SECOND EDITION

THE WOUNDED WORKER

Inside the Pennsylvania Workers' Comp Maze

GREGORY J. BOLES

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Second Edition

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This book is dedicated to my patient wife, Allison, and our three children, Kerry, Jack and Meghan.

ABOUT THE AUTHOR

Mr. Boles, a certified specialist in Pennsylvania workers' compensation, has been elected a SuperLawyer every year since 2007. He is graded AV Preeminent by Martindale-Hubbell, which demonstrates that his peers rank him at the highest level of professional excellence. He has a 10.0 rating, the highest possible, by AVVO, the independent lawyer rating service. Mr. Boles is a graduate of Georgetown University and Villanova Law School. He has written extensively on Pennsylvania workers' compensation and has lectured before attorneys, labor unions and advocacy groups for the disabled.

ALSO BY THE AUTHOR:

The Worker's Guide to Pennsylvania Workers' Compensation

A comprehensive handbook on Pennsylvania workers' compensation, written for injured workers and their families.

Battered and Broke: Making Ends Meet when Your Workers' Compensation Claim is Denied

A guide to benefits available to disabled workers.

Doctor's Guide to Pennsylvania Workers' Compensation Billing

A manual for healthcare staff and billing personnel on how to bill insurance companies efficiently.

A Safety Handbook for Pennsylvania Nurses

A directory of the latest safety methods in nursing, one of the most dangerous professions in the United States.

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FOREWORD

IT SOMETIMES SEEMS that lawyers have a worse reputation than Congress, primarily because of self-inflicted wounds. The supremely stupid lawyer ads we all see on television certainly do not help their prestige. Throughout history, however, lawyers have played a leading role in many of our nation's greatest achievements. During these years, lawyers helped expand the right to vote, reduce workplace discrimination, ensure safe food and drinking water, enhance workplace safety, increase access to post-secondary education, improve consumer protection, protect the wilderness and endangered species, advance human rights and provide humanitarian relief. When you hear about somebody saved by airbags, remember this: a handful of lawyers, including my Uncle Tom McGrath, fought tooth and nail against an attempt to scuttle the "airbag" rule. The work of lawyers such as my uncle has dramatically improved the lives of the poor, disadvantaged, elderly, injured, sick, and falsely accused.

The next time someone makes a joke about killing "all the lawyers," it helps to know the real story underlying this oft misused quote. In Shakespeare's Henry VI, Part 2, the traitor Jack Cade plots the overthrow of the royal family and the creation of a dictatorship with him at the head. Dick the

butcher, in an effort to help Cade in his plot, utters one of the most memorable lines of the play: "The first thing we do, let's kill all the lawyers." In other words, Dick the butcher wanted the people to be stripped of their protectors so that Jack Cade could take away their freedom.

Years ago, I made the decision to devote my career to helping people. I took on cases that were hard because I felt bad for the unfortunate. I continue to represent people who have troubles in their lives apart from the fact that they're injured, and I do my best to help them and their children, even in the many instances that I work for free. For a family that has mouths to feed, a few thousand dollars makes a huge difference. Our firm made the decision that we would help people regardless of the amount of lawyers' fees we earned doing so. We've never looked back.

You're not reading this book to be reminded of the many ways lawyers help people, though it is good to know that you are best represented by a lawyer with high ideals and the reputation to match. You're reading this book because you have been injured at work and are frightened. How will I put food on the table? What do I need to do to get my bills paid? What am I supposed to do for medical treatment? Why is my employer giving me such a hard time, when I have been so loyal for so many years? Am I going to lose my job if I file a claim for benefits? The supervisor with whom you always got along turns against you. Rumors circulate that you are lying or exaggerating. The company sends you to a doctor who treats you, at best, with skepticism. Friends you thought you had turn out to be anything but. The stress of dealing with a disabling injury is bad enough. To have to worry about these things makes the entire problem infinitely worse.

Under most circumstances, your claim will be paid, but insurance companies unfairly deny many claims, forcing injured workers to file legal actions to obtain benefits. Because the hearing process is lengthy, it can take many months for a judge to grant your claim. Insurance companies are well aware of your need to receive compensation quickly to avoid a financial squeeze. Many insurance companies will deny claims for blatantly illegal reasons, knowing that at some point you'll be tempted to "cave" and accept an amount that is less than the value of your case.

This book is designed to help you avoid common mistakes, resolve claims with the insurance company yourself, understand when you need a lawyer, learn how to choose the right lawyer or doctor, and maximize the chance that you will be paid as fast as possible. This book is not legal advice for your case. We can provide you with general advice concerning the claims process, and give you a general overview of the law, but every case is different and only a lawyer can give you high quality legal advice.

There is light at the end of the tunnel. Even if you suffer a serious injury and need a lawyer to help you, there are many things you can do to move your case to a successful conclusion. I hope this book makes your life a little bit easier at this difficult time.

CHAPTER 1:

Understanding the Basics of Pennsylvania Workers' Comp

WORKERS' COMP BENEFITS: WHAT ARE THEY?

Welcome to workers comp, tthe magic law that guarantees tax-free wage loss and medical expense benefits if you're injured on the job! Of course, you have to give up your right to sue your employer for negligence, but what's the big deal? Well, if your supervisor runs over you with a forklift because he was busy texting his bookie, you get no pain and suffering recovery and your workers' compensation checks are fixed on the date of injury. Even if you can never do heavy labor again and get stuck in a nowhere, low paying career, you get no award for your loss of earnings from expected future wage increases. And, as you will see, the "guarantee" of benefits is far from real.

On the other hand, you do not have any co-pays for medical treatment and though you can't sue your employer for causing your injuries, you can pursue a negligence claim against someone other than your employer or a co-employee. Furthermore, if you've received wage loss benefits for more than 90 days, the insurance company cannot take self-help

and cut them off unless you return to work without a loss of wages or they obtain a court order, which is not easy.

There are certain other "specific loss" benefits available if you suffer a disfigurement of the face, neck or head, the loss of the use of a body part, or a loss of vision or hearing. Most people, however, will recover wage loss and medical expense benefits only.

If you're still hurt but you return to work at lower wages, the insurance company has to pay you checks equal to two-thirds of the difference between your current wages and your pre-injury average weekly wage. If you work restricted duty due to your injury, you may receive partial disability benefits for up to 500 weeks. If you undergo an impairment rating evaluation (IRE) and are found to be less than 35% disabled under American Medical Association guidelines, you get no more than 500 additional weeks of benefits. It is rare for anyone to meet the 35% disability rating, and thus virtually all who undergo IRE's will be limited in

I once represented a truck driver who made a delivery to a discount store while a holdup was in progress. One man pressed the barrel of his gun into the back of the store manager, who faced the store vault. A second gunman yelled "Get down on the ground!" to the driver. The thief pressed a gun to his head. The driver pled, "Don't shoot me; I'm a father of five!" As he did so, the first gunman shot the store manager, severing an artery that spurt blood across the driver's face. After clearing out the safe, one of the gunmen stole his wallet, warning, "I know where your family lives. If you get up before half an hour passes, we'll get them." After they left, he saw blood dripping from the manager's platform. He put the manager's leg in a tourniquet and called 911. Ultimately she recovered, but the driver had a mental breakdown and his employer refused to pay benefits. This man needed a good lawyer and got one.

the amount they can receive in benefits. After that, you're on your own.

BASIC HANDLING OF YOUR CLAIM

If you suffer a work-related injury that requires medical treatment, your employer is supposed to forward notice to its workers' compensation insurance company, which will assign a claim number and representative (or "adjuster") to handle the claim. The claims representative decides whether to pay wage replacement benefits and medical bills. Sometimes the insurer assigns two different claims representatives to a claim, with one handling payment of wage loss benefits and the other handling medical expenses. At the beginning of your case, it is likely that there will be a single claims representative handling the case. Ask your employer for the name, address, and telephone number of the insurance company, and call your claims representative. Politely ask for your claim number, your representative's phone number, and instructions regarding submitting medical bills. If you speak with or write to anybody at the insurance company, you will need your claim number.

MINOR OR SEVERE INJURY?

Under Pennsylvania law, an employer and its workers' compensation insurance company have 21 days from the date you start losing money to decide whether to pay your claim. Where the injuries are obvious, the insurance company will probably pay the claim without a hitch. For example, if you

miss work from breaking your leg on the job, the insurance company will probably pay the claim. From their perspective, the injury is obvious and you'll eventually recover without costing them too much. Injuries that are relatively minor, require no more than a few visits to the doctor, and do not involve a significant amount of lost time may be handled without you ever getting in touch with the insurance company.

For more severe injuries, the insurance company probably will look more closely, even if the injury is obvious. This may lead to some delay before they start paying you. Or maybe they won't pay at all unless a judge forces them. Wait, what about those guaranteed benefits?

YOU MAY BE ENTITLED TO ADDITIONAL BENEFITS

Now that you've reported your injury, your HR department will sit down with you and go over all the benefits you're entitled to. Right? Anything's possible, but I wouldn't count on it. Take the bull by the horns and ask your employer what benefits are available.

You may be entitled to use sick, vacation or accident and sickness benefits while your claim is pending. Sickness and accident benefits are an additional benefit provided by some employers or unions and are not the same as sick pay. You should apply for such benefits as soon as possible if the insurance company denies your claim, but be wary if your employer encourages you to file for such benefits instead of filing a worker's compensation claim. You probably will have to repay sickness and accident benefits if you win your workers' compensation case. If you accumulate sick and vacation pay, you normally may receive both workers' compensation and sick pay for the same period of time. If your employer provides a pension, review your pension agreement to see whether you are eligible for disability, early retirement, regular disability, or regular retirement benefits. If you are a police officer, firefighter or prison guard or hold a similar job, you may be entitled to additional benefits under state or local law.

You need to know the benefits available to you whether your claim is accepted or not, but if your claim has been denied, understanding all your available benefits may be the only way to put food on your table. For more information, order a copy of *Battered and Broke: Making Ends Meet when Your Workers' Compensation Claim is Denied* at www.theboles-firm.com.

YOUR EMPLOYMENT IS NOT PROTECTED BY THE WORKERS' COMPENSATION ACT

Pennsylvania is an "at-will" employment state, which means that unless your firing falls into a narrow set of categories or you are a union member, you can be fired for any reason at all, including such stupid things as the boss doesn't like the way you cut your hair. If you work for an employer with more than 25 employees, you may qualify for protection under the Family and Medical Leave Act, which give you 12 weeks of employment protection per year. This does not mean that your employer is required to pay you while you're out. It means only that they can't fire you during this period of time. As unfair as this sounds, an employer is not required to keep your job open if you've suffered a work injury and have been out for more than 12 weeks.

YOU MAY LOSE YOUR HEALTH INSURANCE COVERAGE

It is also widely but incorrectly believed that employers must continue to pay your health insurance and other fringe benefits while you are out for a work injury. This is not true. You may have the right to purchase your coverage at the group rate for a period of up to 18

months, but if you suffer a work injury, you are not guaranteed any coverage. If you have a spouse who is working and has health insurance coverage available, you should switch to that policy as soon as possible. Otherwise, if your coverage is canceled and you're not able to pay the group rates, you may have to check the insurance exchange created by the Affordable Care Act.

IF YOU ARE IN A UNION, CHECK YOUR CONTRACT

If you are a union member, however, your collective bargaining agreement may provide for many added benefits, such as protection of your employment for longer than is required under the Family Medical Leave Act. It may provide for payment of sickness, accident, health insurance and vacation pay during your period of disability, or compensation in addition to your workers' compensation benefits. It could contain short term and long term disability benefits, and you may even qualify for a disability pension.

You may have rights that are not explicitly spelled out in the collective bargaining agreement. If an employer and a union engage in certain practices over the course of time, those "past practices" may give you additional rights. Furthermore, there may be other agreements governing your employment, such as a pension plan or disability insurance contract other than the collective bargaining agreement. Check this with your union representative and your company's human relations department.

FOR SERIOUS INJURIES, YOU WILL NEED HELP

Most good law firms will provide assistance to anyone who has a legitimate work-related injury, even if the claim is small. If you are receiving ongoing workers' compensation benefits and the insurance company has paid the claim voluntarily, you still should consult a lawyer if your injury is serious enough that you expect to miss more than two months of work. Most experienced workers' compensation lawyers will not charge you for providing advice while you are receiving benefits on a claim the insurance company paid voluntarily. For questions you should ask a lawyer before hiring him, see Chapter 5.

Do not make the mistake of believing that the insurance company has your best interests at heart. While you are receiving benefits, the insurance company is trying to figure out ways to cut off or reduce your benefits. There are countless ways you can make it easy for them to do so.

You now have a very basic understanding of the issues you face. What do you have to do to get your claim accepted? That is the subject of the next chapter.

CHAPTER 2:

Ten Things You Must Do to Get Your Claim Accepted

MANY PEOPLE MAKE SIMPLE ERRORS that come back to haunt them. Claims are often denied for no reason other than the way you speak to an insurance representative. It's not fair, but it's the truth. If you want your claim to be accepted without hiring a lawyer, follow the advice described below to maximize your chances.

1. TREAT EVERYONE WITH RESPECT.

Doctors, claims representatives and others are only human. The one thing you don't want to do is distinguish yourself from other people by being difficult or arrogant. Your goal is to get the insurance company to accept your claim voluntarily. If you are rude to the claims representative, it is much more likely that your claim will be denied. The same is true

of company doctors. If you are polite to them even if they are boorish to you, they may find it very difficult to write negative things about you in their medical reports.

Claims representatives have different levels of experience, education, patience, and work ethic. Most experienced claims representatives will treat you with respect, but you need to understand that they often get frustrated, in part because they're constantly dealing with people who are not particularly happy, but also because they are taught by their employer to be cynical with respect to workers' compensation claims. In our private lives, we know that it is extremely difficult to empathize with someone unless we are engaged in a face-to-face discussion. Conversations over the telephone or via email are cold and impersonal. To a claims representative who has not met you and does not know you, your family or your circumstances, you are little more than an abstraction, a file to be dealt with. When you speak with a claims representative, recognize that the frustration with which you may be treated is not personal. While you should be skeptical about the insurance company's intentions, be civil at all times with the claims representative, even if the claims representative is rude to you.

2. CHECK TO SEE IF YOU HAVE ANY OBLIGATION TO TREAT WITH COMPANY DOCTORS

You may be required under Pennsylvania law to treat with one or more medical providers on a "panel list" that is supposed to be posted in the work place. Your employer is also required to have you sign a document in which you acknowledge your rights and responsibilities under this part of the law, which

is described in a sidebar. If you treat with a medical provider not on the list, the insurance company may not pay the bills.

Employers rarely comply with the law fully, which means that under most circumstances, you have the right to treat with a doctor of your choice. If, for example, you never signed an acknowledgment of your rights and duties, you have the right to pick your doctor. As a practical matter, however, if you don't play ball, the employer or insurance company may end up denying your claim, even if doing so is illegal.

