

The Rising Costs of Your Workers' Compensation Program During Downsizing

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Introduction

Recent and ongoing economic pressures within the global economy and particularly in North America have escalated downsizing activities of organizations. These actions include widespread facility closures and involuntary termination of employees. Workers' Compensation costs typically increase during downsizing, or rightsizing, of a facility or organization. A NCCI 2009 report found that faster job destruction due to *contractions of continuing establishments* as well as job destruction caused by the *closings of establishments* leads to an increase in the growth rate of the workplace injury and illness incidence rate.¹

What Drives the Increase

In order to mitigate these costs, one must first understand the underlying drivers of the claims:

Increase in Number of Claims Reported

While most employees do not deliberately set out to defraud their employers, employees with a history of non-specific ailments and facing loss of income may report injuries or complaints as a means to "cover their bases" for potential income should they become the subject of layoff. For the vast majority of employees, medical benefits for treatment will be more lucrative under the various state systems, saving them the expense of deductibles, copayments or possible non-compensated expenses following job termination; and wage continuation may be much longer under Workers' Compensation than for unemployment benefits. In fact it is often the case where the laid off worker does not have the means to continue medical insurance coverage. For these same reasons, symptoms may be exaggerated and/or subjective recoveries slowed.

For many employers, detailed and specific investigation of reported injuries, especially soft tissue complaints, may be weak and not well defined. This missed opportunity to mitigate the loss at the onset allows the injured employee to convey the details of the job and their personal

perspective on ergonomic exposures to treating doctors and insurance providers, allowing one to obtain claim compensability under Workers Compensation.

Reopening of Claims Previously Closed

As noted above, employees who have previously experienced a work-related injury or illness may report symptoms, re-opening claims as a means to ensure future medical costs and possible wage-loss benefits will be paid. Because the injury, illness or disorder has already been established as work-related, investigation of these reoccurring symptoms is sometimes overlooked, and denial of continuing treatment and benefits becomes a challenge for the employer.

Higher Reserves for Like-Type Claims

Companies who have early Return to Work policies typically have lower per-claim costs, because wage-loss benefits are greatly reduced as employees are placed on modified duty and compensated by the employer or by the carrier based on earned wage differential rather than through the Workers' Compensation system only. Claim Service Providers (insurers or Third Party Administrators) recognize this and establish reserves within the framework of an abbreviated indemnity period. Once job placement (with or without restrictions) is no longer feasible, claim administrators adjust the projected claim costs to reflect the lack of a return to the workplace, driving the cost of the claim higher.

Additionally, should an employer wish to settle and close an open claim, settlements will be more costly if the employee would otherwise be entitled to a voluntary or legally-mandated severance package.

Claims Filed Following Facility Closure

Once a facility is closed, employees faced with loss of income may file a claim for additional payments either prior to, during or after receiving unemployment benefits. A major insurance carrier's study done by Travelers, reports workers' compensation claim filing increase during impending layoffs, with some experts noting 40 to 50% of claims filed within six months of termination.² Faced with limited access to documented job exposures, lack of employer (management) contacts, and reduced or no employer community presence, local physicians rely heavily on employee accounts of job descriptions and the underlying exposures in determining whether or not the job contributed to the employee's presenting physical complaints..

Other Cost Drivers

Both the employer's management of Workers' Compensation claims, historically and newly reported, and the employer's management of communications and business decisions surrounding downsizing will impact the costs of the planned reduction. Elements of the program to be examined in determining whether the employer is at risk for extraordinary cost include, but are not limited to the following:

Documentation and Detail of Job Exposures

The employer should have detailed Job Safety Analyses available to the treating physicians, which document specific job exposures and the precautions that are or were in place to protect employees. For musculoskeletal claims, this is especially important regarding weights, forces, measurements and reaches so that determination of work causality may be established; or

alternatively adjudicated within another health care benefit. The consideration of videotaping of jobs which may no longer be available due to plant closings has also shown favorable results.

Thoroughness of Accident Investigations

Using the aforementioned job descriptions, photos and witness accounts, and detailed accounts of the factors associated with the accident will also determine whether or not injuries sustained were the result of workplace exposures and should be compensated as Workers' Compensation claims. While injuries should be thoroughly investigated, consistent adherence to policies is critical at this time. This consistency will prevent validity to claims from employees alleging retaliatory practices for injuries.

History of Adherence to Safety Policies, Including Employee Discipline

Too often, employers choose to exercise disciplinary measures for safety violations only after an accident. For safety discipline to be effective in managing workplace practices during the downsizing they must be followed for all noted safety violations, whether or not an injury was the outcome.

Return-to-Work Programs

If the employer has utilized early return to work as a means to full employee recovery, the majority of workers employed with accommodations should return to full duty within the period between the downsizing announcement and the actual terminations. If, however, the employer has used Return to Work without effective controls in place regarding the duration of modifications; has issued "permanent modified duty" (formally or informally); or handled employees "case by case" without consistency, some of these so-called "eggshell claimants" may have reached a state of long-term work within modified duty. These employee claimants can represent significant financial liability in that they are physically unable to return to full duty and will return to total disability following the termination of their employment. In some cases, employees may become qualified as disabled under the Americans with Disabilities Act due to the long-term nature:

.....Temporary impairments may be disabilities if they take significantly longer than normal to heal and significantly restrict the performance of major life activities during the healing period. Similarly, long-term impairments, or potentially long-term impairments of indefinite duration, may be disabilities if they are severe. Chronic conditions that are substantially limiting when active, and conditions with a high likelihood of recurrence in substantially limiting form, also are disabilities....³

What Can Employers Do?

