

Managing Your PA Workers' Compensation Risk

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I. Understanding the Risk

Elements to Secure Benefits

- Employment relationship
- Accident, injury or material aggravation
- Arises
- In the course and scope of employment; AND
- Is related to the employment

Special focus: material aggravation

Understanding the Legislative History

- Form of insurance in which Employers provide wage replacement and medical benefits to injured workers in exchange for the MANDATORY relinquishment of tort rights.
- Through history, known as “The Compensation Bargain”.
- Hotly lobbied by both sides. Employers fought for this; Unions were in an uproar.
- Germany – 1884
- Maryland – 1902
- Pennsylvania – 1915
- Preamble of the original PA Workers’ Compensation Act: remedial piece of legislation and, as such, must be liberally construed by the Judges. Affirmed by PA Commonwealth Ct: Hannaberry v. WCAB
- 1915: PA WC Act
- 1939: Occupational Disease Act
- Act 12 of 1972: Special Rules of Practice and Procedure
- Act 44 of 1993: Medical Cost Containment Act (repricing medical bills / fraud prosecution)
- Act 1 of 1995: (changes to hearing loss provisions; partial loss)
- Act 57 of 1996: (IREs, LMS, can settle medical, offsets)
- Act 68 of 2006: (death benefits to children)
- Act 147 of 2006: (mandatory trial schedule and mandatory mediation)

Types of Benefits

- Wage Loss (Indemnity)
- Medical
- Specific Loss
- Scarring/Disfigurement

Wage Loss Benefits

- Total v. Partial
 - Total: Claimant is completely disabled so is receiving the full comp rate
 - Partial: Claimant has some earnings so the partial rate is 2/3 of the difference between the AWW and the weekly earnings
- Must be documented- typically in the Statement of Wages (LIBC 494).
- AWW is typically calculated by looking at earnings from the 52 weeks preceding the work injury.
- The Compensation Rate is usually 2/3 of the AWW. There is a maximum comp rate. This can be found at www.dli.state.pa.
- Note: if the AWW is very low, then the comp rate is 90% of the AWW.

Medical Benefits

- “Reasonable and necessary” standard
 - Ex: Is a total knee replacement “reasonable and necessary” medical treatment for a torn meniscus?
 - Ex: Is a fusion “reasonable and necessary” medical treatment for a low back strain?

Scarring/Disfigurement/ Specific Loss

- Awarded based on each Judge's *subjective* viewing of the scar. No standard or consistency from Judge to Judge, although some guidelines like 10 weeks per inch on a surgical scar.
- Scarring/disfigurement can only be awarded for scars to head, face and neck if scar is permanent, serious and unsightly.
- Maximum scarring benefit is 275 weeks.
- The total weekly benefit is based on the comp rate.
- Scarring benefits are not paid at the same time of TTD.
- Note: Look for scarring claims when the Claimant has a cervical fusion.
- Specific Loss: The Act has a chart that lays out the benefit for each body part.

Exposure Under the Act

- Duration of TTD
- Duration of TPD
- Duration of Medical Benefits
- Duration of Specific Loss
- Penalties
- Unreasonable Contest Fees

Most Common Injuries Facing Nursing Homes

- Lifting/turning residents
- Showering residents
- Catching residents when they stumble/fall
- Slips and falls
- Punches/kicks from residents
- Partner lift, but not performed in unison

II. Prevention

- Safety training
- Identifying injury trends
- Safety incentives
- Partner lift training
- Hoyer lifts
- Keeping equipment in working order
- Ergonomic analysis of work place
- Cameras when possible
- Close monitoring after reprimand
- Close monitoring during times of lay off
- Managing “pockets” of risk within the workforce

III. Initial Investigation

Factors to Consider

- Job Description
- Injury Report
- Supervisor's Input
- Witness Statements
- Timeliness of Report
- Social Media
- Panel Physicians
- Nurse Case Manager
- Surveillance within Facility
- Surveillance when the Injured Worker is Out of Work
- Communication, Communication, Communication