You have the right to choose from the medical providers on your employer's list. Your employer has no right to require you to treat with a particular doctor or office. Insist upon receiving a copy of the list. Before you treat with a company doctor, make sure your read Chapter 4.

3. TELL THE COMPANY DOCTOR THE TRUTH

Even though many company doctors cannot be trusted, you must tell them the truth. It's perfectly understandable to "turn up the volume" by exaggerating your pain when a doctor is skeptical or rude. This is a terrible mistake. Company doctors are looking for signs of lying or exaggerating. Don't fall into that trap. If a company doctor accuses you of exaggerating, contact a lawyer immediately.

COMPANY DOCTORS AND THE LAW

The PA Workers' Compensation Act gives employers the right to establish a list of designated health care providers. When the list is properly posted, injured workers must seek treatment for the work injury or illness with one of the designated providers for 90 days from the date of the first visit. There are some specific guidelines provided in the rules and regulations for these lists:

- The employer must provide a clearly written notice to the employee of the employee's rights and duties.
- The notice must be signed by the employee at the time of hire, whenever changes are made in the list and at the time of injury.
- The list must contain at least six providers; three of the six providers must be physicians.
- Providers as defined in the Act are more than just physicians.
- Each provider's name, address, telephone number and specialty must be included on the list.
- If a particular specialty is not on the list and the specialty care is reasonable and necessary for treatment of the work injury, the employee will be allowed to treat with a health care provider of his or her choosing.
- The employer may not direct the employee to any specific provider on the list.
- The employee may switch from one designated provider to another designated provider.
- Listed providers must be geographically accessible.
- Listed providers must contain specialties appropriate for the anticipated work-related medical problems of the employee.
- If employer's list of designated providers fails to comport with the Act and the regulations, the employee has the right to treat with a provider of his or her choice.

4. TELL ALL OF YOUR DOCTORS ABOUT ANY RELEVANT PAST MEDICAL HISTORY

Inform all of your doctors, including the company doctors, about any similar prior injuries or problems. Under Pennsylvania law, the exacerbation of a preexisting condition is a work injury. It is precisely those old injuries that may make you prone to further injury. Failing to reveal a past medical history is one of the most common reasons claims are denied and cases are lost. Don't make this mistake.

LIAR, LIAR, PANTS ON FIRE

Sometimes company doctors lie under oath even when it's not necessary to do so. I once cross-examined a company doctor who testified about his medical reports. Amazingly, the doctor gave a phony description of what he wrote in the records, which were sitting on the table under my nose. When I confronted him, he admitted that his testimony about the records was false. After the deposition, the clinic fired him.

The insurance company has access to information you do not have. For example, insurance companies can perform an "index check" to see if you've ever made a claim of any kind against anyone in the past. This is not limited to claims in which you have filed a lawsuit, but involves any type of insurance claim whether a lawsuit resulted or not.

Those who conceal a history of a prior injury often find that the evidence appears in prior medical records, with disastrous results. Sometimes there will be a brief reference to a prior injury, or description of chronic pain that began before the work injury occurred. Sometimes the name of another physician will appear in the records, and the insurance company lawyer sends a subpoena to that doctor and finds out

about an old injury. The insurance company lawyer always discovers all of your past medical history. Don't give him a chance to destroy you on the witness stand.

5. CONSIDER SEEING YOUR OWN DOCTOR

Do not trust company doctors to record your history or complaints accurately. You may want to consider going to your own doctor, at least at the time of the first visit, to document your history and complaints. At a minimum, you need to write notes after you are evaluated by a company doctor to ensure you have an accurate record of what you said.

6. SPEED UP YOUR APPLICATION

Even if you are treating with a company doctor, the insurance company may refuse to pay your claim because the doctor does not clearly state in a report whether the condition is work-related. Ask the doctor's office for a copy of the report. If the doctor does not state in the report that the condition is work-related, ask why, noting that it may result in a delay in the processing of the claim. If the doctor refuses to acknowledge that your condition is work-related, you should speak with a lawyer.

7. ASK FOR COPIES OF YOUR MEDICAL REPORTS.

Under HIPAA (the Health Insurance Portability and Accountability Act), you have the right to get a copy of your medical records. While company doctors may give you sheets

of paper that say "summary of visit" or some other nonsense, these documents are a small part of your medical records. There is often another report prepared either at or after the time of your visit. Ask that they send you reports and copies of any documents they send to the insurance company. If they do not send your records, ask for a full set of medical records during your next medical visit. Request updated medical records at each visit. Because the claims representative will decide your claim based on what is in the medical reports, you must understand what this doctor is saying about you. When you obtain a copy of the medical report, compare it to your own notes about what you said during that visit. Consider switching to another company doctor if any errors are significant.

8. MAYBE I SHOULD WRITE SOME THINGS DOWN

You do not want to be a victim of dirty tactics (See Chapter 4), particularly if your injury is serious and your employer has a reputation for giving injured workers a hard time. If

you're assigned light duty, there may be reasons why you need to record what's happening on the job.

Furthermore, you want to be able to keep a record of your symptoms and how they change over time in the event that there is a dispute with the company doctors or physical therapists. Start a journal.

9. IF YOU DON'T MIND, I HAVE JUST A FEW QUESTIONS ABOUT YOUR INJURY....

Be very careful if the insurance company requests that you give an oral statement. The claims adjuster will pleasantly explain that the insurance company is "investigating" the claim. Guess what? The claims representative is experienced in questioning injured claimants. How much experience do you have answering questions about a claim? Do you have your medical records in front of you? Witness statements? Your personnel file? No. But the claims adjuster might, and anything you say will be used against you.

While you should always be polite to the claims representative, you should avoid giving a recorded statement unless your injuries are minor or obvious. When your claim is more complicated, your horse sense should tell you that the insurer is about to screw you. If your employer fired you the day of your injury (or worse, fired you before you reported the injury), or medical records state that you tested positive for smoking dope, it's a safe bet that the adjuster is not trying to help you by asking for an oral statement.

If you are asked to give a statement and your claim is minor, the statement, on the record, should be preceded by the following comments: "I am giving this information to

the best of my knowledge and belief. I do not have access to my medical records at this time, and cannot recall specifically all that may be contained in those medical records. If there is any information that the insurance company has concerning me that I do not have, I would like that information in advance." Ask the representative to send you the records so you can review them. Except in obvious injury cases (like a broken leg), it is best to have a good knowledge of your prior medical history. In giving a statement to a claims representative, you should assume that they have information you do not have. Insurance companies have access to a central information source that gives them information on all claims you have ever made, whether the claims resulted in a lawsuit or not. It is not uncommon for some claimants to lie about their prior medical history. Do not make this mistake.

If you don't feel comfortable giving a statement to a claims representative, contact a lawyer to assist you. Most good firms will assist you with a recorded statement at no charge.

10. MAKE SURE YOU UNDERSTAND THE DOCUMENTS ISSUED BY THE INSURANCE COMPANY

Under Pennsylvania law, the insurance company has 21 days from the date your disability begins to accept or deny your claim. By issuing a "Notice of Temporary Compensation Payable," the insurance company agrees to make payment of ongoing benefits, but retains the right to deny your claim within 90 days of the date your disability began. To stop paying benefits, they must issue a Notice of Workers' Compensation Denial and Notice Stopping Temporary Compensation

"Sorry, but pinky swear doesn't cut it anymore. My attorney has a few documents for you to sign."

within 90 days of the date that you first became partially or totally disabled as a result of your injury.

If more than 90 days goes by and you remain disabled, the "Notice of Temporary Compensation Payable" automatically converts into a "Notice of Compensation Payable," which imposes upon them the obligation to pay ongoing benefits until you agree that you are no longer entitled to benefits or they get a court order allowing them to stop paying. Getting a court order is not such an easy thing to do.

The insurance company may also accept legal responsibility for your injury by filing a "Notice of Compensation Payable," which describes your injury, sets forth your benefit rate, and constitutes a full legal acceptance of your work

injury. If you suffered injuries beyond what is set forth in this notice, you may want to notify the claims representative and find out if they are willing to include a description of those injuries. If the injuries are serious and you need significant medical treatment, including surgery, you should consult a lawyer if the insurance company refuses to change the description.

It is important for you to do the things necessary to get your claim accepted, but your health must be your most important concern. While you are dealing with your pain, your employer may be pushing you to get back to work. What should you do if they offer light duty?

CHAPTER 3:

What If My Employer Offers Light Duty?

In Pennsylvania, if you suffer a work injury that prevents you from performing your regular job, your employer may offer you restricted duty employment. Many employers have light-duty programs that provide alternate work to injured employees for periods lasting anytime from a few weeks to indefinitely. Both your employer and you must act in good faith in offering and responding to an offer of light-duty work. An employer, for example, does not have the right to take measures designed to hinder your return to work. You, on the other hand, cannot refuse a position because it is "demeaning." If your workers' compensation claim has been accepted, employers must send you a "Notice of Ability to Return to Work" to trigger the obligation to return to work. If they don't send this notice, *they do not have the right to file an action to cut off your benefits*. If your claim has not yet been accepted, however, your employer does not have to send this notice, though they still must notify you that the job they are offering is within your medical restrictions, including restrictions placed on you by an employer panel doctor or a physician who performed an Independent Medical Examination. Because most offers of light duty employment are made

before a claim is accepted, *do not ignore* an offer of restricted duty employment.

Under most circumstances, you should at least try to perform the light-duty job. If you don't, you run the risk that you will lose your benefits if a workers' compensation judge later determines you were able to perform it. If you refuse a light duty offer, don't be surprised if your supervisor tells the judge they were planning to let you sleep on a cot and watch TV had you shown up. Most good law firms will not charge you for advice they give you on this crucial issue.

The following is a discussion of some of the most frequent issues that arise when an employer offers light work.

LABOR UNIONS AND LIGHT DUTY

If you're a member of a labor union, check with your shop steward if you are offered light-duty work. There may be sections of your union contract that you should understand before you accept such a position. Among other things, there may be seniority rules that prevent you from «bumping» a more senior employee from a light-duty position. Do not, however, take the law into your own hands. As discussed above, if light-duty work is offered to you and you do not make a good faith effort to follow through, you may end up losing your benefits. You *may* need to accept a light duty job even if doing so violates the collective bargaining agreement and rely upon the union to file an appropriate grievance.

ACT PROMPTLY IN RESPONSE TO AN OFFER OF LIGHT WORK

Injured workers must act promptly in response to an offer of employment. If the you are expected to start work on a particular day, failure to do so could endanger your workers' compensation benefits. You are free to request an extension of the starting date or time, but if it is not granted, you better have a very good reason for failing to show up for work. If it is granted and you do not show up for work on time, your employer has the right to withdraw the offer.

WHAT IF THERE IS A DISPUTE BETWEEN MY DOCTOR AND THE COMPANY DOCTOR CONCERNING MY PHYSICAL CAPABILITIES?

Often there may be a significant difference of opinion between your doctor and an insurance company doctor who performs Independent Medical Evaluations (IME's) concerning your physical capabilities. Your doctor may feel that you are incapable of any work while the IME doctor believes you are capable of sedentary or light work. There may be differences of opinion about how much you can lift, how long you can stand, or other restrictions. While it is important to ensure that you do not engage in physical activities that worsen your condition or cause you significant pain, under most circumstances you should err on the side of caution in the event of a dispute between your doctor and the company doctor concerning your physical capabilities. If a judge later finds that the IME doctor's conclusion concerning your restrictions was correct, your

failure to try a job that fits those restrictions will probably result in the loss of your benefits.

All too often, injured employees refuse to show up for light-duty work, which almost always will result in a petition to cut off their benefits or a refusal to pay benefits in the first place. Remember that you have an obligation to act in good faith. If your doctor provides restrictions that are greater than the restrictions of the company doctor, provide that information to your employer and see if they will accommodate them. Even if they are not willing to accommodate you, under most circumstances you should at least try the job offered. Your testimony in a workers' compensation case will be much more credible if you can explain what happened after you returned to work. If you return to work and your employer provides you with safe and productive work, you have little reason to complain if you are physically capable of performing the job. If you ignore an offer of light-duty work entirely, relying upon your physician's opinion concerning your physical capabilities, don't be surprised if a workers' compensation judge gives your employer, and not you, the benefit of the doubt.

FUNDED EMPLOYMENT

An employer is permitted under Pennsylvania law to require an employee to work a restricted duty position at another firm even though it or the insurance company is paying the wages ("funded employment"). For example, an injured employee may receive notice of an available position a charitable organization such as Goodwill. This tactic is usually used in connection with profoundly injured claimants.

Employees whose injuries are so severe they qualify for Social Security Disability benefits may be forced to accept a funded employment position, even though there is no reasonable prospect that any employer would hire them. Charitable organizations such as Goodwill, however, can use all the help they can, and getting an employee whose salary is being paid by an insurance company is an offer many such organizations can't resist.

MISCELLANEOUS ISSUES: COMMUTING DISTANCE, CHILD CARE EXPENSES, AND NON-WORK RELATED MEDICAL CONDITIONS

Where an employee's family relocates out-of-state due to the spouse's employment, a job offer in Pennsylvania is not actually available because it is not within a reasonable commuting distance of the employee's current residence. On the other hand, an employer need not prove the existence of available jobs if the employee is an undocumented worker. Furthermore, an employer is not obligated to prove that a particular job is consistent with the employee's non-work related medical conditions. Finally, child care expenses are not to be considered in determining whether a job is available if the employee arranged for and paid for child care before he suffered the work injury.

Most employees have no problem with light-duty work, and most employers offer such work in good faith and will work with you to make sure that you are safe and productive in the workplace. Some employers, however, engage in very dirty tactics, which are described in the next chapter.

CHAPTER 4:

The Seven Most Ugly Tactics Employers Use to Harass Injured Workers

SOMETIMES YOUR employer will offer you light duty work, usually based on the opinion of an insurance company doctor. Except under the most unusual circumstances, you should at least try the job. Make the attempt even if the physician who cleared you was hired by your employer or the workers' compensation insurance company to perform a so-called "independent medical evaluation."

When you are offered light duty, you have an obligation under Pennsylvania law to make a good faith effort to follow through on the offer of employment. If you return to work and you find that you are physically capable of performing the job, you are legally obligated to continue working at that position as long as it is available.

WHILE YOU'RE DONE SITTING ON YOUR BUTT, COULD YOU CARRY THESE CINDER BLOCKS TO THE ROOF?

If your supervisor asks you to do tasks beyond your physical capabilities, you must refuse and remind him that you are under strict orders not to violate your medical restrictions. Take careful note of all requests to perform tasks that are more difficult than those described in the notice you received about the light duty job.

While most employers treat injured workers properly, those who have suffered work injuries need to know about the unscrupulous tactics used by some. The following is a list of the seven most common improper employer return to work tactics:

1. THE PHONY LIGHT OR SEDENTARY JOB

In this scenario, the company falsely claims that light duty is available. Don't make the mistake of failing to follow through on an offer of such work. If you don't show up and find out what the job is all about, you will have no way to prove that the job was not light. Unfortunately, your employer may claim that light work is available, but when you show up your supervisor tells you to do your regular job heaving concrete into roll-off containers.

