DEFENDING HIGH EXPOSURE
AND CATASTROPHIC WORKERS’
COMPENSATION CASES

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DEFENDING HIGH EXPOSURE AND CATASTROPHIC WORKERS’ COMPENSATION CASES

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.
DEFENDING HIGH EXPOSURE AND CATASTROPHIC WORKERS’ COMPENSATION CASES

I. DEFINING HIGH EXPOSURE:

High exposure cases typically involve either a significant injury or an injury to an individual with limited education who is accustomed to working primarily with “his body” and not his brain. The death claim, of course, is the most obvious high exposure claim, followed by those of permanent total disability, “odd-lot” permanent total disability, and significant wage differential.

II. EXAMPLES OF INJURIES RESULTING IN HIGH EXPOSURE/CATASTROPHIC RECOVERIES:

- Paraplegia/quadriplegia
- Blindness in one or both eyes
- Brain injuries
- Severe orthopedic injuries leading to significant disability
- Newer injuries in an extremity causing significant disability
- Injury resulting in permanent disability and work limitations to workers accustomed to physical work with limited education (often back injuries)
- Joint replacements that result in significant restrictions
- Rotator cuff tear/shoulder injuries to laborers

III. DEFENSES TO HIGH EXPOSURE CLAIMS:

The defenses to these claims are the same as in any workers’ compensation case. The practitioner, however, must be aware of the impact that sympathy may play in compensability determinations in claims involving horrific injuries and significant permanent disability. Nonetheless, it is imperative that the defense practitioner assert all available defenses at the outset in order to control costs!

- Controlling medical expenses
- Avoiding long term TTD exposure
Avoiding permanent total and/or significant wage differential exposure

Sending proper message to claimants’ attorneys

Fostering positive work environment

Keeping Medicare options open

Maintaining settlement options

You just might win!

IV. HANDLING THE HIGH EXPOSURE CASE:

A. Communicate!

Communicate early and often with the claimant and the claimant’s family.

1. The supervisor and/or insured and adjuster should personally visit the injured claimant as soon as possible in the hospital or at home. A claimant with “catastrophic” injuries should be visited thereafter on a regular basis. The employer needs to take responsibility for giving support and guidance to the worker in the early stages of an injury to improve motivation and rehabilitation. Personal contact is a strong motivating force for both employers and employees.

2. Listen closely to the injured worker’s concerns, wants and needs.

3. The adjuster/carrier needs to reassure the claimant that everything he needs to get better and return to work will be provided. The employer needs to express concern over the injured worker’s welfare and reassure the worker that every effort will be made to provide him/her employment upon their recovery.

B. Medical Treatment

Obtain the highest quality medical care. Put patient care first. The goal of all treatment (physical, psychological, psychosocial) is to improve function and return the injured worker to some form of work.

Within reason (and in accordance with the individual State’s laws) second opinions should be encouraged and facilitated. It is common for an injured worker with serious injuries and an aggressive treatment plan to wish an additional opinion.
C. Thorough Investigation

Discover everything!

1. Subpoena all medical records and update records requests. This is a good way to obtain additional information/corroboratation of the facts of the accident, as well as to get a handle on the nature and extent of the injury. Records to be obtained should include, but not be limited to:

- Ambulance/first responders
- Police reports
- Death certificates/autopsy reports (where relevant)
- Emergency records
- Family doctor
- All specialists
- Any and all records of prior injuries
- Prior employment records
- Obtain job description
- SSDI benefit applications
- Psych records (if relevant)

2. Consider the following as “triggering events” or “reminders” to obtain updated records:

- When an independent medical evaluation is being arranged
- When a utilization review is being performed and/or updated
- Prior to any evidence depositions of treating or examining physicians
- At the time of receipt of any notice scheduling the case for trial or arbitration
- Upon receipt of a settlement demand to corroborate claims
3. Review records of Workers’ Compensation Commission of prior claims and settlements. This might provide information as to the type of individual you are dealing with and the potential for credit from future settlements and awards.

4. Review the records of the Circuit Clerk with respect to prior civil litigation and criminal activity.

5. “Informal” discovery: “It is only a matter of time before an attorney faces a malpractice claim for failing to review publicly available social media data.”
   Joshua Briones, Social Media Practice Group Leader, DLA Piper

   - Google search
   - Facebook
   - When to gather social media?
     - Right away
     - Once is not enough
     - Privacy settings change over time
   - Use of social media: remember your ethics!
     - Best rule of thumb: if you can see it publicly, it is fair game!
   - Remember the social media is a two-way street! Advise your client to avoid any references to the claimant or the claimant’s injury on social media sites.

D. **Retain Medical Manager and Consider Retention of Vocational Rehabilitation Specialist Early On**

Effective use of the medical manager:

1. Assist in retention of the best quality medical treatment

2. Coordinate care with claimant’s involvement

3. Initiate and participate in “team conferences” to involve treating physicians, employer, insurance adjuster, medical manager, and vocational rehabilitation specialist, along with claimant to outline in a collaborative fashion the treatment plan and the recovery expectations so that all parties, including the injured worker, are moving toward the same goal.
4. Assist in avoiding “chart lore” among treating doctors. Chart lore exists where a subsequent treating doctor accepts on face value the diagnosis of preceding doctors without rendering independent judgment. This is especially common with pain treatment specialists.

