Should you consider a career representing employers or injured workers in the administrative law compensation system for workplace injuries?

Workers’ compensation is a legal mechanism designed to provide wage compensation and medical benefits to workers who are injured in the course of their employment. It is a cornerstone of our network of social insurance programs. As of 2006, more than 130 million workers in the United States were covered by workers’ compensation, and compensation and benefits exceeded $54 billion dollars. Employer costs for workers’ compensation were even higher, a total of $87.6 billion or $1.58 per $100 of covered wages. The billions of dollars spent on compensation and benefits highlight the economic significance of workers’ compensation as well as the potential for a flourishing workers’ compensation legal practice.

The enactment of worker’s compensation statutes falls within the purview of the legislative power of the states, and no federal workers’ compensation insurance
program exists for private employees. Accordingly, each state has its own statutory approach, which may include private insurance, a state insurance fund, self-insurance, or a combination. All workers’ compensation programs provide coverage to employees without regard to fault. An injured worker is entitled to participate in the workers’ compensation system even if his own negligence contributed to the injury. Similarly, a covered employer enjoys immunity from damages for pain and suffering such as might be awarded in a tort action, even if it failed to exercise due care. The essential element necessary for a workers’ compensation claim is simply an injury or occupational disease sustained in the course of and arising out of employment.

In large part, the workers’ compensation system was intended to function without the need for either party to hire an attorney or file a lawsuit. In recent years, however, legal representation at administrative hearings has become the rule rather than the exception, providing an entree to workers’ compensation for young attorneys. A workers’ compensation practice allows an attorney to develop critical litigation skills in the administrative arena before deciding whether to embark on a career as a trial lawyer.

UNDERSTANDING A WORKERS’ COMPENSATION CLAIM

For most on-the-job injuries, a worker’s compensation claim is allowed as a matter of course. Medical bills are paid upon submission, and the injured worker receives compensation for time lost from work while the injury heals. A lawyer rarely becomes involved in uncontested claims. Where the causal relationship between an injury or occupational disease and the employee’s job is disputed, or where medical opinions differ as to the appropriateness of treatment or the claimant’s extent of disability, the administrative hearing process comes into play.

Administrative adjudication of workers’ compensation claims involves the same elements as regular trial practice, but on a more limited scale. The workers’ compensation statute and accompanying administrative rules provide the legal framework for adjudicating a claim. The attorney must investigate the merits of the claim, research applicable law, and develop a theory of the case. Discovery is minimal, although claimants are required to authorize release of pertinent medical records. Requests to take the deposition of a treating or examining physician are rarely granted.
A thorough understanding of the medical aspects of an injury is essential. There is no substitute for a careful review of a treating physician’s office notes, operative reports, and results of diagnostic testing. A working knowledge of common medical codings is also key, since care providers may refer to a diagnosis or procedure by its numeric code only rather than a narrative description. A medical dictionary and ICD-9 and CPT code books should be kept close at hand.

Preparation for an administrative hearing frequently includes obtaining an opinion from a physician on a disputed issue. The lawyer must not only be familiar with the medical conditions in the claim, but must also understand the law well enough to phrase the questions to be answered by the physician. A physician’s stock in trade is taking a history, examining the patient, and making a diagnosis. For purposes of workers’ compensation, however, the physician may also be asked to give an opinion as to causation. A care provider may be reluctant to give an opinion as to the cause of carpal tunnel syndrome, for example, because of a mistaken belief that absolute certainty is required. A statement of causation “to a reasonable degree of medical probability” or that it is “more probable than not” that a worker’s job caused the condition will suffice, and it’s the lawyer’s responsibility to properly instruct the physician as to the appropriate standard.

Similarly, a physician may be asked to opine whether an injured worker’s condition has reached “maximum medical improvement” or whether the injury has resulted in a “permanent impairment.” In each instance, the lawyer must be careful to define the terms for the physician. While it is not necessary to parrot certain “magic words,” a medical opinion must be phrased to meet the applicable legal standard. Physicians who regularly treat work-related injuries expect to receive accurate information from the lawyer with respect to the facts and the law, and developing and maintaining a good professional relationship with the medical community will pay dividends in the future.

THE ADMINISTRATIVE HEARING

An administrative law judge or hearing officer presides over hearings concerning disputed matters. Due process rights are respected, and the parties receive advance notice of the date, time, and place of the hearing as well as the matters to be considered. Each party may present evidence in the form of live testimony, witness statements, expert
reports, medical records, employment documents, videos, or demonstrative exhibits. The administrative rules governing the proceedings do not require strict adherence to the rules of evidence, and objections are rare. Hearings typically last about 15 minutes, although additional time may be granted. Generally no formal record of the hearing is made, but any documents submitted are preserved as part of the claim file. If warranted, either party may arrange for a court reporter to transcribe the hearing at its own expense.