2. THE LIGHT DUTY JOB THAT SLOWLY BECOMES YOUR REGULAR JOB

Often companies provide light duty, but over time, ask you to perform more and more strenuous tasks. Beware of the employer who keeps you at a desk job for two weeks before demanding that you carry a refrigerator to the 10th floor.

I represented a man who suffered a severe back injury while working for a pie manufacturing company that assigned him "light duty" after the injury. They ordered him to sit on a chair in the bathroom, writing down the toileting activities of visitors. You can imagine what it was like for him to be sitting in a toilet all day long, in pain, on medication and resented by every person who entered the bathroom. His co-workers soon started calling him the "peter patrol."

One day he came to work in severe pain and took an extra dose of medication, causing him to fall asleep in the bathroom. His employer fired him for sleeping on duty. When he testified, the Judge was clearly furious. The supervisor who fired him sat nervously in the courtroom. When I called him as my next witness, the lawyer for the employer pulled me aside. "We give up," she said. The check soon followed.

3. THE "GHOST" JOB

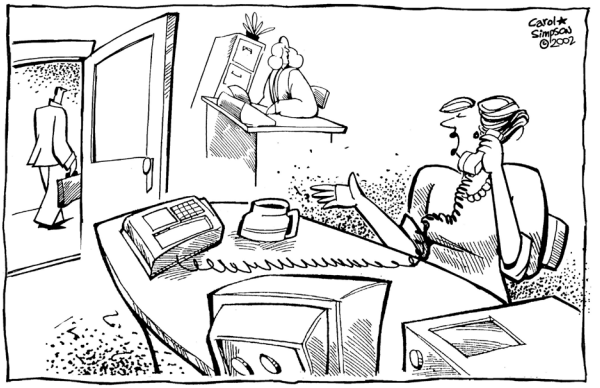
Some companies will tell you not to do anything heavy and then tell you to perform jobs you couldn't possibly do without hurting yourself. I once represented a graveyard shift steel worker with a 20 pound lifting restriction. His employer provided him with two inexperienced assistants who could not possibly get the product to the loading dock alone. The company told him to not do anything heavy but to make sure the product was on the dock by the morning.

4. THE "NO DUTY" JOB

Your employer may tell you to sit all day in a conference room. You may be told that you can bring in a book or watch television all day. Surprisingly, this type of behavior is permitted in Pennsylvania.

5. THE "PSYCHOLOGICAL TORTURE" RETURN TO WORK JOB

Particularly nasty employers (in legal parlance known as "scumbags") enjoy driving you to the edge of sanity to force you to misbehave, quit or return to your regular job. For example, your employer may require you to look at the same safety films day after day or do nothing at all. They may tell co-workers not to speak with you. The supervisor of a client with a severe knee injury forced him to sit in a chair next to a busy production line. Whenever he walked past, he lightly whispered attacks on the injured worker's manhood. Not surprisingly, he exploded in anger and threw his chair at his sleazy, sneaky supervisor.



"Good morning, Human Resources. How may I demean you?"

6. "DIVIDE, CONQUER, AND EMBARRASS" TACTICS

Here's a clever tactic of some sadistic employers: turn your co-employees against you! For example, your boss may assign you to a speedy manufacturing line and tell you to ask for help to do any heavy lifting. Resentful because they have to do your work in addition to their own, your colleagues may soon start rolling their eyeballs and treat you rudely.

7. THE "DISCIPLINE AND DISCHARGE" TACTIC

Some employers will progressively discipline you, eventually firing you. If they prove you were discharged for reasons unrelated to the work injury, you are not entitled to wage loss benefits. Even if you otherwise have a completely clean record in your years with the employer, you may suddenly find that you are being disciplined for minor rule infractions.

"As a part of a cost-cutting experiment all of our safety measures will be replaced with these good luck charms."

If you suspect that your employer is not acting in good faith, keep a daily journal that describes what is going on in your workplace. If you are a union member, talk to your shop steward and insist that someone from the union be present whenever the company talks to you about your job. When your employer plays these hardball tactics, you generally have no choice but to consult a lawyer. But how do you choose the right one?

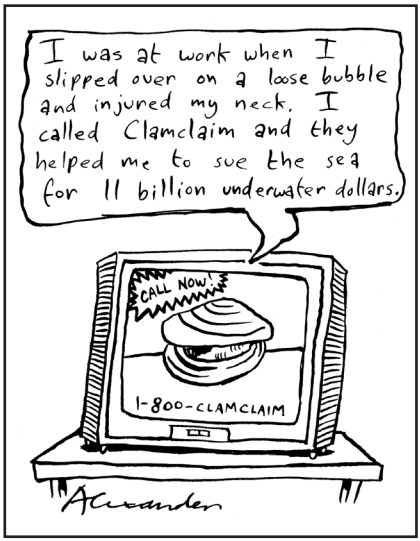
CHAPTER 5:

How to Choose a Lawyer

YOUR INJURIES ARE SERIOUS and you need a lawyer. How do you pick the right one? In a sidebar, I list a number of questions you should ask any lawyer you are considering to hire. Even without speaking to the lawyer, look for some of the following classic danger signs that the lawyer you are considering might not be appropriate for you.

IDIOTIC LAWYER ADS

Many lawyers advertise their services as if they're selling toasters, providing you with none of the information you urgently need. Run for the hills from any lawyer that brags that he "eats insurance companies for breakfast." These types of lawyers aren't smart enough to create an appropriate and



professional advertisement, so why would you expect them to do well in the courtroom?

LAW FIRM OR CASE FACTORY?

If you go to a firm with lots of lawyers, don't be surprised if you're treated like a product on the assembly line. At large firms you often meet the impressive senior partner and soon learn that the firm assigned the case to a young associate who is a few years out of law school. Find out about the lawyer who is actually going to represent you. How good some other lawyer may be is irrelevant.

YOUR LAWYER'S GOLF BUDDY, DR. QUACK

Beware of any law firm that sends you to a doctor with whom they have some type of business relationship. If there are lots of cards of doctors and chiropractors on the lawyer's desk, walk out. Think about it. Does the doctor send the lawyer cases in return for referrals? If you have a good relationship with your own doctor, why should you go to some other physician about whom you know very little? What is the reputation of the doctor your lawyer is raving about? How is it going to sound in court when the insurance company asks who referred you to this doctor?

IT'S CHESS, NOT THE WORLD WRESTLING FEDERATION

Never hire a huckster who tries to con you by boasting about beating up insurance companies. A legal case is like a chess match, not a prize fight. You hire a lawyer not to knock around the other lawyer but for the experience, knowledge, skills, intelligence and work ethic you need to win your case. Otherwise, you'd hire Mike Tyson.

If there are problems with your case you do not want a lawyer who thinks he can bully his way to a successful result. You need a lawyer who is able to consider the challenges you face, anticipate the way the other side will fight you and take the time and the effort necessary to prepare an effective strategy to handle all difficulties.

RUDE LAWYERS LOSE CASES

Some people think that the best lawyers are the most obnoxious. Nothing could be further from the truth. Lawyers who are rude inevitably are ill-mannered not only to their opponents *but to the judge who will decide your case*. Being civil to opponents is essential to a lawyer's effective representation in any type of legal case. This does not mean that your lawyer should not fight hard. It means that acting like a jackass does not help you.

EXPERIENCE MATTERS

What about experience? Would you feel comfortable letting a doctor just out of medical school perform surgery on you? As time passes, we all develop "tacit" knowledge gained from good and bad experiences. Have you ever tried to give "life lessons" to your kids? Good luck. This type of knowledge cannot be explained no matter how hard you try. I could write the greatest book on bike-riding ever and you could study it diligently but you would have no idea how to ride until you got up there and fell a few times.

Over the years, a good lawyer develops a "sixth sense" for such things as determining whether someone is lying, anticipating a defense to your case, assessing you as a witness, evaluating the skills of the other lawyer and considering the impact of the judge's viewpoint. This sense is the result of honing litigation skills over many years. You don't want your case to be the one in which your lawyer is learning the ropes.

From trying cases in front of the same judges year after year, lawyers develop reputations with the Judges, learn how to best try a case in front of a particular judge, and determine how the viewpoint of a judge affects the value of your case. If your lawyer isn't devoting more than half of his practice to workers' compensation cases, you may want to consider finding someone else. Make sure you ask the lawyer about how much his practice is spent trying workers' compensation cases, which are NOT the same as personal injury cases.

CREDIBILITY MATTERS

AA lawyer's word is his bond. It is your lawyer's credibility that could mean the difference between winning and losing a difficult case. Many people erroneously believe that a deceptive lawyer is more

likely to win than one who is honest. You know how you can spot a phony from a mile away? So can a judge.

WATCH TV OR WORK ON YOUR CASE?

Will your lawyer do the hard work necessary to win your case? Winning can only be done through the application of the lawyer's experience and skills to your case via hard work. If you hire a "legal mill" that makes money by pushing as many cases through the machinery as possible, do not be surprised if you get a poor result. Ask the lawyer: what procedures do you use to prepare witnesses for depositions and hearings? Will I receive that kind of preparation in my case? Do you formulate questions for witnesses before they testify? Do you outline the arguments you will make well before the close of the case?

"Hey, don't blame me. I don't make the laws—I just circumvent them."

LOOK BEFORE YOU LEAP: DOES THIS LAWYER KNOW WHAT HE IS DOING?

- Most skilled workers' compensation lawyers are certified. To be a certified workers' compensation specialist in Pennsylvania, you must pass a rigorous exam. You should be reluctant to hire a lawyer who is not certified.

- This is a specialized field, and you should not hire a lawyer who does not spend more than 50 percent of his time handling workers' compensation cases.

- The best lawyers regularly write on the topic in which they specialize.

- You can check your lawyer's rating on AVVO.com, Martindale.com, or SuperLawyers.com, all of which are independent consumer and peer review rating sites. Lawyers with superior ratings on AVVO are generally recognized by their peers and by clients as being more qualified. SuperLawyers are lawyers who have gained a reputation in their professional community for legal excellence. Martindale.com rates lawyers on their adherence to ethical standards and their general excellence as lawyers.

- Particularly if you are not receiving workers' compensation benefits, you may not be able to afford the expensive litigation costs associated with a workers' compensation case. Make sure you understand the lawyer's policy on payment of costs.

- If a claim has been accepted by the insurance company voluntarily without hearings, there is really no need for the lawyer to charge fees unless there are some other issues involved in your case that require the lawyer to spend money or expend extraordinary amounts of time.

PREPARE FOR YOUR INTERVIEW BY THE LAWYER YOU CONSULT

You want to make a good impression upon your lawyer, particularly at the first meeting. Your lawyer is going to have a very brief period of time to draw certain judgments about you. If you're careless and sloppy, he knows he's going to have to double check everything you say. If, for example, you show up at the initial meeting with a trash bag filled with your "work comp" papers, medical records, old lottery tickets, laundry lists, magazines, and assorted trash that has to be dumped and organized on the conference room table, the lawyer will assume you don't care enough about your case to organize your paperwork properly and may not trust you to provide a complete list of injuries you've suffered or the physicians with whom you have treated. If everything you say must be double-checked, your case may be delayed.

EIGHT QUESTIONS TO ASK THE LAWYER BEFORE SIGNING THOSE PAPERS

1. Are you a certified workers' compensation specialist?
2. How much of your practice do you devote to workers' compensation cases?
3. Have you written anything in the field of workers' compensation?
4. How have you skills been rated by independent organizations such as AVVO?
5. What will I have to pay in fees?
6. In what kind of cases will I be required to pay a fee?
7. What services does your firm provide free of charge?
8. What is your firm's policy regarding costs?

FEES AND COSTS

Usually in workers' compensation cases, lawyers charge a contingent fee of 20 percent. This means that they can only collect a fee if they obtain benefits for you or protect your right to receive benefits. If the lawyer asks you to sign an agreement for a fee greater than 20%, run for the hills.

Under most circumstances, you should not have to pay a fee unless your lawyer obtains a court order winning your petition or successfully protects you against a challenge to your right to benefits. If you are seeking benefits, the fee will be approved when you win or settle. The lawyer's fee will ordinarily be approved at the first hearing of a petition challenging your benefits. Once approved by the judge, the insurance company will deduct the fee from your benefits and pay it to your lawyer. If the insurance company refuses to change the description of injury on the notice of compensation payable to include other very serious injuries that you may have suffered, the lawyer will again charge you a fee, though ordinarily that fee will be paid only if the judge issues a final ruling in your favor. Finally, if the lawyer negotiates a lump-sum settlement of your case, you will pay a fee. These descriptions contain most circumstances under which a lawyer is entitled to a fee. Good firms provide a wide variety of free services to individuals who have been

TIP FOR SOCIAL SECURITY DISABILITY RECIPIENTS

If you are receiving benefits but the Judge has approved a lawyer's fee, you may be entitled to an increase in your Social Security disability benefits to account for the reduction in your workers' compensation benefits caused by the deduction of your lawyer's fee.

injured on the job. Be wary of a firm that quickly looks to make a fee as a result of your misfortune.

Ask the lawyer about his firm's cost policy. You will incur court reporting, expert witness and medical copying charges in your case. Most firms advance t hese costs. Confirm this with your lawyer before signing a fee agreement.

Getting a good lawyer is essential to handling your claim in court. Only a skilled lawyer can effectively navigate the Workers' Comp maze, which is described in Chapter 8. But before we enter the maze, we need to look at the tricky topic of getting your medical bills paid.

CHAPTER 6:

Getting your Medical Bills Paid

IF THE WORKERS' COMPENSATION insurance company has accepted your claim, you should not pay for your medical treatment. Instead, the doctor, hospital or other medical provider is legally required to bill your workers' compensation insurance company directly and may not seek payment from you. The insurer pays only what is required under a fee schedule that limits how much a provider can receive for treatment. It is illegal for a medical provider to bill you for the difference between their charges and the amount allowed under the Pennsylvania Workers' Compensation Act.

With respect to prescription bills, it may not be so easy to find a pharmacy that is willing to bill your workers' compensation insurance company directly. To obtain prescription medicines, you may want to use a mail order prescription facility such as Injured Workers Pharmacy (IWP) to serve your prescription needs. You can find information about mail order prescription pharmacies on the Web.

Sometimes your doctor, physical therapists or pharmacist will tell you that the insurance company has denied payment of medical bills. If your claim has been accepted, this is usually the result of a miscommunication. Get the name and phone

number of the person who spoke to the insurance claims representative. Talk to this person to find out what happened. Call the claims representative to find out why the medical bills were denied. Often the bills were never submitted or the medical provider spoke with the wrong person. At other times it is not clear that the treatment was for the work injury and the insurance company needs clarification. Of course, if your medical bills are unpaid because your claim has been denied, you may have to take further action, which may be as simple as getting a medical report from a doctor stating that your condition is work related. If that doesn't work, you may need to hire a lawyer. Before you do so, review Chapter 6.

