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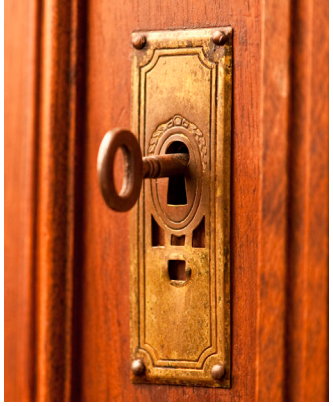

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Reducing the Anxiety of Filing Form WC-1 in Questionable Claims

By: David L. Black

Lately, have you noticed more claimant's attorneys filing a notice of claim without requesting a hearing? What are they up to? First, they understand that without clear grounds for denying the claim, you are more likely to accept the claim. Second, by not filing a hearing request, they prevent the use of formal discovery that can lead to evidence supportive of a denial.

Is it any wonder that even the most seasoned adjuster can experience a little anxiety, when there is uncertainty about the compensability of a claim? The reality is that either accepting or denying a claim can have negative consequences.

If "denied," the employer and insurer lose control of the medical and the claimant can choose a non-panel physician who will keep him out of work. On the other hand, to "accept" the claim can open the floodgates to benefits that are difficult to shut off without significant cost in time and expense. Add the 21-day deadline for the decision and you have a recipe for anxiety.

So what can an insurer do to minimize the anxiety with questionable claims? Here are a couple of tips. First, understand the WC-1 filing requirements. Second, know the legal options associated with filing the first report of the alleged accident.

WC-1 Filing Requirements: Checklist

- **Employer's are required to complete section A of the Form WC-1 immediately upon notice of the injury and send it to the insurer.** In questionable claims, the employer should enter the date of accident as it is reported by the claimant and note the date that they were first informed under the section entitled "employer's knowledge." Rule 61.

- **The Insurer must file Form WC-1 within 21 days of the employers' knowledge of the disability.** O.C.G.A. § 34-9-221/Rule 61 does not require the WC-1 to be filed in every reported injury but only those with a "disability." If the claimant continues to work, there is no economic disability and no mandatory requirement to file the WC-1.

- **The Insurer must file Form WC-1 if the employee is out of work for more than seven days.**

- **The Insurer must file Form WC-1 if they are going to commence income benefits or controvert the claim.**

Legal Options to Controvert or Accept on the WC-1

- **Medical Only Option:** When a claimant is not missing work or is out for reasons unrelated to a work injury, the insurer can treat the claim as medical only rather than complete a notice to controvert. The insurer thereby maintains control of the medical and does not have to file the WC-1 with the State Board. A medical only claim does not prevent a subsequent denial. In fact, the insurer can pay for treatment and later settle the claim under a no liability stipulation.

- **Partial Denial Option:** A partial denial is an option for a clear injury but with a questionable disability. For example, when a non-authorized physician takes the claimant out of work but the authorized physician says the claimant can work and the employer has work available. The insurer again maintains control of the medical, as in a medical only claim, while the WC-1 is filed within the first 21 days, denying disability.

- **Defending Claim After Missing WC-1 filing deadline.** Failure to controvert within 21 days does not estop the employer and insurer from defending a claim for compensation. *American Int'l Adjusting Co. v. Davis,* 202 Ga. App 276 (1991). The failure to file the WC-1 may result in penalties and assessed attorney fees, but the ability to defend the claim at hearing is not waived.

In short, an employer and insurer who are familiar with the WC-1 filing requirements, and the legal options associated with those requirements, can be at ease with the questionable claim. By being aware of the requirements and options related to the WC-1, First Report of Injuries, they will have had more time to investigate the claim and thereby see the WC-1 as part of a defensive strategy, rather than a decision fraught with anxiety.

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Panel of Physicians — Avoiding Pitfalls

By: S. Elizabeth Wilson

In order to mitigate exposure and control medical costs in a claim, it is imperative employers maintain a posted panel of physicians. An invalid panel can lead to an undesirable authorized treating physician, or a complete loss of control of the injured worker's medical care. By maintaining a valid posted panel of physicians and following some simple guidelines in utilizing the panel, employers and insurers can provide the best care for injured workers while maintaining control of costs. The failure to properly maintain or explain the panel of physicians to an employee may invalidate the panel and allow an injured worker to treat with any physician his attorney selects at the employer/insurer's expense.

O.C.G.A. § 34-9-201 mandates employers to maintain a posted panel of physicians stating, "The employer shall maintain a list of at least six physicians or professional associations or corporations of physicians who are reasonably accessible to the employees . . . ." According to the Act, an employee may accept the services of a physician selected by the employer from the panel, or may select another physician from the panel. The physician selected from the panel may arrange for any consultation, refer for extraordinary or other specialized medical services as the nature of the injury shall require without prior authorization from the Board; provided, however, that any medical practitioner providing services as arranged by a primary authorized treating physician under this subsection shall not be permitted to arrange for any additional referrals. *See* O.C.G.A. § 34-9-201(b)(1).

