

# The Dynamic Duo: The Adjuster and Defense Attorney

Working together to resolve claims.

# Introduction

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# The Big Four Periods of a Claim

Most of the time the following periods run concurrently and overlap as the claim progresses.

1. Injury – Claim Reporting
2. Investigation – Accept or Deny
3. Treatment – MPN, Return to Work, Permanent & Stationary
4. Resolution – Trial, Compromise & Release, or Stipulations with Request for Award

# Why Refer a File to a Defense Attorney (DA)?

- The Employee (EE) is represented.
- There has been a breakdown in communication with the EE.
- A 132A has been filed.
- Settlement documents were rejected by the Workers' Compensation Appeals Board.
- The Employer (ER) or Third-Party Administrator (TPA) would like a second opinion on the Plan of Action (POA) or some other element of the claim.

# Claim Referral: 7 Key Facts

When referring a file to a DA for representation there are a handful of key facts the DA must know, these include:

1. Is the claim accepted or denied?
2. Is the EE working, on Temporary Total Disability (TTD), terminated, or resigned?
3. Do we have a Permanent & Stationary (P&S) date?
4. Is there a MPN and who is the PTP?
5. Is the case represented?
6. Is there a QME/AME?
7. Is there a court date or deadline pending?

# Claim Referral: Key Documents

A DA will use the following key documents to identify a claim's key facts, develop a POA, and draft the Initial File Review (IFR).

- The 5020 Form
- DWC-1Form
- Personnel File, to include wage statements
- Investigation Report
- ISO Search
- Initial PTP Report
- Most Recent Medical Report
- Updated Benefits Printout

# Claim Referral: ER/TPA Litigation Goals

The DA should be advised the next specific litigation goal and the reason for the referral. The next litigation goal can include, but are not limited to:

- Attend an Expedited Hearing.
- Set the deposition of EE.
- Contact Applicant's Attorney (AA) to negotiate a settlement.
- Initiate the medical-legal process.
- You're the DA so tell me what our next step should be!!

# Discovery Plans: Purpose

The ER, TPA, and DA must create a discovery to keep everyone on the same page and to keep the claim moving towards resolution.

- Detailed and agreed upon discovery plans ensure the DA and TPA are working together to further the ER's interests as a team.
- A discovery plan should identify the steps required to bring EE's claim to resolution.
- Claims without discovery plans result in delays, higher costs, and more litigation.
- Successful discovery plans vary and depend on whether the claim is accepted or denied.



# Discovery Plan: Accepted Claim

If the claim is accepted the discovery plan will provide an outline of the steps needed to bring the EE's injury to a permanent and stationary (P&S) status with a rating and then settlement. These steps include:

- Maintain MPN Control combined with sensible Utilization Review/Independent Medical Review.
- Secure Permanent & Stationary Report that is substantial medical evidence.
- Possible Medical-Legal Evaluation.
- Interactive Process and/or Offer of Work.
- Settlement documents: Compromise & Release or Stipulations with Request for Award of Future Medical Care.

# Discovery Plan: Accepted Claim

As part of an accepted discovery plan we have to identify what medical treatment is necessary to bring an EE's condition to a P&S, also called maximum medical improvement (MMI), status. Reaching a P&S status is usually the longest part of a claim. This process may include:

- Letters to the Primary Treating Physician (PTP).
- Deposing the PTP.
- Determine if the EE is interested in invasive treatments such as surgeries.
- Reviewing the UR process to determine if a specific treatment should be sent to UR or determine the extent there should be an override of a UR non-certification.

# Discovery Plan: Denied Claim

If the claim is denied our discovery plan will outline key facts for the denial and the necessary steps to develop evidence required to support the denial.

- Claims are denied for several reason such as:
  - AOE/COE - EE was injured playing basketball at home or moving to a new home.
  - Post-Termination - Prior to termination for cause EE never reported any injuries to the ER.
  - Initial Aggressor - EE started the fight.
  - Intoxication - EE was intoxicated when the injury occurred at work.

# Discovery Plan: Different Types of Evidence

When a claim is denied evidence required to support your denial could include:

- Co-Worker Interviews and Testimony at Trial.
- Surveillance footage of EE.
- Background Checks that show EE is lying.
- Records from Prior Employers that show EE suffered the same injury.
- Police Reports that show EE was intoxicated or the initial aggressor.
- Medical-Legal Evaluations that show a lack of injury.

# Discovery Plan: Keep an Open Mind

As the claim develops and evidence is gathered a discovery plan will have to evolve to keep the claim on track.

- Regular communication between the DA, TPA, and the ER ensure everyone is on the same page and understands the next step.
- A Discovery Plan is not written in stone that can and should change when unforeseen events occur.
- When a discovery plan changes everyone should be in agreement to the change.

