CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

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Roundtable 3: Thursday, April 10, 2014 (3:30 pm – 4:30 pm)

Non-Workers' Compensation Issues that Every Workers' Compensation Adjuster and Practitioner Needs to Know

There is More to a Case than the Workers' Compensation Issues.

As new state and federal laws are established addressing an employee's employment, medical and privacy rights and remedies, it has become increasingly important for all workers' compensation defense members to timely identify and ensure that the ever growing list of non-workers' compensation issues arising out of an employee's work accident are adequately investigated and addressed. Without such identification and scrutiny, the greater the likelihood the employer will miss out on opportunities to recover monies it has paid to the injured worker and/or be faced with various other forms of liability and exposure beyond those addressed by the State's workers' compensation laws.

I. Subrogation

One of the first issues which should be addressed in evaluating every workers' compensation matter is whether there is any potential subrogation claim and accompanying right of recovery of one's workers' compensation lien from a third party. Early and thorough investigation into why an accident occurred and who and what was responsible for an employee's work accident and injury is critical to making appropriate strategical decisions associated with possible subrogation and lien recovery.

Determining who was likely at fault and to what degree someone was responsible for an accident is important in this evaluation process. Most states have statutory provisions associated with the right of recovery of one's workers' compensation lien. One must know the statutory workers' compensation lien provisions of the controlling state in order to analyze the potential of some lien recovery.

It is also important to understand the statutory and common law provisions of the State in question as this will impact how each type of accident and cause of action is dealt with. For example, while Illinois and other jurisdictions recognize the natural accumulation doctrine making it difficult to

recover for slip and falls on snow and ice, Indiana follows no such doctrine and instead focuses on the issue of prior notice of said condition to the premises owner.

It is also critical to be aware whether the employer is subject to being added as a third party defendant or non-party to the civil suit thereby raising the potential effect of reducing its recoverable workers' compensation lien.

With this information, one is able to weigh the potential workers' compensation lien recovery against the potential civil recovery for the plaintiff and lienholder.

This cost benefit analysis is important in determining how much in resources to devote towards a potential subrogation action.

When to settle a workers' compensation case and for how much can be dictated to a degree in some cases by the amount of the potential workers' compensation lien and the strength of the underlying civil suit. Where allowed by the subject jurisdiction, a $1.00 workers' compensation settlement in return for a full lien waiver or a lower workers' compensation settlement in return for a reduced lien recovery and other combination workers' compensation settlement/civil lien recoveries should be considered.

II. Labor and Employment Issues

Long in the past are the days when the only employment-related issue a workers' compensation adjuster or practitioner had to be concerned about was whether a terminated and injured worker could subject the employer to a wrongful or retaliatory discharge claim. An ever-growing list of labor and employment rights and causes of action accorded to employees has complicated the employment scenery and placed upon the workers' available compensation defense team the need to be aware of such potential rights and remedies to the injured worker.

It is not enough for the employer to simply say it has no light duty available for its injured employee and therefore is laying him off. The Americans with Disabilities Act (ADA) requires the employer to demonstrate that it could not reasonably accommodate the restrictions or limitations faced by the injured worker.

Similarly, the employer must allow the employee to take up to twelve weeks of time off work following a work injury (or other non-occupational condition) without terminating the employee if they so qualify under the Family Medical Leave Act (FMLA).

If the employer seeks to terminate or demote an employee after a work injury, this increases the chances that this employee will assert a Title 7 claim for discrimination based on race, age, gender, ethnicity or another protected class, sexual harassment or even retaliation. Being aware of any such previously alleged claim(s) by the employee or the possibility that he will assert such a claim after a change in the job status is something a workers' compensation team member should address in advance with the employer.

Most states recognize a civil cause of action by an employee who is terminated because of his workers' compensation injury or claim. Retaliatory and wrongful discharge lawsuits can be very expensive and result in high recoveries. Where possible and practical, attempting to obtain a resignation from the employee in return for some monetary consideration by the employer and release by the employee for any employment-related liability or cause of action can avoid such situations.

III. Spoliation of Evidence

During the initial investigation into the cause of the accident, it is important to determine not only what, if any, instrumentality was involved in potentially causing the accident, but whether such instrumentality (equipment, machinery, etc.) still exists in the condition it did at the time of the occurrence. Or has it been lost, destroyed, modified or altered? If the later situation has occurred, that could be problematic and the employer could be faced with defending a civil spoliation lawsuit.

