

Litigation Process and Settlement Strategy

Presented by:

Jennifer M. Fitzgerald-Shareholder,
Natalie K. Lund-Officer, and
Elizabeth R. Cox-Associate

Cousineau McGuire
ATTORNEYS AT LAW

Minneapolis & Northern Wisconsin/Michigan

www.cousineaulaw.com / 952.546.8400

Initiation of Litigation

- There are a variety of ways to initiate workers' compensation litigation in Minnesota. This presentation will cover the most common methods and the procedures involved.

Denial of Liability

- One way for litigation to begin is with a denial of liability followed by a Claim Petition.



NOPLDs

- The purpose of the NOPLD is to notify the employee and Department of Labor and Industry of the insurer's position regarding primary liability.
- When primary liability is denied or partial liability is denied, the NOPLD must be filed with the commissioner and served on the employee within 14 days of notice to or knowledge by the employer of an injury.

NOPLDs Tips

- **BE SPECIFIC:** General and vague denials are red-flagged at DOLI. The more detail provided in Box 3 the better. If denying a claim, it is not the time to hide information – the more information the better.
- **LEGAL BASIS:** Every denial must have a legal basis – separate this out on the denial or in your notes to make sure you have a legal basis.

NOPLDs Tips

- **FACTUAL BASIS:** Don't simply say "no increased risk" – get specific with the claim.
- **SHOW YOUR WORK:** If you tried to contact the employee five times without a response, put it in your denial. If you talked with numerous witnesses – list those and what they said (if helpful). Demonstrate to DOLI that this was a well-investigated and thoughtful denial.

NOPLDs Tips

- **ATTACHMENTS:** If you have prior medical records that show a significant pre-existing condition, attach them to the NOPLD. Same goes with helpful witness statements or any other documentation that gives rise for denial.
- **USE EASILY UNDERSTANDABLE TERMS:** the reason for denying the claim should be understandable to a person of average intelligence.

NOPLDs Tips

- **REMEMBER NOTICE:** (Minn. Stat. § 176.141) This is always a factual and legal basis if employee fails to give notice within the time period required by statute. But it is notice to the ***employer***, not the insurer that matters.

NOPLDs Tips

- **KNOW WHEN TO HOLD THEM, KNOW WHEN TO FOLD THEM:** Sometimes, despite all the red flags, there isn't a legal or factual basis to deny within the 14 days. Know when you have to accept the claim and create other ways to control it – get an independent medical exam, work with the employer to get a fast turn-around on a job offer, etc.

NOPLDs Tips

- **KEEP TRACK OF YOUR 60 DAYS:** Within 60 days from the date of injury, if new information arises, an insurer can file an amended NOPLD and deny the claim. The claim is then treated as if it were denied from the start.

Claim Petition

- The filing of a Claim Petition initiates the litigation proceeding where an employer and insurer have denied primary liability, the employee is claiming additional benefits which have been denied or are in dispute, or in a variety of other situations.

Answer

- Once the employee files a Claim Petition, the employer and insurer have **20 days** to file an Answer pursuant to Minn. Stat. § 176.321.
- In the Answer, the employer and insurer shall admit, deny or affirmatively defend against the claims made by the employee.
- If an Answer is **not** filed within **20 days**, an expedited hearing will be scheduled.

Settlement Division vs. Expedited Hearing

- Once the Claim Petition is filed, the matter will either proceed to the Settlement Division or an expedited hearing.

Expedited Hearing

- An expedited hearing is normally granted when an employee is not receiving benefits and can prove hardship, or if it is a surgery issue.
- Expedited hearings will proceed very quickly. As such, the employer and insurer need to be prepared to act quickly and defend against the employee's claims in a timely manner. This may include taking the employee's deposition and/or the depositions of experts or witnesses. An independent medical examination will also most likely be needed.

Settlement Division

- The majority of the claims proceed through the Settlement Division. This is a much lengthier process and allows the employer and insurer adequate time to take the employee's deposition, obtain an independent medical examination, and proceed with whatever discovery is needed in the case.

Settlement Division

- If the matter is in the Settlement Division, a settlement conference will be scheduled approximately nine months out from the filing of the employee's Claim Petition. These are informal and held before a compensation judge at the Office of Administrative Hearings. They are a good way to try to resolve claims without a formal hearing.