In order to effectively stay in control of a claim, employers must remain in conformity with the basic requirements under the Act regarding the posted panel of physicians. The most basic requirement is that a list of six physicians or professional associations must be posted on the employer's premises in a place available to employees. At least one of the physicians must practice the specialty of orthopedic surgery, not more than two industrial clinics shall be included on the panel and one of the six physicians must be a minority physician. Each physician listed must also be a separate entity and cannot be affiliated with any other physicians on the panel. Problems may arise when two physicians in the same practice group are separately listed on a panel under different locations for that group. Additionally, when two panel physicians share a physical address, it essentially serves to invalidate the panel. It is important to regularly review the physicians and professional associations listed on the panel to ensure the physicians and professional associations still practice at the address listed on the panel and that no other circumstances have changed, such as the telephone number. Employers should also ensure that all physicians listed on the panel still accept workers' compensation patients. Regularly updating a valid panel can help avoid the potential issues above.

Swift Currie Spotlight

By: Debra D. Chambers and Jonathan M.C. Johnston

The typical means of returning a claimant to light-duty work when the claimant is receiving workers' compensation income benefits is under O.C.G.A. § 34-9-240(b) and Board Rule 240. However, the failure to follow the procedures outlined in the statute or board rule does not necessarily negate an employer's defenses to the payment of income benefits. Indeed, in a case with a very unique set of facts recently litigated by Debra Chambers and Jonathan Johnston, the Appellate Division of the State Board of Workers' Compensation held an employer may offer a light-duty job outside of the strict O.C.G.A. § 34-9-240(b) and Board Rule 240 procedures and prove the claimant has the ability to work, such that a change in condition has occurred.

In this case, the claimant sustained an on-the-job hip injury and was paid temporary total disability benefits. When the claimant was eventually released to light-duty, the employer offered the claimant a suitable position. Although typically an employer would offer the light-duty position in strict compliance with the requirements of O.C.G.A. § 34-9-240(b) and Board Rule 240, this employer informed the claimant directly a light-duty position was available and instructed him to report to work. The employee reported as directed, but after only four hours, stopped working to attend a physical therapy appointment for his hip. All of the claimant's medical treatment from that point forward involved his lower back, an unrelated medical condition. Thereafter, the claimant never returned to work and requested recommencement of temporary total disability benefits going back to the date he stopped working light-duty.

Another common pitfall that may invalidate a panel is when the employer does not properly maintain the panel at their actual premises. O.C.G.A. § 34-9-201(c) mandates that the employer shall post the panel of physicians in prominent places upon the premises, take reasonable measures to ensure employees understand the function of the panel and are given appropriate assistance in contacting physicians on the panel. Problems may arise when the employer has a valid panel, but the panel is not actually posted in a prominent place at the employer's location such as a break room, a bulletin board or near the time clock. If the panel is posted in a conspicuous place at the employer's location, the likelihood is most employees have seen the panel.

Furthermore, it is important for employers to ensure their employees are familiar with how the panel operates. An easy way to ensure the panel is properly explained to all employees is to make sure they actually read the panel during orientation. The panel itself contains a simple explanation of its' functions and the employee's rights to select a doctor and change physicians. An effective practice for employers is to have all new employees sign a form acknowledging they have received and were explained the purpose of the panel, and return the documentation to the employee's personnel file. If the validity of the panel becomes the subject of litigation, it is best that a supervisor or human resources employee who conducts orientation be available to testify regarding how the panel was explained, where the panel is located and to authenticate the employee's personnel file.

When an injury occurs, it is important that the individual in a supervisory role shows the panel of physicians to the employee and allows the employee to choose a physician from the list. It is important that the employee be given the choice of physicians from the panel. It is also important to offer the employee their one-time change to another doctor on the panel if they inquire about a new doctor. This is usually best accomplished by having an employee circle their selection, sign and date the panel, and place the document in the injured worker's personnel file.

By maintaining a properly posted panel of physicians and utilizing the panel in the proper manner, we can avoid undesirable physicians treating injured workers and insure the best level of care is provided to employees. We can also keep the employees with physicians who are familiar with the unique issues presented in workers' compensation and with whom we have a good relationship. In general, this helps move claims towards closure in a more streamlined fashion. It also helps us build a relationship with the physicians on our panel, insure quality care and helps us retain control of the claimant's medical care mitigating our exposure for future medical treatment and litigation expenses.

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U.S. Tax Court Weighs in on Workers' Compensation Benefits

By: K. Martine Cumbermack

The Internal Revenue Code generally excludes workers' compensation payments received by a taxpayer from their gross income. In contrast, Social Security disability benefits may be included as part of a taxpayer's gross income and subject to tax pursuant to a statutory formula that accounts for a number of factors. Those factors include the amount of Social Security benefits received and the taxpayer's other income and filing status. Federal law also allows for the

In support of his claim for income benefits, the claimant argued that because he worked less than 15 days, and the employer did not immediately recommence income benefits when he stopped working, in accordance with O.C.G.A. § 34-9-240(b) and Board Rule 240, the employer was barred from defending the claim based on the availability of suitable employment. However, both the Administrative Law Judge and the Appellate Division rejected this argument. The Appellate Division first explained that although O.C.G.A. § 34-9-240(b) and Board Rule 240 can be used to offer a claimant a light-duty job, that is not the only method. Therefore, the employer did nothing wrong in offering the claimant a light-duty job outside of the strict procedures under Board Rule 240. Second, the Appellate Division noted the "change in condition" provisions of O.C.G.A. § 34-9-104(a) as well as the "refusal of suitable employment" provisions of O.C.G.A. § 34-9-240(a) can justify suspension of an employee's income benefits, under certain circumstances, independent of O.C.G.A. § 34-9-240(b) and Board Rule 240 procedural requirements. Fortunately for this employer, the circumstances of the claim were so unique the claimant was ultimately denied income benefits.

