

COLLATERAL DAMAGE OF COVID-19 TO THE WORKERS' COMPENSATION INDUSTRY: START MAKING YOUR RECOVERY PLAN NOW

The unprecedented global pandemic of COVID-19 is currently wreaking havoc with the world economy. There are very few businesses that will be left untouched by the carnage of this virus. This includes the Worker's Compensation industry. There are a variety of ways in which there will be "collateral damage" as a result of this pandemic.

The response to this challenge needs to begin immediately. The longer parties and key players wait to confront the problems created by the situation, the greater the damage will be. Many of us are currently only at the front-end of this pandemic with multiple states and jurisdictions imposing shelter in place orders. However, this does not mean that we cannot begin to plan and tackle these issues.

In order to do this, we must first address the multiple ways in which the industry will be impacted, and then determine how best to begin addressing those issues.

The following is a list of items that will be part of the "collateral damage":

1. THE BACKLOG OF CASES.

The shelter in place order for the state of Illinois is effective through April 7, 2020. The Illinois Worker's Compensation Commission has issued an order with a modified schedule for emergency hearings through March 31, 2020. However it is most likely that it will extend until the shelter in place order is lifted. The result of this is that all cases are being automatically continued. This means that any pending request for hearings, special set trial dates, pretrial dates, etc. will most likely be continued for another 90 days. A very large portion of cases typically resolve from the combination of personal meetings at the Worker's Compensation Commission and, assistance of the arbitrators through the pretrial procedure. The current "pause" on proceedings means that a very large number of cases will not be resolved and as a result, will still be pending 90 days later creating an even larger amount of cases pending before the Arbitrators for resolution.

2. THERE COULD BE A LARGE AMOUNT OF NEW FILINGS WHEN THE PANDEMIC ENDS.

At this point, the Commission currently is open for filing which would include application for adjustment of claims. However, the reality is that with the shelter in place order it will be much more difficult and cumbersome for the petitioner's bar to personally meet with clients and have

them sign necessary paperwork. Furthermore, a large segment of the petitioner's bar is functioning on a work-at-home basis. The result is that when the shelter in place order is lifted, that we could potentially see a large amount of cases that have been sitting for 3 to 4 weeks all filed at one time. This will potentially add to the "crunch" due to the backlog of cases that did not resolve during that same time period.

3. THE COMMISSION COULD BE OVERWHELMED WITH CASES FURTHER SLOWING DOWN THE PROCESS.

As the first two issues point out, we are facing a situation involving a backlog of cases combined with the potential of a large number of cases being filed at one time. This could potentially create a logistics nightmare for the Arbitrators and Commissioners in terms of volume. They can only hear so many cases at one time. The Commission is currently only granting hearings for urgent situations. This means that there will most likely still be a large amount of immediate hearings that will take precedent over all of the old cases and new cases. This could further tie up the system.

4. INDEMNITY EXPENSE WILL INCREASE AND RESERVES WILL NEED TO BE ADJUSTED.

There are several ways in which indemnity will be impacted:

- A. *Delay in surgery and medical treatment* - CMS has issued a memorandum in which they provided guidance to limit nonessential adult elective medical and surgical procedures, including all dental procedures. Some of the recommendations that fall into the "workers compensation world" include postponing carpal tunnel release and endoscopies. The memorandum also indicated that they recommended "considering postponing" non-urgent spine and orthopedic procedures including hip, knee replacement and elective spine surgery. Vice President, Mike Pence, who heads the White House's coronavirus task force, asked hospitals last week to stop doing elective surgeries and reiterated the call on March 18, 2020 at a White House news conference. The vice president stated:

"We are asking every American, and our medical community leaders, and hospitals to partner with us in delaying elective procedures across the country and our healthcare system to ensure that medical supplies and medical capacity go where they're needed."

There are two reasons behind this recommendation. First as reflected in the Vice President's comments, is the urgent need to preserve medical supplies and make sure the providers are prepared to deal with the virus. The second reason is that in many cases surgery or a medical procedure might weaken an individual's immune system which could put them at a higher risk to complications from virus. This would certainly be the case for anyone who underwent a surgery requiring anesthesia.

Complications from the postponement of these elective procedures will be significant to the Worker's Compensation industry. Even when the different jurisdictions lift their shelter in place orders, there still remains the possibility that certain medical providers will be low on supplies and pushing back on as many elective procedures as possible. Furthermore, similar to the issues that we will face at the Worker's Compensation Commission, there will be a large backlog of individuals all seeking to schedule an elective surgery at the same time. Again as with the Worker's Compensation Commission, there will also be a large amount of new elective procedures that will also need to be scheduled. People will still be active while at home, exercising taking walks, etc. There will be new orthopedic issues added to the current backlog.

