Session No. 735

Worker's Compensation: The Whole Nine Yards

Danny W. Smith
Safety Manager – MailSouth
Consultant – Electrolab Training Systems

Introduction

The joys of daytime TV seem endless. Dr. Phil, Oprah, various judges and the endless soaps; all sponsored in part by groups whose message causes safety professionals to cringe: "Have you been injured on the job? You have rights!" Unfortunately, these ads are not just confined to daytime TV. We even find them on billboards in metro areas and even on the back of phone books!

Admittedly there is a fine line for those in safety which must be maintained in terms of worker's compensation. We're compelled to take care of the injured worker to ensure a speedy recovery, while at the same time driven to ensure the company is protected. At best it is a balancing act. Aside from the "human factor," there are many issues facing the administrator of worker's comp programs.

Federal regulations such as the Americans with Disabilities Act (ADA) and Family Medical Leave Act (FMLA) form a dangerous triangle to be navigated. An employee who is out recovering from an injury could be eligible for FMLA leave, but could also receive protection under ADA. On top of this, Worker's Compensation laws are not federally mandated so they vary greatly from state to state. For employers with multi-state operations, at times it can become mind-numbing and only decipherable by legal counsel.

And then there's the endless *Sea of Acronyms* or *Alphabet Soup*. "The FT ee was treated on 3/18 for an injury received on 1/27 which resulted in him being placed at TPD. Following three weeks of PT, he has now reached MMI and should be scheduled to undergo a FCE to determine the impairment rating for PPD in order to settle the claim according to the WC code as prescribed by the DIR." Here's a four letter word that's not an acronym… HELP! Can someone pass me a cheat sheet?

The goal of this paper is to provide the safety professional with an understanding of the basics of worker's compensation, examine ideas for improving programs, and identify potential pitfalls. The author's background in manufacturing and safety management yields an employer's perspective differing somewhat from that presented by insurance representatives or attorneys. It is

vital that each employer consult with appropriate legal counsel when questions exist concerning these items.

Basics of Worker's Compensation

No Fault Insurance/Exclusive Remedy

Employers are mandated to provide Worker's Compensation insurance which covers all workplace injuries, regardless of who was at fault. In exchange for this coverage, injuries which occur are typically covered exclusively under the Worker's Compensation act.

Not Federally Mandated

This coverage is mandated by state code which, as mentioned previously, causes a number of variances with the administration of claims. Some of these specific differences will be outlined in greater detail later in this paper.

Worker's Compensation insurance policies are purchased through private insurance carriers in most states. There are monopolistic states where premiums are paid directly to a state agency which administers the program. Currently these states are North Dakota, Ohio, Washington, and Wyoming. Nevada was formerly monopolistic, but privatized the system with a phased-in approach beginning in the late 90's. Similarly, West Virginia began this process in 2005 and allowed insurers who met specific state requirements to begin selling policies on July 1, 2008.

US Rep. Joe Baca (D – CA 43) has proposed legislation HR 635, known as the "National Commission on State Workers' Compensation Laws Act of 2009." If enacted, this would set up a commission which would be charged with reviewing existing state codes. At the end of 18 months a report would be submitted to Congress and the President reviewing the effectiveness of the state codes and presenting recommendations for enhancements to the system. This would be the first comprehensive review at the federal level since 1972 under President Nixon. It is unclear what the result of this study could mean in the realm of state versus federal mandates for worker's compensation.

Basic Terminology

As previously mentioned; employers may find themselves seeming awash in a sea of acronyms when dealing with insurance adjusters and medical providers. Some of these deal with the disability status of the employee. TPD (Temporary Partial Disability) status is what is commonly known as a "light duty or restricted duty" case – the employee is able to work but only with specific limitations or restrictions. "Loss Time Accidents" where the employee is off work for a certain length of time may also be called a TTD (Temporary Total Disability) case.

Once the employee has recovered from the incident, medical professionals will determine they have reached MMI (Maximum Medical Improvement) or in laymen's terms, "as good as they're going to get." At this time, a FCE (Functional Capacity Exam) is typically performed to evaluate any permanent disability rating.

Impairment ratings fall into two categories depending on the severity. One is PPD (Permanent Partial Disability) where restrictions and limitations are noted for a particular body part or for the

whole body. If the employee cannot return to work, they may be classified as having a PTD, or "Permanent Total Disability."

Waiting Period for Benefits

There is a waiting period for wage coverage for employees who suffer a TTD/Loss Time Accident. This varies from state to state and ranges from three to 7 days. Depending on state code, the employee's lost wages for this waiting period may be covered retroactively should the Temporary Total Disability continue.

