Mitigate Workers' Compensation Claim Costs In A Shifting Climate

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THE WHAT & WHY

WHAT?

- Recent Legislative Changes and Case Law Trends
- Overview of an Oregon WC Claim
- What you can do to impact your claim costs

WHY?

- An Employer's Experience Rating is directly impacted based on number of claims and the severity of those claims.
- The greater the severity (i.e. cost), the higher the premium.
- There are many aspects of a WC claim an employer CANNOT impact. Focus on the those you can control.

Increased Claim Costs: Legislative Trends

New Legislation/Legislative Trends:

- **HB 4138**

  Changes entitlement to retroactive time loss benefits from 14 to 45 days.

  Limits recovery of any overpaid benefits.

  - Can only recover overpaid time loss benefits from permanent partial disability award from 100% to 50%.
  - An insurer or self-insured employer now may not declare an overpayment of any compensation that was paid more than two years prior to the date of the overpayment declaration.

- **HB 4113**

  Expands the Firefighter Presumption to include bladder cancer, and cancer or gynecologic cancer of the uterus, fallopian tubes, ovaries, cervix, vagina, or vulva

  - Note: cancers currently covered under the firefighter's presumption are brain cancer, colon cancer, stomach cancer, testicular cancer, prostate cancer, multiple myeloma, non-Hodgkin's lymphoma, cancer of the throat or mouth, rectal cancer, breast cancer, and leukemia.

- **HB 4086**

  Expands definition of "dependent" to include "any individual related by blood or affinity whose close association with the worker is the equivalent of a family relationship"

  - Previously defined dependent as "a parent, grandparent, stepparent, grandson, granddaughter, brother, sister, half-brother, half-sister, niece or nephew".

Increased Claim Costs: Case Law

New Case Law/Court Trends:

- *Marisela Johnson v. SAIF Corporation* (4/21/2022) & *Theresa Robinette v. SAIF Corporation* (6/3/2022)

  Limit ability to apportion permanent impairment (i.e. separating the impairment due to an accepted work injury and impairment due to preexisting and/or unrelated/non-accepted conditions). Time loss benefits from permanent partial disability award from 100% to 50%.

  An insurer or self-insured employer now may not declare an overpayment of any compensation that was paid more than two years prior to the date of the overpayment declaration.

- *Luis F. Nava*, 74 Van Natta 372 (5/17/2022)

  Board, *en banc*, held insurer or self-insured employer have an affirmative claim processing obligation to revise the claim acceptance when medical information indicates that a previously issued notice of acceptance should be modified.

- *Mekayla N. Dancingbear v. SAIF Corporation* (2021)

  Expands scope of claimants' attorneys' fees.

Oregon Workers' Compensation 101

- Reporting Injuries
- Determining Compensability
- When a claim is denied….
- When a claim is accepted…
- How an employer can impact claim exposures/costs

Reporting Injuries

- TIMELY REPORTING
  - An employer must report a claim to its insurer no later than five days after the date the employer has notice or knowledge of any claim or accident that may result in a compensable injury.
  - 60 days from date of employer knowledge to investigate a claim (accept/deny).

- KNOW THE REPORTING PROCEDURE
  - Do foreman, supervisors, or management that are ‘boots on the ground’ trained? Do they know what paperwork/investigation forms/documents are expected?

- FORM 801
    - Provide worker with Form 801 and have worker complete and sign it.

Reporting Injuries

436-060-0010 Employer Responsibilities

(1) General

A subject employer must accept notice of a claim for workers' compensation benefits from a worker or the worker's attorney under ORS 656.265.

(a) Form 801, "Report of Job Injury or Illness," must be readily available for workers to report their injuries. The employer must provide Form 801 to the worker:

(A) Immediately upon request by the worker or worker's attorney under ORS 656.265(6); or

(B) Upon receiving notice or knowledge of an accident that may involve a compensable injury under ORS 656.262(3)(a).

(2) Employer reporting time frame

(a) An employer must report a claim to its insurer no later than five days after the date the employer has notice or knowledge of any claim or accident that may result in a compensable injury.

(b) The date an employer has knowledge of an accident that may result in a compensable injury is the earliest date any supervisor or manager of the employer has enough facts to reasonably conclude that workers' compensation liability is a possibility.

Determining Compensability

Legal Causation (i.e. The FACTS)

- This is the who, what, when, where, and how.

Medical Causation (i.e. The MEDICINE-- Is there are relationship and/or what is the relationship between the injury event and the claimed medical condition/treatment?)

- Requires medical opinions rendered by medical experts.

For a claim to be compensable, both legal and medical causation must be established.

Determining Compensability – The Employer's Role

COMMUNICATION/INVESTIGATION

- Ensure worker completes and signs Form 801.
- Have worker complete any other required investigation/incident reports.
- Immediately identify any/all crew/co-workers and obtain written statements.

  NOTE: All statements should be dated, signed, and include that individual's contact information.
- Take pictures and secure evidence.
- Check in with worker and co-workers after initial investigation/claim reporting.

Determining Compensability – The Employer's Role

COMMUNICATION (INVESTIGATION)

- Provide the claims professional, attorney or investigator any 'through the grapevine' or other information that may be relevant. Examples:

  Injured worker's wife is best friends with co-worker Bill's wife and the four of them go camping together every year.

  Injured worker is claiming a shoulder injury. He drives a Harley with 'ape-hanger' handlebars to work.

  Injured worker's wife used to work for the doctor currently treating injured worker's injury.

  Injured worker is claiming a shoulder injury; he's an avid archer and bow hunter.

What Happens When a Claim is Denied?

