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To Pay or Not to Pay. That Is the Question.

In this overly litigious world we are living in, it seems that handling and defending litigated claims, including workers' compensation claims, is becoming increasingly difficult and more expensive. As a result, companies are looking for ways to minimize costs and cut expenses in an effort to reduce exposure and bring claims to quick conclusions, via settlement or otherwise. While limiting costs in some cases may be appropriate, considerations need to be made in determining whether costs should be incurred for various activities performed by your legal counsel and potential physicians, including experts. Below are some things that should be considered in determining whether you request your legal counsel or your expert to perform certain activities in addressing your claim.

I. Requesting Your Counsel's Legal Review and Analysis of Medical Records

With respect to your counsel's legal review and analysis of medical records, in more complicated claims, it is becoming increasingly important for your legal representative to review and analyze medical records. Some bill review companies strictly prohibit attorneys reading, reviewing, and summarizing medical records as such a task is deemed to be secretarial in nature. Other bill review companies deem it a paralegal task and not an attorney task. It is important to remember, though, that secretaries and paralegals do not go to law school and are not as attuned to spotting important legal issues in cases. Moreover, secretaries and paralegals are not attuned to applicable defenses in various jurisdictions and current case law. For a mundane slip-and-fall case, it may not be necessary for your legal counsel to review and analyze medical records. However, if you have a slip-and-fall claim resulting in a back injury superimposed on a severely diabetic person, the case becomes much more complicated and your counsel's review becomes much more important. Even what appears to be simple cases at the outset can turn into a more complicated claim as the claim progresses.

When asking your legal counsel to review and analyze medical records, please remember your attorney is not simply reading the records and regurgitating the

information. Your counsel utilizes medical information in addressing written discovery. In all states, attorneys are allowed to engage in written discovery in the form of Interrogatories, Request for Production of Documents, and Request for Admissions. Having knowledge regarding the injured worker's pre-existing conditions, current medical conditions, accident descriptions, and the injured worker's contentions about his or her medical condition (all information that can be found in medical records) helps in preparing questions to be posed to the injured worker in the form of Interrogatories. Interrogatories are utilized to secure information and set up parameters in a case, to include identifying witnesses. Depending on an injured worker's response to Interrogatories, additional follow-up typically occurs to determine whether there may be additional defenses to the claim. In requesting documents, understanding the injured worker's medical condition and various accident descriptions will help in determining what documents you demand the injured worker produces versus documents you may request from prior employers, potential subsequent employers, and various medical providers. Similarly, understanding an injured worker's accident, contentions regarding the accident, medical contentions, and diagnosis helps an attorney formulate Request for Admissions. Request for Admissions are utilized in clarifying facts in the case so that an attorney can determine what arguments an injured worker may make and what facts are not in dispute.

To go further, requesting your counsel's legal review and analysis of medical records also assists in securing deposition testimony. Knowing and understanding the injured worker's pre-existing conditions helps an attorney phrase questions. Also, knowing an injured worker's pre-existing conditions helps delineate whether an injured worker is being open and honest in his or her response. Having the injured worker's recorded statement via a deposition allows your attorney to pick apart additional and future medical treatment the injured worker may receive by reviewing the medical records and noting the inconsistencies between the injured worker's sworn statement and what he or she is telling a physician. For instance, an injured worker may deny being diagnosed with diabetes or hypertension, but advise a physician he or she is receiving treatment for same. As you may know, these two conditions may severely impact a person's ability to recover from certain types of injuries. Learning through written medical records that a person does indeed have a medical condition previously denied, allows the attorney to conduct follow-up investigation to locate the treating physician to determine the severity of any of these denied pre-existing conditions. Thus, your counsel has specific facts and information which may not appear to be important, but which may become very important down the road. If a person downplays his pre-existing medical condition and your counsel follows-up on securing medical records for prior treatment, your attorney may come to find out the pre-existing medical condition was rather severe and really the true cause of the injured worker's current complaints. As a result, the alleged current medical condition may be just a continuation of the pre-existing condition and no aggravation may have occurred

as a result of the accident. This could have a great impact on your case and may even bring your case to a complete resolution.

