



PATRICO | HERMANSON | GUZMAN

*A Professional Corporation*



# DO YOU THINK YOU KNOW WORKERS COMPENSATION?

*Workers Compensation Claims and Litigation Strategies*

# Course Statement

This presentation will provide an overview and discussion of topics of interest to employers, supervisors and managers. It will discuss issues concerning the duty of the employer, preservation of evidence and witnesses, defense strategy, and problems with extended modified duty cases as well as WCAB issues.

# Introduction

## Perspectives

- Employer
  - Workers Compensation/Risk Managers
  - Safety and HR Managers
- TPA/Carrier
  - Adjusters, Risk Control Specialists
- Defense Attorneys

# Mitigate NOT Litigate

- ❖ First and foremost, Injury Prevention is key.
- ❖ Communication and transparency with all employees wins respect.
- ❖ Avoid litigation for the sake of litigation!
- ❖ Why does the Injured Worker feel the need to obtain an attorney?

# Mitigation Tools

- ❖ Open Door Policy, Employee Safety Training, Employee Involvement and Regulatory Compliance
- ❖ Post Injury Management Program (PIM) / Return-to-Work Program (RTW)
- ❖ Employee Communication during the Claims Process
- ❖ Employer Claims Management

# PIM / RTW Programs

- ❖ Claim Cost Avoidance & Business Necessity
- ❖ Employee Interactive Process, RTW Documentation
- ❖ Third Party Assignments
- ❖ Ongoing Communication w/Injured Worker
  - Work Status Updates
  - Periodic Check-ins (Safety, HR, Supervisor, Foreman)
  - **TLC – Empathy, Employer Cares!**

# Employer Claims Management

- ❖ Internal Claims Handling – Strategic & Cost Effective
- ❖ Knowledge of Claims Procedures and Regulations
- ❖ Employee Benefit Payments
  - Total Temporary Disability
  - Total Partial Disability (Wage Loss)
  - Permanent Disability
  - Mileage and other reimbursements

# Financial Claims Analysis

*Are you involved with:*

- ❖ Initial Claim Reserves
- ❖ Claim Reserve Development
- ❖ Claim Valuation and Settlement

*Are you knowledgeable of:*

- ❖ Total Incurred  
= Total Paid + Total Outstanding
- ❖ Average cost per Claim / High Severity Claims
- ❖ Third Party Recovery (Subrogation)



# Cost Management & Settlements

- ▶ Monitoring Claim Costs
  - Indemnity Payments
  - Utilization Review / Medical Treatment
  - Legal
- ▶ Settlement Agreements
  - Approach to Settle
  - Compromise & Release vs. Stipulations
  - Resignations

# Claims Key Elements

- ❖ Employer and Claims Adjuster Relationship
- ❖ Field Case Nurse Management
- ❖ Medical Provider Network
- ❖ AOE/COE and Accident Investigations
- ❖ Surveillance / Subrosa Investigations
- ❖ Investigator and Attorney Selection

# Proper Assignment and Acknowledgement

- ▶ Defense counsel selection
- ▶ Knowing venues, Judges and AAs
- ▶ Initial Litigation Plan & Budget

# Communication

- ▶ Client Status Updates
  - Managing Expectations
- ▶ Deposition Summaries
- ▶ Management of Communication

# Compensability vs Nature & Extent

- ▶ Cases on Delay
  - Denied – Accepted
- ▶ Med-Legal
- ▶ PQME

# DWC 1 Claim Form

- ▶ This is one of the most important documents in litigation. It is even more important than the Application for Adjudication.
- ▶ The DWC-1 Claim form provides injury notice, triggers decision period, affects the statute of limitations in claim.
- ▶ Not providing this form can also create penalties for the employer.

