A Claim Is In the House: What To Do

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Our clients take very seriously the legal duty to insure or self-insure for workers' compensation. In the wake of reportage that was critical of everybody involved in the noninsured phenomenon, employers are aware that civil and criminal provisions of the Workers' Compensation Act will be deployed not only to facilitate delivery of compensation to the injured employee, but also to impose punishment and retribution on noninsured employers.

Having bought and paid for coverage then, what else is there for the employer to do? After all, the insurer's dual duty is to *defend* and indemnify.

However, the well-advised employer in today's litigious environment does well to put a policy-based program of risk management in place. It will serve the business well at renewal time if the workers' compensation claims in the past year have been defended successfully or settled minimally.

I. Protocols for Investigation

Before any claim is made, the company will do well to have a published personnel policy requiring employees to give prompt notice of work-related injury or illness. As in the case of personnel policies in general, employees should be required to read it and sign verification to that affect. Then, when injury or illness is reported, the company should have a protocol or action plan in place and a designated member of management to implement it.

There are two principles of investigation that are easy to learn and easy to remember: (1) more information is better than less; and (2) sooner is better than later. As soon as possible the employer should interview all potential witnesses and obtain statements from them. Each statement should be in writing and signed by the respective witness. In the event an employee allegedly suffers an unwitnessed accident, the employer should interview any co-workers who, due to their job duties and any other peculiar circumstances, would or should have been nearby at the time and location of the alleged accident. In these cases, a helpful statement from a well-placed co-worker may amount to no more than, "I didn't see anything, I didn't hear anything, and I wasn't aware of anything out of the ordinary."

Check the documentation obtained in the hiring process to make sure the employee did not make any false representations that he was fit for the duties he was hired to perform. Then the employer should obtain a first-person written statement from the employee. The statement should include the exact details of the accident, the existence of any pre-existing conditions or previous injuries, the identification of witnesses, prior employment history, prior claims history, names of medical providers, and description of current symptoms and physical limitations.

Physical evidence should be preserved. If the employee tripped over a torn rug, do not throw it away. Whether it turns out to be Exhibit A for the employee or employer such items should be maintained until all issues have been resolved, if necessary at a hearing. Spoliation of evidence is penalized under the rules of

evidence.

Photos of the accident scene will be helpful as well. Time sheets, production records, and any other documentation that provides an account of what the employee was doing at or near the time of accident should be reviewed and maintained as well. As stories evolve, the availability of contemporaneous records and demonstrative evidence may hold the key to preserving and portraying the truth.

Great care should be taken by the employer in every case of injury or illness that occurs to an employee on the job. Precipitate job action can raise issues under the ADA and REDA. Lax management of the case, on the other hand, may give rise to waiver of the right to contest under N.C. Gen. Stat. § 97-18(d), which allows the employer to make payments without prejudice for up to 90 days. Be careful when doing so, for when an employer "does not contest the compensability of the claim or its liability therefor within 90 days from the date it first has written or actual notice of the injury… it waives the right to contest the compensability of an its liability for the claim." *Id.*

There is the principle of law, however, incorporated in the North Carolina Rules of Evidence, Rule 409: "Evidence of furnishing or offering or promising to pay medical, hospital, or other expenses occasioned by an injury is not admissible to prove liability for the injury." This writer will say from experience that this principle has been honored under the North Carolina Workers' Compensation Act.

That supposition was nevertheless challenged by the plaintiff in the case of *Alston v. N.C. A&T State University*, No. COA 13-137 (Opinion filed October 15, 2013). The Court of Appeals in an unpublished opinion held that medical compensation payments could be made without waiving the right to contest under G.S. 97-18(d). The opinion distinguished between making disability or indemnity payments as opposed to paying for a medical examination. That liability could turn on some fine distinctions of rather turgid statutory text is testament to the point already made and its corollary, pay close attention to on-the-job injury and illness *and* manage the sequelae with due regard for the provisions of the Workers' Compensation Act.