UTILIZATION REVIEW

An employer may challenge the reasonableness and necessity of medical treatment by filing a utilization review petition within thirty days of receiving medical bills. The Bureau of Workers' Compensation will assign the request to a Utilization Review Organization ("URO"), which will request your medical provider to send a copy of your medical records. If your physician or medical provider fails to provide copies of your medical records to the URO, the treatment will automatically be deemed unreasonable or unnecessary, so make sure your providers send the requested records. Send the URO a short note that explains how your treatment is helping you, even if you only get temporary relief. The URO will issue a report that states whether your treatment was reasonable or necessary. If the URO finds that your treatment was wholly or partly unnecessary or unreasonable, you have

the right to appeal this decision to a worker's compensation judge. You are not required to pay bills found to be unreasonable or unnecessary.

HEALTH INSURANCE

Under Pennsylvania law, if you have health coverage and the workers' compensation insurance company refuses to pay your medical bills, your health insurance company must do so. The health insurer may require proof that the workers' compensation insurance company refuses to pay your bills. This is ordinarily accomplished by sending to the health insurer a copy of a Notice of Workers' Compensation Denial, which you should get from the workers' comp claims adjuster. Once this occurs, your doctors, hospitals and other medical providers may bill your health insurance company directly.

If you file a claim petition, the health insurance company (or a Union Health and Welfare Fund) may require the workers' compensation insurance company to pay them back if you win your case. Keep a list of all payments made by your health insurance company, along with a list of all out-of-pocket payments you made.

WHAT IF THEY ARE ONLY PAYING SOME OF MY BILLS?

Though you may have injured more than one body part in your work accident, insurance companies often list only one of the injured body parts on the Notice of Compensation Payable (NCP), which is supposed to contain a complete description of the injuries you suffered. This ordinarily is not

a problem because insurers often pay medical bills that are related to the work injury even if the condition is not listed on the NCP.

Sometimes conflicts occur over the description of the injury the insurance company has accepted. In general, the insurance company will try to describe the injury as narrowly as possible to keep them from running into difficulties later should some doctor they hire disagrees with your doctor about the nature of the injury. For example, if you suffer a herniated disc in your lumbar spine, the insurance company probably will describe the condition as a lumbar strain. If an insurance company doctor examines you later, the insurer does not want to be bound by an NCP that describes your injury as serious because it is easier to file a petition and prove you have recovered if they described your injury as minor.

There are situations in which their action in narrowly describing the injury can cause difficulties. If, for example, you suffered a knee injury in addition to your back injury, you will sometimes find that the insurance company refuses to pay bills for medical treatment for the knee. If the insurance company refuses to pay expenses associated with that condition, you have no choice but to file a petition to correct the NCP.

It is not uncommon, however, for people to develop conditions after a work injury has occurred that have nothing to do with the original work injury. If your knee starts bothering you 8 months after you injured your back, it is a virtual certainty that the insurance company will refuse to pay for any medical treatment for your knee. It is also unlikely you'll be able to convince a judge that there is a relationship, unless

you have a pretty good explanation by a reputable orthopedic surgeon.

If you receive medical treatment at the same time for work related and non-work related conditions, the insurance company must pay the bill, though they only are required to pay the amount set forth in the fee schedule for the work-related treatment. For example, if you go to an office visit and you are treated for your back injury and for an unrelated neck condition, the doctor will be entitled to payment from the workers' compensation carrier for the office visit. Whether the provider is entitled to any additional payment from your health insurance carrier is a separate issue, but certainly the doctor is not legally permitted to double bill.

KEEPING TRACK OF WORK-RELATED MEDICAL BILLS

While your case is pending, you may pay medical expenses related to your injury, though many providers will accept a "letter of protection" from your lawyer and will not charge you in the meantime. If you pay cash for all or part of a medical bill, ask that the pharmacy, doctor or other medical provider to provide you with a receipt for the cash payment. If you pay by check, keep a copy of the cancelled check.

If your claim has not been accepted, and you are pursuing a petition to obtain benefits, you should tell your medical providers to bill the insurance company anyhow. Even where a workers' compensation insurance company refuses to make payment of biweekly wage loss checks to you, they sometimes pay for your medical treatment. In many cases, they

will agree to pay medical expenses, but not wage benefits, by issuing a "medical only" NCP.

Getting your medical bills paid is very important, but don't let the claims representative intimidate you into accepting sub-standard treatment by a company doctor. In the end, there is no substitute for treating with a doctor you choose. You may have to treat with a company medical provider for 90 days from the date of first visit to the doctor. After the 90-day period is over, go to your own doctor. But how do you pick a good one?

CHAPTER 7:

Choosing a Good Physician

If you've treated with a company doctor for a serious injury, you probably did not have a pleasant experience. Occupational Health Clinics, to whom your employer may direct you, provide general treatment to employees and ordinarily do not have experts on their staffs. These facilities also tend to have close business relationships with insurance companies. Most orthopedic injuries involve torn tissues such as cartilage, tendons, muscles, and discs. These soft-tissue injuries can often be difficult to diagnose and may require the use of expensive diagnostic procedures. Doctors in occupational health clinics tend not to order these diagnostic tests because of the expense involved.

HORROR STORIES

Many of these doctors lack sufficient experience in handling orthopedic injuries to diagnose patients properly. Few are orthopedic specialists, and most are general practitioners who do not keep up with the latest medical literature or technology. The willingness of these doctors to push people back to work as quickly as possible is sometimes disastrous.

According to the Injured Worker's Support Network, an Australian non-profit organization, an employee of Australia Post went to a company doctor who diagnosed a soft-tissue injury in his left knee. Knowing that the condition was far more serious, the following day he sought a second opinion from his personal physician, who properly diagnosed a leg fracture.

This story is all too typical. If you treat at an occupational health clinic, you may be made to feel like you're a little better than meat. These doctors often treat you with skepticism, and you may end up seeing a different physician or physician's assistant at each visit. These clinics are notorious for treating injured workers extensively at first, but after about 60 days, a clinic doctor may proclaim that you have miraculously "recovered" and that any problems you have are related to "preexisting" medical conditions. Never mind that at no time did the

"We caught it early, but your insurance wants to let it go for a while and see what happens."

"preexisting medical condition" cause any symptoms before in your life. Company doctors abandon their patients to the wolves because if they support too many injured claimants, employers will stop sending patients to them. From their perspective, if you have children to feed and their opinions mean that they won't eat, that's your problem. After all, they have to make a living, too!

Avoid going to these types of clinics and insist on your right to see a specialist on the list. There is no guarantee that the specialist won't do the insurance company's bidding either, but at least you have a better chance of getting fair treatment.

CHOOSE YOUR OWN PHYSICIAN

When you no longer must treat with a company doctor, you should choose your own physician, possibly by seeking a recommendation for a specialist or from your family doctor. If you have health insurance, make sure that the physician you choose accepts your coverage if the workers' compensation

OOPS! I AM THE DUMBEST DOCTOR EVER...

I represented a sweet elderly woman who had a back injury with numbness and pain in the back of her leg, consistent with a serious medical problem caused by pressure on her spinal nerves.

When I received the medical records, the company doctor recorded that she never complained of symptoms in her leg. She cried when I told her that the records only described back pain. "I told them about my left leg every time, Mr. Boles. I just can't believe they'd do this," she said.

I ordered physical therapy records covering the same period of time she was visiting the company doctors. The physical therapist described her repeated complaints of pain and numbness in the leg, proving that the company doctor was a liar.

carrier refuses to pay some or all of your bills. You should also ask if the specialist will agree to testify if a dispute arises with your employer or its workers' compensation carrier.

Lawyers can provide you with useful information if you do not have access to a physician. A common example occurs when injured workers have no health insurance and their workers' compensation claims have been denied. If you are faced with this dilemma, you may need to treat with a physician who is willing to defer being paid until your case is over. Often you need a lawyer to find such a medical provider.

Research the reputation of the doctor you are considering. Check Google. See where the doctor went to medical school. Ask the doctor how often he testifies in workers' compensation cases and how often he testifies on behalf of claimants. If the doctor performs insurance company evaluations, this may help you with the judge, but you have to be very careful to make sure that he values his professional judgment more than his business relationship with insurance companies. In general, physicians associated with teaching hospitals or who regularly perform research and write articles have better reputations than those who do not. The better your doctor's reputation with the judge, the greater are your chances of winning.

AVOID EXCESSIVE TREATMENT

How many chiropractors does it take to screw in a light bulb? One, but it takes a thousand visits.

I don't mean to make fun of chiropractors, many of whom provide excellent care to injured workers. I tell this joke to warn you about the possible negative consequences

of over-treating for your injury. If you are receiving physical therapy, acupuncture, or chiropractic treatment for an extended period and it is not helping you, you should discontinue that treatment and try something else. While your physician must evaluate you and do his best to treat your condition, judges are not impressed by individuals who receive steady expensive treatment for long periods of time and claim that the treatment provides no improvement, In general, physicians who judges perceive as providing excessive treatment do not have good reputations.

QUACK DOCTORS CAN HURT YOU

Beware of doctors who try to sell you snake oil treatments. If a doctor offers you "holistic" treatment that "removes toxins," or promises to use "natural" treatments or "alternative" medicine, be very skeptical. There is an old joke: What do you call "alternative medicine" that has been proven to work? Medicine. Physicians who talk of vast conspiracies to hide the truth about a particular treatment, who tout "Eastern" medicine and offer "cure-alls" are not going to help you. If a doctor's pitch sounds too good to be true, it probably is.

BEWARE OF THE LAUNDRY LIST OF DIAGNOSES

Avoid the physician who diagnoses multiple medical problems when your condition is simple. If, for example, you suffer an injury to your hand and your doctor diagnoses elbow, shoulder, neck and low back injuries, be very wary.

In general, long "laundry lists" of diagnoses undermine the credibility of your physician, particularly if the mechanism of injury is inconsistent with the diagnosis. If you suffer an injury to your hand, it is difficult to see how your low back could be injured. If you get medical treatment from physicians for an extended period of time and then switch to a new doctor who suddenly finds ten additional maladies that were not seen by any of the other physicians, the new doctor is not likely to help you.

THINKING ABOUT SURGERY?

Many people are reluctant to ask themselves or their doctor tough questions when considering orthopedic surgery. Because the decision to undergo surgery may mean the difference between resuming normal activities and being permanently disabled, you have no choice but to confront the difficult issues this decision entails.

QUESTIONS FOR YOU

- Why am I undergoing this surgery? Am I trying to get pain relief in everyday activities, or am I getting it to be able to return to a strenuous job?

- If the workers' compensation insurance company has denied my claim, what does my health plan cover? Am I limited in my choice of physician or medical facility where I can undergo surgery?

- Do I need to know more about the suggested procedures?

- How important is it for me to be near home for the surgery and post-surgical rehabilitation?

- Do I have any interest in participating in a clinical trial or new surgical approach?

- Am I comfortable with the doctor's credentials? Do I like and trust the doctor? How well do we communicate?

- Should I seek a second opinion?

QUESTIONS FOR YOUR ORTHOPEDIC SURGEON

- Do you accept patients with work-related injuries?

- What type of procedure do you recommend?

- Are there alternatives, and why would you not recommend the alternatives?

- Do you perform the procedure that you recommend?
- Do you perform the other possible procedures?
- How often have you performed this particular procedure over the last year?
- What is your rate of complications?
- What is your post-surgical follow-up procedure?
- What am I going to need to undergo for follow-up care?
- What can you tell me about your medical team, including physical therapists who will be providing treatment?

" Of course I'm nervous . . you have your attorney with you. "

You may find it difficult to ask these questions, but good physicians have no problem answering and will respect your need to seek a second opinion. The decision to undergo surgery is too important to be shy about asking tough questions.

Choosing a good physician can be a difficult task, but now it is time to enter the workers' comp maze.

CHAPTER 8:

Inside The Pennsylvania Workers' Comp Maze

BENEFITS IF YOUR WORKERS' COMP CLAIM IS DENIED

If you have to file a claim petition, talk to your lawyer about how long he expects it will take for you to be paid your workers' comp benefits. It is often difficult to estimate this before a claim petition is filed, but ask anyway. If your claim has been denied, you can learn about available benefits in *Battered and Broke: Making Ends Meet when your Workers' Compensation Claim is Denied.*

HOW THE HEARING PROCESS WORKS

Workers' compensation cases are heard in a series of hearings. Once you or the insurance company files a petition, the Bureau of Workers' Compensation assigns it to a judge in the county in which you live. The bureau will notify you and the insurance company of the identity of the judge. The bureau usually schedules a hearing within a few weeks, at which you will probably tell your story if you filed the

petition. If the insurance company filed the petition, you ordinarily will not testify at a later time.

Workers' compensation cases are not decided in a single hearing. Usually there are about three, each spaced about 90 days apart. Judges will move the case faster in some circumstances, but in general the length of time is controlled by the scheduling of medical or fact depositions in your case. A deposition is a formal question and answer session during which lawyers ask doctors or other witnesses for sworn answers to questions about your injury. It may take a while to schedule depositions, particularly of doctors, who must clear time on their busy calendars.

TYPICAL TYPES OF PETITIONS CLAIM AND REINSTATEMENT PETITIONS

If your claim is denied, you must file a claim petition with the Pennsylvania Bureau of Workers' Compensation.
A claim petition contains a brief summary of the facts you must prove to win your case. Usually the company will deny the truth of the facts because their lawyer needs time to investigate and can't do it in the time allotted. If you're seeking benefits on a claim for which you previously received benefits, you must file a reinstatement petition. Typically injured workers file this petition if they return to work and their condition worsens or they get laid off from light duty jobs.

An insurance company that receives evidence that you have recovered must file a termination petition unless you sign a document called a "Final Receipt" in which you acknowledge that you're fully recovered. If you return to work but remain partially disabled, you ordinarily will sign a

document called a "Supplemental Agreement," which may contain a provision reducing your benefits if you are earning less than your time-of-injury wages. If you and the insurance company disagree about whether you are capable of returning to work, but agree that you're not fully recovered, they may file a Suspension petition. If you return to work and do not sign a supplemental agreement, the insurance company may file a "Notice of Suspension," which stops or reduces your wage loss benefits but gives you the right to a quick hearing to challenge the company if the notice is incorrect.

If you file a petition, the insurance company has 45 days from the date of the first hearing to have you undergo an "Independent Medical Evaluation," which is discussed in Chapter 10. Their lawyer also has 90 days from the date that your doctor testifies to take a deposition of their doctor.

LATER HEARINGS

A second hearing on a claim or reinstatement petition will normally be scheduled 90 days after the date of the first hearing. At the second hearing, the lawyers may present testimony from non-expert witnesses. The deposition of your physician will be submitted at that time, and at the conclusion of the second hearing, the record will be left open for opposing counsel's medical expert deposition.