Managing the transition and reduction in force while mitigating the impact of Workers' Compensation costs can be challenging, but companies have employed strategies to minimize this impact while preserving the morale of those remaining in the firm's employment.

Determine Legal and Consistent Strategies in Handling Claims and Employee Complaints

Early on (preferably prior to the downsizing or closure announcement), establish a strategy and protocol for managing all aspects of outplacement, including employee communications, claim

investigation procedures, job exposure documentation, interface with physicians, expectations of the claim administrator, and metrics to be used in measuring the success of cost containment during the process.

Because safety, claim cost, and legal aspects must be considered when handling both existing and newly-arising claims, a team of professionals should be used when developing and implementing policies; and when making decisions regarding strategies for specific claims, including:

- Human Resources
- Safety
- Operations Management
- Workers' Compensation Counsel
- Employment Counsel
- Claim Administrators (carrier or Third Party Administrators)
- Treating Physicians and related other Licensed Health Care Providers

Employers should notify their treating health care vendors and claim service providers as soon as practical when anticipating a major restructuring event.

Increase Levels of Investigation and Assure Proper Filing

At this time more than ever, employee claims and complaints must be thoroughly investigated to determine whether 1.) the employee has a *legitimate and properly diagnosed injury or illness*; and 2.) the job exposures *caused or contributed to that injury or illness*. The importance of thorough root cause accident investigation and objective review of job exposures cannot be understated. Outside resources well versed in ergonomics and claim validation may be utilized as required to determine claims are filed under the appropriate venue, be it Workers' Compensation or Group Health.

Assess Skill Sets of Management Personnel Charged with Claim Intake, Investigation and Management

If claims have historically been handled without the level of investigation referenced above, employer claim managers who have a long and close relationship with the employees may lack the skill set to adjust to this methodology. Similarly, if claim management has recently been reassigned to a different manager due to management restructuring, training in effective claim management and communications may be necessary.

Employers should also consider its relationship in providing medical treatment to personnel. Organizations which have historically treated employees outside the formal Workers' Compensation system must look for the ramifications to long-term cost. If employees were treated by nurses, physical therapists (onsite or with employer permission) or others without the involvement of a claim administrator, compensability of the injury as work-related maybe a foregone conclusion on the part of the employee and caregiver alike, with no formal investigation into the work exposure/diagnosis relationship. Any cases such as these should be reported immediately to the Claims Service Administrator for full claim compensability investigation and appropriate assignment to specialists as necessary.

Examine the Claim History of the Organization

Early identification of claims with a high likelihood of reopening, or individuals with a long history of repeated claims can allow for specific strategies for those cases, and early use of appropriate resources in managing claims. A multi-disciplinary team should review:

- All open cases, especially those with accommodated duty for more than 60 days or where accommodations have been granted multiple times. Specific strategies for the full resolution of these cases should be developed and documented well in advance of the termination of the employee's position.
- Cases that have closed, with or without settlement, during the previous three years and where the employee is still working within the firm. Special attention should be given to cases involving cumulative or non-specific musculoskeletal disorders. Potential "reopeners" should be addressed with a specific strategy similar to that above.

Document All Job Exposures, Investigations, Findings, Medical Opinions and Causal Factors in the Work Environment

In many cases, claims alleging occupational disease, occupational asthma, cumulative trauma, hearing loss and other long-term disorders are filed following the termination of the employee. Documentation of exposure data, specific investigation or risk assessment findings, diagnostic tests, and work environment (industrial hygiene) exposures throughout the workplace assures that all employee exposures are available to medical professionals, claim investigators and specialists should claims be filed or complaints alleged following the closure of a facility. Many employers have chosen to conduct exposure level testing, employee audiograms and/or physical examinations just prior to terminations or plant closures in order to preserve exposure level data in the event claims are filed.

As required by OSHA, exposure data for industrial hygiene and occupational noise levels should be retained by the employer and available to the employee and their representative for the period of time specified by the specific applicable Standard.

Maintain Communications with Medical Providers, Adjusters and Employees Following Downsizing

If a facility is to be closed, provide local medical staff, claim administrators and appropriate governmental officials with contact information for the employer following closure. Former employees should have access to a communication avenue should they have questions regarding any benefits, including Workers' Compensation.

Use the Downsizing Event to Create Cultural Change

While downsizing is a difficult transition for employees and employers alike, it also presents an opportunity to transform an organization into a more innovative, nimble, and competitive one. Successful employers use these challenging times to ask themselves how their overall injury management program can be improved; and subsequently put those improvements into place as they emerge from crisis.

These enhancements in procedures and protocols often result in:

- Improved and strategic employee selection and hire
- More effective and meaningful prevention programs
- Greater participation and accountability of the employees in workplace safety and claim mitigation
- Improved accident investigation, injury diagnosis, and claim management
- A more cost-effective and disciplined approach to early Return to Work
- Meaningful metrics for benchmarking and measuring success
- A sustainable reduction in injuries and costs

Many employers have reported a more resilient, focused and “prevention-oriented” workforce following the painful transition of downsizing. The employees who continue with the organization represent an opportunity to create a culture of shared goals and efficient and safe operations.

Bibliography

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