A few days after the hearing, the hearing officer issues a written decision granting or denying the relief requested. The decision will generally include the rationale and specify the evidence relied upon. Most states allow for a further administrative appeal and a chance to remedy any evidentiary shortcomings, but the number of appeals is limited. The timely resolution of workers’ compensation claims works to the advantage of a beginning lawyer eager to gain experience. While the usual personal injury case may take two to three years to get to trial, administrative resolution of a workers’ compensation claim is often completed in less than six months. Aspiring litigators benefit from the opportunity to examine witnesses, present exhibits, and make arguments during administrative hearings with much greater frequency than in the usual trial practice. An attorney who specializes in workers’ compensation practice may handle 25 or 30 hearings a week. Also, because witnesses are not deposed prior to the hearing, the lawyer learns how to deal with unanticipated testimony.

For those cases in which a final administrative decision is appealed to court, the lawyer who has handled the administrative hearings will already have a solid understanding of the case. Written discovery, depositions, and appropriate motion practice can be conducted with efficiency and skill. In short, administrative workers’ compensation practice allows lawyers to gain valuable litigation experience and to present the case in a manner that is most beneficial to their client.

**REPRESENTING EMPLOYERS AND INJURED WORKERS**

Most attorneys choose whether they will represent employers or employees and limit their acceptance of clients accordingly. Ideally, representation of an employer begins long before a workers’ compensation claim is filed. The lawyer may function as a “risk management consultant” to assist the employer in implementing policies contributing to a safe workplace. Procedures for reporting and treating injuries,
providing light duty, and facilitating return to work are important cost-control measures. Where written disclosures are required to benefit from statutory presumptions, counsel can verify compliance. In Ohio, for example, R.C. 4123.54 creates a rebuttable presumption that where an injured worker tests positive for drugs above the statutory level, the drug use is the proximate cause of the injury. To benefit from the presumption, the employer must post written notice to employees that the results of a chemical test—and the refusal to be tested—may affect the employee’s eligibility for compensation. The lawyer’s assistance can be invaluable in complying with the statute. Besides managing risk, these efforts help to develop a relationship of trust and confidence between lawyer and client. A good working relationship will go a long way in smoothing out the inevitable bumps in the road when a claim is filed.

Attorneys typically charge employers by the hour for representation in connection with workers’ compensation matters. By hiring an attorney to defend against the allowance of a claim or approval of a particular medical treatment, the employer hopes to save money down the road but cannot expect to receive payment from the claimant or any other party. A thoughtful practitioner, therefore, will often use paralegals and other support personnel to assist in case preparation and keep costs down for the employer. Well-trained paralegals can relieve a busy practitioner from the mechanics of filing motions and appeals, obtaining signatures, and collecting medical records and can significantly lower billing rates as well.

Attorneys who choose to become claimants’ counsel are also called upon to provide advice and navigate the workers’ compensation system on behalf of their clients. Even though workers’ compensation statutes must be liberally construed in favor of awarding benefits, every injury that occurs at the workplace is not compensable. Explaining to a disabled factory worker who suffered a heart attack at work that he may not be entitled to workers’ compensation benefits can be a challenge for even the most experienced attorney. Similarly, even when a claim is allowed, an injured worker must be informed that visits to the chiropractor three times a week for months and months is not authorized and that he may be required to foot the bill for prolonged care. Paying for medical services may seem especially burdensome since the compensation an injured worker receives while his injury heals is only a percentage of his regular earnings, not the full amount. Accordingly, zealous representation of an injured worker may include expectation management as well as budget counseling.
On the other hand, workers’ compensation recipients are generally pleased to learn that they are entitled to a lump-sum award for any permanent impairment resulting from their injuries. Wage loss attributable to the industrial injury is also compensable. Awards of compensation are the primary source of payment for claimants’ attorneys, who typically provide representation in exchange for a percentage of the compensation received. Where a claimant is found to be permanently and totally disabled and, therefore, becomes eligible for lifetime benefits, claimant’s attorney receives a lump-sum fee, subject to approval by the worker’s compensation administrative body. Similarly, the fee awarded to an attorney who obtains a favorable verdict for his client on a court appeal is frequently set by statute. In Ohio, for example, an attorneys’ fee of up to $4,200 may be awarded by the trial judge, based on the effort expended. Claimants’ attorneys have high earnings potential, but their income is subject to significant variation.

HEARING OFFICERS AND ADMINISTRATORS

The hearing officer acts as both judge and jury for the administrative adjudication of a workers’ compensation claim. A hearing officer must have a JD, but no special experience is required. An attorney selected to be a hearing officer receives several months of specialized training in the procedural, legal, and medical aspects of workers’ compensation. The training process includes attending hearings with an experienced hearing officer to develop familiarity with the hearing process.