Your lawyer should push hard to obtain a decision as soon as possible, but during the course of the litigation, there may be delays. The insurance company may hire a private investigator to video your activities (more on that later), hire experts to look at your claim or present fact witnesses

to rebut your story. Other facts may also come to light that require additional work and time.

TERMINATION, SUSPENSION AND MODIFICATION PETITIONS

In a termination petition, the insurance company claims you are fully recovered from your work injury and can resume normal activities without restrictions. In a suspension petition, the insurance company alleges that though you have not recovered, you are not entitled to wage loss checks. They may claim that you rejected an offer of a job you were capable of performing. Sometimes the insurance company files a suspension petition because you have returned to work but have not signed any documents permitting them to stop paying you benefits.

Insurance companies file modification petitions when you return to work at wages that are less than your preinjury wages but you do not sign documents permitting them to pay you reduced wages that reflect the lower paying job that you are currently working. In general, however, modification petitions are filed when the insurance company uses a vocational expert to give an opinion about your earning power, which is discussed below.

If the insurance company has filed a petition to cut off or reduce your workers' compensation benefits, the lawyer for the insurance company will make a preliminary motion called a supersedeas request in which the insurance company asks that your benefits be cut off pending the final outcome of the case. Ordinarily you will not testify at the first hearing on a petition filed by the insurance company. Instead, you

and your lawyer will prepare a sworn written statement called an affidavit and obtain a medical report for submission to the court. If you are still disabled, supersedeas requests are usually denied and the insurance company must continue paying benefits. At the same time, the judge will approve your lawyer's fee, which will soon be deducted from your compensation. You will probably testify at the last hearing. At the end of any case, including cases you file, the judge directs the parties to submit proposed findings and conclusions of law that summarize the evidence. Normally all parties file these findings within 90 days of the last hearing, after which the judge will issue a final decision.

The maze is complicated, confusing, and worst of all, lengthy. But there are ways that you can help bring your case to a swift conclusion. To learn how, keep reading.

CHAPTER 9:

Let's Get This Done: Speeding Up Your Case

To receive good representation, you must be an effective partner to your lawyer in handling your case. This is particularly urgent when you have no income and you need the judge to decide your case as quickly as possible. The following is a discussion of the key ways you can assist your lawyer.

1. **Provide your lawyer with complete information**, including the full names and addresses of your family doctor and all medical providers with whom you have treated for your work injury, prior injuries or pre-existing conditions. The mere fact that you suffered an injury

HOW DO I PUT FOOD ON THE TABLE IF MY CLAIM HAS BEEN DENIED?

You should not assume that you need to go through your savings if you are missing time from work and your claim has been denied. You may be entitled to disability, pension, unemployment compensation, or many other types of benefits while you wait for your case to be decided. To find out what benefits are available to you, go to www.thebolesfirm.com for a free copy of *Battered and Broke: Making Ends Meet when your Workers' Compensation Claim is Denied.*

to the same body part previously is not necessarily significant because the aggravation of an old injury counts as a new injury in workers' comp. Why is it so important to reveal this information as soon as possible? Think about it. You "forget" the name of the doctor who treated you for an old back injury, and your lawyer learns the day before you testify that he doesn't have those records. Delay! You shouldn't say anything to the judge unless you know what's in the records, and your lawyer will probably ask the judge to reschedule. If your case involves a neck injury and that old car accident involved your low back, what's the problem? The problem is that your memory, like everyone else's, sucks. Medical records always contain surprises, often unpleasant. Nothing makes an insurance company lawyer happier than finding medical notes that contradict you. Take particular care to see that the description of your condition and the circumstances underlying your work injury are consistent with the information contained in the medical records. Don't make it easy for the insurance company lawyer to make you look like an idiot, or worse, a liar. Your lawyer and your physician will depend on you to provide accurate information concerning your injury and any possible pre-existing condition

2. **Reveal prior claims**, including injuries suffered in motor vehicle accidents and other incidents (if your case involves an orthopedic injury). If you have ever made a claim at any time against anyone, including

an insurance company, the workers' compensation insurance company already knows about it even if you never filed suit, because they can do an "index check" of records maintained by insurance companies of all claims made by anyone. Your lawyer can't get this information. Why? Because he represents you, not the insurance company, and they are not likely to hand that information to you.

3. **If you treated in an emergency room,** discuss with your lawyer any significant differences between the facts recorded in the emergency room records and your recollection of the events.

4. **Identify all witnesses** who have any information relevant to your claim.

5. **Disclose negative information** to your lawyer, who can place these facts in their proper context. Do not let the insurance company use negative undisclosed information to undermine and embarrass you, your witnesses or your physician during questioning. The last place you want to be when talking about a conviction for theft is when an insurance company lawyer is grilling you in a courtroom.

6. **Get your medical records** for your lawyer, but talk to the legal staff first. Lawyers swamp medical providers with record requests, which are handled in the order received. Under the best of circumstances, it can take a provider three weeks to a month to send

records to your lawyer. Sometimes medical providers send the records months after the initial request is made. It is much faster for you to get these records yourself.

7. **If your lawyer needs a medical report from your doctor**, ask your physician to respond promptly. Otherwise, it can take a physician weeks or even months to respond to such a request.

8. **If there is any change in your condition or treatment**, including surgery, a recommendation of new methods of therapy, or you seek treatment from a new medical provider, let your lawyer know as soon as possible.

9. **Get wage records to your lawyer**. To calculate your compensation rate, you must analyze the wages you earned during the 52 weeks before the date of your work injury from all employers you worked for at the time you were injured. Though your lawyer will request this information from the insurance company or its lawyer, they are often achingly slow to respond, and they will not get the wage records from your other employer. If you keep your wage stubs, put them in chronological order and provide them to your lawyer. Unless you have a complete set, however, the wage information you provide may be useless. In the alternative, go to your employer's personnel office to request a printout of the wages you earned during the 52 weeks before the date of your injury. If

you had more than one job, get this information for each employer.

10. **Do not sign anything without first consulting your lawyer**. This includes applications for any types of benefits, and any agreements concerning your benefits presented to you by your employer or its insurance company.

JUST SIGN HERE ON THE DOTTED LINE....

If you attempt to return to light duty work, you should refuse to sign any documents, including a supplemental agreement or a final receipt, unless those documents are first reviewed by a lawyer. The documents are not for your protection. Most good law firms will not charge you for this service.

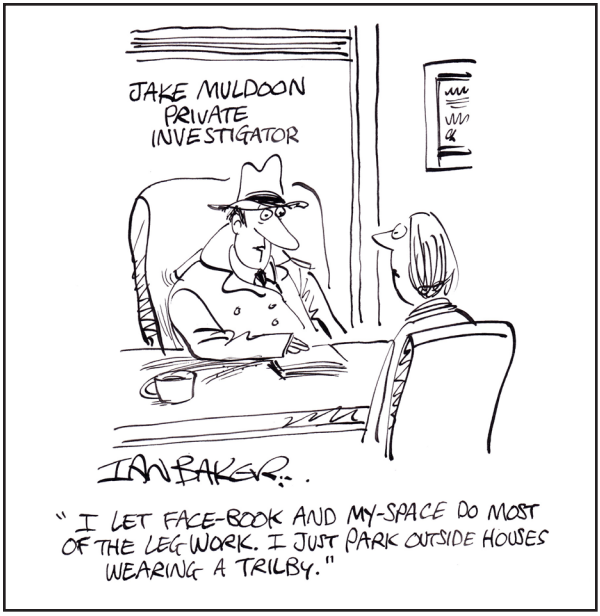
"Sign here to indicate you have no idea what you've signed for."

11. **Your lawyer may have a staff of paralegals and secretaries available to answer routine questions**. Let your lawyer spend time productively preparing your case for trial. If a staff member can't help you, talk to your lawyer.

12. **Keep track of health insurance payments, medical bills, health and welfare payments, and unemployment compensation payments**. Be prepared to provide accurate and complete information, with supporting documentation, at a moment's notice. You never know when the insurance company may decide to pay your claim or offer to settle. If all information needed is available, a stipulation to settle your case can be prepared very quickly.

13. **If you decide** to retire, return to work, leave work on disability or pension, or seek any type of benefits, you must consult your lawyer first.

14. **Keep track of wages you receive after returning to restricted duty**. You may be eligible for partial benefits if you are earning less than before you were injured. Keep track of your wages and save your wage stubs. Place your wage stubs in chronological order so they can be presented to your lawyer in an orderly fashion on short notice. If you do not keep track of your wages, your lawyer will have to rely upon the insurance company lawyer, who has to get them from your employer, who will deliver them on the back of a snail.



15. **The insurance company and its lawyers may investigate your claim** by interviewing your friends, neighbors, and co-workers, so avoid speaking about your claim to anyone other than your lawyer and the legal staff. Some insurance carriers and their counsel gather evidence the dirty way: they may hire investigators to take hidden photographs or videos of you. You need to live your life, but remember that a video may come back to haunt you.

16. **Watch out for social media** One of the easiest ways to investigate your activities is to look you up on Facebook. The video of you power lifting 450 pounds is going to be as helpful to your case as your 50 posts

complaining about your employer or the insurance company. Stay off Facebook.

17. **Due to your physician's busy calendar, it may not always be possible to schedule a deposition to take place as early as you would like**. Furthermore, your physician may be called away to attend to medical emergencies, resulting in additional delays. If you discuss with your physician the importance of bringing your case to a swift conclusion, the doctor may be more willing to be flexible in scheduling a timely deposition.

Because your discussions with your lawyer are confidential, you can speak frankly with your lawyer on all matters that are potentially relevant to your claim. Insurance company lawyers are paid to dig up negative information about you and have your employer, claims personnel, paralegals, private investigators and others to help them. Become your lawyer's partner and reduce the other side's unfair advantage.

THE VIDEO THAT BITES YOU IN THE ASS

Private investigators generally do not find any information about you that will hurt your case. The most important exception occurs when an injured worker exaggerates his limitations in court. If you tell the judge you spend your days lying on the couch in pain or otherwise describe extremely limited activities, it is highly likely that the insurance company will hire a private investigator to take videos of you. If you're telling the truth, the videos may even help you in your case (that is, if the insurance company actually turns them over, which they often do not do). If, on the other hand, the video shows you playing basketball when you claim that you can barely move, you will lose your case.

If you've been asked by the insurance company to go to an Independent Medical Examination, the company is getting ready to challenge your right to benefits. If this occurs and you haven't hired a lawyer yet, you better do so soon. Why you need to do so will be clear once you read the next chapter.

CHAPTER 10:

Handling the Independent Medical Evaluation

THE MULTI-MILLIONAIRE INSURANCE DOCTOR

At some point the insurance company may ask you to undergo a so-called "Independent Medical Examination" or "IME", which is a special evaluation in which the insurance company gets a "hired gun" doctor to examine you. The doctor they choose is going to give the insurance company the benefit of the doubt. Though an IME doctor may support you, many IME doctors will say anything to collect lucrative fees from insurance companies.

According to the *New York Times*, Hershel Samuels, M.D., a New York orthopedic surgeon, was videotaped performing an IME of an injured trucker, stating that he detected tenderness in his neck and mild spasm bilaterally when he palpated his back. When he submitted his report, however, he cleared the driver for work and stated that he had no back spasm or tenderness in the neck. The Times reported his outrageous explanation: "If you did a truly pure report, you'd be out on your ears and the insurers wouldn't pay for it.

You have to give them what they want, or you're in Florida. That's the game, baby."

Although the fees charged by doctors like Dr. Samuels charge for examinations varies widely, they can get anywhere from $400.00 to $1,000.00 for an examination that usually lasts about 30 minutes or less. In Pennsylvania, most doctors charge deposition fees of $2,000.00 or higher. Physicians who perform Independent Medical Evaluations typically charge $3,000.00 to $4,000.00, and some perform so many examinations and testify in so many cases that their total income for medical-legal work often exceeds $500,000.00 *yearly*. With so much easy money at stake, it's not surprising that many of these doctors take ethical shortcuts.

Fortunately the judges know the reputations of many of these physicians. If you're being treated with a reputable doctor and the insurance company chooses a physician who with a poor reputation to evaluate you, a workers' compensation judge is more likely to rule in your favor. Check with your lawyer concerning the reputation of the IME doctor.

IME BASICS

During the IME, the insurance company doctor will ask you about your physical complaints, the cause of your injury or illness, and your prior medical history. The physical examination may last as little as five minutes. Immediately afterward, record the length of the IME and the actual physical examination and write down everything that occurred during the evaluation, including everything you told the doctor. You may be asked by your lawyer at some point to respond to the claims made by the independent doctor. If you didn't

take notes, it will be difficult, if not impossible, for you to remember.

If the doctor requires any additional testing, such as MRI's, EMG/nerve conduction velocity studies, or similar studies, you should refuse. Do not undergo those types of studies without consulting your lawyer.

Do not make the mistake of lying or exaggerating about your condition. That is what the doctors are paid to look for. Even doctors who are willing to say virtually anything to collect deposition fees may be reluctant to claim that you are lying or exaggerating, particularly when there is no evidence anywhere in the medical records that you have ever engaged in such behavior. Good firms maintain videos or other educational materials that will help you understand the importance of providing accurate information to physicians and the consequences of lying or exaggerating.

Don't worry. You may well get a "fair shake" from the insurance company doctor. If you comply with the rules outlined below, you will maximize the chance that the IME doctor's opinion will help or at least not hurt you.

The 7 IME rules

1. TELL THE TRUTH

Whenever you deal with any physician concerning your work injury, tell the truth. If you lie about your symptoms or provide an incomplete or false medical history, you will not only encourage the physician to write a negative report, you will also raise credibility issues in your workers' compensation

case. If there are falsehoods or inconsistencies in the report prepared by your physician or in the report prepared by the independent medical examiner, the insurance company's representative will argue that you are a liar.

If you have suffered prior orthopedic injuries, you should accurately describe the nature, care, and treatment you received for these injuries. Only by providing an accurate history can these injuries be placed in a proper context.

You should assume that the insurance company will obtain all medical records of your medical history both before and after your injury. Any attempt to cover up or distort your medical history will be quickly revealed.

2. DON'T EXAGGERATE

There is a natural tendency among injured workers undergoing independent medical evaluations to exaggerate their symptoms. While this is understandable, it is the worst mistake they could possibly make.

The physician examining you at the request of the insurance company will be looking for signs of exaggeration or malingering, as will be discussed in greater detail below. You are not capable of "fooling" the examiner, who will quickly detect any attempt to "magnify" your symptoms, to your great disadvantage.

It is not necessary to claim you are suffering severe symptoms to qualify for workers' compensation benefits. Resist the temptation to "pour it on" during the examination.

"Always exaggerate. It makes life seem more interesting."

3. GATHER YOUR THOUGHTS

Sit down to think about the history of your work injury, your symptoms, the treatment you received, and the activities associated with your symptoms. Think of the best way to describe your symptoms, and try, as much as you possibly can, to find

a way to describe the exact location of your symptoms. If you have medical records available, review them before the examination.

