



Making workers' comp work for you and your client

The new rules of workers' comp and how WC intersects with personal injury law

BY JONATHAN M. BRAND

I get it. Workers' compensation is the stepchild to personal injury. From time to time you need to deal with it, but for the most part you wish it just wasn't there. The reality is that in many serious personal injury cases, workers' compensation is a part of the process. It is my contention that by taking the time to understand a bit more about workers' compensation, you can make it work for you instead of against you. You already know about liens and credits, and I will touch on those concepts here as well. However, the focus is more on the nuts and bolts of workers' compensation and how it affects your personal injury case. This article is to help you identify ways of making the workers' compensation system work for you as much as possible

when personal injury and workers' compensation "cross-over."

Medical legal process QME and AME (Free experts)

• The QME

In the good old days, each side had the opportunity to select their own medical expert to address the issues that come up in workers' compensation: permanent disability, temporary disability, medical care and retraining. This expert was called the qualified medical evaluator or QME for short. Now we have a ridiculous system called the panel QME process. Instead of each side selecting their own expert, the "panel QME" is selected by the medical unit – a division of the Workers' Compensation Appeals Board. The medical unit issues a list of three doctors. Each side can strike one and the last one

standing is the QME. For the most part, the specialty is determined based on which party wins the race to the courthouse. Why should you care since none of these workers' compensation rules prevent you from selecting your own expert for the personal injury trial? There are several reasons to pay attention to the workers' compensation panel process:

1. Imagine if the panel QME has the same opinion as the defense expert in your personal injury trial. The defense will hammer you with this. *Ladies and gentleman of the jury, the evidence shows that our expert agrees with the neutral doctor appointed by the State of California.* Wouldn't it be better if the panel QME agreed with your expert?
2. The panel QME can be your expert in the personal injury trial. In smaller cases it can be an advantage to use the panel



QME as your expert at trial. The QME evaluations are very comprehensive. The reports generated would likely run into thousands of dollars if you were to request them in the personal injury case. **The workers' compensation carrier pays for the evaluation, the initial reports and any supplement reports** – you don't pay a dime. Save your budget for the trial. The idea here is not to make you an expert in the panel process. The idea is to motivate you to work with the workers' compensation attorney early in the case about strategy and themes so that you increase the probability of the panel process working in your favor.

3. The panel QME can order diagnostic tests and consults with other physicians. The rules require that the tests and consults be paid for by the workers' compensation carrier. Testing may include but is not limited to neuro-psych testing, MRIs, nerve conduction testing and the like. The workers' compensation attorney can make sure that the tests are authorized and get done.

One word of caution here – there are very strict rules regarding ex parte communication with the panel QME. Given that the comp carrier wants your help to get paid back by the defendant, you can usually work something out.

- **The AME**

The parties in a workers' compensation case have the option to agree on an evaluator by selecting an Agreed Medical Evaluator (AME) and therefore skip the panel process outlined above. Since the issues in the workers' compensation case may be very different from the issues in the personal injury case, the AME may not agree with your expert. In addition, many AME-quality physicians will not participate willingly in a personal injury case. A negative opinion by the AME can be devastating to your case since your client's other attorney agreed to the doctor.

Again, I strongly recommend communication with the workers' compensation attorney to avoid conflicts. You should have input as to any doctor

selected as the AME. Call and talk to the workers' compensation attorney before an AME is selected.

Medical Provider Networks (MPN)

(Who is going to fight for plaintiff's treatment?)

Gone are the days when an injured worker could simply select any doctor of his or her choice. In most cases the injured worker will be permitted to select a doctor only from the Medical Provider Network or MPN. I would review the list of doctors with the client and the workers' compensation attorney. Make sure that the doctor selected will cooperate in the personal injury case. There are no ex parte rules as to treating doctors. You can talk to them in advance to determine availability and fees. In addition, the rules allow for second and even third opinions within an MPN. Making sure our clients receive the treatment they need should be a priority for all of us.

Temporary Disability

(Being mindful of the limits)

One of the most important benefits of comp is temporary disability or TD. It should be noted that for injuries on and after 2004, TTD benefits are capped at two years. In some cases the injured worker can continue to stay on disability for up to an additional year if they qualify for state disability. In order to qualify for TTD, the injured worker's disability status must be supported by the *authorized* treating doctor. In the event a dispute over TTD comes up, the issues can be resolved in workers' compensation court. You will want to work with an applicant's attorney who is willing to take the time to go to court over these issues.

Permanent Disability

(Whole person impairment admissible)

Once the injured worker has reached maximum medical improvement for legal purposes, they are declared permanent and stationary. A rating is obtained through the medical-legal process I have

described here. In some cases permanent disability is advanced prior to settlement. Since 2004, disability ratings are based on the AMA Guides to the Evaluation of Permanent Impairment 5th Edition. Therefore, a medical expert in the personal injury case can testify as to any whole person impairment. Whole person impairments can also be used for settlement purposes in the personal injury arena.

Vocational experts

(More free experts)

In more serious comp cases, it is customary for vocational experts to be retained by both sides in a workers' compensation case. The case law is relatively clear that the defendant in the comp case pays for the cost of the VR experts. Therefore, if you have an earning capacity claim or other types of income loss claims, this is another way to obtain an expert opinion on the defendant's dime. I would suggest communication with the applicant attorney so that the expert selected in the workers' compensation case is also someone that will be helpful in the personal injury case.

Now playing – the Independent Medical Review

(Uncharted waters)

As of July 1, 2013, all disputes over treatment go to Independent Medical Review or IMR. Needless to say we really don't know how this is going to work at this point. I think the take-away is that you need to work closely with the applicant's attorney to be sure the client gets the treatment they need. One thing already known about this new process is that there are rigid timelines and forms to deal with! You will want to know the applicant's attorney is challenging denied treatment.

Impact of the personal injury settlement on WC benefits and attorney fees

(The realities)

You already know that the workers' compensation carrier has a *lien* against the personal injury recovery. In addition,



the workers' compensation carrier can claim a *credit* in the amount of the plaintiff's net recovery from the personal injury case. Other issues in connection with the lien where *employer negligence* is present have been discussed in other articles so I will not address them here. But, have you considered that when you settle the personal injury case before settlement of the workers' compensation case, the *credit* may not only preclude further workers' compensation benefits but may in fact wipe out the applicant's attorney's fee? I strongly recommend entering into a fee agreement with the applicant's attorney to protect all parties consistent with State Bar rules.

In addition, depending on the nature of the credit and the timing of the credit, the personal injury settlement will simply result in shifting the burden

of TTD and medical from the comp carrier to the injured worker. There is a bit of a balancing act here. In some cases, the early personal injury settlement does little good for the injured worker/plaintiff since they have to then pay for their own disability and medical until the credit is exhausted. In other cases, if the personal injury settlement is later, the workers' compensation lien can wipe out the personal injury case. This is especially a concern if the limits are low. There is an opportunity for customizing deals to avoid this type of result or to minimize this result. There can be a global settlement of both the personal injury and the workers' compensation case together by way of a third-party compromise and release. As part of the lien negotiations, stipulations can be obtained to delay the impact of the credit

or to restrict the credit to permanent disability only.

There are many creative ways to deal with these issues. The take-away is that if you are not able to handle both the personal injury and workers' compensation case yourself, you must coordinate with the workers' compensation attorney to deal with these issues.



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Jonathan Brand has been representing clients in connection with personal injury and workers' compensation law since 1989. The Walnut Creek firm has a special interest in cases that involve both personal injury and workers'

compensation arising out of the same event.
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