Independent Medical Examination

- With regard to an independent medical examination, the employer and insurer's independent medical examination report must be filed within **120 days** of the filing of the employee's Claim Petition pursuant to Minn. Stat. § 176.155, subd. 1. If it is not filed within this timeframe, it may not be admissible at the hearing. A Motion for IME extension can be filed to extend the filing time.

Hearings



*"Hey, don't blame me. I don't make the laws
—I just circumvent them."*

Hearings

- If a matter proceeds on an expedited matter to the Hearing Division, or is unable to settle at the settlement conference and proceeds to the Hearing Division, a compensation judge will be assigned, additional discovery can be completed, if necessary, and the case will eventually be tried.

Hearings

- If an employee, employer or insurer does not prevail at the hearing level, an appeal can always be made to the Workers' Compensation Court of Appeals, pursuant to Minn. Stat. § 176.421.

Appeals

- An appeal must be filed within **30 days** after the service and filing of the Findings and Order. A party may also cross appeal decisions from the Findings and Order within the 30-day period from making an appeal or 15 days after the service of the Notice of Appeal, whichever is later.



"And don't go whining to some higher court."

Discontinuing an Employee's Receipt of Wage Loss Benefits

- Another way for litigation to commence is through discontinuing an employee's wage loss benefits.
- Pursuant to Minn. Stat. § 176.238, subd. 1 and Minn. Rule 5220.2630, an employer and insurer may not discontinue payment of workers' compensation benefits to the employee until written notice is provided of the intention to do so.

NOID

- The most common method for providing this written notice to the employee is the Notice of Intention to Discontinue (NOID) Workers' Compensation Benefits.

NOID

- Any and all information relied on for termination of the employee's benefits must be attached to the NOID.
- In addition, the NOID must be served upon the employee, his/her attorney (if applicable), the employer, the defense counsel, and filed with the Department of Labor and Industry. It is also important to remember that unless the employee has returned to work, the benefits, which are going to be discontinued, must be paid through the date of the NOID.

Discontinuing an Employee's Receipt of Wage Loss Benefits

- If the employee objects to the discontinuance of benefits, he/she can request an administrative conference pursuant to Minn. Stat. § 176.239, subd. 2. There are timeframes within which the employee must request the administrative conference in order for a compensation judge to have jurisdiction at said conference.

Amended NOPLD

- It is important to note that if wage loss benefits are going to be discontinued within **60 days** of the date of injury, a NOID is **not required**. Rather, the employer and insurer can file an Amended Notice of Insurer's Primary Liability Determination form.

Administrative Conference

- If the employer and insurer do not prevail at the administrative conference, a Petition to Discontinue can be filed. This will send the matter to the Hearing Division for a formal hearing. If the employee is unsuccessful at the conference, he/she can file an Objection to Discontinuance, which again sends the matter to the Hearing Division.

Objection to Discontinuance

- Please note, an employee can also file an Objection to Discontinuance on receipt of an NOID rather than requesting an administrative conference. The advantage to filing an Objection to Discontinuance in lieu of a request for administrative conference is that it speeds up the process of obtaining a formal Findings and Order from a compensation judge.

Expedited Hearings Pursuant to NOID or Petition to Discontinue

- The issues in expedited hearings are limited to issues raised by the NOID or Petition to Discontinue, unless all parties agree to expand the issues. If the issues are expanded, the parties are not entitled to an expedited hearing and the compensation judge is no longer required to issue a decision within **30 days** as required under the expedited procedures.

Resolving Medical and Rehabilitation Issues

- Litigation can also result from medical and/or rehabilitation issues.
- If there is a dispute regarding medical and/or rehabilitation issues, the employee, employer, insurer, QRC, or medical provider can file a Medical and/or Rehabilitation Request. The timeframe for responding to a Medical Request is **20 days** pursuant to Minn. Rule 1415.3800, subp. 3. The employer and insurer have 10 days to respond to a Rehabilitation Request pursuant to Minn. Rule 5220.0950, subp. 1(a).

Administrative Conference v. Expedited Hearing

- The normal course of action, when a Medical and/or Rehabilitation Request are filed, is for an administrative conference to be held at the Department of Labor and Industry. One exception to this is if the employee is requesting surgery. If this is the case, the matter will be scheduled for an expedited hearing.

Administrative Conference

- If a conference is scheduled at the Department of Labor and Industry, a mediator will preside over the conference. He/she will then issue their decision regarding the reasonableness of treatment or services requested, etc.