4. ANSWER THE QUESTIONS ASKED

Respond to the examiner's questions, but do not unduly elaborate.

5. BE ACCURATE

It does not help for you to describe vague symptoms. Although it may be difficult to find the words that best describe your symptoms, do the best that you can.

6. RESPOND APPROPRIATELY DURING THE ACTUAL PHYSICAL EXAMINATION

Much of the independent medical evaluation will be spent reviewing your history and complaints of pain. The actual physical examination may take as little as 5 minutes and usually lasts no longer than 15-20 minutes. It is during this portion of the exam when injured workers most often make the mistake of exaggerating symptoms.

The physician will be performing a number of tests on your during this portion of the examination. It is impossible for you to outwit the examiner. Physicians hired by insurance companies are highly trained and look for specific responses during the physical examination. Most orthopedic or neurological injuries have a typical set of symptoms associated with

them. While every individual is different, there is a pattern of symptoms that are reproducible on physical examination.

Unless you are a highly trained specialist, you will have no way of knowing what the examiner is looking for. If you claim that a particular maneuver by the examiner caused an increase in pain or other symptoms and these symptoms do not correspond to any known medical abnormality, the examiner will note this in the report. Furthermore, during every independent medical evaluation, the physician will test for consistency. For example, individuals with low back injuries will be subjected to straight leg tests both lying down and sitting. This test is designed to place pressure on the nerves that go down your leg. Both examinations are the same and should yield the same result. If you respond differently to each test, the examiner will note this as an inconsistency on examination and may suggest you are feigning or exaggerating symptoms.

At other times, the physician will perform "distraction" tests to determine whether your range of motion or other symptoms are consistent at all times.

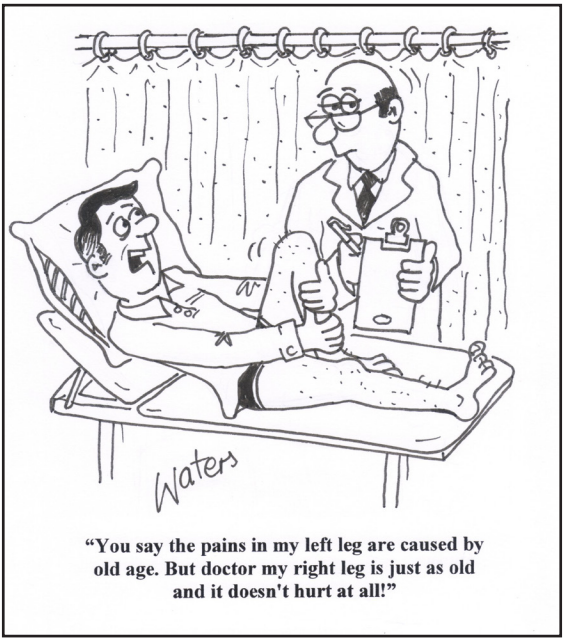
The physician may use measuring devices to determine your strength. For example, if

IME TIPS

- Tell the truth.
- Do not exaggerate! The insurance company doctor looks for signs that you are exaggerating or lying.
- Gather your thoughts about the history of your work injury and the medical treatment you have received.
- Answer the questions asked.
- Be accurate with your responses to the doctor's questions.
- Respond appropriately during the actual physical examination.
- Schedule an examination by your own doctor.

you have a hand or wrist injury, the IME doctor may ask you to squeeze on a measuring device and will do repeat testing to check for consistency. If you are capable of squeezing with 40 pounds of pressure and are tested again and now you can squeeze only 25 pounds, the doctor will note this as an inconsistency. Your strength will also be tested in multiple positions, and we know from the structure of the hand that some positions will result in greater grip strength than others. If you are trying as hard as you can, the tests should yield results that are consistent with the structure of your hand.

In short, unless you are a physician, there is no way that you can "outwit" the insurance company's physician and any attempt to do so will be disastrous.



7. SCHEDULE AN EXAMINATION BY YOUR OWN DOCTOR

Because the insurance company may use the independent medical examiner's report against you, you should see your doctor shortly after the insurance company's examination to document your condition with a physician who will protect your interests.

Following these rules will not guarantee that the IME physician will support you except when an injury is obvious (bleeding, broken bones, bruising, swelling, etc. You get the idea). IME doctors commonly claim that conditions are age-related or pre-existing. Never mind that you never had any pain until the steel pylon fell on your head at work. Do not get upset if the doctor does not support you. That is to be expected.

At some point, you may have to testify in your case. The next chapter discusses what you need to do to persuade the court of the truth.

CHAPTER 11:

Winning through Effective Testimony

YOUR DAY IN COURT is finally coming. Of course, the night before you should drink until 4 am, come to the courtroom in shorts, sunglasses and a "funny" t-shirt, and start yelling at everybody. Right? Of course not. Spend a day outside hearing rooms and you will be amazed how informally some people take their day in court. Distinguish yourself from these buffoons by showing respect for the court by being prepared and well dressed.

Although hearing procedures before a workers' compensation judge are sometimes more informal than other court proceedings, testimony is taken under oath and normal rules of evidence and procedure govern the testimony presented. In attendance at the hearing will be you, your lawyer, a lawyer representing your employer or its insurance carrier, a court reporter, and the judge. Your lawyer will ask you questions to prove the facts of your case. The insurance company's lawyer will have a chance to ask questions as well.

TESTIFYING: DO NOT WORRY

You look into your hearing room and there are 30 chairs, all of them taken, with people standing in the back. The whole place is packed with injured workers and their lawyers. You think, "are these people going to be watching when I testify?" Don't panic. They won't.

In Philadelphia and many of the county workers' compensation offices, judges conduct hearings like "cattle calls" in which 10 or 20 matters are scheduled to take place at the same time. In most instances, those hearings will be very short, and involve little more than handing in evidence. When everything else is done, the judge takes testimony. By then, virtually everyone is gone. Frequently there is no one in the hearing room other than you, the lawyers for each side, the judge, and the court reporter. If anyone is sitting in the back, they're either reading or dozing. When you testify, you will not be onstage, so relax.

"Mr. Bowman, would you please, in your own words, explain what happened just like we rehearsed?"

THE BASICS

When you testify, your lawyer usually must ask mostly "open-ended" questions, which cannot be answered with a yes or no.

The lawyer for the other side is going to cross-examine you. During cross-examination the lawyer is allowed to ask you leading questions, which have the answer contained within. For example, a lawyer could ask you "Is your name John Smith?" The answer to the question, of course, is either yes or no.

Cross-examination will not, however, be that easy. The job of the insurance company lawyer is to destroy your story and credibility. The lawyer will review your medical records closely to look for information in the records that might be inconsistent with your testimony. Though the records may contain many types of errors and may not reflect exactly what you said to a particular medical provider at the time, the lawyer will use the records to make you look less credible.

In answering questions from the insurance company lawyer, you must not get angry. Angry people do not think straight. They may get facts mixed up, answer questions that were not asked, make rude, inappropriate comments and exaggerate.

Have you ever had young children? Have you ever had the experience of saying to a child "I told you not to climb on that thing 10,000 times. Now get down!" Well, you obviously made the "10,000 times" claim for emphasis, but in court, it may not always be clear that you were exaggerating to make a point. The words you say are will be recorded in a type-written transcript that will be reviewed by the judge later. He may

not recall the inflection in your voice or your mannerisms and may take a perfectly innocent exaggeration literally.

On the other hand, you have to avoid "giving away the store" to the other lawyer if it turns out that the lawyer is "friendly." The lawyer may be respectful because that is naturally the way he is. It's also possible, however, that he's setting a trap for you.

We all have the natural tendency to want people to like us. When we're talking to someone, we tend to avoid disputes and emphasize agreement. If you are conciliatory, you may say things to people that you don't really believe to get them to like you. This can be fatal in a courtroom when you're being cross-examined by a lawyer who is being paid to get the judge to rule against you. Often an insurance company lawyer will start out cross-examining you in a very friendly way, trying to get as many concessions as he can from you by being friendly. As soon as he decides he can no longer get any information out of you by being your good buddy, the lawyer may become more aggressive, using pointed, direct questions to force you to concede points that will hurt your case.

Of course you must be respectful to everyone in the courtroom, including the insurance company lawyer, but do not "play nice" with the lawyer for the insurance company because you want the lawyer to like you. You are not concerned with the lawyer's attitude. The sole purpose for your testimony is to present your story to the judge in a way that the judge will know that you are telling the truth. The lawyer is paid to believe you are lying or exaggerating, and nothing you can say or do will change that. When you testify, you should be a truth-telling machine, unconcerned with the behavior of the insurance company lawyer.

While you want to tell the truth in response to these questions, you have to pay careful attention to what the lawyer is asking. If the lawyer asks you about information you do not know, you need to say that. If you don't understand a question, you have to say so or the court will assume you understood the question when you answered it.

Regardless of the type of hearing, follow these 15 general rules of effective testimony:

1. GET A GOOD NIGHT'S SLEEP BEFORE YOUR TESTIMONY AND TRY TO RELAX

A comfortable and well-rested witness presents testimony in the most effective way. Before you testify, do the things that help you relax and be in control, whatever those things may be — a good night's sleep, some exercise, or a good meal.

2. APPEARANCE IS IMPORTANT

Getting ready to appear before a judge and you put on your shorts and flip-flops? Think again. As a witness, you should appear neat, presentable, and properly attired.

GUESS WHAT? YOUR LAWYER DOESN'T LIKE UNPLEASANT SURPRISES!

Years ago I was a partner in a law firm that represented labor unions. When his case was called, an injured prison guard announced, "Does anybody mind that I have a gun?" As you can imagine, the judge minded very much. He called security, who promptly escorted him out of the building. The following week, court officials placed a warning at the entrance to the courtroom: "Weapons and Explosives are Strictly Prohibited." As I walked past the sign, a friend asked me, "Can you believe how stupid that sign is? Who would bring weapons or explosives into a courtroom?" I kept very quiet.

The judge's opinions should be based on the content of your testimony, not on your hair style, clothing, or grooming habits.

If possible, male witnesses should dress in a comfortable, conservative suit. Generally, a grey, brown or blue suit should be worn, with a white shirt. Men should wear a tie that is understated and matches your suit, dark socks and dark shoes. Facial hair and head hair should be neatly trimmed, regardless of length.

A female witness should ordinarily wear a dress or skirt. Your attire should not be too "dressy," and it should be relatively conservative. Color or patterns in clothing are acceptable as long as they are not loud. Do not use too much makeup, perfume or hairspray. Do not have your hair cut or styled in an unusual fashion. Do not wear a lot of jewelry. (A watch, a ring or two, necklace and earrings for women are acceptable).

3. UNLESS REQUESTED, DO NOT BRING ANY PAPERS OR DOCUMENTS WITH YOU REGARDING THE MATTER ON WHICH YOU ARE TESTIFYING

If you have documents with you, you can be questioned about them.

4. BE PREPARED TO TESTIFY

Review the events about which you are going to testify in your mind. Try to picture the scene, recall the statements that were made and otherwise think carefully about the topic upon which you are presenting testimony. If you will testify

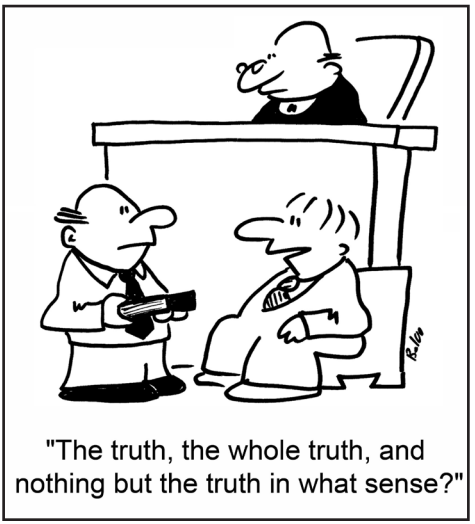
about events that occurred over a period of time, create a timeline. If you gave statements concerning the matter at issue, review the statements.

5. BE COURTEOUS, POLITE AND RESPECTFUL AT ALL TIMES

Address any person asking you questions in a proper and respectful tone. Calling the other attorney a son of a bitch may give you deep emotional satisfaction, but won't put food on your table. Don't give the judge a reason to feel sorry for the other side.

6. TELL THE TRUTH

The judge is legally required to determine if you are truthful or lying. The easiest way to appear credible? Tell the truth.



7. SPEAK UP

Every day, judges deal with a common courtroom annoyance: the whispering witness. Testify in a clear and even voice. Do not mutter, mumble, or speak so quietly that people cannot hear you. Never cover your mouth with your hands when you speak.

8. SIT IN A COMFORTABLE, STRAIGHT POSTURE WHEN YOU TESTIFY

THE SHIFTY-EYED WITNESS

A young associate in my former firm represented a man with a knee injury. When the insurance company lawyer asked him simple questions, he kept looking at her. Of course, she did everything but look back at him, for fear that it would look like she was coaching him. She nearly lost it when the lawyer asked him the incredibly easy question, "what parts of your body were injured?" He turned to her as if he had no clue. Afterward, she asked him why he kept looking at her. "I wanted to make sure I answered the questions the way you wanted me to," he replied. Nice guy, horrible witness.

If you are physically capable of doing so, sit up straight in the witness chair, without slouching, leaning, tilting backwards or forwards, or bracing yourself against any object (like a table, the witness stand, etc.).

If your injuries interfere with your ability to maintain good posture, do not worry. The judge will understand. If you feel the need to stand up during your testimony, request permission from the judge, who will immediately grant the request.

9. AVOID NERVOUS GESTURES

Keep your hands in your lap, at your side, or on the arms of your chair. Do not: run your hands through your hair; place your hands about your face or chin; drum your fingers on the table or witness stand; fidget in your seat; play with papers or any other object while you testify; or play with jewelry on your fingers or around your neck. You may feel anxious, but it is important to avoid movements that are nervous and distracting.

STAGE FRIGHT

An experienced lawyer should know what to do if a witness panics.

I once represented a young woman who was nervous about testifying. In an empty courtroom we practiced as if we were before the judge, and soon she was calm.

When she began testifying in the courtroom, she looked like a dear in headlights. I "accidentally" pushed a stack of folders off the desk, stood up to recover them, and joked about how clumsy I was. Everyone laughed, the tension was broken, and she testified beautifully. And won.

10. LISTEN TO THE QUESTIONS

If you do not "hear" the question, you cannot answer the question. Witnesses should never answer a question if they do not know and understand what information is being asked of them. Witnesses who answer questions other than that which they have been asked look and sound like they do not know what they are talking about or, worse, like they are lying.

11. DO NOT ANSWER A QUESTION YOU DO NOT HEAR OR UNDERSTAND

It is not your role to figure out what you are being asked. Do not guess what the question calls for if you do not understand it. Note that if you do answer a question you did not hear or understand, the judge will assume you knew what you were asked. If you did not hear or understand the question, ask that it be repeated or re-phrased.