In addition to the delay in elective surgery, there will also be delay in things such as physical therapy, work conditioning, and functional capacity evaluations. We anticipate that there will also be a backlog for all of these services

- B. *Delay in vocational rehabilitation* - Similar to elective surgeries, vocational rehabilitation is now on hold. There are no in person meetings, job searches or retraining currently proceeding. In some circumstances, vendors will be able to work with employees on a remote basis with computer skills, resume building, etc. The vendors will be doing the best job possible under the circumstances. However, employees will not be able to look for jobs. Furthermore, as the country moves back to "normal" we will most likely be facing a far different economy. There are some economists predicting a potential unemployment rate as high as 20%. Hopefully, that will not be the case. However, there is no doubt that the unemployment rate will significantly increase. The result will be more people looking for work and make vocational rehabilitation that much more difficult.
- C. *Delayed independent medical evaluations* - Many independent medical evaluations have already been canceled by the medical provider. It is not clear whether the shelter in place order would prohibit an individual from attending an IME presuming the doctor was willing to proceed and the petitioner was willing to appear. Additionally, there will most likely be a large segment of petitioner's that will not want to appear for the IME while the shelter in place order is effective, even if the doctor is willing to perform the exam. We would not recommend termination of temporary total disability benefits if the petitioner chooses not to attend the exam while the shelter in place order is in effect. We believe the Worker's Compensation Commission will look harshly upon any party perceived to have taken advantage of this situation. As long as the shelter in place order is in effect, we do not believe that an individual can be compelled to attend an IME and those who choose to terminate TTD do so at their own risk. We would point out this might not simply be penalties at the Commission, but could include a particularly litigious petitioner's attorney trying to allege some type of civil action given the unusual circumstances of the pandemic. From a risk versus reward analysis, we do not recommend taking such a risk.

D. Delay in the receipt of medical records - In order to evaluate the compensability of the case or need for surgery, we frequently need to review a complete set of medical records. The same is true in determining entitlement to temporary total disability benefits. We can anticipate that there will be a slow response from many medical providers to subpoenas and/or request for records via HIPAA release. Once again, we anticipate a backlog of such requests when everyone resumes operations. This could present difficulties in assessing compensability, TTD, and need for surgery.

Clearly, all of these issues will present significant challenges to the Worker's Compensation industry. Now is the time to begin planning for the response to those challenges. Our recommendations are:

1. START MAKING LISTS.

Review your inventory of pending claims and create lists as to which categories the cases fall into. This will make it easier to sort through everything and begin to move the cases forward based upon the respective challenge for each claim. Some examples to separate them are:

- Cases involving elective surgeries currently on delay.
- Cases involving physical therapy, work conditioning or an FCE currently on delay.
- Cases involving an IME that need to be rescheduled.
- Cases that need medical records for some type of issue to move forward.
- Cases currently in vocational rehabilitation.
- Non-disputed cases with petitioner at MMI and ready for settlement.
- Denied cases
- Cases that the parties have determined must be pre-tried or tried.

2. CONTACT YOUR PARTNERS/VENDORS.

Once the various lists have been created, reach out to any partners and third party vendors. Discuss the situation, the recommendations and make sure that this stays on their front burner. For example, make sure that the nurse case manager is ready to schedule the surgery, FCE, therapy, etc. as soon as possible. If an IME is needed and you are utilizing a vendor, reach out to them and make sure the file is on their list. On that same subject, when rescheduling the IME be cautious of the physician that you are using. Typically, the more respected physicians have a longer wait time. This can often be 6 to 7 weeks for an appointment. We can expect that timeframe to double when this ends. Therefore it might be tempting to take a quick appointment with a physician who is not as respected or does not have as good a reputation at the Commission. In some situations that is acceptable. However, it is important to determine when and where you can make that type of sacrifice. It is important to not be in such a rush to move the file that a significant strategic error is made.

3. SETTLE CASES.

The next few weeks will be the ideal time to take an aggressive approach to settling cases and minimizing the backlog. There are a variety of ways this can be done:

- When creating your list of claims, take note of the petitioner's attorney or petitioner's firm. If you have several cases with one attorney or firm, consider scheduling a telephonic settlement conference with them. Remember that the petitioner's attorneys will be working remotely as well and have more time on their hands. Furthermore, they might be more interested in discussing settlement if they know that they can move volume instead of just one case.
- Pick up the phone and call petitioner's attorneys. In this business everyone relies heavily on email communication. Parties are often busy with meetings, trial dates, depositions, etc. At the moment, there are far less conflicts. It is much quicker and efficient to move the case with a personal discussion rather than email. Less things are "lost in translation" with a phone call as opposed to a email. It is easier to get to the heart of the issues. At this point with so many individuals socially distanced and isolated, a personal connection is helpful.
- Consider making a reasonable settlement offer on your cases. Often, parties do not wish to extend an offer until they have a demand as they do not want to "bid against themselves". In these circumstances it might pay to be a bit more aggressive and bold. Furthermore, when making an offer you might want to consider something that while still on the low end of the spectrum, is at least realistic enough to grab the petitioner's attention.
- Revisit cases that previously could not be settled and see if things have changed. Given the uncertainty of the economy, issues of medical care, etc. the priorities of some people might have changed. It cannot hurt to inquire.
- Consider setting up a "settlement days" at the Commission for late summer/early fall. This is another way to help move volume and often high exposure cases.

4. **TELEPHONIC FILE REVIEWS.**

Consider a telephonic file review to make sure that everyone is on the same page, the plan is updated, and there is a concise strategy to move that case forward when the pandemic passes. Parties will have more time on their hands over the next few weeks and this is the best time for thorough preparation.

5. **REACH OUT.**

With regard to non-litigated compensable claims, make sure that you reach out your petitioner's by phone and see how they are doing. As already noted, for many this is a time of social isolation. That is especially true for older individuals who are in a higher risk category for the virus. You can do your part during this pandemic by reaching out and making some personal contact while at the same time continuing to build a strong connection that hopefully will result in an amicable resolution of the file sooner than later.

Will these are challenging times, we must continue to look to the future. Before we know it, the shelter in place orders will lift, the pandemic will pass and life will resume back to normal. Those who prepare now will be in the best position when that occurs.

If there are any questions or if you need any assistance, please feel free to contact any member of our Workers' Compensation Team.

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