Request for Formal Hearing

- If any party is unsatisfied with the decision of the mediator, a Request for Formal Hearing can be filed and the matter will be sent to the Hearing Division at the Office of Administrative Hearings. The Request for Formal Hearing must be filed within **30 days** of the filing of the mediator's decision. The same appeal process exists as noted above under Claim Petitions and administrative conferences for NOIDs

Certification of Dispute

- A dispute must be certified by the Department of Labor and Industry before an employee's attorney can be awarded attorney's fees for a dispute over rehabilitation or medical benefits. The employee's attorney must file a Request for Dispute Certification with the Department. This will generally result in a phone call from a mediator at the Department inquiring as to whether there really is a dispute. If there is no response to that phone call or if the mediator is advised that there is a dispute, a Certification of Dispute will be issued. The certification should be attached to a Medical or Rehabilitation Request.

Motion for Consolidation

- If there are existing disputes which are already the subject of a Claim Petition, any party can request that the Medical and/or Rehabilitation Request be consolidated with the Claim Petition. A Motion for Consolidation can be filed on these issues.

Settlement and Negotiation



"It was a brilliant legal strategy. I think he borrowed it from either James Heiting or Perry Mason."

Settlement and Negotiation

- There is no exact science to settling workers' compensation cases. The settlement terms in each case will be different and vary from case to case. It is an art form more than a science and can sometimes only be garnered with experience over time.

Determining Case Value

- It is essential to accurately evaluate a case. There are a variety of different settlements that can be reached. Cases can be settled on a to-date basis. However, a greater percentage of cases are settled on a full, final, and complete basis. Sometimes future medical is closed out full, final if there is a viable primary liability or temporary aggravation theory defense. In other situations, future medicals, or certain types of future medicals will remain open.

Know the Applicable Law

- The field of workers' compensation is akin to an archeological dig. The law in effect on the date of injury controls or determines what benefits will be payable. *Joyce v. Lewis Bolt & Nut Co.*, 412 N.W.2d 304, 307 (Minn. 1987). It is essential that you know what law applies to your date of injury. An incorrect application of the law to the applicable date of injury can make a difference of tens of thousands of dollars or even hundreds of thousands of dollars in assessing potential future exposure.

Know the Applicable Law

- Temporary Total Disability Benefits – 104 vs. 130 week cap;
- Temporary Partial Disability Benefits – no cap vs. 225/450-week cap;
- Permanent Total Disability Benefits – retirement presumption, threshold requirements, and supplementary benefits; and
- COLAs.

Medical Benefits

- Know what statutory or other defenses you may have to claim for medical benefits. Know the fee scheduled amount of the bill and the treatment parameters.
- In addition, it is important to factor in Medicare's interest whenever necessary. You will need to be aware of the potential need for a Medicare Set-Aside and/or whether this is something you want to explore.

Vocational Rehabilitation/Retraining

- You must know whether or not the employee is potentially a qualified employee for the receipt of vocational rehabilitation services. Also, know what potential vocational rehabilitation benefits the employee may be entitled to, i.e., is the employee a retraining candidate? If it is a case where retraining is involved, the exposure will be significantly more.

Know the Claim

1. Determine what benefits have been paid to date;
2. Know the employee's background;
3. Review the vocational rehabilitation records and job logs;
4. Review medical records for restrictions, MMI, and future treatment;
5. Determine if case is ripe for settlement; and
6. Know the opposing counsel (if one has been retained).

Know the Claim



"Can we, just for a moment, Your Honor,
ignore the facts?"

Be Realistic In Your Evaluation

- This is probably the most difficult part of evaluating a case. You must objectively give weight to various factors to determine the probability of the outcome and probable exposure. Again, experience is the best teacher in this regard. Consultation with colleagues; reviewing case law and discussing this matter with your defense attorney will also provide guidance.

Valuing Future Exposure

- One way to value the future exposure is to calculate what the total potential exposure may be and then determine the likelihood of the claim being successfully prosecuted on a percentage basis. Then multiply the total exposure by the percentage of success.
- An alternative way to measure the exposure is to determine what the maximum total exposure may be on the case and then determine the minimal likely exposure. Then, use your judgment to pick a reasonable number somewhere in between the two figures.

Reduce Future Exposure to Present Value

- You may be conducting an exposure analysis that assumes the payment of benefits many years into the future. Since you will likely settle the case on a lump sum basis, it is imperative that you reduce future exposure to present value. This can be done by using a present value calculation table, such as that at www.wcra.biz. It is advisable to calculate the present value of future exposure utilizing multiple interest rates (for example: 5%, 6% or 7%).

