Workers Compensation: Disruption is the Only Cure to Saving a Broken System

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Program Overview:

A. Costs to Employers of Workers’ Compensation Claims Nationwide:

- What can be done?
- Proposed Best Practices

B. Status of Current Workers’ Compensation Legislation and Case Law

C. Fraudulent Claims Reporting and Aggressive Case Management Are Required
Costs to Employers of Workers’ Compensation Claims Nationwide:

- The DOL states that as of 2010, workers’ compensation cost employers more than $95 billion annually.

- In 2013, the Coalition Against Fraud, claimed that worker’s compensation fraud cost businesses and insurers tens of billions of dollars in stolen premiums and bogus claims.

- Studies reveal that 1 to 2 percent of all claims are fraudulent (and the sources are likely significantly underreported).
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Proposed Best Practices: Start with administration of the Employer’s TPA/Captive Program:

• Audit the Claims Protocol and Develop Client Instructions
• Aggressive Claims Handling Registers Results-follow the simple indicators to register results
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What areas require Immediate Attention in any Claims Handling Program?

Best Practices:

- Demand Immediate Internal Reporting of Notice of Claim (response time is critical)
- Use of Recorded Statements
- Referral to Defense Counsel - When? (not solely when “litigation” filed)
- Use of Surveillance
- Medical or Legal Red Flag Indicators
- Preparing Strategic Plans of Action (and monitoring adherence to them)
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Best Practices:

• Demand Immediate Internal Reporting of Notice of Claim (response time is critical)

Ten warning signs of Potential Workers’ compensation fraud:

1. Monday morning reports;
2. Suspicious providers;
3. Conflicting descriptions;
4. Treatment is refused;
5. Claimant is hard to reach;
6. Employment change;
7. No witnesses;
8. History of claims;
9. Late reporting; and
10. Other changes (physician, addresses)
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Best Practices:

• Use of Recorded Statements
  – When to obtain a recorded statement? (types of claims and timing issues)
  – Always consider questionable compensability, repetitive / cumulative trauma claims, possible fraud, known pre-existing conditions, among others
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Best Practices:

• Referral to Defense Counsel- When? (not solely when “litigation” filed)
  – Develop with TPA, a specific set of criteria as to when a defense attorney should be assigned
  – Under your client’s program, what is the definition of “litigation” (understanding the expertise and limits of claim administrators in workers’ compensation arena)
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Best Practices:

• Use of Surveillance: When and Why?
  – What red flag indicators should mandate surveillance?
  – Timing and use of results varies from state to state
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Best Practices:

- Medical or Legal Red Flag Indicators
  - Review every claim to consider if any of these exist
  - Understand the fraud referral process (including to potential criminal investigative agencies/ state district attorneys)
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Best Practices:

• Preparing Strategic Plans of Action (and monitoring adherence to them)
  – What are they?
  – When should they be prepared and for whom?
  – How to monitor compliance with the SPOA and who owns this risk function?
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• B. Status of Current Workers’ Compensation Legislation and Case Law

• Across the country, courts are steering workers compensation decisions on a path that is unsustainable.
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- LANKFORD v. NEWTON COUNTY  517 S.W.3d 577 (Missouri Court of Appeals 2017)

- Claimant worked in a county courthouse. During his breaks from work, he would smoke cigarettes in an area covered with pigeon droppings.
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• After years of smoking in this area, as well as smoking at home and outside of work, Claimant died due to complications from pneumonia.

• Employer’s expert testified that years of smoking cigarettes was the primary cause of death.
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• Surviving spouse’s medical expert indicated that claimant’s lungs had evidence of fungus and bacterial infection which can come from exposure to pigeon droppings.

• Case proceeded to trial, with Claimant’s attorney arguing that the exposure to pigeon droppings was “the prevailing factor” in causing Claimant’s death.
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• The Administrative Law Judge awarded benefits, finding that Claimant’s periodic exposure to the pigeon droppings during his employment were the prevailing factor in causing the lung infections, and that the stroke (final cause of death) was a direct consequence of the treatment Claimant received for the two infections.
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• The matter was appealed to the Missouri Labor and Industrial Relations Commission, where the Commission determined that claimant’s expert was more credible than 3 pulmonary experts who determined that claimant’s pneumonia was solely caused by claimant’s lifetime of smoking.
• In Missouri, the Industrial Commission is chosen by the Governor. At the time of this decision, the Governor was pro-claimant and the Industrial Commission reflected this bias.