II. Procedural Steps

Claims are made, disputes resolved, and benefits awarded typically through a series of official forms of the Industrial Commission (I.C.). The insured or self-insured employer will defer for the most part to the professional claims representative in completing most of these forms, although a basic knowledge of what form comes when will be helpful.

The first form that will be issued is in most instances the Form 19, Employer's Report of Employee's Injury to the Industrial Commission. By law, every employer is required to keep a record of all injuries sustained by employees in the course of employment "on blanks approved by the Commission." N.C. Gen. Stat.§ 97-92(a). These approved "blanks" for many years have been denominated I.C. Form 19. The law requires submission of the completed form to the Industrial Commission within five days "after the occurrence and knowledge" of an injury causing the employee's absence from work for more than one day or charges for medical compensation exceeding $2,000. N.C. Gen. Stat.§ 97-92(a). Rule 104 of the I.C. Rules also places the duty on the employer to report *any* injury or occupational disease, or allegation by an employee of an injury or occupational disease, that is sustained in the course of employment for which the attention of a physician is needed or actually sought, to its carrier or administrator. Then, within five days the employer or carrier/administrator is required to file the Form 19 with the Industrial Commission and to provide a copy of the Form 19 to the employee if the injury causes the employee to be absent from work for more than one day or the employee's medical compensation is greater than $2,000. The Rule goes on to say, "the employer may record the employee's or another person's description of the injury on the Form 19 without admitting the truth of the information." That is to say, by iterating the description of the alleged accident the employer does not

bind itself to that account, and the right to raise defenses is preserved.

Rule 104 also requires the Form 19 to "prominently display" the following language on the front of the form:

To the Employee: this Form 19 is not your claim for workers' compensation benefits. To make a claim, you must complete and sign the enclosed Form 18 and mail it to the Claims Section, North Carolina Industrial Commission, 4334 MailServiceCenter,Raleigh,NC 28799-4334 within two years of the date of your injury or last payment of medical compensation. For occupational diseases, the claim must be filed within two years of the date of disability and the date your doctor told you that you have a work-related disease, whichever is later.

As signaled by the foregoing language, the employer must provide the employee with a blank Form 18 in addition to a copy of the Form 19. The Form 19 does not invoke the jurisdiction of the Industrial Commission for the employee's benefit, nor does it have the performative power of commencing the employee's claim for benefits. For this, initiative is required of the injured employee, usually the filing of Form 18.

Form 18 is the I.C. Notice of Accident to Employer and Claim of Employee. The statutory basis for this form isN.C. Gen.Stat. § 97-22, which does require the injured employee to give the employer written notice of the accident. Generally, the law requires the employee to provide this written notice within 30 days after the occurrence of the accident. The 30-day requirement is much honored in the breach. It may be circumvented if the employer had actual knowledge of the accident, or if employee had a reasonable excuse for not giving the notice and the Industrial Commission is satisfied that the employer was not prejudiced by the employee's failure to give the notice. The same requirements apply to a claim of occupational disease pursuant to N.C. Gen.Stat.§ 97-58(b). In such cases, the 30-day notice period generally begins to run from "the date that the employee has been advised by competent medical authority" that he or she had an occupational disease.

In order for the Industrial Commission to have jurisdiction over the claim, the Form 18, or some written notice containing substantially the same information, must be filed with the Industrial Commission within two years after the accident, N.C. Gen. Stat. § 97-24(a), or, in the case of occupational disease, within two years "after death, disability, or disablement." N.C. Gen. Stat. § 97-58(c). Additional gloss on this law is the requirement that the employee has been advised by competent medical authority that he or she has an occupational disease.

In cases of clear liability, a Form 18 may never get filed as jurisdiction will typically be admitted and compensation to the injured employee may begin by way of a Form 21, Agreement for Compensation for Disability, or by way of a Form 60, Employer's Admission of Employee's Right to Compensation. Compensation will typically continue until the employee returns to work, an event which is memorialized by Form 28, Return to Work Report. The great majority of workers' compensation claims are resolved without dispute by the foregoing procedures or some variation.