IV. Decision on Compensability

Possible Reasons to Deny

- Recent lay off
- Recent disciplinary action against the employee
- Pre-existing medical problems such as arthritis
- Panel provider cannot relate medical condition to the workplace
- Mechanism of injury is inappropriate
- Not in the course and scope of employment
- Injured worker changes his/her version of the facts multiple times early in the case

Possible Reasons to Deny Continued

- Intentionally self-inflicted injury or death
- Injuries or caused by the employee's violation of the law
- Injuries caused by the illegal use of drugs
- Injuries caused by intoxication
- Injuries caused by personal animosity and physical assault
- Violation of a positive work order

Note: Very fact specific

Factors to Consider within Your Organization

- Documentation from supervisor and witnesses
- Job description (was Claimant doing what he/she was supposed to be doing)
- Length of employment
- Work ethic
- Modified work program
- In put from your team (adjuster, management, defense attorney)
- Cost Analysis
- Gut

Options for Bureau Forms

- Accept an injury without conditions: Notice of Compensation Payable (NCP) or Medical Only Notice of Compensation Payable (no NCP) (LIBC 495)
- Deny: Notice of Workers' Compensation Denial (NCD) (LIBC 496)
- Accept for 90 Day Investigatory Period: Notice of TEMPORARY Compensation Payable (NTCP) (LIBC 501)

The NCP or no NCP (Accepting)

- Used for accepting an injury immediately and allowing for no further investigation. There is a box to check on the form if you want to make it a medical only (i.e. no lost time) claim.
- DANGER ZONE: once a NCP or no NCP is issued, it cannot be taken back. Example: I fall and shatter every bone in my leg while giving a presentation in front of 100 people at my office.
- DANGER ZONE: Be careful how you describe the injury because you are obligating yourself to pay medical for that specific description.
- Claimant can get medical benefits for a lifetime.
- Claimant can get wage loss benefits for a lifetime (unless limited to 500 weeks via an IRE).
- Partial disability benefits are capped at 500 weeks (by statute).
- What will happen after the NCP or no NCP?

The TNCP (Investigating)

- This accepts the injury (for both wage loss and medical) for 90 days, which allows more time to investigate.
- If you do nothing, the TNCP will automatically convert to an NCP at the end of the 90 day period. Note: Monitor this timeframe closely if you may revoke the TNCP. The 90 day timeframe is strictly enforced.
- If you decide to deny the claim in the 90 day period, then you can issue a Notice Stopping Compensation (LIBC 502) and a Denial #1 or #4.
- What will happen after the TNCP?

The NCD (Denying)

- Once the claim is denied, we do not have to continue paying (even if we paid the first few bills from the panel provider).
- Claimant bears the burden.
- Note: We must have a reasonable basis for the denial. If there is no reasonable basis, the Judge can (and some will) award unreasonable contest fees.
- What will happen after the NCD?

V. Litigating the Denied Claim

- Burden of Proof
- Know your Judges
- Testimony of Claimant
- Fact Witnesses
- Medical Depositions
- Mediation
- Briefs
- Decision

VI. Strategy for the Accepted Claim

- Modified work programs
- Mediation
- LMS
- Funded Employment
- IMEs
- Surveillance
- LIBC 750, 756, 760
- IREs
- Utilization Review

Job Offer Letters/Modified Work Programs

- Importance: (1) mitigate wage loss exposure; (2) create settlement leverage; and (3) foster good will with the Judge.
- Notice of Ability to Return to Work (LIBC 757) MUST be issued before a job offer.
- Job Offer MUST be in writing.
- Job Offer MUST contain specific information.
- Note: Once letter is signed by the Employer, it should be signed by someone who will testify and make a good witness.
- Goal: To show that work within the injured worker's restrictions is "open and available"

VII. Settlement Analysis / Mediation

- Cost: cost to litigate v. cost to settle v. exposure
- Claimant: age, health condition, transferable skills, education level, geographic location, transportation, personal life (going through a divorce, moving, young kids that need private healthcare benefits)
- Your Needs: need to make an example v. need a closed file
- Judge: claimant-friendly v. employer-friendly