The employer prevailed on the issues here because the specific facts of the claim resulted in somewhat of a "perfect storm." Typically, an employer would follow the procedures under O.C.G.A. § 34-9-240(b)/Rule 240 in offering suitable employment before the claimant would return to work. Furthermore, if the claimant returns to work and fails to work at least 15 days, it is usually due to the work-related injury. While this case, and its unique set of facts, resulted in a favorable decision for the employer, employers should still follow the procedural requirements under O.C.G.A. § 34-9-240(b) and Board Rule 240.

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reduction of monthly Social Security benefits payable to a claimant who receives workers' compensation benefits. 42 U.S.C. § 24(a). The Internal Revenue Code includes workers' compensation payments in the definition of taxable Social Security, insofar as they offset Social Security payments.

In a recent decision by the U.S. Tax Court, *Sherar v. Commissioner of Internal Revenue*, 2011 WL 1314677 (U.S. Tax Ct.), the issue was whether certain workers' compensation benefits received by a claimant were taxable as though they were Social Security benefits. In that case, Ms. Sherar suffered two work-related injuries in 1998 and began receiving workers' compensation benefits in 1999. In 2003, on the advice of her attorney, she applied and was eventually approved for Social Security disability benefits in 2007. For the 2007 tax year, Social Security issued a benefits statement indicating that she had received $36,374.40 in Social Security payments. Even though the statement included a nearly $31,000.00 offset for workers' compensation payments, when Mrs. Sherar filed her returns for the year, she failed to report any Social Security benefits as income, perhaps because the majority of her income was offset by workers' compensation benefits.

The U.S. Tax Court concluded that the roughly $31,000.00 offset for workers' compensation benefits was taxable. Citing Sec. 86(d)(3), the Court noted that if the amount of Social Security benefits that a taxpayer receives is reduced due to the receipt of workers' compensation benefits, then the amount of workers' compensation benefits that caused the reduction (or offset) is treated as a Social Security benefit. In their decision, the Court stated "we acknowledge that the taxpayer applied for Social Security benefits on the advice of counsel. We also acknowledge that if she had not applied for Social Security benefits, then her workers' compensation benefits would not have been subject to Federal Income Tax. Under the circumstances, we can appreciate the taxpayer's dismay… Nevertheless, we are duty bound to apply the law as written by Congress to the facts as they occurred and not as they might have occurred. Because the taxpayer's Social Security benefits were reduced by the amount of workers' compensation benefits received, that offset is treated as a Social Security benefit and is, therefore, taxable."

What are the implications of this decision? While this ruling did not necessarily create new law, it did apply an often forgotten section of the Internal Revenue Code with regard to workers' compensation payments. This decision should remind claimant attorneys to clearly advise their clients of the potential (tax) implications of applying for Social Security disability benefits while they are still receiving workers' compensation benefits.

A good majority of the claims we handle, particularly those headed for or already deemed as catastrophic, involve claimants who have applied for or have been approved for Social Security disability benefits as a result of their work injuries. Many of these claimants are receiving assistance with their disability applications from their workers' compensation attorneys. This decision should caution claimant attorneys against urging their clients to apply for Social Security disability benefits while they are still receiving workers' compensation benefits, especially in those cases that are not truly catastrophic.

Employer/insurers and their attorneys can use this case as an example to convince claimants to delay applying for Social Security disability benefits until after their workers' compensation claim is settled. As a result, this could reduce the number of cases requiring an MSA or CMS approval, and the delays that come with that process. Claimants may be motivated to settle sooner rather than later, and wait until long after their workers' compensation settlement is approved before proceeding with any application for Social Security disability benefits. This could also result in reduced costs for employers and insurers in having to retain vendors to prepare MSA reports and facilitate the CMS approval process, as those cases requiring them could very well reduce.

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Events

Expert Witness Usage in Fire Claims
Tuesday, June 7, 2011
11:00 am - 1:30 pm
Maggiano's Buckhead
Atlanta, GA

Multi-State Breakout Session at the Florida WC Convention
Wednesday, August 24, 2011
8:45 am - 3:00 pm
Orlando World Center Marriott
Orlando, FL

Annual WC Seminar
Thursday, September 15, 2011
More Details to Come
Cobb Energy Performing Arts Centre
Atlanta, GA

For more information on these programs or to RSVP, visit www.swiftcurrie.com/events.

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