Some cases get more complicated. Compensation may be terminated provisionally by reason of a Trial Return to Work documented by Form 28T. A Trial Return to Work may be attempted for a period not to exceed nine months N.C. Gen. Stat. § 97-32.1. The employee may later request reinstatement of compensation after an unsuccessful Trial Return to Work by filing Form 28U.

An employer signifies outright denial of a worker's compensation claim by filing Form 61. The law actually contains a provision requiring the employer to notify the Commission on or before the fourteenth day after employer has written or actual notice of the injury, "or within such reasonable additional time as the Commission may allow." N.C. Gen. Stat. § 97-18(c).

A recurrent issue is what effect, if any, an untimely denial might have on the employer's legal right to contest

a claim. Rule 601 requires the employer or insurance carrier to promptly investigate each injury and "at the earliest practicable time" to admit or deny the employee's right to compensation. The Rule states that within 30 days following notice from the Commission of the filing of the claim (or within 90 days in the case of a claim based on a disease alleged to have resulted from exposure to chemicals, fumes, or other materials or substances in the workplace) the employer is expected to notify the Commission and the employee in writing that it is admitting employee's right to compensation; or notify the Commission and the employee that it denies the employee's right to compensation; or initiate payments without prejudice and without liability in satisfaction of N.C. Gen. Stat. § 97-18(d). The Rule states that when the employee files a claim for compensation with the Commission, the Commission may order "reasonable sanctions" against the non-compliant employer under certain circumstances. The Rule specifically states that the phrase "reasonable sanctions" does not include prohibiting the employer or its insurance carrier from contesting the compensability of, or liability for, the claim.

Following denial of the claim, or dispute over a Trial Return to Work, or some other issue having to do with the employee's disability, the next step in the process would be the filing of a Form 33, Request that Claim be Assigned for Hearing. Filing the Form 33 is yet another way an employee can invoke the jurisdiction of the Industrial Commission within the two-year limitation period.

Under some circumstances, the employer may file a Form 33. For example, the employer may seek to terminate the payment of compensation which was previously approved on a Form 21 Agreement. The employer might do so if there was evidence that the employee was no longer disabled.

Such cases may commence with yet another procedure which is outlined inN.C. Gen.Stat.§ 97-18.1(c)-(e). The filing of a Form 24 Application to Terminate or Suspend Payment of Compensation initiates this process. The form must include the reasons for the proposed termination or suspension of compensation, for example, the employer has evidence that employee has actually returned to work elsewhere or was seen engaged in some strenuous activity which would belie his claim of disability.

The employee then has fourteen days to enter an objection to the application. The Commission must then conduct an informal hearing by telephone with the parties, or it may conduct a "hearing in person" where each party is afforded the opportunity to be heard and to submit documentary evidence in an abbreviated, but still adversarial, proceeding.

The Form 24 application may be approved or disapproved, or the Commission may defer reaching a decision on the application. In the latter case the Commission must schedule a formal hearing on the question. Also, the nonprevailing employer or employee may request a formal hearing, again using the Form 33.

III. Employer's Statutory Duty to Investigate and Determine Compensability

Employers have certain affirmative duties to investigate the claim and determine compensability. These duties are tortuously set forth in N.C. Gen. Stat. § 97-18.

N.C. Gen. Stat. § 97-18 (j) specifies that the employer or insurer "shall promptly investigate each injury reported or known to the employer and at the earliest practicable time shall admit or deny the employee's right to compensation ...."

If the employer is tardy for any reason, the same subsection allows for the Commission to enter an order requiring the employer to make a determination on compensability "within 30 days following notice from the Commission of the filing of a claim, or within such reasonable additional time as the Commission may allow...." Failure to do so exposes the employer to "reasonable sanctions" but not a prohibition against contesting the claim. *Id*.