- The claims professional sends worker a written notice by regular and certified mail advising that the claim has been denied and how to appeal.
- A worker has 60 days to appeal a denial from the date the denial was mailed to the Oregon Workers' Compensation Board Hearings Division.
- When the Hearings Division receives an appeal (Request for Hearing), a hearing is set no sooner than 90 days but not later than 180 days of that request. Hearings are scheduled for either 9:00 am or 1:30 pm, unless a party requests an all-day set.
- Hearings are held before an Administrative Law Judge (not a jury).
- Any witnesses must appear at hearing to testify (cannot rely only on written statements or hearsay).
- Employer should have an employer representative attend the hearing. This person sits at counsel table, is present throughout the hearing, and may testify.

What Happens When a Claim is Denied?

Cont'd -

- Once the hearing is complete and the "record is closed", the Judge has 30 days to issue a written decision (Opinion & Order).

- Either party has 30 days from the date of the Judge's decision to appeal that decision.

A Denied Claim- The Employer's Role

- Ensure the company's claims professional and attorney have all investigative materials.
- Continue to provide the claims professional and/or attorney any documentation/investigation information.
- Assist the claims professional and/or attorney preparing the case by having witnesses (co-workers/crew members) available, and if necessary, attend a hearing.
- Identify/make available the best management member to attend the hearing as an employer representative.

What Happens When a Claim is Accepted?

- The claims professional sends worker a written notice by regular and certified mail advising that the claim has been accepted.
- Worker is entitled to benefits. These **MAY** include ongoing medical treatment, temporary disability (time loss), permanent partial disability, and vocational assistance/retraining.
- Claims processing goals regarding an accepted claim:
  - Ensure worker receives appropriate treatment for the accepted condition(s).
  - Return the worker to regular work/the job at injury.
  - Properly assess any permanent partial disability associated with the accepted conditions once the worker has reached a medically stationary status.
- Once the treating doctor determines the worker is medically stationary, then the workers' compensation claim is closed.
- If a worker is **NOT** released to perform regular work at the time of closure, he/she is entitled to a work disability award and a vocational eligibility assessment to determine if he/she qualifies for retraining.

An Accepted Claim- The Employer's Role

- Communicate with injured employee:
  - If the employee is off work, and employer does not have modified work, check in with the employee to see how he/she doing.
  - If the employee is working modified duty, check in with the worker's management to ensure the work being performed is within the restrictions, and check in with the worker.
  - Ensure you are receiving updated work status forms from the worker/worker's physician.
- Communicate with the claims' professional:
  - Provide any updates regarding work status; work status forms; or any other information that may impact claim.

An Accepted Claim- The Employer's Role

What is the most impactful action an employer can take to mitigate claim costs and help facilitate the fastest and most successful recovery for an employee?

Provide meaningful modified work within the employee's restrictions while the employee is recovering from the injury.

STEP 1: Identifying Light Duty/Modified Work

Examples of light duty jobs:

- Inventory parts, supplies, and/or tools
- Inspect fire extinguishers; eye washes
- Replenish first aid cabinets
- Office work
    - Laminating
    - Scanning
    - Shredding
    - Update Manuals
    - Answering Phones
    - Data Entry
    - Filing
- Perform security functions (“greeter”; door/ID monitor; monitoring surveillance/CC video)
- Complete on-line training (safety videos or other types of training required/relevant to the worker’s job at injury)

STEP 2: Approving the Light Duty/Modified Work

The employer or insurer **MUST** communicate and obtain approval from the worker's attending provider as follows:

- Notify the attending physician or authorized nurse practitioner of the physical tasks to be performed by the injured worker.
- Notify the attending physician or authorized nurse practitioner of the location of the modified work offer.
- Ask the attending physician or authorized nurse practitioner if the worker can, as a result of the compensable injury, physically commute to and perform the job.

STEP 3: The Modified Job Offer Letter

A modified job offer to a worker must be in writing, stating:

1. The beginning time, date, and place of the light duty/modified work;
2. The duration of the job, if known. (if not known, that must be stated);
3. The wages;
4. An accurate description of the physical requirements of the light duty work;
5. The statement that the worker's attending physician or authorized nurse practitioner has found the job to be within the worker's capabilities and the commute to be within the worker's physical capacity;
6. The worker's right to refuse the offer of employment without termination of temporary total disability if any of the following conditions apply:

   (i) The offer is at a site more than 50 miles from the location where the worker was injured or where the worker customarily reported for work, unless the work site is less than 50 miles from the worker's residence, or the job at the time of injury involved multiple or mobile work sites as established by the intent of the employer and worker at the time of hire or the employment pattern before the injury;

   (ii) The offer is not with the employer at injury

   (iii) The offer is not at a work site of the employer at injury

   (iv) The offer is not consistent with existing written shift change policy or common practice of the employer at injury or aggravation; or

   (v) The offer is not consistent with an existing shift change provision of an applicable union contract;

7. The following notice, in prominent or bold face type:

   "If you refuse this offer of work for any of the reasons listed in this notice, you should write to the insurer or employer and tell them your reasons for refusing the job. If the insurer reduces or stops your temporary total disability and you disagree with that action, you have the right to request a hearing. To request a hearing you must send a letter objecting to the insurer's actions to the Worker's Compensation Board, 2601 25th Street SE, Suite 150, Salem, Oregon 97302-1282."

Takeaways

- Based on current legislative trends and recent case law, employers are likely to see increased workers' compensation claims costs associated with higher permanent impairment awards; more litigation, and more attorney fees/penalties
- Higher claims costs mean higher Mods/ER and thus higher premiums
- Employers can help mitigate claim costs in a few specific ways:
  - At the outset of notice of an injury or claim, conduct an investigation that includes obtaining contemporaneous written documentation from the injured worker and witnesses.
  - Maintain an intentioned open line of communication with the worker.
  - Have a policy of offering modified work and provide modified work to injured employees.

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