

How to Avoid, Manage, and Win Workers' Comp Claim Litigation

The majority of workers' compensation claims resolve without going to litigation, but those that do can be extremely frustrating. Start with strategies to avoid litigation which also serve as fundamental elements to ultimately winning the case should it go to trial.



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Point #1: How to Avoid Workers' Compensation Litigation

Why Injured Workers Seek Out Attorneys

WCRI Study – Avoiding Litigation: What Can Employers, Insurers, and State Workers' Compensation Agencies Do?

The Workers Compensation Research Institute surveyed injured workers in 2014 to find out why injured workers hired attorneys. Here are their top responses:

- 1 Fear of being fired.**
 - a) 33% of all injured workers had a fear of being fired
 - b) 48% of injured workers with a fear of being fired hired an attorney.
- 2 Felt faking injury.**
 - a) The injured worker perceived that his or her supervisor did not think the injury was legitimate.
- 3 Claim denied.**
 - a) Injured worker perceived that his or her claim had been denied, even if it was later paid.

Brad: All three of the things in the WCRI study all involve fear, and fear is the primary underlying reason injured workers contact me.

Empathy is a key skill in the successful management of workers' compensation claims, which includes understanding why an injured worker would hire an attorney.

Culture of 'Do Not Report the Injury'

Stuart: A company culture that discourages reporting will breed litigation because the injury will often get worse until it gets bad enough to finally report it, and that individual will almost certainly hire an attorney to protect themselves.

Union vs. Management

Stuart: I see many cases when a union is involved the relationship between labor and management is such that everything is litigated because that's the way it's always been done. You have to address this relationship by creating programs and trying to open up trust between the injured worker and the employer.

Impactful Steps to Avoid Litigation

1 Communicate and Set Expectations

Communicate and set expectations with injured workers' in as many ways as possible to address underlying fears:

- Send get-well card. As a first step, send a card that says, "we hope you get better; we miss you here at work."
- Employee brochure. A brochure provides details on how the program works, what the injured worker can expect from the workers' compensation process, and sets the stage for return to work.
- Adjuster information. Provide the specifics of the injured worker's claim to eliminate his fears.

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2 Measure and Track for Success

It is important to track metrics once your organization has a system of communication and setting expectations.

1. Lag time report.

a) Studies have consistently shown higher litigation rates for claims that are not reported timely.

2. Return to work ratio.

a) Defined as the percentage of employees that return to work in 0-4 days. An organization should have a goal of 90+ % of employees returning to work in 0-4 days.

3. Litigation rate.

a) Low lag time reporting of claims and faster returns-to-work equal lower litigation rates.

Point #2: How to Manage Workers' Compensation Litigation

Never having a litigated claim can be as much a red flag as litigating every claim.

Get the Right Attorney

Managing litigation is largely dependent on the relationship between the employer and the defense attorney. Your attorney should treat you as a fiduciary, meaning he treats you and your interests better than his own.

Costs

A high integrity attorney is a key part of a high integrity injury management program. An attorney with a fiduciary relationship does not overcharge you. Look at the attorney's bill to see:

- Did he charge a fair rate?
- Did he charge for emails or simple phone calls?
- Did he provide good service?

Early Engagement with Attorney – "What Do You Think?"

A best-in-class program should involve the perspectives of several professionals early in the case to make the best decision. The defense attorney should be part of the team to help create a better outcome and someone to ask "what do you think about this case?"

The right attorney will provide his thoughts and advice without opening a file and charging you.

Pay Without Prejudice

Paying without prejudice is defined as paying a claim before it's determined whether or not the claim is compensable.

Stuart: Sometimes, in the states that allow it, the advice might be, 'you know what, let's issue a denial, but why don't we voluntarily pay the emergency room bill, because that emergency room bill is going to be a lot cheaper than you hiring me to win the case.'

Point #3: How to Win Workers' Compensation Litigation

Rig the Deck in Your Favor

Eliminate fear

Stuart: There are times when I find employers, adjusters or the TPA have a fear of litigation, and fear means that you just don't understand something. So if we could educate and explain to take away the fear, then we're ready to go ahead and present our best case.

Reputation

Brad: When I'm representing the Plaintiff side I lower my value of the case if my opponent is a tough litigator who has a winning reputation because he always comes prepared with a good team behind him investigating.

Early investigation

Part of a best in class injury management program is collecting as much information and documentation as possible at the beginning of every claim. You want your attorney to be armed with as much evidence as possible to win, such as:

1. Written/recorded statements
2. Videos
3. Social media investigations

Present the Evidence

Stuart: There are two things that I like to say when we're dealing with evidence, "What is my evidence?", and, "How can I present that evidence in the most persuasive manner to a judge, arbiter, or eventually a jury?"

Having the employer present at the trial further demonstrates the company's care and commitment to its employees.



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