The employer's choices:

- **Admit compensability** and file an IC Form 21 or 60 within 30 days. N.C. Gen. Stat. § 97-18 (b).
- **Deny compensability** and file an IC Form 61 within 14 days of notice of injury. N.C. Gen. Stat. § 97-18 (c).

Note: If the employer denies compensability, the employer loses its right to control medical treatment under N.C. Gen. Stat. § 97- 25 and the employee then may file a request for a hearing IC Form 33. See also IC Rule 611.

- **File an IC Form 63** and pay without prejudice for 90 days. N.C. Gen. Stat. § 97-18 (d)

Note: Payment without prejudice allows the employer additional time to investigate the claim and to control medical treatment.

"Payments made pursuant to [GS 97-18 (d)] may continue until the employer or insurer contests or accepts liability for the claim or 90 days from the date the employer has written or actual notice of the injury or death, whichever occurs first, unless an extension is granted pursuant to this section."

The employer and carrier have the right to suspend the payments without prejudice during that 90 day time period if it files an IC Form 61, stating the specific grounds for denying compensability or liability for the claim.

IV. Employer's duty to calculate average weekly wages

N.C. Gen. Stat. § 97-2(5) defines "average weekly wages" as the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury. If the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. That is, the lost time is back out of the 52-week calculation.

Form 22 is the Industrial Commission form frequently used to calculate average weekly wages. The employer is required to include on the I.C. Form 22 the following: gross wages, including overtime pay, the employee's 401(k) contributions, and profit sharing paid to the employee as earnings during the year. The employer is also required to include the value of "free rent, lodging, or board or other allowances made in lieu of wages," including a company car and a company gas account.

V. Red Flags

There are many red flags to look for when investigating an alleged work-related injury. A commonly seen compilation includes the following:

- Accident occurs late Friday afternoon or early Monday morning
- Accident occurs soon after an announced layoff, closing or merger
- Accident occurs after a strike or labor conflict
- Accident happens near end of seasonal work or temporary assignment
- Injured party is a good candidate for forced early retirement
- Injured party has a record of disciplinary action or conflicts for supervisors
- Injured party has a record of filing workers' compensation claims with other employers
- Injured party participates in sports such as football, skiing or weightlifting
- Injured party is usually not home to answer his phone
- No witness to accident

- Witness statements are not consistent or are ambiguous
- Accident occurs in unlikely location
- There is a delay in reporting the accident
- Injured party has free-lance income and commitments
- Accident coincides with hobby conflict (e.g. fishing tournament)
- Injured party is known to have financial complications
- Other members of injured person's family are known to have received government benefits or assistance
- Injured party has a history of a lot of medical provider charges
- Arbitrary (e.g. headache, nausea) or "soft tissue" accident (e.g. back strain) makes it hard to evaluate progress
- Medical views differ between doctors
- Diagnosis differs from treatment
- Disability differs from treatment
- Physician often schedules injured party for routine treatment
- Injured party does not keep physician appointments
- Injured party refuses back-to-work programs and/or physical therapy
- First report of accident comes from a lawyer
- Injured party or lawyer are eager for a quick, or relatively small settlement
- Injured party has knowledge of workers' compensation laws and handling procedures of claims
- The physician/attorney team have previously been involved in similar claims
- Injured party is a new employee and has an "unpredictable" work history
- Co-workers have heard rumors the accident may be untrue
- Injured party moves often from address to address
- Criminal record
- Home telephone has been disconnected
- Works multiple jobs
- Has requested vacation time for the dates unable to report to work due to accident
- Reports an accident about the same time every year
- Injured party does not have health insurance
- Filed bankruptcy recently
- Ascertain evidence that injured party has had a claim for the same injury in the past

The existence of any one of these factors does not bespeak a false claim. However, the employer should be suspicious when multiple factors are present. Before accepting the claim in such a case, proceed cautiously.