12. ALWAYS LOOK AT YOUR QUESTIONER

What do you think when you ask someone questions and the person refuses to look you in the eye? You think something's fishy. If a judge or lawyer asks you a question, look at them when you answer. If you look at friends, family members, or even your own lawyer, your testimony will look "staged."

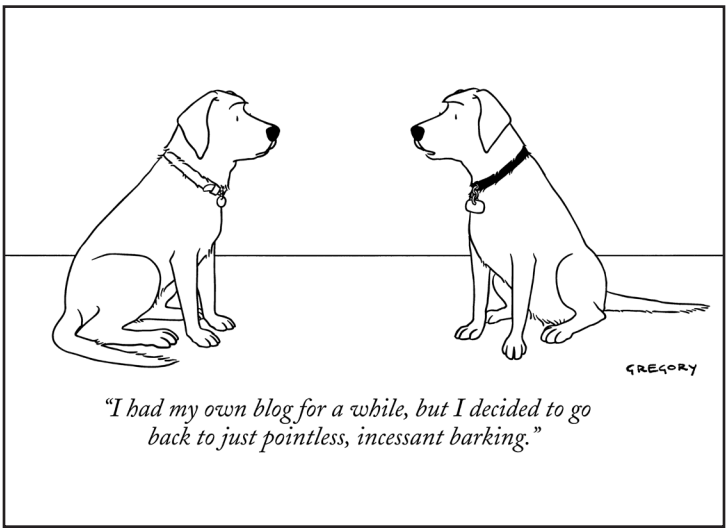
13. DO NOT ARGUE OR FIGHT WITH YOUR QUESTIONER

Remain in control of your temper. When witnesses lose poise, they lose control over their testimony. Be prepared for abrasive or even insulting cross-examination. Sometimes the subject of your testimony will concern issues that irritate you or that you find unpleasant. Calling the lawyer an idiot, even if true, will not help.

14. DO NOT VOLUNTEER INFORMATION BEYOND THE QUESTION WHICH YOU HAVE BEEN ASKED

We all love the sound of our own voices. I'm as guilty of this as anybody else. Blah, blah, blah, blah, blah. We've all had the experience of rambling on to the point that we're obviously losing half the people in the room and annoying the rest. But what's the worst-possible place for you to be a yammering nincompoop? The courtroom. Answer only the question asked and do not unduly elaborate. The judge really doesn't care how much you loved kindergarten. If you lose the judge, you risk losing your case.

On cross-examination, never volunteer information if you have not been asked a specific question which asks you to disclose that information. On direct examination, know what your "role" is and the scope of the answers that your lawyer seeks from you, and give only those answers.



"I had my own blog for a while, but I decided to go back to just pointless, incessant barking."

15. YOU CAN ONLY TESTIFY AS TO WHAT YOU KNOW. DO NOT TRY TO DO MORE

Never "imagine," or "suppose" in response to a question that calls for you to state your knowledge on a particular topic. If you do not know the answer to a question, do not say anything more than "I do not know." If you do know the answer, you should respond in plain, straightforward language only what you know.

These "standard" instructions obviously cannot anticipate every situation you might face as a witness, but if you are truthful and candid in your testimony, and keep these simple guidelines in mind, your testimony should be an easy task for you.

YOUR TESTIMONY AT A WORKERS' COMPENSATION HEARING

At some point, unless your case settles, you will testify before a workers' compensation judge. A court reporter will transcribe the testimony into a typewritten transcript that contains everything said during the hearing. After your lawyer presents your testimony, a lawyer representing the insurance company will ask you questions about your claim.

At the hearing, do not put on a "pain show" for the judge or anyone else. If you truly are in pain, people can tell. Wincing, ostentatiously supporting yourself against your chair or a table, limping into the courtroom and other behaviors are quickly seen as fraudulent if they are not genuine. Sometimes people will limp into a courtroom and walk out normally.

The judge and lawyer are watching. Don't give them such a stupid reason to doubt you.

CLAIM PETITION TESTIMONY

Your lawyer will ask you who your employer is and may ask about your employment history, particularly if you have a long and stable work history. Because you need to prove that you are disabled from your regular job, your lawyer will ask for detailed information on the physical requirements of the job. (Keep in mind that you ordinarily do not need to prove that you are disabled from all work). Does your job demand that you spend all or most of your day on your feet or to bend, twist, push, pull, squat, climb ladders, or do other physical activities? Must you must lift and carry heavy objects and, if so, how much do they weigh?

Provide a brief description of how and when your injury occurred. Because the fault of you or your employer is not at issue, usually there is no need to give extensive testimony on this topic. More details will be required if, for example, you suffered a repetitive motion injury or became ill from extended exposure to a toxin in the workplace.

You must explain how and when you notified your employer of your work injury. It is not sufficient for you to testify that you told your employer that you were "injured." It is also not sufficient if you testify that you gave notice to a co-employee, unless your co-employee testifies that he informed the company that you suffered a work related injury. You must prove that you or someone informed your employer of your injury and its relationship to your job.

In most instances proving notice will not be a problem. For individuals who suffer repetitive motion injuries, however, it is often not clear at first that the condition is work related. These injuries occur over a long period of time as a result of repetitive motions of the upper or lower extremities. A classic example is carpal tunnel syndrome, which often develops from longstanding use of a keyboard. If you are suffering from this type of injury, the date of injury is generally considered to be the date you last worked at the job which caused or aggravated the condition. If you suffer an occupational disease, the time limit for notifying your employer begins when you knew or should have known that your condition was work-related.

The judge must understand your symptoms, why they keep you from performing your job duties and the exact time you missed due to your injury. Your lawyer will ask how your symptoms interfere with your ability to sleep, concentrate, stick to a steady work schedule or perform your normal everyday activities. You may be asked about any side effects of your medications.

You will identify your medical providers, describe the treatment they provided and chronicle any changes in your condition, including whether the treatment helped you. The lawyer for the insurance company will also want to know the names and addresses of virtually all medical providers who have ever treated you for anything, including your family doctor, primarily to see if there are any medical notes that contradict your story.

Because you are entitled to receive wage loss benefits based on an analysis of wages from all sources of employment, you need to provide either the wage information or a

good estimate of your wages. Often the insurance company will provide a "Statement of Wages" that calculates your benefit, but if you worked for more than one employer, you must submit wage information for your other job or jobs.

If you were out for less than 52 weeks, you can submit medical reports in support of your claim. For claims longer than 52 weeks, your lawyer must take a deposition of your physician, ordinarily at the doctor's office. Present at the deposition will be your lawyer, a court reporter, opposing counsel, and the physician. Your lawyer will ask your doctor about your history, diagnosis, prognosis, level of disability and the connection between your condition and your work. The insurance company lawyer will then question your doctor. The court reporter types the testimony in a transcript that your lawyer will submit to the judge at a later hearing.

TESTIMONY IN PETITIONS FILED BY THE INSURANCE COMPANY

Testimony in a termination petition is generally much shorter because the only issue is whether you recovered from your work injury in full. If the judge believes your injury or sickness still restricts your physical abilities, your benefits will not be terminated.

Unfortunately, the insurance company may make the specious claim that you miraculously recovered and are now suffering from the effects of a pre-existing condition that never bothered you before. This is typically done by having an insurance defense doctor claim that your condition is "degenerative" or "age related". Incredibly, these doctors make such claims even when the injured worker is still

young and cannot reasonably be expected to be suffering from age-related pain.

If they make this allegation, you may have to testify in a bit more detail concerning your condition, including the stability of your symptoms over time and the fact that you were asymptomatic before the work injury occurred.

Where you really did have a pre-existing condition that was aggravated as a result of the injury, the case will often turn primarily on the medical testimony of your doctor and may concern whether there was a physical change in your body as a result of the aggravation. If you had a preexisting condition, the lawyer for the insurance company will try to establish that you have returned to the "baseline" of symptoms that existed before your work injury occurred. If your symptoms are currently identical to the symptoms you had before the injury occurred, there may be a basis to this claim.

In a suspension petition, the lawyer for the insurance company may try to prove that you were offered employment that paid wages equal to or greater than your pre-injury wages, but you failed to make a good faith effort to follow through on the offer. In a modification petition, the lawyer will try to prove either that you refused an offer of a light duty job that paid wages less than your pre-injury wages or that you have an "earning power" that entitles the company to reduce you benefits. (More on that later).

If you are not physically capable of performing a job your employer offered, you must present medical evidence to prove it and describe to the judge what occurred after you tried it. As discussed in Chapter 4, there are many ugly tactics employers use to harass injured workers in the workplace. If

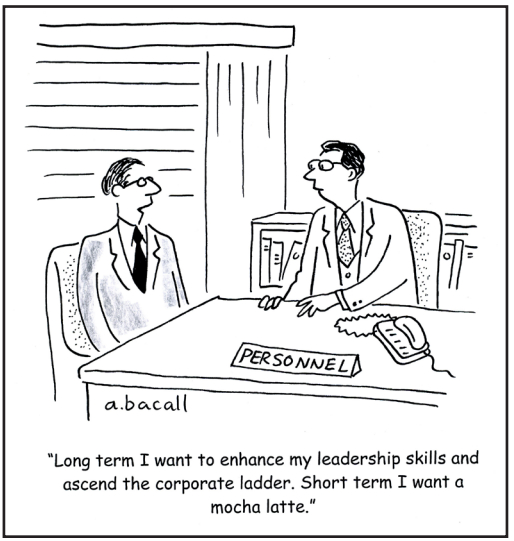
you have been the victim of these or similar tactics, you will be asked to testify about them as well.

T**here is a second type of modification petition** in which the insurance company tries to prove that though your disability continues, you are capable of performing other work that is generally available. This is a more specialized type of petition, and understanding how to testify in such a case will require you to understand the concepts in the next chapter.

CHAPTER 12:

Your Friend, the Insurance Company's Vocational Expert

At some point, the insurance company may ask you to undergo an expert "vocational interview." Under no circumstances should you submit to such an interview without a lawyer. The expert is not going to help you start a new career or obtain new training; he has been hired by the insurance company to help them cut your benefits. Don't make it easy for them.



"Long term I want to enhance my leadership skills and ascend the corporate ladder. Short term I want a mocha latte."

CHECKLIST: YOUR TESTIMONY IN A VOCATIONAL CASE

- What is your age, education and work history?
- What are your symptoms and limitations?
- What medications are you on and what side effects do they have?
- Does your injury or illness affect your ability to concentrate or deal with other people?
- Does your condition affect your ability to sleep?
- Does the intensity of your symptoms vary from day to day?
- Are there days when you are physically incapable of performing even sedentary work? How frequently do such days occur?
- Why are the jobs identified by the insurance company's expert inappropriate for you?
- Are there any factual errors in the vocational report?

Insurance companies hire these experts to assess your "transferrable skills," perform a "labor market survey," and determine your "earning power." The vocational expert will look at your educational and vocational background to see if you have any skills that might be transferrable to a new career. A labor market survey is a review of jobs near you that are supposed to be consistent with your age, education, vocational background, and physical restrictions you have due to your work injury. Based on this information, the expert forms an opinion on the wages you could earn (your "earning power").

THE NOTICE OF ABILITY TO RETURN TO WORK

To start this process, your employer or its insurer is required to send a document entitled "Notice of Ability to Return to Work" that states the following:

- The nature of your physical condition or change of condition.
- That you have an obligation to look for available employment.
- That proof of available employment opportunities may jeopardize your right to receive ongoing benefits.
- That you have the right to consult with a lawyer in order to obtain evidence to challenge the insurer's contentions. This notice must be given promptly upon receipt of the medical evidence that you are able to return to some type of work.

These notices are often sent whenever the insurance company receives any medical evidence that you can work in some capacity and only rarely are followed by a request for a vocational interview. Take the request that you look for work seriously, though there may be many reasons that it is not practical for you to look for work, including, for example, that you are getting surgery. If you have been cleared by a physician (even an IME Doctor) to some type of work, an insurer is legally entitled to proceed with an earning power assessment, and if you receive a request for a vocational interview, make sure you understand what will occur.

THE VOCATIONAL INTERVIEW

After learning your age, the expert will question you about your educational background, including any specialized training you may have. The expert will ask you about nearly every job you ever had, focusing on any skilled or semi-skilled work you may have done. Experts ask injured workers, for example, whether they supervised workers, received specialized training to perform job duties, or obtained licenses to perform skilled work. To determine the work you are physically able to perform, the expert will rely on medical opinions, but will ask you in detail about the work you feel you are physically capable of performing.

THE TRANSFERABLE SKILLS ANALYSIS

After conducting a vocational interview, the vocational expert will do a "transferable skills" analysis. He will look at your skills to see whether they are transferable to some other field. For example, if you performed skilled work in the past or have a special license, the expert will consider this in determining your earning power.

THE EARNING POWER ASSESSMENT

Once the transferable skills analysis is done, the expert will survey your "usual employment area" to see if work is generally available. Earning power assessments must be based on jobs that are open and available at the time the vocational expert conducts the assessment, but it is not necessary that the jobs be referred to you. If open jobs are identified by a vocational expert, you should apply for those jobs in good faith. Whether you are hired may be relevant to the question of whether jobs are open and available.

YOUR TESTIMONY IN A LABOR MARKET SURVEY MODIFICATION PETITION

If the insurance company files a modification petition based on a labor market survey, they will request that the judge reduce your workers' compensation benefits as if you were earning wages equal to the wages the insurance company expert claims you can earn. In Pennsylvania, if you return to work at a job that pays less than your old job, the insurance company must pay two-thirds of the difference between

your pre-injury wage and your return-to-work wage. In a modification petition involving a labor market survey, if the judge finds that you have an earning power, he will order the insurance company to pay you two-thirds of the difference between your pre-injury average weekly wage and your earning power. For example, let's assume you have a pre-injury average weekly wage of $800.00 per week. The expert for the insurance company testifies that you are capable of earning $500.00 per week, and the judge accepts the expert's opinion. Your benefits will be reduced to $200.00 per week. (Pre-injury average weekly wage $800.00 minus "earning power" $500.00 equals $300.00 multiplied by two-thirds equals $200.00).

Some lawyers argue that vocational experts are not required to take into account your age in calculating your earning power, even though they are required to do so by law. They claim that because age discrimination is prohibited by Federal law, the insurance company vocational expert must assume that no employer discriminates against older workers.

This strikes me as supremely silly. The law also prohibits murder, but does that mean that murder no longer occurs?

If you disagree with the expert, you must explain to the judge why he is wrong. This is usually done by presenting testimony from you and possibly from your own vocational expert.

One way to defend against this type of petition is to present testimony from your doctor that you are completely disabled from all employment or that you are not capable of performing the work identified by the expert. Even if you are capable of light or sedentary work, you may be incapable of performing sustained gainful employment. There are limits to the number of days that an employer will allow an employee

to take off due to a medical condition. If, for example, you must miss 20 random days per year as a result of your work injury, that may make you ineligible for any employment.