Choice of Doctors

Perhaps one of the most varied portions of worker's compensation code deal with the question "who controls the choice of treating physicians?" Currently, there are 25 states where the employee completely controls this choice. At the other extreme, eight states allow the employer to determine the physician, at least for initial treatment. Even in states where the employer controls the choice, employees have the right to request treatment from another doctor should they feel their treatment is not meeting their needs.

Mediation/Ombudsmen Benefits

In recent years, many states have instituted mediation or ombudsmen programs in an attempt to settle cases "out of court" and thereby reduce legal expenses for all parties. Typically these cases are handled quicker and allow greater flexibility for both parties. In most cases, the settlements receive reviews by the court and have a waiting period for both parties to file disagreements with the settlement.

Notification of Injury

Written notice is required by many states for employees to notify their employer of an injury. However, case law may allow actual (verbal) notification to be sufficient. In some states, if the employee does not report a claim within 90 days of the accident, they may forfeit all benefits. There are no absolutes with this either as case law has overridden this in numerous cases.

Statute of Limitations

A statute of limitations requires employees to file a claim or action with a specified length of time. For most injuries, this statute runs from the date of last medical treatment or last payment of wage benefits. In occupational illness and cumulative trauma cases, the statute of limitations may run from the last date of exposure.

Calculation of Worker's Compensation Rates

In determining an employer's rates for premium, an evaluation of actual losses versus expected losses using actuarial tables/calculations for three years is used. One of the major sources of this rating is the National Council on Compensation Insurance (NCCI) in Boca Raton, FL. The employer's rating combined with their projected payroll by job classification form the basis for premiums for the current policy year.

Since the losses for the current year may include open cases, ratings calculations are performed using the most complete data available. This results in the immediately prior year being left out of the calculation. As an example, the loss history for 2008 is not included in the rates for 2009; these rates are set using data from 2005, 2006, and 2007. The rates for 2010 would

use data from 2006, 2007, and 2008. Obviously a "bad year" can stay with you for some time using these calculations, as can a "good year."

The expected losses and actual losses form an employer's Experience Modifier for premium calculations. This is basically a multiplier which starts at 100% (a modifier of 1.00). The carrier takes their normal premium and applies this multiplier to determine the final premium. As an example, if an employer has an experience modifier of 1.15, there would be an additional 15% surcharge on the premium they pay. Employers with limited losses can also gain a credit on their premium; an experience modifier of 0.90 would net a 10% savings.

It is also important to note some state funds do not report loss data to NCCI. This could be positive or negative depending upon your losses in a particular state. If an employer had their corporate office with a very low loss ratio in one state that was covered by a state fund, and had processing facilities with higher losses in another state covered by an insurance carrier, the inclusion of the data for the state fund program could help lower the experience modifier in the states which do report to NCCI. Check with your insurance agent and they should be able to evaluate the benefits of inclusion or exclusion of this data.

Worker's Compensation Improvement Ideas

Awareness vs. Compliance

As with many topics in safety, OSHA or MSHA compliance is not enough if employers truly want to reduce accidents and injuries in their workplace! The focus must shift from compliance to best practices in order to see a drop in exposure to hazardous conditions which result in injuries and illnesses. Employee involvement and "ownership" of the process is critical. This may be accomplished through many means including self-audit checklists, behavioral observations, participation on safety committees and etc. Management must provide adequate resources (including time) to encourage this participation. It is truly amazing to see employees realize they are instrumental in helping keep each other safe!

Post-Accident Screenings

Many employers require injured employees to submit to a drug and alcohol screening following an accident. Be sure to include this in your employee handbook and/or internal communication regarding worker's compensation.

In many states, all or some of the benefits due the employee may be forfeited if the employee tests positive and the accident/injury is determined to be a direct result of the impairment. As an example, an employee who falls off a platform while under the influence of alcohol and breaks their arm could potentially lose benefits. Conversely, an employee who was high on marijuana and was injured when another (unimpaired) employee ran into them with an electric pallet jack would not be determined to have been injured because of the drug's influence and would likely not lose benefits due to the impairment.

As with any privacy issue, employers should be very careful with the "chain of custody" of any information regarding drug testing.

Employers should check with the state agency governing worker's compensation for additional benefits. Many offer "drug free workplace" discounts for employers who have testing procedures in place.

Establish Relationships with Occupational Medicine Clinics

It is vitally important in states where the employer controls the choice of initial treating physician for the employer to establish a solid working relationship with their clinics. A great idea is to have the physician tour your facility when possible so they are more familiar with the work your employees perform. Knowledge of the specific requirements of your operations can be especially helpful when they are considering potential restrictions for an employee receiving treatment.

Simplified First Report of Injury for Supervisors

The official First Report of Injury form for most states is very confusing even for safety professionals, much less front-line supervisors who don't deal with it regularly. Supervisor's reports with incomplete data are the norm; so we really need to ask ourselves, "What information do we need from the supervisor?" Perhaps it's just the basic information on the employee, the injury, and the event. All of this can be captured on a simplified in-house first report form as opposed to filling out the state required form.