A related point is something we might call the happinessquotient at work. Long recognized but chronically overlooked is the fact that dissatisfied, unhappy employees are more likely to make workers' compensation claims. *See* C. Robinson, "Factor Human Relations into Workers' Comp Costs," from *Safety & Health*, a National Safety Council publication, ISSN: 0891-1797 (July 1993). Psychologists tell us that unhappiness at work is a good predictor of injury. Sally M. Duffy, Ph.D., Address at N.C. Bar Assoc. Workers' Compensation Section Annual Meeting (February 23, 1996). The psychological component can result in more and bigger workers' compensation claims in a workplace where employees and managers are angry at each other. Nor would it come as a surprise that unhappy employees may be motivated to make false workers' compensation claims in the wake of a reprimand or modification of responsibilities.

VI. What Role Does the Insurance Company Play?

Every employer who is subject to the Workers' Compensation Act must purchase workers' compensation

insurance coverage or take the steps necessary to qualify as a self-insured employer, N.C. Gen.Stat.§ 97-93. That the employer and insurance carrier are both named party defendants before the Industrial Commission and in subsequent litigation within the appellate division is testament to their union in these matters.

Nevertheless in bygone years the employer would purchase insurance, turn the claim over to the insurance company, and assume that the matter would be handled with little further involvement. It is a new day. Costs are higher, and claims are more complicated. The employer is well-advised to take an active role, partnering if you will with the carrier, in the management of workers' compensation claims.

Even though the employer has purchased insurance or, if self-insured, has a professional administrator (TPA) to adjust claims, best practice is to have a member of management designated to assure timely, thorough on-the-spot investigation, as well as compliance with legal and any contractual reporting requirements. This individual will coordinate with the claims representative for the insurance company or TPA. Having a knowledgeable person taking an active part in managing the risk increases the likelihood of catching bogus claims in time.

When the employer is notified of an injury or a work-related condition, notice should be given to the insurance company or administrator as soon as possible. Typically, there will be forms and protocols established in advance to facilitate giving timely notice.

The employer will want to share the results of internal investigations with the insurance company. The assumption should not be made that the insurance company has or can otherwise get ready access to such information, particularly the red flags listed in Section IV above. In short, our advice to the employer is to "Wrap It Up!" Compile the information that has been developed internally, organize it coherently, and turn it over to the insurance company to facilitate its further investigation and defense efforts in your behalf.

It is likely that a Rule 607 request will be received from the employee's legal counsel. Thus, at an early stage the employer should be prepared to send the injured employee's personnel file and health information related to the injury to the insurance company. Also helpful will be the completion of a Form 22 wage chart as soon as possible, as it will be needed to calculate an accurate average weekly wage and compensation rate.

The employer will also want to alert the insurance company of any third party involvement. If machinery malfunctioned, or if a vendor, contractor or customer played some role in the injury, then there is the potential for recovery under N.C. Gen. Stat. § 97-10.2 from the actual tortfeasor to reimburse the benefits paid out in worker's compensation.

When engaged by the insurance company, defense counsel will also work closely with the adjuster responsible for the file. Investigation tasks sometimes will be shared between the two. The employer and/or adjuster may prefer that counsel work through the adjuster's office. Many times, the adjuster will already have the information from the employer, or will have the best contacts to obtain it. An experienced adjuster will have been through multiple replications of the process described in this paper. She may be able to join Judge Milian in saying, "Where you're going, I've been, sat down, had a soda, and come back," a good ally for the employer in any event.

VII. Injury Action Plan

We can summarize this paper with the following checklist:

1. Employer Policy
    1. Require prompt report by injured employee
        1. Verification by all employees

2. "Go-to" member of management or supervisor
3. Incident Protocol
    1. Statement from injured employee
    2. Eyeball location of alleged injury
    3. Photos (maybe)
    4. Preserve physical evidence
    5. Interview obvious witnesses
    6. Not-so-obvious: who should have been a witness?
    7. Do not forget to take non-statements (from those who should have witnessed)
    8. Heard nothing?
        1. Saw nothing?
    9. Time records, production records, schedules, video?
    10. Notify your carrier

Wrap It Up!

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