

Best's Insurance Law Podcast

Navigating Florida Workers' Compensation Claims - Episode #159

Posted: Tues., Nov. 19, 2019



Hosted by: John Czuba, Managing Editor

Guest Attorney: Jeff Kerley of [Vernis & Bowling](#)

Qualified Member in *Best's Recommended Insurance Attorneys* since: 2002



John Czuba: Welcome to "Best's Insurance Law Podcast," the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor of Best's Insurance Professional Resources.

We're pleased to have with us today attorney Jeff Kerley from the law firm of [Vernis & Bowling](#) in Florida. Jeff is the firm's workers' compensation managing attorney. He represents employers and their insurance carriers in the defense of workers' compensation claims.

Jeff handles complex litigation of workers' compensation matters before multiple judges throughout the state of Florida. Jeff was also awarded an AV rating by Martindale-Hubbell, which identifies attorneys with preeminent legal ability, and is a reflection of his experience, integrity and overall professional excellence.

Jeff, we're very pleased to have you with us today.

Jeff Kerley: Thank you, nice to be here.

John: Today's discussion is navigating the complexity of Florida workers' compensation claims. Jeff, for our first question this morning, why is a wage statement important and when should one be completed?

Jeff: A wage statement is basically the foundation of your indemnity portion of your claim. A wage statement is used to determine the claimant's average weekly wage, which is then the basis for any money benefits provided to the claimant, such as temporary total disability, temporary partial disability, and impairment benefits.

The wage statement contains the claimant's earnings for the 13 weeks preceding the accident, starting with the first full week of pay prior to the accident date. It should also include benefits such as bonuses earned, insurance premiums paid by the employer, tips, and housing.

A wage statement should be completed for all claims as soon as possible. The reason that we like to have the wage statement completed early on is that those benefits are easier to capture contemporaneous with the accident.

There are a couple of times when the wage statement must be completed. The first is when disability exceeds one week, or 40 hours, and in cases where no indemnity benefits have been paid, that the claimant has reached maximum medical improvement with an impairment rating.

John: Now, Jeff, many employers bring employees back to work on light duty or use transition-to-work programs. Are there any concerns with bringing employees back to work or using transition-to-work programs when it comes to exposure for TPD benefits?

Jeff: There are. It's always preferable to have the claimant working rather than sitting at home collecting temporary partial disability. The idea is to get the claimant the ability to earn at least 80 percent of their average weekly wage, which then results in no temporary partial disability benefits being due to the claimant.

It's important, going back to our first question, to calculate the average weekly wage accurately and make sure that the claimant is offered sufficient hours to earn 80 percent of the average weekly wage. If the claimant is offered enough hours to make 80 percent of their average weekly wage and refuses the work, that's also a defense to payment of temporary partial disability benefits.

The problem that I most often encounter is that the offer of employment is made based on the claimant's normal hourly rate and hourly rate of pay, but not the actual average weekly wage calculated for purposes of the workers' compensation claim.

For example, if the claimant normally earns \$10 an hour for a 40-hour workweek, then the employer assumes that the average weekly wage is \$400. 80 percent of that would be \$320, so they would offer the employee 32 hours a week at \$10 an hour without considering the actual average weekly wage, which could be higher due to overtime work or bonuses paid.

If the actual average weekly wage is \$415, due to those bonuses or overtime, you can see how offering only 32 hours would leave the claimant short by \$12 per week. Really, the concern there is if the issue is litigated, there could be exposure for attorney's fees paid by the employer carrier over such a small increase or small deficit in what's owed to the claimant.

John: Jeff, you just mentioned attorney fees. How are attorney fees calculated in workers' compensation cases? When are they paid, and by whom?

Jeff: Attorney's fees are either paid by the claimant or by the employer carrier, depending upon the situation. If the claimant pays the fees, the fees are based either on the Florida statutory guideline or the contract of representation between the claimant and his or her attorney. Typically, the claimant pays an attorney's fee at the time of the settlement. The amount is a percentage of the settlement.

Most claimants' attorneys are now contracting with their clients to receive a 25 percent attorney's fee. The claimants can also be required to pay a fee if a petition is filed and the employer carrier provides the benefit within 30 days of the filing of the petition, which would be providing that in a timely fashion. That fee is based on the value of the benefits obtained or the number of hours the claimant's attorney spent securing the benefit for their client.

An employer carrier is required to pay a fee when the claimant prevails on a denied benefit. This typically means that the employer carrier provided the benefit more than 30 days after a petition is filed, either voluntarily or as ordered by the judge of compensation claims after a hearing on the benefit.

The employer carrier paid fees are based on either the value of the benefits obtained or an hourly fee. The claimant's lawyer is required to show that a fee paid based on the value of the benefits obtained results in an unjust compensation in order to be awarded an hourly fee. However, the burden to establish that the fee based on the value of the benefits obtained is unjust is relatively low. Most often, an hourly fee is awarded.

