

WORKERS' COMPENSATION CLAIMS AUDITING: SYNCHING TPA PERFORMANCE AND COMPLIANCE WITH THE CLIENT'S EXPECTATIONS

I. The Audit and Review – Start with the End in Mind

Employers and insurance companies frequently utilize the services of third party claim administrators (TPA) to manage their workers' compensation claims. When they do, detailed instructions are provided with varying degrees of specificity, with authority to hire outside vendors and, counsel, and make litigation or settlement decisions. How to measure the TPA's performance in supervising and managing the claim and litigation process can be difficult, particularly given the variations of state law. An outside, independent claims auditor can assist in developing an understanding of the TPA's performance in meeting expectations of its insurance carrier or employer clients. The claims auditor's goal should be to help the parties identify the strengths and successes as well as the weaknesses of the working relationship in order to achieve better litigation and claims handling results for the client.

In some instances, a client's best interests are served by contesting liability and taking a case to decision. But in many instances, early resolution of a claim regardless of liability is in the best interest of the client. Long-term indemnity exposure and the need to pay for ongoing medical treatment can result in costs which far exceed the cost of early settlement. While litigation of most workers' compensation claims is streamlined compared to civil litigation, the claims themselves may be open for years and thus needlessly expensive. The key to determine what is actually the "best" outcome for a particular client in a particular case while defining what constitutes a "win."

Workers' compensation defense lawyers often find themselves navigating relationships and disagreements between the employers they represent, the carriers which insure them, and the claims professionals managing the claims where the parties do not agree on strategy or what constitutes the best outcome. It is critical in such situations that the lawyer communicate openly and freely in order to assist in coordination of a defense strategy and goal.

II. Communicate, Communicate, Communicate for Understanding

A lawyer is constrained and obligated to act in accordance with a client's instructions. At the same time, TPAs have their own service instructions to follow. It is the claims auditor's role to determine whether the attorney and TPA are following the client's service instructions and, more importantly, whether the instructions are sufficient to allow a client to achieve its goals overall. Although clients provide service instructions that have in many cases specific details and time frames in which specific tasks must be completed, the lawyer and claims professional must not allow such a checklist to substitute for critical thinking. The

claims auditor works to determine if the claims professional and lawyer are together working to bring creative solutions to the litigation and possible settlement of a workers' compensation claim. The claims auditor's goal is to reach beyond the checklist and determine if critical thinking skills are being applied creatively. In addition, the claims auditor looks to see if the lawyer and claims professional are making an early determination of the ultimate objective in a particular case. Once communicated to and agreed upon by the client, the lawyer, working together with the claims professional, must develop a road map and specific plan on how to achieve the goal. In a workers' compensation case, there may be many different paths to the same point.

III. Measurements

When a claims audit is requested, before a list of files to be reviewed is established, the auditor must know the client's expectations. The auditor must ask how it is that the client and the claims professional determined that an audit is necessary: What was the client's objective going into the relationship and what are the client's current perceptions of the relationship? Additionally, the auditor must identify the business plan that the client has going forward in order to make the audit relate to achieving that objective. If an audit is to be meaningful, the claims auditor looks at the end result first, and asks "How is this audit going to meet and impact the client's collateral, the client's balance sheet, and the Risk Management department's budget?" An audit perceived as a witch hunt will be of no benefit to anyone.

IV. Successful Outcomes

This is both the easy part and at times most difficult. It cannot be stressed enough that understanding a client's perceptions of what a claims professional must do with a new claim file upon assignment is critical. This can be affected not only by the written service instructions, but also by the interpersonal relationships established at the original set-up meeting with the claims professional. But the relationship is not static. Changes in the management level of the client or the claims professional's office can affect successful performance by the TPA in meeting the client's objectives. The role of counsel in the process must also be part of the claims auditor's assessment. If the attorney and claims professional are not working well together, the client may be the loser in the relationship.

Once an auditor has made a preliminary determination of where the audit may be going, a list of files to be audited should be established. 15% to 20% of the audit should be devoted to closed claim files and the balance should consist of a wide range of incurred claim files that remain open. Review of closed claim files allows the auditor to gain an understanding of the results and practices of the claim professional. The auditor is able then to gauge the ultimate outcome of the remaining open files from a financial perspective. It is important in particular to

determine whether the claims professional was able to successfully predict within a reasonable margin which files would result in litigation, and what would be the result of the litigation, to ensure that the client's reserving practices are appropriate. Close attention should be paid to the ability of the claims professional and lawyer to work together as a team on behalf of the client.

V. Successful Partnership

The claims audit process is a tool that has many uses. At its best, it provides valuable information to the client on whether the client's litigation financial objectives are being achieved. It can identify weaknesses in the claims-handling process and as well as in the litigation process. It can identify strengths as well.

Everyone involved in the relationship is part of a team. The claims auditor can provide an outside perspective using agreed upon metrics to determine what is a win and whether a client is winning more than losing. A client which requests a claims audit has generally perceived a problem, but has not identified the cause or nature of the problem. The claims auditor can bring everyone together as part of the team to achieve better outcomes in both the claims handling and litigation processes.