Workers' Compensation Claims: To Try or Not to Try? Coming Out on the Winning End Without Going Trial

E. Louis Stern, *Partner*
Jacqueline B. Steele, *Partner*

Florida's workers' compensation statute is intended to be self-executing, allowing for a quick and efficient delivery of benefits to an injured worker so as to facilitate his return to gainful employment at a reasonable cost to the employer. Upon occasion, however, disputes arise and costly litigation ensues with the filing of a petition for benefits. In a partial response to limit litigation, Florida's Workers' Compensation Statute mandates the parties engage in mediation within 130 days of the filing of a petition for benefits.

The 2007 – 2008 Annual Report of the Office of the Judges of Compensation Claims, State of Florida, Division of Administrative Hearings, indicates that 34,481 petitions for benefits were filed to create new claims in Florida and a total of 72,718 petitions were filed in this reporting cycle, requiring 20,021 mediation conferences to take place. In 28.07 percent of these mediations, the parties effected a complete settlement of past, present, and future benefits and in 60.17 percent of these mediations, there occurred at least a partial resolution of the issues in the claim. Accordingly, only 11.76 percent of the claims proceeded past mediation into a pretrial hearing phase, with a final hearing being noticed thereafter. Thus, with only 11.76 percent of petitions proceeding to the pretrial hearing stage in the litigation process, the mandated mediation process offers employers and carriers an opportunity to appreciate significant claims' savings through the aggressive yet efficient management and resolution of a petition for benefits in the approximately ninety percent of remaining claims. This article seeks to guide the employer and carrier through the mediation process in an effort to maximize these potential claims' savings opportunities.

Investigation

The single greatest tool available to an employer and carrier is the ability immediately to investigate a claim and gather facts pertinent to the claims' process. Upon the reporting of a workers' compensation claim, the claims' specialist must obtain sufficient information to determine correctly whether proper insurance coverage existed for an employer at the time of an alleged employee's accidental injury, whether there existed an employer – employee relationship at the time of the alleged accidental injury, whether the claimed accidental injury itself is compensable, whether the claimed accidental injury occurred in the course and scope of employment, and whether the claimed accidental injury was and remains the legal and medical cause of the benefits claimed. Additional inquiries should be undertaken to determine the existence of mitigating strategies, such as third party subrogation claims and apportionment. These issues should be resolved as soon as possible and, as to the issue of whether the accident occurred within the course and scope of employment, within 120 days from the initial provision of benefits, unless it can be demonstrated that facts relevant to the issue of compensability could not have been discovered through reasonable investi-

gation within this period. Delays in the resolution of these issues can add to unnecessary payments and exposure to litigation costs and, depending on the substantive law in effect on the date of the claim, payments to the claimant's attorney for fees and costs, if denied or delayed benefits are secured.

The claims specialist should obtain specific and concise information as to the facts surrounding the claim and be able to identify and interview the claimant and witnesses. Recorded statements should be taken where practical and, based on the information obtained, further investigation into the claimant's past medical and claims' history should commence. Florida's workers' compensation statute sets forth a policy for reasonable access to medical information by all parties. Past relevant medical records should be obtained and conferences with health care providers restricted to a claimed workplace injury should be undertaken to understand the nature of the claimed accident and injury and to determine the viability of defenses such as causation ("major contributing cause") and apportionment. The medical opinions obtained from these discussions should be confirmed by physicians with follow up correspondences, which can prove valuable at mediation.

Employers should strive to have the claimant and witnesses voluntarily sign a statement as to the accident claimed. These written statements should be provided to the carrier's claims specialist as soon as possible to assist in the investigation of the claim and the background of the claimant. The employer and claims specialist must work jointly to ensure open communication between them to permit a complete investigation of the claim so as to limit its potential exposure. Subrogation issues and the retention of liens, as well as the identification of the correct average weekly wage likewise should be established at the onset of the claim, with supporting documentation provided to the claims' specialist at the onset of the claim.

Mediation and its Preparation

While mediation presents an excellent opportunity to resolve disputes and settle claims, the employer/carrier should engage in settlement discussions only after they have fully assessed the claim and the exposure it presents. Mediation can serve as another step in the discovery process and can allow the parties additional time to review their claim's goals and expectations. However, if the employer and carrier are prepared to present evidence supporting their position on the claim's valuation, such should be presented in an aggressive, but respectful manner, in an effort to educate the claimant to the claims' process and to instill doubt in the mind of the claimant's attorney as to his likelihood of prevailing on the pending petition.

A preliminary decision is whether to engage in state mediation or retain the services of a private mediator. While the later adds costs to the litigation budget, state mediators on occasion are not afforded adequate time within which to meaningfully engage the parties in the complex or emotional issues some claims present. If the claim presents significant legal or medical issues or involves an irrational party, a detailed and, albeit time consuming, presentation may be best suited for a private mediation.

Mediation presents the opportunity to present medical opinions, records, and test theories of defense, as well as assess the position of the claimant and review a claim's potential exposure and the defense strategy. If the employer and carrier are properly prepared, and the parties attend the mediation with an "open mind," a washout settlement within identified authority often times can be achieved. The aggressive settlement of a claim early in its history eliminates the risk of protracted payments and, if properly valued, can save untold revenue for the employer and carrier.

Conclusion

With close to ninety percent of Florida's workers' compensation claims being resolved at mediation, significant opportunities for claims' savings can be realized by employers and carriers who aggressively prepare for settlement. Preparation, the key to properly valuing a claim, requires effective communication between the employer and carrier representatives and their counsel as well as the effective and efficient investigation into the circumstances of the claim and the claimant's personal and professional background. With aggressive preparation and efficient claims management, significant savings can be realized through the prompt resolution of workers' compensation claims in Florida.

Original publication: Florida Underwriter Magazine, Workers' Compensation Report to the Industry Supplement, August 2009, p. S-6