The Changing Landscape of Work Comp Litigation

Presented by: Mary Wells & Mark Kraemer CIC, CSRM, CWCA
Introducing Mary Wells

- Director of Risk Management
- 25+ Years Experience
- ID, Prevent, Mitigate Risk
- Claims Management
- Litigation Management
- Cost Containment

Introducing Mark Kraemer

Certified Work Comp Advisor (CWCA)
Certified School Risk Manager (CSRM)
Certified Insurance Counselor (CIC)

Named to first agent advisory council for largest self-insured contractors work comp group

Workers compensation speaker and educator for numerous local associations, training of physicians…
Minnesota Comp Advisor assists school districts with controlling all of the variables that lead to better outcomes when dealing with Minnesota's complex workers' compensation system.

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Why do employees retain attorneys?

- Late reporting
- Delayed medical care
- Failure to fix hazards based on lack of investigation
- Lack of light duty available
- Denials (Idiopathic)
- Lack of communication
- Adversarial environment

Minnesota Work Comp System Report of 2015

- February 2017, MN Dept of Labor and Industry (DOLI):
  - Total work comp costs for 2015 $1.76 Billion
  - Claimant attorney fees are estimated at $50 Million
  - 21% of indemnity (lost time) claims had one or more disputes
Minnesota Work Comp System Report of 2015

- Medical disputes up 67%
- Vocational disputes up 59%
- Percentage of indemnity (lost time) claims with attorneys are up from 17% to 24%
- 20% go to a formal hearing

Minnesota Work Comp System Report of 2015

- Time to adjudicate:
  - Medical: average 59 days
  - Vocational: 28 days
    - Law recently changed that now requires vocational disputes to be heard within 21 days

Minnesota Work Comp System Report of 2015

- Hearings
  - Median time from findings and order: 332-360 days
- Mediations; from 1999-2016:
  - Increased by 370
  - Administrative conferences increased by 80
  - Total mediations and conferences increased by 450
Minnesota Work Comp System Report of 2015

- The number of denials has increased from 12.4% in 2011 to 17.4% in 2015
- In 2012, on claims that had 7 or more lost days, 25% had a defense attorney on the file
- Not tracked by DOLI, based on information received

Minnesota Work Comp System Report of 2015

- Indemnity (lost time) claims make up 23% of all work comp claims in 2015
- 20% increase since 1997

Cost of Delayed Reporting

![Graph showing the cost of delayed reporting.](image)
Delayed Medical Care

- Employee feels isolated, confused, and unappreciated
- Medical bills going unpaid, sent to collections

Unsafe work environment

- Failure to investigate accidents and near misses
- Lack of training and proper oversight

Late Reporting

- Carrier does not know to contact employee
- 93% injuries are first time introductions to the workers comp system
Lack of light duty

- Employee sits home
- Fear of losing their position
- Financial impact outlined on next slides

Financial Impact on Employee

- Per American Journal of Public Health:
  - WC benefits replace 32-41% of pretax losses
  - 40% reduced time on household work
  - Lifetime losses cause financial catastrophe when work comp benefits have ceased

American College of Occupational and Environmental Medicine

- “Unnecessary prolonged work absence can cause needless, but significant harm to a person’s well being.”
- Many lose:
  - Social relationships with co-workers
  - Self respect from earning a living
  - “Major identity component”: what they do for a living.
American College of Occupational and Environmental Medicine

- “Many key players do not fully realize the potential harm that prolonged medically excused time away from work can cause”
- “Many think time away allows for healing but do not consider that the worker’s daily life has been disrupted.”

American College of Occupational and Environmental Medicine

- “Patients take on the ‘sick role’ and ‘dependent patient role.’”
  - The sick role exempts them from their normal responsibilities while giving them the right to receive care from others free of fault.
  - To recover, they must relinquish these roles. Those who have trouble coping with their circumstances are likely to resist relinquishing these roles.

Journal of the American Medical Association

- “Early intervention is key to preventing disability.”
- Research confirms:
  - People who never lose time from work have better outcomes than people who lose some time from work.
  - Those receiving benefits recover slower and not as completely than those with the same medical conditions not receiving benefits.
Denials

- Denials on indemnity claims were 17.4% in 2015, up from 12.4% in 2011

Dykhoff v. Xcel Energy

- Dykhoff precedent:
  - The employee was walking, fell and sustained an injury to her knee
  - Flat, dry, non-slippery floor
  - The accident investigation could not determine reason for fall
  - Claim denied by claims professional
Dykhoff v. Xcel Energy

• Dykhoff precedent:
  – WC Judge agreed with denial
  – WC Court of appeals reversed denial
  – MN Supreme Court reversed the appeals court ruling, upheld denial

Dykhoff v. Xcel Energy

• Minnesota Supreme Court Determined:
  – Injury not compensable solely because it occurs on employer premises
  – Must be causal connection between injury and employment
  – Injury from neutral condition compensable if increased risk of injury caused by peculiarities or characteristics beyond what the employee would face outside of work

Communication issues

• Confusing messages from all parties
  – Adjuster
  – Medical Provider
  – Employer
Adversarial Environment
- Ekblad V. St. Paul Public Schools
- Accused the school of failing to protect him
- Alleged the school knew that the student that attacked him was dangerous
- Attorney argued special hazard dealing with breaking up fights in his role as safety team and lunchroom supervisor

Ekblad V. St. Paul Public Schools
- Claiming negligence
- Exclusive remedy (work comp only) does not apply because the school was negligent
- Alleged they can take it to civil court because the school was negligent

Ekblad V. St. Paul Public Schools
- School said he volunteered to be on the safety team and serve as lunchroom supervisor
- Compensated accordingly
- Student had no prior documentation of violence in their records
- Paid him $60,000 in work comp benefits while he's claiming it's not work comp!
Ekblad V. St. Paul Public Schools

- Motion for summary judgment set to take place on Thursday, May 4

Deb York Vs Edina Schools

- Attacked by a student
- Settled claim for $100,000
- 2016 Minnesota Statutes 121A.64
  - Teacher has a “legitimate educational interest” in knowing which students have a history of violent behavior, and must be notified

Deb York Vs Edina Schools

- 2016 Minnesota Statutes 121A.53
- School board must report to the Commissioner of Education “each exclusion or expulsion and each physical assault of a district employee by a student”
- Electronic reporting system
- Within 30 days of the effective date
Deb York Vs Edina Schools

- Required to include a “statement of alternative educational services, or other sanction, intervention, or resolution in response to the assault given the pupil and the reason for”
- Effective date and duration
- Student's age, grade, gender, race, special education status, and student ID

Deb York Vs Edina Schools

- Report summary data on “dismissals and physical assaults of district employees by a student by age, grade, gender, race, and special education status”
- Commissioner to include aggregate data in annual school performance reports

Best Practices

- Prompt reporting
- Medical triage-24/7 nurse line
- Supervisor training
- Medical clinic relationship
- Prompt and thorough investigations
- Creative return to work program
- Claims management