The hourly rate awarded varies based on factors such as the skill level of the attorney, the complexity of the case, and the fee customarily charged in the locality for similar services. Most fees awarded recently have been in the range of \$300 to \$400 per hour.

Therefore, if we look back at the scenario previously discussed, if the claimant was underpaid by \$12 a week for six months and that issue went to a hearing, the claimant would be awarded \$288, plus applicable penalties and interest. However, it would not be unusual for the claimant's attorney to accumulate at least 25 hours taking the case to hearing. Therefore, the fee could be as high as \$10,000 for securing benefits totaling less than \$500.

John: Jeff, are there any time deadlines in workers' compensation cases that are of particular importance?

Jeff: There are several time deadlines that are important to be aware of. The two most important time deadlines that I encounter on a regular basis involve the claimant's request for a one-time change in treating physician and responding to authorized doctors when they request authorization for medical treatment.

The workers' compensation statute provides the claimant the right to a one-time change in their treating physician once during the life of a claim. The employer carrier has the right to direct the medical treatment that the claimant receives. This right extends to authorization of all medical treatment from the initial evaluation to authorization of specialists.

The only time the claimant gets to select their medical provider is the selection of a pharmacy or if the claimant asks for a one-time change and the employer carrier does not respond to that request within five days. This is a very tight deadline and requires a response within five days, rather than five business days.

You can imagine a situation where the claimant requests a one-time change by fax on the Wednesday before Thanksgiving at 4:55 PM. The adjuster doesn't catch the request until returning to work after Thanksgiving, then that Monday would be the fifth day from the request. If the adjuster fails to respond on the fifth day with the name of a doctor who is authorized as the

one-time change, the claimant gets to select any physician within the same specialty to become the new authorized doctor.

This failure by the adjuster can completely change the projected course of medical treatment as the claimant will inevitably select a claimant-friendly doctor who may end up providing an opinion regarding future medical care or related treatment, such as a surgery, to the accident rather than a preexisting condition.

The statute also requires the adjuster to respond to requests for medical treatment from an authorized physician within 3 or 10 days, depending upon the costs of the recommended treatment. Typically, recommendations for treatments such as physical therapy or diagnostic tests require a response within three days. More expensive procedures such as surgery require a response within 10 days.

Failure to respond in a timely fashion results in the employer carrier losing the ability to assert that the requested medical treatment is not medically necessary. The employer carrier is required to furnish medical treatment that is medically necessary, reasonable, and causally related to the industrial accident.

While it may not be fatal to the employer carrier's overall defense to a requested medical treatment, it is certainly more difficult to defend a case without the defense of medical necessity.

John: Jeff, what advice would you give to an adjuster who was just starting out or is new to handling Florida workers' compensation claims?

Jeff: Sure. Florida workers' compensation law is very complex. The first thing I would recommend is to establish a relationship with a defense attorney. I often field emails and telephone calls asking about how to proceed on a case. Getting off on the right foot is really important. You don't want to accept a case that should have been denied and vice versa.

Failure to timely deny a case can result in the employer carrier providing benefits to a claimant who is not entitled to those benefits for the claimant's lifetime. There are multiple time frames that must be met in workers' compensation litigation. Failure to meet those time frames can often have disastrous results.

A couple of previously mentioned others include not denying a case within 120 days. Failure to authorize benefits within 30 days of the filing of a petition can result in payment of attorney's fees. Not paying indemnity benefits on a timely basis can result in penalties and interest on those benefits. When appropriate, not responding to an initial pleading, asserting that the statute of limitations is run, can revive the case for the claimant.

Another critical component of workers' compensation law is the provision of medical benefits. Picking the wrong doctor to provide care can often lead to exponential increases in the payout of a case. I often provide guidance on which doctors are best suited to provide treatment. Having a relationship with a defense attorney can help the initial investigation period proceed smoothly by gathering medical records and sending out necessary subpoenas.

John: Jeff, thank you so much for joining us today.



Jeff: You're welcome. It's my pleasure.

John: You've just listened to attorney Jeff Kerley from the law firm of [Vernis & Bowling](#) in Florida. Special thanks to today's producer Frank Vowinkel. Thank you all for joining us for "Best's Insurance Law Podcast." To subscribe to this audio program, go to our web page, www.ambest.com/claimsresource.

If you have any suggestions for a future topic regarding an insurance law case or issue, please email us at: lawpodcast@ambest.com.

I'm John Czuba, and now this message.

To find out more about becoming a Qualified Member in *Best's Insurance Professional Resources*, contact claimsresource@ambest.com or visit our [Learn More](#) page to start the application process.

Transcription by CastingWords

BEST'S INSURANCE PROFESSIONAL RESOURCES

Copyright © 2020 A.M. Best Company, Inc. and/or its affiliates ALL RIGHTS RESERVED.



No portion of this content may be reproduced, distributed, or stored in a database or retrieval system, or transmitted in any form or by any means without the prior written permission of AM Best. While the content was obtained from sources believed to be reliable, its accuracy is not guaranteed. For additional details, refer to our Terms of Use available at AM Best website: www.ambest.com/terms.