• Also, as in most states, the Industrial Commission is the sole determiner of the credibility of the witnesses.
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• As such, since the Commission decision was based on the credibility of the witnesses, the Court of Appeals affirmed the award of lifetime benefits for the surviving spouse.

• The Court of Appeals stated: "we do not reweigh the evidence; the Commission is the judge of the weight to be given to conflicting evidence and the credibility of the witnesses."
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• So....we have a lifetime smoker, who may have been around pigeon droppings when he was on his smoke break at work, dies of pneumonia and lung cancer, and his death is determined to be caused by his employment.
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- We have a Commission that reflects the pro-claimant bias of the Governor, and a Court of Appeals that is prevented from overturning a ridiculous decision.

- How can businesses plan, budget, and reserve for this type of risk?
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• Bonnie Jensen-Price v. Encompass Medical Group (Mo.App. WD 8/23/16, transferred to the Missouri Sup. Ct 1/31/2017, decision pending)

• Claimant was a nurse. She left work (from an office building) and was in the building’s common area by the elevator. Employer did NOT own or control the area where the accident occurred.
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• Claimant was bumped by a cleaning cart. She was carrying a laptop computer to do work at home. Nurse injured her back, underwent surgery, could not return to work, and alleged permanent total disability.

• Claimant requested a lifetime of PTD benefits, and lifetime medical care.
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• The Administrative Law Judge found that the claim was NOT compensable under the “Going to – Coming from” rule. Claimant had left work and was off of the property owned or controlled by the Employer at the time of the accident. ALJ determined that claimant’s work ended once she exited the Employer’s property.
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• The Missouri Industrial Commission UPHELD the defense award, but for different reasons. The Commission determined that there was no evidence of greater risk of injury to her than in claimant’s normal non-employment life.
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• HOWEVER - The Commission disagreed with the ALJ's analysis that claimant's work ended when she left the suite and came to a common area. Because claimant was going home to work and going from one work location to another, she was still 'on the job' for Workers Compensation purposes.
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- According to the Industrial Commission, the “Going To- Coming From” rule did not apply because the claimant was carrying her laptop computer home.

- How is this any different from us carrying our phones in our pockets or purses with the intent to exchange emails at home?
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• The Western District Court of Appeals upheld the denial of benefits because claimant was not at an increased risk of injury due to her employment.

• However, the Court of Appeals stated that it was bound by the Commission’s decision that claimant was “on the job” at the time of the accident.
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• Case has been transferred to the Missouri Supreme Court on the issue of whether possession of a computer, in of itself, is sufficient to negate the “Going To – Coming From” rule that rejects the compensability of injuries that occur while going to and coming from work.

• Again, how could this risk be reserved?
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- Ronald Reynolds v. Wilcox Truck Lines (MO Industrial Commission, July 3, 2018)

- Claimant was involved in a single-vehicle accident when the tractor trailer he was driving overturned. Claimant was not seriously injured in the accident, but was in the cab when he smelled diesel fuel. He kicked out the windshield, exited the vehicle, and then the cab was engulfed in flames.
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• Claimant suffered relatively minor physical injuries but experienced emotional trauma due to escaping from the flaming cab and was diagnosed with PTSD

• Claimant returned to work for the employer for several months but then voluntary resigned his employment alleging that he was unable to deal with the stress of driving a truck.
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• In addition to alleging permanent total disability, Claimant also argued that he needed someone to manage his medication, doctors’ appointments, transportation and avoid going into crisis.

• The ALJ awarded PTD benefits, but denied benefits for “nursing care” requested by the claimant’s spouse.
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• The Industrial Commission upheld the award of PTD benefits, but modified the award by awarding the cost of “nursing care” to the claimant’s spouse.
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• The Commission concluded that the claimant’s spouse was entitled to compensation for services rendered related to managing claimant’s medication, doctors’ appointments, transportation, and helping claimant to avoid “going into crisis”.
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• The Commission determined that the claimant’s spouse was entitled to receive $16 per hour, 20 hours per day, for the 5 years prior to the hearing.

• In addition to the award for PTD, claimant was awarded an ADDITIONAL $208,000 for assistance given to him by his spouse, along with future benefits for his lifetime.
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• Case has been appealed to the Missouri Court of Appeals, where a decision is pending.

• Main issue on appeal is whether, under the Missouri Workers Compensation Act, managing claimant’s medication, doctors’ appointments, transportation, and helping claimant to avoid “going into crisis” constitutes “Nursing” or “Medical” care.
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CONCLUSION TAKE AWAY

Employers can only control their own workers’ compensation programs and not depend on the courts. Fraudulent Claims Reporting and Aggressive Case Management Are Required.
THANK YOU!!

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