The hearing officer plays a pivotal role in the expeditious and impartial resolution of issues arising in the course of administering claims. Besides deciding the merits, the hearing officer manages the hearing process by granting or denying continuances, apportioning time between the parties, and controlling witness testimony. On occasion, hearing officers may even get into the act by asking key questions that the attorneys overlooked. Particularly where a claimant is unrepresented, hearing officers may explain the hearing process to the participants and offer guidance as to the next steps.

In most cases, hearing officers say that the right answer is clear and the matter can be decided based on the evidence presented at the hearing. In some instances, however, an unusual issue may require additional research, and the hearing officer will issue an ex parte order postponing a decision to allow time for research and consultation with colleagues. With four hearings scheduled every hour, however, the vast
majority of cases are decided without further review. Hearing officers develop a high level of expertise in dealing with even the most arcane features of workers’ compensation law.

A lawyer who elects to pursue a career as a hearing officer must be comfortable making decisions. Hearing officers may hear upward of 100 cases a week, and each one requires a decision. Experienced hearing officers enjoy the autonomy of having control over their docket and deciding the issues. While the volume of cases may raise the specter of repetition or boredom, hearings involve a variety of interesting legal issues and the job is both varied and fun. Further, unlike a typical litigation practice, a hearing officer’s work week does not exceed 40 hours.

Lawyers may also serve as hearing administrators. The administrator may conduct prehearing conferences for permanent total disability claims, but the job is largely managerial and supervisory. It is the administrator’s responsibility to assure that the hearings are scheduled appropriately, that hearing officers are assigned, and that notices are provided to all parties. The administrator will also rule on requests for continuances submitted in advance of the hearing. Some, but not all, administrators go on to become hearing officers.

Hearing officers and hearing administrators are state employees, and these positions typically include benefits and retirement. An attorney may pursue a 30-year career as a hearing officer, but moving to private practice after five or six years is also an option. Law firms value the expertise and professional polish that good hearing officers bring to the practice, and the lawyer may wish to return to the advocacy side of the table.

**ETHICAL ISSUES**

One of the more common ethical issues presented by workers’ compensation practice is the unauthorized practice of law. Although the workers’ compensation system is intended to operate largely without representation, the administrative adjudication of disputed issues presents pitfalls for the unwary. In a claim that has been allowed for a lumbar sprain, for example, the treating physician may diagnose a herniated disc and file a motion seeking to have the herniated disc allowed in the claim. Filing motions, however, constitutes the practice of law. The claimant or the employer who are parties to the action may file motions, but physicians or other care providers may not, despite their best intentions to advocate for their patients. Such a motion is invalid and may subject the physician to civil penalties.4
On the other hand, union representatives may assist an injured worker, and a service company or third-party administrator may help the employer administer its workers’ compensation claims. Such assistance is acceptable as long as it does not involve legal analysis, skill, citation to legal authorities, or interpretation. Although nonlawyers may provide representation at administrative hearings, a nonlawyer’s role is limited to stating the party’s position and identifying specific evidence in the record that supports that position. Only attorneys may make legal arguments, examine witnesses, and comment on the evidence.

Hearing officers are in the best position to spot the unauthorized practice of law, but employers’ counsel and claimants’ counsel alike have the same duty to avoid assisting in the unauthorized practice of law. Because of the nature of the workers’ compensation system, the potential arises more frequently than in other settings, and heightened awareness is warranted.

CONCLUSION

A workers’ compensation practice allows an attorney to develop critical litigation skills in an informal setting around a table rather than in a courtroom. All the elements of trial practice come into play, from examining witnesses and presenting evidence to making arguments. Workers’ compensation matters can be adjudicated in six months or less—providing a wealth of experience in an abbreviated time frame. Attorneys may seek employment either as administrative hearing officers or representing a party to the claim, both of which require knowledge of workers’ compensation law and present unique legal challenges. Because many of the disputed matters in a claim involve medical issues, a workers’ compensation practice may be a particularly appealing option for lawyers who had a hard time deciding whether to go to medical school or law school.

NOTES

2. E.g., Cleveland Bar Ass’n v. CompManagement, Inc., 111 Ohio St. 3d 444, 857 N.E.2d 95, 2006-Ohio-6108, ¶ 8.
3. R.C. 4123.512(F).
4. In Ohio, the medical community and the workers’ compensation bar worked together to develop a new form whereby physicians could give “notice” to all parties of their recommendations as to additional conditions or proposed treatment without running afoul of the prohibition against the unauthorized practice of law.