***How to Avoid, Manage, and Win Workers’ Comp Litigation***

**Introduction: (3-5 minutes)**

* Welcome to WC Mastery training
  + Litigation is often polarizing, either avoid altogether, or ‘stick-it’ to employees
* Introduce 3 Major Points
  + Early Take Away: Strategies You Implement at the Beginning Dictate Ultimate Success
  + How to:
    - Avoid Litigation
    - Manage Litigation
    - Win Litigation

**Main Point #1: How to Avoid WC Litigation (10 minutes)**

* *Exercise: What is your litigation rate? What would you like it to be 3 months from now?*
  + Goal is to avoid litigation when possible
* Why do injured workers seek out attorney?
  + WCRI Study:
    - Fear of getting fired
    - Thought that their supervisor thought faking it
    - Claim denial, either the claim was actually denied, or their perceived
  + **WCRI Take-Aways**
    - Underlying problem is **poor communication**
    - It is the **PERCEPTION** of the situation and their fears that drive workers to hire an attorney.
    - Workers get info from questionable sources
  + Plaintiff Attorney’s Top 5 reasons:
    - “No one has contacted me”
    - “How am I going to get paid”
    - “Who is going to pay medical bills, no one is giving me contact information”
    - “How long until they send me a check.”
    - “Will I be able to get back to my job; how will I get back?“
  + Additional considerations:
    - Cultural aspects
    - Southern (or Northern) man, providing for family
    - “Am I going to get what I deserve?”
      * Most Americans living paycheck to paycheck
    - Union vs Management
      * Everything is litigated because “that’s the way it’s done”
* Impactful steps to avoid litigation
  + Three Vital Components
    - Trust
    - Care
    - A Hard Line
  + Communication & expectations:
    - Get Well Card
    - Employee Brochure
    - Adjuster communication
  + Leading & Lagging indicators:
    - Lag Time Report
    - RTW Ratio
    - Litigation Rate

**Notes:**

**Main Point #2: How to Manage WC Litigation (20 minutes)**

* **Early Take-Away**
  + **Never having a litigated claim can be as much a red flag as litigating every claim**
  + **Get the right attorney**
    - Hire an attorney, not a law firm
    - Expectation of Relationship:
      * “Defense counsel is not my friend”
      * Fiduciary relationship
* Considerations:
  + Selection
  + Cost
  + Working Relationship
* **Selection:**
  + What are attorney/client privilege laws in your state?
    - Meaning of this: discovery, TX, FL
  + Do you know how to change your lawyer?
  + **“Select” vs. “Consult” in Account Instructions**
    - **Employer or carrier decides**
    - **Hourly billing vs less expensive paralegals**
      * **“you want cases handled by attorney who has your best interest in mind, often the higher billing rate attorney”**
  + Defense Staffing:
    - **Many times never get the lawyers that you interviewed with.**
    - **Want the attorney you selected, needs to be understood & agreed**
      * **Might be my panel of lawyers, 3 lawyers in our firm that will handle your work. This particular judge likes this other lawyer in our firm.**
* **Cost**
  + **“selecting an attorney that is right for you and your claim, going to treat you and your money just like it is their own.”**
  + **“When you looked at my bill, did you get good services”**
  + **“If you don’t trust the hours that I bill, then don’t hire me”**
  + **“Attorney shouldn’t be overbilling, nitpicky stuff tells me that viewing as the enemy”**
* **Working Relationship:**
  + Early Engagement with Attorney:
    - ***What do you think?***
    - Early investigation is key, good adjusters that knew when to do an IME
    - **Call the defense attorney early**
  + **Early engagement is key:** 
    - **Doesn’t mean the conversation starts the clock.**
      * **Doing that in the best interest**
      * **Spend a lot of time emailing with adjusters every day.**
        + **adjuster wants to deny MRI, Stuart - “what do you think”.**

**come to attorney when something is denied; win the battle and loss the war; many early callers, the ER bill hasn’t been accepted yet.**

**Many injured workers don’t have medical insurance. First to turn over to collection.**

* + - **Pay without Prejudice**
      * **Paying a claim whether or not determined compensable**
      * **California first $10k of claim**
        + **Remove incentive to hire attorney**
        + **Ensure employee gets treatment**
        + **Lose the battle, but win the war**
* Claim example: What is earliest indicator to give attorney a call / email?
  + Which types of claims, what scenarios should this happen?

**Main Point #3: How to Win WC Litigation (20 minutes)**

* **Eliminate Fear:**
  + **Fear of litigation will drive poor outcomes**
  + Objectives
    - Determine their objectives
    - Determine your objectives (without emotion)
    - Does litigation achieve objectives?
  + Calculate Total Costs of Litigation
  + Consider External Factors
    - Covid-19
    - 9/11 attacks
    - Public Perception
* 2 Parts:
  + Early engagement
  + Presenting Evidence At Trial
* Rig the deck in your favor
  + Attorney, Employer, & Carrier Team
    - Investigate every claim early
    - Investigate every claim fully
    - Ready to go to trial on every claim
      * ***Carpel Tunnel Example***
  + Early investigation
    - Recorded statement
    - Written statement
    - Witness statement
    - Social media investigation
      * “where you lying then, or are you lying now”
      * \*injury triage can make systematic
    - teamwork of employer, adjuster and attorney
      * “Early stuff really gets to the judges, long before they had a chance to talk to their plaintiff lawyer”
  + **Investigation Checklist**
    - Protect
      * Attorney client privilege (state law)
      * Insured’s liability (state law)
    - Preserve all evidence
      * Preservation letters
      * Preserve all video
      * Protective order for blood or urine
      * Witnesses
      * Accident site
    - Expert retention
  + **Early claim denial**
    - **working with your attorney in making decision**
  + Reputation to try case to the end
    - The people that are settlers aren’t going to get the best settlements.
* Closure Strategy Session
  + Perspectives
    - Multi-disciplinary “All hands on deck” (adjuster, legal, medical, invited guests)
  + Objective
    - Forget what you “knew” about the case: approach for the very first time. Even (especially) legacy cases
  + Cost factors
    - Total Cost of Risk, loss development factor, Costs of litigating and not litigating
  + Think creatively
* Presenting Evidence at Trial
  + “Defense in Depth” – developing multiple mutually supporting pieces of evidence
    - All doubts resolved in favor of injured worker
    - Approach as if employer has burden of proof
  + Witnesses
    - Employer being present is huge.
    - Credibility of the witnesses, supervisor vs co-worker vs owner of company.
    - Bring in two workers who have no skin in the game
      * “I was there that day and he came in limping; not attention seekers and it didn’t go down that way.”
    - Bring in IW supervisor carry’s a lot of weight with the arbitrary
  + Credibility of evidence
    - Present evidence in a manner that the judge is not expecting
      * If have video of incident, may have video of the incident, may show the person fall, but not what told the doctor. If show laughing and joking.
      * Video reenactment– try to reenact what the employee said.

**Notes:**