# DWC 1 Claim Form

*Is the employer obligated to provide a DWC-1 Claim Form or can this be provided by the Third Party Administrator or Insurance Provider?*

- ▶ Labor Code Section 5401(a)
  - mandates provision of the form within one day of knowledge of a work-related injury.
  - which injury results in lost time beyond the employee's work shift at the time of injury or which results in medical treatment beyond first aid.
- ▶ *Definition of Injury? Definition of First Aid*
- ▶ California Code of Regulations Section 10140

# Failure to Provide Claim Form and Statute of Limitations

- ❖ Labor Code 5405 provides that a claim for workers' compensation must generally be filed within one year of the date of injury, or one year after the last date benefits were provided.
  - *Reynolds v. WCAB* the California Supreme Court
- ❖ We see this come up years after someone stops working for an employer, claiming they told their supervisor that they were injured, and were ignored.



# Failure to Provide Claim Form and Penalties

- ▶ Failure to provide Claim Form can expose one to penalties under California Code of Regulations Section 10111.1(d)(3) - a penalty of up to \$5,000 can be awarded if the claim form is not provided within five working days of receipt of the request, if benefits are not being provided at the time of the request.

# DWC 1 Claim Form Triggers Decision Period

- ▶ The filing of the claim form triggers a 90 day period to investigate/evaluate the claim; until either the claim is denied, or the 90 day period runs out.
- ▶ LC 5402(b) establishes presumption of injury being compensable if employer does not deny liability within 90 days. The presumption is rebuttable.
- ▶ LC 5402(c) establishes that until the liability is accepted or rejected, the employer must authorize all treatment... up to \$10,000.
- ▶ No claim form, no 90 day period - *Azbill v. Fators Motorcycle*

# Honeywell v. WCAB

In very limited cases, 90 day period runs from employer's knowledge of injury, rather than the date the claim form is filed. This applies if:

- (1) the employer, knowing the employee had suffered or was asserting an industrial injury, refused to provide a claim form, or misrepresented the availability of or the need for the employee to file claim form;
  - (2) the employee was misled into believing that no claim form was available or necessary and failed to file one for that reason, and
  - (3) because of this reliance, the employee suffered some loss of benefits or setback of claim form.
- ▶ Employer actions do not have to be deliberate, *negligence is enough*.

# **EVIDENCE**

It Begins With The Employer

# Preservation of Evidence

Evidence that the Defense will most heavily rely on:

- Accident / Injury Investigation
- Witness Testimony
- Personnel File
- Surveillance
- Third Party Forensics

# Purpose of Evidence

## Why do we collect evidence in the first place?

- ▶ Dispute/disprove alleged injurious exposure, mechanism of injury and/or extent of alleged injury.
- ▶ Prove contradiction at a deposition, or in provision of information to treating physicians or evaluators.
- ▶ Posture claim for fraud referral.
- ▶ Evidence can also tell us when a claim should be accepted, so that we can maintain medical control and move the claim as quickly as possible to resolution.

# Preservation of Evidence and Witnesses

- ▶ Witnesses sometimes leave employment
- ▶ Video available of the alleged incident.
  - Security and surveillance video contemporaneous to the alleged incident.
  - It is imperative that the employer be instructed to maintain that footage.

# Witness Interviews and Testimony

Main purposes:

(1) Post-Termination Issues

(2) Activities outside of employment (Side Business, sports...)

(3) Things could not have possibly happened the way that the applicant states it did



# Witness Interviews

- For physical injuries, it is important to discuss the alleged mechanism of injury with employer witnesses. Even those who did not witness the alleged incident can provide invaluable information.

# Before Applicant's Deposition

Important items prior to the deposition:

➤ Personnel file

These files often contain crucial information in the form of write-ups, job descriptions, training, performance and records of counseling.

➤ Surveillance video

A review of this information can allow us to formulate very specific questions as to physical abilities and daily living activities. This may greatly assist in disproving subjective complaints and applicant credibility.

# Employer Witnesses at Depositions

In certain claims it can be of great benefit to have the employer witness appear at the applicant's deposition.

- Encourages applicants to be honest and forthcoming.
- Familiarity with applicant, job position, company policies, procedures and personnel records (i.e. safety training, etc.)
- Provide defense counsel guidance and suggest appropriate questions to ask.
- Demonstrates that the Defendant is taking the claim seriously.
- If the employer witness cannot attend the deposition of applicant, it can be extremely helpful for them to review the deposition transcript and provide notes.

**Open Forum**

**Questions? Case Scenarios?**

**Thank You!**

