results have been a crap shoot for employers and carriers on a local jurisdictional level and downright disastrous for national programs. For those needing an example, you need not look any further than the emerging issue of medical marijuana. In some states it is still illegal while in other states the courts are looking at cannabis as the answer to a wide array of conditions. Another example of gap between what the law was originally designed to address versus what it now must address is that the factory floor that drove the creation of the original workers compensation statutes have given way to home offices, and laptop (or cellphone) offices at a table at the local Starbucks.

And, of course, in the last twenty years, the practice of law has changed from the supreme courts of each jurisdiction limiting the publication of decisions to those they deemed to provide true legal impact to a near crowd-sourced model driven by the ubiquitous existence of LexisNexis and Westlaw publishing more judicial decisions in any week than most jurisdictions previously approved in a year. The prevalence of these

decisions allows attorneys to present more unique theories, and courts to rely on a larger pool of judicial reasoning which, even though not controlling in a jurisdiction, provide guidance for the courts to create new law. The result is that claims adjusters are constantly having to update their knowledge and practices, attorneys have to spend more time scouring changes occurring beyond their jurisdictional boundaries and carriers and corporations have a much more complex set of considerations in setting reserves. With this as background, the very foundation of the workers compensation laws is under the greatest number of constitutional challenges - either how the workers compensation statutes have been applied to a given case, or to the very existence of the statute, since their inceptions a century ago.

II. Examining how changes in modern society have given rise to constitutional challenges

If you need to ask, you may be giving away that you are new to our profession. Have you ever heard of Sleep Shift Disorder or Sleep Shift Syndrome? If not it's okay. You will hear about it soon enough. Hopefully at this roundtable but if not, it is coming to a courthouse and a claims adjuster's desk near you soon. In the 1980s the industry got caught by surprise by a sudden explosion of chronic bronchitis / COPD claims. In the 90's the industry was again unprepared for the tsunami of carpal tunnel syndrome cases. The new millennium brought its own dybbuk in the form of Reflex Sympathetic Dystophy / Complex Regional Pain Syndrome. There is a growing concern that the next "New Thing" will be the recognition of a cause of action created by work induced interruption to workers' circadian rhythm in a cause of action know as Sleep Shift Disorder or Sleep Shift Syndrome.

OK, so that's one. Give me another.

Since you asked: there are more people working remotely than ever before. Cell phones and lap-tops have changed the classic "9 to 5" work life to the new "Work /Life Blending" model. Your office is now in your home, your local coffee shop or … wherever. So what happens when you trip over your own dog or a pile of laundry at your home office, how about when you develop carpal tunnel syndrome because you were working at your kitchen table instead of at an ergonomically designed desk that was available at your employer's office? What about those "minor deviations" such as slipping on the ice on your driveway while taking a break to get your personal mail?

But if LexisNexis and Westlaw have effectively crowd-sourced justice, shouldn't that bring uniformity and predictability to the practice of workers compensation and claims adjusting?

If only it were so. Maybe somewhere off in the future this will occur, but for now we need to figure out how to live… no, how to survive … no, how to thrive in the uncertainty that is today's workers compensation environment. And since you like examples, let's go with the easiest: Uber and Lyft drivers. Are they employee or independent contractor? The classic test for determining the worker's status looked at who provided the essential tools, who had the right to control the actions of the worker and who had the power to hire and fire? Many courts use an updated test broadly referred to as the Economic Dependence Model: Does the worker provide an essential aspect or function to the employer's mission and, conversely, how much of the worker's economic existence relies on the "employer"? A driver cannot work for Uber and Lyft without their providing access to their software which will provide the driver with leads. Clearly an essential tool. The driver provides the other essential tool: a vehicle. Then again, Uber and Lyft have to approve the car that the driver is using. The driver maintains the vehicle, and (hopefully) obtain appropriate insurance. The driver agrees to Uber and Lyft's rate structure; the modern-day equivalent of wage or salary. The driver chooses when he or she wants to work and within certain limitations, where he or she want to work. Uber collects the payment for the rides, retains a portion of the payment and remits the rest to the driver. Uber and Lyft can "fire" the driver if the driver's ratings drop too low. So, what happens when an Uber and Lyft passenger assaults the driver? What happens when the driver has an accident while transporting an Uber or Lyft client? How about when an Uber or Lyft driver hurts himself or herself while cleaning his or her car after a ride got sick in the car? What about when the driver gets hurt while washing and waxing his or her car on a weekend afternoon? How significant is this exposure? Uber alone provided 1,300,000,000 rides in 2018. Lyft reported over 375,000,000 rides in 2017. The courts all over the map have come down with decisions on whether the driver is an employee or an independent contractor that are… well… all over the map! But even if you do not handle Uber and Lyft, their models are showing up in professions as diverse as nursing, food preparation, engineering and graphic arts and landscaping.