Know the Costs of Litigation

- There are costs involved with litigation. This involves the expenses you will pay to your attorneys, including costs of discovery, deposition, IME, expert medical testimony, expert vocational testimony and attorney time. There is also the potential for hourly attorney fees for the employee's attorney, including *Roraff, Heaton, Edquist* and .191 fees. The employee could also be entitled to partial reimbursement of attorney fees pursuant to Minn. Stat. § 176.081, subd. 7, in the event he or she would prevail on the merits, or in the event that the case is settled.

Negotiation Tips



"Remember, in this negotiation you're the 'Paula Abdul.'"

Negotiation Tips

- **BE REASONABLE:** Part of being reasonable is knowing the employee and/or the competence of his or her attorney. By in large, you should be reasonable in your opening offer or demand. If you start out with a low ball offer, it may stall or even terminate settlement negotiations and push the case to a hearing. Be sure to keep the lines of communication open.

Negotiation Tips

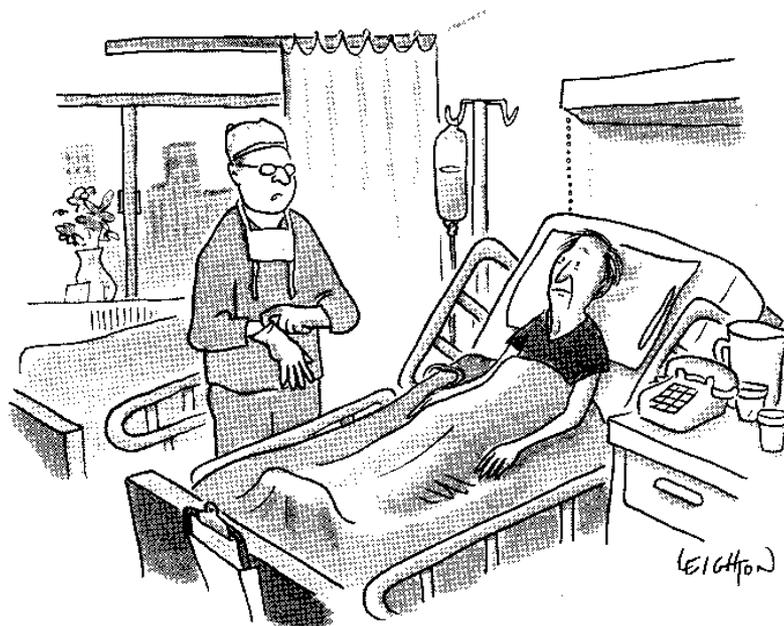
- **DO NOT BID AGAINST YOURSELF:** If you make a settlement proposal and then make another settlement proposal without receiving a counter-proposal from opposing counsel or the employee, this is a negative precedent that will come back to haunt you in future negotiations. This is why you should start out with a reasonable opening offer or demand so that you are not placed in the potential position of having to bid against yourself to restart settlement negotiations.

Intervenors

- If the intervenor(s) is not included in the settlement negotiations and given an opportunity to negotiate prior to settlement being reached, that intervenor will be entitled to 100% reimbursement of its intervention claim. *Brooks v. A.M.F., Inc.*, 278 N.W.2d 310 (Minn. 1979); *Parker-Lindberg v. Friendship Village*, 395 N.W.2d 713, 39 W.C.D. 125 (Minn. 1986); *Le v. Kurt Manufacturing*, 55 W.C.D. 650 (W.C.C.A. 1996).

Intervenors

- *Gamble v. Twin City Concrete Products*, Minnesota Supreme Court, August 13, 2014



"I'll have someone come in and prep you for the bill."

Documenting the Settlement

- In Minnesota, stipulations for settlement are required regarding any workers' compensation settlements. These need to be drafted by legal counsel. You can send a file out to a defense attorney for the sole purpose of drafting a stipulation for settlement.

Judicial Approval

- A settlement that is submitted for approval is **conclusively** presumed to be reasonable, fair, and in conformity with the Act if:
 1. All parties are represented by legal counsel;
 2. Medical and vocational rehabilitation benefits are not closed out on a full, final and complete basis; and
 3. A Guardian or Conservator is not required.

Judicial Approval

- If one of these preconditions are not met, then the parties bear the burden of proving to the court that the settlement is fair, reasonable and in conformity with the Act. Minn. Stat. § 176.521, subd. 2.

QUESTIONS?