By way of example, in one case, an injured worker claimed to have an injury to his right shoulder. The injured worker reported to various treating physicians he was experiencing excruciating pain. The injured worker received not only medical benefits, but income benefits, as he was placed on light-duty restrictions which his employer could not accommodate. Through various investigations and review of medical records produced in responses to Request for Production of Documents, the attorney learned the injured worker actually had a previous injury to the same shoulder, wherein the injured worker had surgery. Based upon this information, the attorney was able to ultimately find medical records involving that prior surgery. Medical records were subsequently submitted to the authorized treating physician for the current accident, and the authorized treating physician changed his opinion with respect to not only the need for medical treatment, but changed his opinion regarding impairment ratings. While the authorized treating physician initially stated the injured worker sustained a 15% permanent impairment to his right upper extremity, that medical opinion was quickly changed when the authorized treating physician was presented with the previous medical records showing that the injured worker already had been provided with a 12% permanent impairment rating. With all of this information, the physician also determined the injured worker returned to baseline and did not need any additional medical treatment for what turned out to be a rather minor injury with the employer. But for the attorney reviewing all of the medical information and being attuned to all of the various issues and facts in the case, the information may have never been located and the claim would not have been brought to resolution.

By way of another example, by allowing your counsel to review and analyze medical records, your counsel will be well-informed regarding any information an injured worker has provided to a treating physician. Sometimes injured workers have the tendency to try and overemphasize and overdramatize medical conditions to substantiate what they believe they feel. A lot of the time what we as counsel encounter is that an injured worker will change his pain complaints, change the flow of pain, change the type of pain, and change the pain distribution. For certain medical conditions, it matters whether pain flows up a limb or flows down a limb, and whether pain, numbness and tingling occur in the pinky and ring finger versus the middle, pointer finger and thumb. Knowing the specific complaints of an injured worker via what he has advised his treating physicians at every doctor's appointment helps to bring issues to the forefront when an injured worker changes his pain complaints and general complaints at every office visit. Knowing what complaints the injured worker has provided to various treating physicians at various times helps to delineate the injured worker's pain complaints provided at a deposition and helps to show whether an injured worker is being forthright with his contentions and his injuries.

In allowing your counsel to conduct a legal review and analysis of medical records, your counsel may be able to secure vital information in defending your workers' compensation claims. By reviewing and analyzing medical records, your counsel may be able to raise causation issues with the authorized treating physician. Your counsel may actually be able to advise a physician about inconsistent statements made by the injured worker during depositions and during office visits, and outline same for the doctor in order to secure an opinion. Moreover, allowing your counsel to conduct legal reviews and analysis of medical records could ultimately lead to specific defenses in a claim. Certain jurisdictions do not allow a person to be compensated if they were asked about medical conditions post-hire when that person was not forthright in the medical conditions, and then that person subsequently injures the same body part. In certain jurisdictions, a claim can be completely barred if the person was not open and forthright in what is known as post-hire medical questionnaires. An attorney may not be able to put forth that defense if they are not allowed to review and analyze medical records because of bill review requirements.

II. Requesting an Expert Medical Review and Analysis of Medical Records

Not only should you consider allowing your counsel to review, analyze, and summarize medical records, you may also want to consider requesting a separate medical records review by a physician who is not the authorized treating physician. In requesting a separate medical records review by a physician not providing treatment to an injured worker, that physician can look at the information with a fresh set of eyes. The reviewing physician is removed from the personal nature of a patient-doctor relationship and will not be as concerned with upsetting an injured worker or damaging the relationship if the reviewing physician does not believe the asserted medical condition is caused by an alleged accident. Moreover, a reviewing physician with no patient-doctor relationship may be more forthright with respect to medically necessary treatment and medication being prescribed. Sometimes, treating physicians develop a rapport with injured workers, especially when the physician treats the injured worker for an extensive period of time. Their judgment may become cloudy with respect to medically necessary treatment, as an authorized treating physician may not want to upset their patient. Moreover, having a second set of eyes via an independent medical review can also help in addressing medication concerns. In a society heavily driven by medication and the use thereof, a completely unbiased physician may be better suited in establishing overmedication issues than a longstanding treating physician. Medical records reviews are best utilized in determining when treatment has plateaued. The reviewing physicians usually cite to various medical guidelines in showing that certain treatments, such as physical therapy, epidural steroid injections, and general pain management, are no longer acceptable.