Generally, "spoliation" means the "destruction, mutilation, alteration, or concealment of evidence." In some jurisdictions such as Illinois and Florida, an independent cause of action for damages can exist for spoliation. Broadly speaking, in those jurisdictions, a cause of actions exists if the destruction or alteration affected the ability of the charging party to prove or defend the underlying case and the party charged with spoliation had a legal or contractual duty to preserve the evidence, or there was some other aspect of the case that demonstrates that a reasonable person would have foreseen that the evidence was material to a potential civil suit. There are differences among the jurisdictions, of course. In Illinois, for example, the proponent must establish that the spoliation caused them to be unable to prosecute or defend the underlying case. Florida is much looser. It only requires proof of the significant impairment of the ability to prove or defend the underlying case.

Most jurisdictions do not recognize spoliation as an independent cause of action. Texas, Indiana, New York, and California, for example, only treat spoliation as a basis for a basis for sanctions or creation of a negative evidentiary inferences. In such cases, spoliation can lead to a jury instruction to the effect that the jury is permitted (if not encouraged) to conclude that the missing evidence would be adverse to the party who destroyed it.)

If the workers' compensation team member intervenes early enough before the product or equipment is destroyed or altered, various steps can be taken to avoid potential spoliation liability. In particular, the employer can invite all potentially civil parties to inspect and test, where applicable, the subject equipment before it is modified. Or it can seek to obtain a court order authorizing such an inspection and testing after which the product can be fixed or replaced.

IV. HIPAA Considerations

Most states recognize that once an employee sustains a work injury there is an absolute right to obtain all post-accident medical records (and in most jurisdictions, pre-accident medical records) pertaining to that injured worker. There is an exception for drug/alcohol and psychiatric-related records unless such treatment is part of the workers' compensation claim. Likewise, despite HIPAA laws and the ever increasing privacy laws accorded to individuals, most states recognize that an employer, its workers' compensation carrier and attorney are entitled to obtain the medical records without the need to secure an employee/patient HIPAA/medical authorization.

Less certain are whether and under what circumstances the legal or human resources department, can procure the employee's medical records from the workers' compensation unit. An increasing number of states, including California, prohibit the workers' compensation team from providing any medical information to non-workers' compensation employer departments except as limited to information related to any work restrictions and the employee's possible resumption of work. Providing any further medical information may constitute a violation of state law unless a HIPAA authorization is executed by the employer.

It is strongly suggested that those in the workers' compensation field consider requiring such an authorization to avoid a possible unwanted result.

Similarly, when the medical records of the employer or workers' compensation carrier are subpoenaed by a defendant in a civil suit can those records be produced under that circumstance? A growing number of states now require defendants to a civil suit to secure HIPAA, plaintiff/patient-executed authorizations, subpoena and/or a court order sanctioning procurement of such records under HIPAA. Requiring the defendant to produce such an authorization and court order is the safest and recommended approach for the employer to take.

The method in which medical records are produced even if pursuant to a court order, executed employee authorization or subpoena can also run afoul of various state laws. While most states allow an employer or workers' compensation team member to send medical records by mail or fax, some states now place very specific requirements on any such records issued by email. The use of passwords and encrypted transmissions when sending an employee's medical records to someone else is now required in California and other states.

V. Government Agency Intervention

Both state and federal government agencies may conduct investigations surrounding the circumstances of an employee's work accident and subsequent time off work and lost wage claim. Being aware of, identifying and monitoring if not directly representing the employer's interests in such independent investigations by government agencies can be important and helpful in the evaluation and defense of a workers' compensation claim. For any lost time workers' compensation injury, the federal government, through OSHA (Occupational Safety Health Administration), has a right to conduct an investigation into the cause and origin of that worker's accident. Inspecting the accident scene, testing any equipment or machinery involved, conducting interviews of the injured worker, co-employees and management representatives by OSHA is not uncommon. Counsel representation of the employer at such inspections and interviews (of management representatives) and procuring all discoverable OSHA reports can be important to the workers' compensation team in further evaluating the workers' compensation claim and ensuring management or supervisor statements are not inconsistent with that information obtained during any workers' compensation trial or discovery (deposition or interrogatory answers). Such information can also be helpful in addressing any existing or potential civil suit and subrogation action.

Similar investigations may be undertaken by the Department of Transportation or Federal Aviation Administration arising out of catastrophic truck driver and aviation accidents respectively. They can also yield important information for the employer in its defense of the underlying workers' compensation claim.

Once an injured worker is laid off or terminated, one can expect a possible unemployment claim to be brought by the former employee. Participating in or securing all available records and decisions from the State Unemployment Board arising out of such claim can be helpful to the workers' compensation defense team. For example, where the former employee claims he is unable to work and seeks workers' compensation lost time benefits but also recovers unemployment benefits for that period, some states grant monetary credit or an offset to the employer for such benefits received by the worker.

If the injured worker pursues an employment claim for discrimination, retaliation, etc., with the State Human Rights Commission, EEOC or state or federal court, there could be valuable and important discovery (records and depositions) and pleadings to obtain from that action to be used in defending the workers' compensation claim.