If your pain interferes with your ability to sleep, concentrate or deal with others, if it varies from day to day, or if you must take medications that give you terrible side effects, you must explain this to the judge. Your lawyer will take care of technical defenses, which often includes such simple things as rebutting false claims by the vocational expert about the physical requirements of jobs the expert identified.

By now, you should have a pretty good picture of the Workers' Comp maze. But one of the most important topics is discussed in the final chapter: settling your case.

CHAPTER 13

Settling Your Claim

AT SOME POINT you may need to examine whether to settle your workers' compensation case for a lump sum and give up the right to wage loss benefits, medical coverage for your injury, or, more likely, both.

For you, letting a judge decide your case is usually an all or nothing proposition. For insurers, losing a particular case has much less significance because they expect to lose a certain percentage of their cases and can easily handle the financial cost of losing one case. As a result, insurers often play hardball in negotiations.

Workers' compensation claims are not like personal injury cases. If you can't settle a personal injury case, you can just say, "Don't want to settle? Fine. We'll just let the jury settle it." That can't be done in a workers' compensation case. There is no jury to decide the value of your claim, and no judge has the power to force either party to agree.

An employer or its insurance company has the right to refuse to negotiate, continue paying workers' compensation benefits, and use whatever legal rights it has to limit the amount they pay you. Government employers or companies that pay claims out-of-pocket ("self-insureds") often waste enormous amounts of money paying people wage-replacement benefits because they are penny-wise and pound-foolish. Rather than settle a claim, they pay lawyers to fight these cases and never get around to making a settlement offer that would be attractive to an injured worker and cheaper for them. For many who have been seriously injured, however, the insurer will try to settle, which means you must understand how your lawyer evaluates your case.

WHAT IS THE "VALUE" OF YOUR CASE?

Over one hundred years ago, the Pennsylvania General Assembly passed the Pennsylvania Workers' Compensation Act, fashioning a compromise between labor and management in which workers exchanged the right to pursue negligence claims against their employers for the right to receive disability benefits regardless of whether anyone was at fault for causing an injury. Unfortunately, the benefits you receive under the Act are relatively meager. There are special benefits available to you if you lose certain body parts or

lose certain functions such as eyesight or hearing. Under most circumstances, however, you will receive medical coverage for your injury and wage loss benefits that are fixed on the date of injury and will not go up. With inflation, the value of those benefits will steadily decline.

Worse still, because your benefits are fixed, you do not recover compensation for the loss of your earning potential. For example, if you ordinarily would receive wage increases of 5 percent per year but for the injury, you will lose all of those wage increases into the future. You also may not sue your employer for negligence and cannot recover for the pain, suffering and aggravation caused by your injury, though you do have the right to pursue negligence claims against parties other than your employer or co-workers. If you get a recovery for your injury as a result of a lawsuit against someone other than your employer, the insurance company has the right to get repaid for all the benefits it paid for your injury.

It's bad enough that your benefits are fixed. Insurance companies also have the right to cut your workers' compensation benefits based on other benefits you receive. If you start receiving Social Security retirement benefits after your injury occurs, the insurance company is entitled to reduce your wage loss benefits by an amount equal to half of your monthly benefits. If you're receiving pension benefits from a plan that was funded by the employer for whom you were working at the time of injury, the insurance company can take a dollar for dollar credit for those benefits. If you received a severance package funded by your time-of-injury employer, the insurance company has a right to take credit for that. Your benefits will also be reduced for each dollar

you receive in unemployment compensation benefits during your period of work-related disability.

The time during which you may receive wage replacement benefits is often finite. If you return to work at wages less than your pre-injury wages or a judge rules that you have an "earning power," the insurance company must pay you wage loss benefits for a maximum of 500 weeks. After you have been disabled for about two years, employers also have the right to have you undergo a special medical examination called an "Impairment Rating Evaluation" (IRE) in which a doctor examines you to determine the extent of your disability under special guidelines of the American Medical Association. Unless you are more than 35% disabled under these rules, you may receive no more than 500 weeks of additional wage loss benefits. As a practical matter, you must be profoundly disabled to qualify for additional benefits.

DOES FIGHTING IN COURT AFFECT SETTLEMENT?

If your right to receive benefits is in dispute and you have a workers' compensation case pending, the single most important factor affecting the value of your case may be the reputation of a particular judge for being pro-employer or pro-claimant.

The relative prominence of physicians who testify in workers' compensation cases is also an important factor. Some treating physicians are so well known for their professionalism and honesty that even the most employer-oriented judges rarely disregard their opinions. On the other hand, there are physicians whose qualifications are limited, whose integrity is questionable, or who make too much money

performing medical-legal work to be trusted. There are physicians performing Independent Medical Evaluations who never give the benefit of the doubt to an injured claimant. Their reputations are well known, and even employer-oriented judges are aware of them. On the other hand, there are many claimants' physicians who have similarly bad reputations.

There are reasons other than the quality of your medical evidence that may diminish the value of your case, including any defenses the company has to your claim. Whether you were acting in the course and scope of your employment or injured yourself because of intoxication or while violating a work order are examples of issues you may have to consider.

"I'm still not sure HOW it happened. One minute, we were bouncing ideas off each other, and the next thing I knew, we were using furniture instead."

On the other hand, the insurer also wants to limit the costs to administer your claim, including the salaries of claims representatives, lawyers' fees, expert witness fees, and other litigation costs. Though your future financial needs are important, the value of your case will be determined not by those needs but by the amount the insurer reasonably believes it will have to pay in the future, considering all the limitations described in this book.

Eight Things You Need to Consider If You're Thinking About Settling Your Case

1. THE PRESENT VALUE OF YOUR WEEKLY COMPENSATION BENEFITS.

To estimate the amount the insurance company will have to pay for future wage loss benefits, lawyers and insurance companies often project the earnings you could receive in alternate employment. Once you estimate the wages you realistically could earn, you calculate the weekly partial disability benefit the insurance company must pay you if you find a job paying your estimated wage. Because you may receive such benefits for no more than 500 weeks, you do not assume you would receive these benefits for life. Finally, you must convert these future dollars to "present value."

For example, if your average weekly wage at the time of injury was $800.00, and you estimate you can earn $500.00 per week, the insurance company must pay you a "make up" check of $200.00 per week. ($800.00 average

week wage - $500.00 return-to-work wage = $300.00 x 2/3 = $200.00). If we assume that this wage will never go up (which is probably unrealistic-let's hope you can get a raise at some point!), the insurance company must keep paying you $200 per week for up to 500 weeks.

What is the "present value" of the insurance company's obligation to pay you $200.00 per week for 500 weeks straight? At first glance, it would seem to be $100,000.00. (500 weeks x $200.00/week = $100,000.00). This is not correct, however, because money paid to you in the future is not worth the same as money paid to you now. (Would you rather have $200 today, or 500 weeks from now?).

The best way to explain the present value concept is to consider what happens if you win a million dollar lottery. Before you hire Jonny Paycheck to sing "Take this Job and Shove It" to your boss, remember that you get a 20 year payout, or $50,000.00 per year for 20 years. Doesn't sound as good as a million up front, does it? It isn't. If you were paid a million dollars up front, you could invest the money and live off the proceeds of the investment. If, for example, you earned a 6% return on your million dollar investment, you would receive $60,000.00 per year in investment income alone. If you spent your earnings every year, at the end of 20 years, you'd still have one million dollars. If you received a million dollars spread over 20 years, and spent $50,000.00 each year, at the end of 20 years, you'd have *nothing.* So when you start adding up all those dollars the insurance company has to pay you in the future, use a present value calculator (which you should be able to find on the web) to learn what they have to pay you in today's dollars.

2. FUTURE MEDICAL COSTS

Workers' compensation insurers are very suspicious about the purported cost of future medical treatment. So many injured workers receive excessive treatment from workers' compensation "medical mills" that insurance company personnel become cynical about the real needs of claimants for medical treatment. Nonetheless, depending on the severity of your injury, future medical costs can be a very significant part of the settlement value of your case. If you are suffering from chronic pain and need lifelong pain management, the cost of such treatment can mount steadily. The insurance company will not, however, believe you are going to receive acupuncture, physical therapy or chiropractic treatment three times a week into the indefinite future. They will also be doubtful about claims that you will need to undergo surgery in the future, unless the need for such surgery is well established. For most people, the insurance company is very skeptical about the cost and need for future medical treatment, and any analysis of these costs must be based on treatment that will really be needed and not on the assumption that whatever the cost of treatment was in the past will continue indefinitely into the future.

You have to be careful about settling the medical expense portion of your claim because it is not clear that a health insurance company is required by law to pay your *future* bills, which may have to be paid out of your pocket.

3. LONG-TERM DISABILITY AND PENSION BENEFITS

You may be covered by a pension plan or insurance policy that provides short-term or long-term disability benefits. The benefits under these plans usually are reduced by any workers' compensation benefits you receive. For example, if you are entitled to $700.00 in long-term disability benefits per week and you are receiving $600.00 in workers' comp benefits per week, the long-term disability insurance company usually must pay only $100.00 per week. If you're entitled to these benefits, you need to understand the impact settlement of your case will have. As discussed in more detail below, a resignation of employment may prohibit you from receiving long-term disability pension benefits.

4. SOCIAL SECURITY DISABILITY

The Social Security Administration is entitled to an offset for workers' compensation benefits, but it is not dollar for dollar. Very high wage earners who have been working for many years will find that they have no offset at all. Individuals whose earnings have been relatively modest or who have not worked for many years may find that there is a complete offset and they collect nothing in Social Security disability benefits.

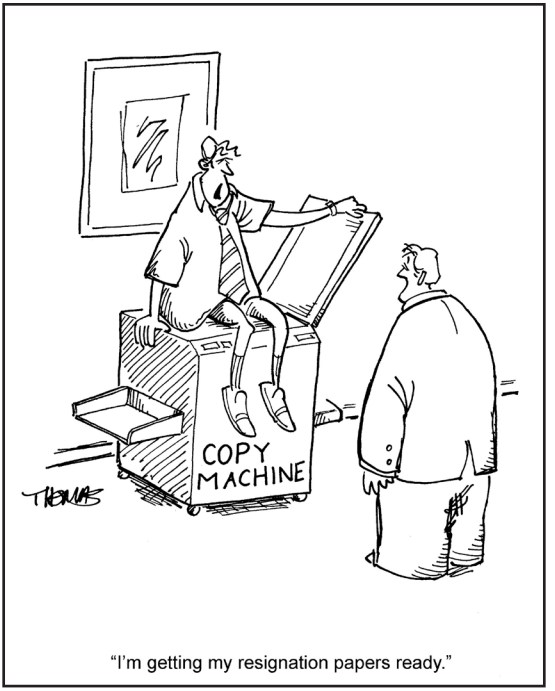
In many cases, you can settle your workers' compensation case in a way that will entitle you to an increase in your social security disability benefits. Contact the Social Security Administration to obtain your ACE (Average Current Earnings) and PIA (Primary Insurance Amount). With this

information, your lawyer can calculate if you will receive additional social security disability benefits if you settle.

5. RESIGNATION FROM EMPLOYMENT

The insurance company may require you to resign your employment when you settle. Although you have no legal obligation to do so, as a practical matter many workers' companies will refuse to settle your claim unless you sign a resignation. If you used your twelve-week Family and Medical Leave time, under most circumstances quitting is not a problem. Unless you have protection under a union contract, Pennsylvania is an "at will" employment state, which means that an employer can let you go for any reason at all, except for some limited reasons specifically prohibited by federal and state law. Quitting, therefore, is often meaningless because your employer is not required to re-hire you anyway. Nonetheless, you need to consider what may happen to other benefits you may have if you resign.

Are you entitled to disability pension benefits through your employer? If so, what impact will settlement have on your right to receive those benefits? If you are a member of a labor union, there may be many benefits available to you, and you need to understand the impact resignation will have on your right to collect these benefits. Some union contracts require your employer to pay for health insurance and other benefits while you are out for a work injury. If so, you may lose that right if you resign your employment.



"I'm getting my resignation papers ready."

6. HEALTH INSURANCE

Contrary to popular belief, your employer is not required to pay health insurance premiums if you are out for a work injury unless you are working under a union contract that mandates it. You may, however, have the right under the COBRA law to buy health insurance benefits for up to 18 months at your employer's rates. Check with your human relations department for your rights under COBRA.

7. MEDICARE SET-ASIDES

Your lawyer needs to know if you are receiving or are eligible for Medicare, but if you are applying for or receiving Social Security disability benefits and are not yet eligible for Medicare, tell your lawyer the date that you will be eligible, which is two years from the date of onset of your disability under social security rules. Once you become Medicare-eligible, it will be more difficult to settle your case because the Center for Medicare Services (CMS) will require that a sum of money be set aside for use to pay future medical bills for your work injury. The rules on this issue are known by all experienced workers' compensation lawyers. Make sure you talk to your lawyer about this.

8. SETTLING CLAIMS THROUGH MEDIATION

A mediation is an informal meeting in which a Workers' Compensation Judge who is not going to decide your case will try to see if it can be settled between the parties. Before the meeting, the opposing parties file private mediation statements in which they discuss the strengths and weaknesses of the case. Usually, but not always, settlement negotiations will be underway before the mediation starts. The parties describe the status of settlement negotiations in their mediation statements.

Although the procedures used by different judges are different, a mediation usually begins with a description of the process by the judge, who also says that he or she will not decide the case. The judge may put the parties in different rooms, shuttling back and forth to relay information

or settlement proposals to the parties. As the mediation proceeds, the difference between the offer by the insurance company and the demand of the claimant will decrease until a settlement can be reached or the negotiations fail. In most situations, both parties leave the mediation a bit dissatisfied.

Although the mediation is an informal process, you need to show respect for the mediating judge. Just as if you are testifying in court, you should dress appropriately. For a description of acceptable dress, see Chapter 11.

Conclusion

If you've read this book, it's not likely that you're in a situation that makes you very happy, but I hope you found this book to be informative. The workers' compensation maze is difficult to navigate, even for experienced lawyers, but the practical knowledge provided in this book should make your life a little bit easier at this difficult time.

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From the desk of a lawyer who has fought for the disabled for over 30 years, this is the ultimate insider's guide to the Pennsylvania workers' compensation system.

PRAISE FOR GREGORY BOLES:

His "impeccable ethics, genuine thoughtfulness and astute knowledge were unmatched." —*Mary Brownell*

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GREGORY BOLES is a certified specialist in Pennsylvania Workers' Compensation and has been elected a SuperLawyer every year since 2007. He is graded AV Preeminent by Martindale Hubble, which demonstrates that his peers rank him at the highest level of professional excellence. He has a 10.0 rating, the highest possible, by AVVO, the independent lawyer rating service. A graduate of Georgetown University and Villanova Law School, he has written extensively on litigation, Pennsylvania Workers' Compensation and disability law and has lectured before attorneys, labor unions and advocacy groups for the disabled.

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