# Clear Communication is Essential

Execution of a Discovery Plan requires open and clear communication.

- Clear communication is not just phone calls, emails, and written case updates. The adjuster is the gate keeper of communication to the DA.
- Clear Communication also includes:
  - Sending medical reports to your DA.
  - Sending UR/IMR to your DA.
  - Sending all correspondence sent to the EE to your DA.
- As a general rule, if something has happened in a claim your DA needs know.

# Litigation Tools: Effective Discovery

Once a discovery plan and goal are in place the DA should present effective litigation tools that will move the claim forward along the agreed upon path.

- Litigation tools will vary on whether a claim is accepted or denied and your wheelhouse of options depends on if an Application for Adjudication of a Claim has been filed.
- Litigation Tools can include:
  - Deposing the EE.
  - A medical-legal report from a Qualified Medical Examiner (QME) or Agreed Medical Examiner (AME) evaluation.
  - A supplemental QME/AME report or deposing the QME/AME.
  - Work site investigations to include onsite interviews of employees.
  - Pushing the claim towards an AOE/COE trial with employer witnesses.
  - Do nothing and sit tight.

# Litigation Tools: Why secure a medical-legal report?

A medical-legal report can be a useful tool to resolve a claim by using a neutral medical-legal evaluator to resolve disputes and claims.

A QME can be used in unrepresented claims and represented claims.

- An EE must be advised of their right to a QME panel when there has been a P&S determination by a PTP.

An AME can only be used when an EE is represented at the time the AME agreement is made.

Disputes that a medical-legal report can resolve include:

- AOE/COE
- Total Temporary Disability
- Work restrictions
- Permanent Disability
- Need for future medical care



# Litigation Tools: Why depose the QME/AME?

Deposing the QME/AME can be a useful tool that has built-in monetary costs. The costs of the QME/AME deposition in most cases include:

- Charges from the QME/AME to prep for and attend the deposition.
- Time spent by the DA to prep for and attend the deposition as well as travel costs and time spent after the deposition to analyze the deposition for the ER/TPA

If there is interest in deposing the QME/AME there should be direct communication on the goal of the deposition and whether the costs outweigh the benefit.

# Litigation Tools: Why depose the QME/AME?

In general the goal of a QME/AME deposition set by the DA is to lower the value of the liability faced by the ER/TPA. To lower the value a DA will need to persuade the QME/AME to change his or her findings in a prior report. Tools a DA may use include:

- Surveillance footage.
- Medical Reports from providers that show a lack of injury or alternative injury.
- Personnel records that show EE's work duties do not include duties reported by EE.
- A Private Rating to illustrate how the QME/AME made an error.
- EE's deposition transcript.

# Litigation Tools: Defending the QME/AME?

In general the goal of a QME/AME deposition set by an AA is to increase the value of the liability faced by the ER/TPA. To increase the value an AA will try to persuade the QME/AME to change his or her findings in a prior report. Tools a DA may use to defend the QME/AME include the same tools previously discussed:

- Surveillance footage.
- Medical Reports from providers that show a lack of injury or alternative injury.
- Personnel records that show EE's work duties do not include duties reported by EE.
- A Private Rating to illustrate how the QME/AME made an error.
- EE's deposition transcript.

# Claim Resolution: Settlement

How the claim resolves will depend on EE's employment status, the value of the permanent disability (PD), the value of future medical care (FMC), if there is agreement on the PD, EE's age, and what the EE wants. Almost all claims will resolve by one of the following means:

- The claim of a former EE in general resolves by way of a Compromise & Release which is a buyout of both PD and FMC.
  - In rare occasions a Compromise & Release with open FMC is used with current EEs.
- The claim of a current EE in general resolves by way of Stipulations with Request for Award of FMC.
  - The award of FMC should be specific to include only the body part(s) at issue i.e. right wrist only or low back only.

# Claim Resolution: Trial

A trial is required when there is a disagreement between the parties that cannot be resolved with negotiations. An effective discovery plan brings together all of the evidence gathered during the discovery process to be presented at trial and ensures the matter is ready for trial.

Issues at trials can include:

- Indemnity rates.
- Dates of employment.
- Coverage periods.
- PD rating.
- Timeliness of a UR/IMR decision. (Remember an Expedited Hearing is a trial.)

# The Dynamic Duo: 5 Tips for Success

1. Clear Referral Instructions.
2. Clear and Constant Communication.
3. Remember the rule, if something has happened in a claim your DA needs to know with regular service of all medicals and correspondence.
4. Don't take it personally.
5. Keep an open mind.

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