Once the employee has been treated, the person in your organization responsible for filing the claims can then gather the other applicable information to complete the official form and conduct accident/incident evaluations.

An option for in-house forms is to use them to report first aid cases as well. Adding a simple acknowledgement line or two at the bottom stating the employee does not wish to receive outside medical treatment for an injury could prove very valuable down the road. If an employee claims they were denied treatment and the employer can show where they signed a statement saying they did not wish to receive medical attention, you can imagine the judge's reaction should this go to court.

Worker's Compensation Audits and Officer Exemptions

Around 60 – 90 days after the end of the policy year, there is an audit of the employer's payroll to compare it to the projections used to set the premium. Premium cost is adjusted up or down depending on the variance.

A few items to watch during this process are overtime, which is subject to premium only at the regular "straight-time" hourly rate, and officer exemptions/caps. Some states allow company officers to sign a statement prior to the beginning of the policy term that removes them from the worker's compensation policy. While this saves premium dollars, it may not affect it as much as one would think. Typically there is a cap on total payroll subject to premium for officers (not for all employees though).

Paying Small, Non-Loss Time Accidents "Out of Pocket"

Many employers chose to pay smaller medical only (non-loss time) claims "out of pocket" instead of having their carrier pay them. This is not a way to just avoid reporting a claim though! The required First Report of Injury should still be filed, but you can send it to the carrier with a note stating it is "For Reporting Purposes Only". Should the case not progress as expected, the carrier is already aware of the situation and the employer can simply make the call for payment to

shift to the carrier instead of paying directly. Policies may also be written with a deductible the employer is responsible for paying in some states.

Shopping Your Insurance Program

Who controls the worker's compensation policy in your organization? If you don't know, you should find out and get involved in the process if at all possible. The savings on worker's compensation premiums is one of the easiest sources of cost justification for a safety and health program!

It is a really good idea to shop your policy once every two to three years. Keep in mind most carriers are looking to build a solid, long-term relationship with the employer. If you constantly shop the policy each year, underwriters will be less likely to provide strong incentives to change if they think they'll only have your business for a year or so.

Common Pitfalls

Ignore the Employee and Get Sued

If your employee is injured and off work, where are they likely to spend some of their time? In front of the TV seeing the commercials we described earlier! The employee who is allowed to "fall through the cracks" and doesn't receive calls and/or follow-up from their employer is much more likely to either malinger or take legal action. The solution here is simple… Let them know you care and you're willing to help. Call them early in the recovery process and maintain a solid line of communications.

Light Duty Programs

Admittedly light duty programs are not always the most efficient work. However, there is certainly something to be said for getting the employee back in the routine of coming to work every day. Some companies have a standing rule that "we don't offer light duty work." Such an approach may prove to be counterproductive in the long run and actually slow the employee's return.

By nature, light duty assignments should be considered temporary in nature. Most employers who provide these limit them to around 60 days in length. Consideration should be given to developing a written policy regarding light duty.

Retaliatory Discharge and HIPPA/ADA/FMLA Issues

It really is amazing that some employers move towards termination of an employee for filing a worker's compensation claim. This may constitute "retaliatory discharge" and is something employers should avoid at all costs!

If the employee alleges they were terminated because of filing a comp claim, the employer will likely bear the burden of proof to demonstrate the employee was fired for valid reasons other than the claim. If there is not solid, documented proof to the contrary, this could prove to be an extremely costly mistake.

There also may be privacy issues under HIPPA (the Health Insurance Protection and Portability Act of 1996). Generally speaking, comp claims are not covered under HIPPA, but

employers would be wise to follow the “what do I really want to know” rule. Should you be made aware of an employee’s existing medical condition, especially one that is protected under the Americans with Disabilities Act (ADA) or other laws, you could bear the burden of proof that you did not discriminate based on knowledge of the condition.

The Family Medical Leave Act (FMLA) also provides some protection for employees who are off under worker’s compensation treatment. While FMLA leave may run concurrent with an employee being off for a worker’s compensation claim, you should consult with your attorney to verify the best course of action in each particular case.

OSHA Recordable Vs. Compensable Claim

There may be circumstances where a claim is covered by the applicable worker’s compensation statute but it is not an OSHA recordable incident. When dealing with an accident, you really have to think through each part of this separate from the other.

As an example, an employee falls and hits their forearm against a machine. This results in a minor cut that required steri-strips but not stitches. Since it had been seven years since their last tetanus shot, they were also given an immunization. Under the OSHA guidelines, this would be classified as a first-aid case rather than as a recordable. Who will pay the bill though? Obviously it is a compensable claim since it occurred at work within the normal line of duty.