If injuring yourself while cleaning the car you use for Uber sounds like an exposure that would be unique to the ridesharing industry, what about the homeowner who injures herself or himself while cleaning their house after their Airbnb guest leaves? What about the Airbnb guest that assaults the homeowner?

Understanding how to handle workers compensation claims in this environment of judicial inconsistency and change is what will separate successful claims adjusters and claims managers from their stressed out peers.

Well, it sounds like we are at the mercy of the judicial system's working out the issues.

NO. As claims managers, attorneys and claims adjusters, we do not merely ensure that injured workers get the best medical care available and process checks. Our job is not

merely limited to responding to a myriad of judicial determinations. Our job descriptions implicitly require that we not only understand the emerging legal and work environments, but rather, it requires that we work to ensure that employers and carriers are able to articulate sound legal reasoning to safeguard that the statutes are interpreted and applied within the legislature's intention. That mission starts with looking at the recent changes in how courts are deciding what was previously considered settled law.

III. Strategies for Putting it All Together

A. Dozens of Jurisdictions, Thousands of Cases, 60 Minutes to Sort It All Out?

Even our panelists aren't that good. Well, actually, yes, they are. Several states such as Pennsylvania, Kansas, Utah, Missouri, Oklahoma and Florida have seen essential sections of their workers compensation status struck down as unconstitutional. Alabama's high court ruled that the entire statute is unconstitutional. Many other states are wrestling with constitutional attacks. Too often claims managers and claims adjusters react to these decisions with dismay over an apparent belief that these seismic court decisions will result in their failure to meet their closure quotas. This in turn will drown corporate claims managers and CFOs in the consequential spiraling increases in reserves. But this is a distorted view of the world. Too often, we only see the world through our own eyes. We forget that claimants also are pushed into that world of uncertainty. So, the question becomes who will be more comfortable in the world of uncertainty. Our panelist will explore how to use the uncertainty created by these major decisions to achieve the most desirable results.

There are, of course, the less sweeping but equally disruptive decisions such as the recent spate of cases where the courts have had to apply old laws to new and unimagined scenarios. For instance, when the New Jersey Workers Compensation Act was passed in 1979, the only person with a watch phone was Dick Tracy. So how does the court apply the forty-year old law to accidents arising from the salesperson who was on the phone or texting while driving? Should it make a difference if the company called the salesperson while the company knew the salesperson was driving as opposed to the salesperson initiating the call? Should it make a difference if the call was to the salesperson's next appointment? How about to the office? How about to the salesperson's spouse? Can the employer defend the claim by arguing that the employee violated a state statute regarding operating a phone while driving, even if the employer initiated the call knowing that the employee was driving?

B. Considering how to prepare for the pending storms that will soon reach each program's shores.

Recently, after the treating doctor determined that the only chance that an employee had for being cured of his back condition was surgery, the insurance carrier cut off his extended use of opioids even though the statute permitted palliative treatment. The appellate court agreed. As a result, employers in the jurisdiction are lining up to enjoy the change in fortunes by get their doctors to make similar findings in other pending cases. What appears to be an employer's panacea may be Pandora's Box. Will this case open the door to more expensive treatments such as spinal stimulators? Perhaps it will hasten the courts' acceptance of medical marijuana? Will the cost of medical marijuana which is not presently controlled by either fee schedule or the ever-popular, though entirely fictional, Average Wholesale Price prove to be a more expensive alternative? Without turning this session into a discussion of medical marijuana (the CLM has got the issue covered throughout the conference by extremely qualified panelists), Do we, as claims adjusters, claims managers and attorneys need to understand how courts are able to order medical marijuana for treatment in workers compensation cases even though the federal Control Dangerous Substance Act (CSA) makes marijuana illegal? (Spoiler Alert: it happens because first the workers compensation judge acknowledges that her or his judicial authority is limited to applying the workers compensation statute and does not extend to interpreting either federal or state constitutional issues. On appeal, the higher courts are increasingly limiting the interpretation of the pre-emption clause of the US Constitution to a narrow interpretation thereby avoiding its application to the state statutes.) Perhaps this same strategy will start showing up to move cases from the Longshore and Harbor Workers Compensation Act when the state workers' compensation act provides better benefits.

This session is not meant to give the attendees black-and-white answers, because that is the point: the courts are in such flux that there is no many of the previously hard and fast rules no longer exist – or at least as we always understood them. But by looking at the latest court decisions that seemingly change the trajectory of the field of workers compensation, the panelists and audience will be able to explore how claims adjusters, claims managers and defense counsel can play win the old File a Claim – Win a Prize with better results.