Instead of utilizing a medical records review, you may also want to consider utilizing an independent medical evaluation. For independent medical evaluations, an injured worker is required to appear before a physician usually chosen by the employer and insurer/servicing agent for the purposes of addressing causation, treatment, medication, and return to baseline/recovery issues. An independent medical evaluator will perform an examination on an injured worker and will provide opinions based upon the examination. When utilizing independent medical evaluations, all medical records pertaining to the injured worker and the accident should be provided to the independent examiner. Actual diagnostic studies and tests in the form of MRI films, CT scans and x-rays should also be provided to an independent medical examiner so that they have a full and complete picture of what has happened to the injured worker to date. After reviewing and examining the injured worker, the independent medical evaluator can then address specific issues as posed to them. Typically, defense counsel will forward correspondence to an independent medical evaluator outlining the injured worker's contentions, provide various facts involving the case, and specifically request that the independent medical evaluator address certain questions involving the claim. Along with a letter to the independent medical evaluator, oftentimes counsel provides a medical questionnaire to be executed by the physician. Attached please find an

example of such a letter and medical questionnaire that will assist an independent medical evaluator in addressing certain topics. Unfortunately, utilizing an independent medical evaluation can be rather expensive. However, you need to weigh the pros and cons of conducting an independent medical evaluation and consider the jurisdiction you are dealing with. In some jurisdictions, independent medical evaluations have no effect on a claim and are not favored. In other jurisdictions, independent medical evaluations weigh heavily in a case that is controverted and can result in a favorable decision for the employer and insurer/servicing agent. Still, other jurisdictions best utilize independent medical evaluations in resolving claims via settlement. Depending on which jurisdiction and what the ultimate goal is with respect to an independent medical evaluation determines whether such costs would be justified.

Finally, in certain states, utilization reviews may also be helpful to your claim and worth the expense. Like medical records reviews and independent medical evaluations, utilization reviews are appropriate in determining whether treatment is appropriate, medically necessary, or causally related to the injured worker's accident and/or medical condition. Utilization reviews are also helpful in addressing the ever increasing costs of medication. Now, medication impacts exposure in the claim and greatly increases Medicare Set Asides. By having a claim reviewed via the utilization review process, the reviewing physician can address generic medications, appropriate use of medications, appropriate length of use of medications, and tapering issues. One must be careful with respect to utilization reviews when it comes to denying medical treatment. Again, jurisdictions need to be considered in making decisions on whether to deny medical treatment or not, as some jurisdictions accept utilization reviews as proper support for denials, and other jurisdictions give no weight to utilization reviews.

III. Utilizing Medical Information

Along with all of the above, you should consider whether you need to have the medical information summarized in some type of chronology. Defense counsel oftentimes prepare medical chronologies to help facilitate and address issues in claims. As part of the medical chronology, the date of service, medical provider, complaints of the injured worker, diagnosis, and treatment plan are listed for each date of service. Medications are also noted for each date of service as well so that counsel or claims specialists can address whether medication should be authorized or not based upon the physician providing the prescription. Once a medical chronology is established and updated information is recorded in same, it can quickly become apparent as to whether a pattern is emerging regarding the injured worker's pain complaints and potential excessive treatment. For instance, a injured worker may have relatively minor pain complaints for an extensive period of time and then all of a sudden have increased complaints and significant changes in his or her pain complaints. You may be able to go back through the claim file and identify certain events that may have taken place that correlate with the pain complaints that have nothing to do with your work injury. It may

be that an injured worker's pain complaints increase after securing an attorney to represent him or her. The pain complaints may increase after an injured worker goes on vacation. Or, pain complaints could increase when the authorized treating physician is advising that he or she is going to release the injured worker to return to work in some form or fashion. In creating and utilizing medical chronologies, a pattern may reveal that injections are being provided at a certain period of time of year, every year. With this pattern established in the medical chronology, it may become clear there are other forces at work other than the actual accident and/or injury that need to be addressed. Medical chronologies and summarizations of medical information can also help in determining whether authorization is appropriate, especially in cases that extend years from a date of accident or involve catastrophic claims. Summaries of medical information can help determine whether specific durable medical equipment has been provided in the past and whether durable medical equipment should be provided into the future.

Finally, in determining whether you should request your counsel perform certain activities or you should request a physician to perform certain activities comes into play oftentimes long after a claim has been established and initial investigations have been conducted. Keep that in mind when you are securing witness statements and injured worker statements. Usually, most insurers/servicing agents have a 3-point contact requirement, wherein a claims adjuster is required to contact the employer, the physician, and the injured worker within a certain period of time from the date a claim is reported. Usually, claims specialists have a set outline of questions that need to be addressed with witnesses and injured workers. Unfortunately, oftentimes what occurs is the information is gone through like a checklist without the claims specialist really listening to the responses and answers provided. Oftentimes, as an attorney, when these recorded statements are reviewed, information is completely missed because the claims specialist was too busy checking off the questions rather than listening to the answers.

For example, in one recorded statement reviewed by counsel an injured worker reported that they were experiencing transient ischemic attacks (which essentially means the person is having mini-strokes.) The person securing the recorded statement never once asked when the person was diagnosed with the transient ischemic attacks, how long the transient ischemic attacks were going on, what physician was providing treatment for the transient ischemic attacks, and what medications the person was taking because of the transient ischemic attacks. All of that information would have been extremely helpful in trying to determine whether the injured worker was disabled for carpal tunnel issues or whether the person was disabled because of the stroke issues.

In another recorded statement reviewed, an injured worker was asked whether they were injured when they were involved in a motor vehicle accident. The injured

worker was a truck driver who slid off the road during a winter storm. The truck driver hit an embankment, but it was a very minor accident. The incident was reportable because the police and a tow truck had to be called to the scene. Because of the reportable incident, the injured worker called into a hotline to give his statement on what occurred. The alleged injured worker was asked whether he was hurt as a result of the incident. The injured worker denied being hurt, but then stated he was shaken up and had hit his head. After the accident was investigated, the alleged injured worker was terminated from employment because a review board determined the accident was preventable. The alleged injured worker then turned around and filed a workers' compensation claim, stating he injured his head, neck, and back as a result of the accident. Unfortunately, the person that took the recorded statement did not follow-up on the statements that the alleged injured worker had hit his head whatsoever. The person securing the recorded statement did not ask the alleged injured worker if he felt he needed medical treatment or received medical treatment at the scene via emergency personnel. Because specific questions were not asked when the alleged injured worker made the statement he hit his head, there is room for the injured worker to now assert he was, indeed, hurt in the accident, to the point he needed medical treatment and none was offered. Because what may seem trivial at the outset of a claim, could become very crucial six months down the road, listening and following-up on answers provided by witnesses and injured workers is very important at the outset.

IV. Summary

While it is certainly important to consider the costs of having attorneys and medical providers conduct various medical records reviews, independent medical examinations and summarizations, sometimes such activities are extremely helpful in bringing cases to a more favorable conclusion. Expending more time and money on the front end in a case can literally end up saving an employer, an insurer, and a servicing agent tens of thousands of dollars over the life of a claim. When it comes to bill review, consider the above facts when deciding whether it is worth a 20% cost reduction on bills. A 20% reduction on bills may not equate to a big savings when you end up paying on a claim longer because the investigation, summarization, or review was not allowed to be undertaken by your attorney or an expert physician.