5. Medical managers can assist in determining the need for evaluation by certain specialties, such as:

- Pain specialists
- Neuropsychologists. Neuropsychologists typically evaluate patients and rarely, if ever, see or treat “normal” people. Often their conclusions are not consistent with the evidence presented. They also perform tests which show impairment. Almost everyone might be shown to be impaired on some of the tests performed, especially due to cognitive age decline.

6. Medical managers can assist in determining when utilization review is necessary. It is important to be judicious in the use of utilization review in cases of catastrophic injuries, so as not to “poison” the relationship between the insurance carrier and the claimant, not to mention the claimant’s treating physician. Nonetheless, there are times when a utilization review is necessary (for example, when experimental procedures are being recommended) and/or when there are questions with respect to the motivation for the recommended treatment.

7. Medical managers can assist in determining when a psychological IME might be useful.

8. Medical managers can assist in determining what, if any, home or vehicular modifications are going to be required. Be proactive!

If it is clear that such modifications are going to be required (and the law of your State mandates that such benefits be provided), do not wait to be asked. Offer them upfront!

Effective use of vocational rehabilitation specialists:

1. In a case of catastrophic injuries and/or high exposure, consideration should be given to early intervention with a vocational rehabilitation specialist to reduce potential wage loss.

2. Early intervention mitigates damaging effects on adjustment of injured worker, including depression, adjustment to disability lifestyle, orientation to pain, and anticipation of poor outcome.
3. Working together, the employer, the adjuster, the medical manager, and the vocational rehabilitation specialist can assist in motivating the injured worker to return to work and assist in identifying barriers to returning to work.

Barriers to return to work:

- Attitudes and beliefs about pain; e.g., that pain is harmful or disabling
- Behaviors: Increased alcohol intake? Illicit drug use? Avoidance of normal activity?
- Compensation issues: Is there a lack of financial incentive to return to work or a lack of satisfaction with job?
- Emotions: irritability, anxiety, depression
- Family: Is the claimant receiving the support necessary to motivate to return to work?
- The availability of real work

V. CLAIMANT HAS REACHED MAXIMUM MEDICAL IMPROVEMENT. WHAT NOW?

A. Verify restrictions
   1. FCE
   2. Surveillance
   3. Confirm absence of pre-accident restrictions

B. Vocational rehabilitation
   1. Consider return to work opportunities with employer
   - Involve both the employer and the employee in the return to work process
   - Ask injured worker what jobs at the employer he or she believes they could do and what accommodations might be required
   - ADA concerns
   - Termination issues
   2. Vocational rehabilitation versus job placement
3. Make sure vocational rehabilitation specialist effectively addresses cooperation and motivation in reports!

4. Consider testing as well as the standard transferable skills analysis

5. Job seeking skills instruction

6. “Enforcement” of accountability on both claimant and vocational specialist

7. Set stop loss points for joint case review

8. Make sure the injured worker is an active participant in the vocational rehabilitation process

9. Think outside of the box!
   - Offer retraining to include obtaining a GED and/or junior college program if necessary (very few claimants are interested in this and this proposal may motivate settlement)

10. Suspend benefits where necessary:
   - Suspend benefits for non-cooperation with treatment and/or vocational rehabilitation process
   - Suspend benefits where surveillance reveals inconsistency in the alleged restrictions on which the job search is being based
   - Suspension of benefits often facilitates settlement

PRACTICE POINTER:
Use the carrot and stick approach. Make a fair offer coupled with firm indication that significant efforts by the claimant will be required in the vocational process.

VI. EVALUATING THE SETTLEMENT VALUE OF THE HIGH EXPOSURE/CATASTROPHIC INJURY CLAIM

A. The value of a claim of permanent total disability and/or impaired earnings ability (wage differential) is the cost to purchase a rated age annuity that would fund the proper weekly benefits.

This figure is typically discounted where paid in a lump sum as opposed to weekly.
B. What is a rated age?

The cost of lifetime structured settlement payments is based upon a combination of the benefits being purchased and the life expectancy of the person for whom the benefits are purchased. Generally, the older the person, the less expensive it is to purchase the same benefits.

Each annuity issuer publishes its own rate sheets, showing the cost of various types of annuities based on the annuitant’s age and sex. The term “standard age rating” implies that, for purposes of annuity pricing, the annuitant is deemed to have a normal life expectancy. Rates vary at any given time among annuity issuers and vary over time with changes in market interest rates.

The term “substandard age rating,” which is referred to a “rated age,” means that an annuity issuer has decided that an annuitant’s life expectancy is less than normal. The shorter life expectancy results in a lower annuity premium than a premium for a standard life policy for the same stream of benefits.

C. What is a “rated age” based on?

The “substandard age rating,” or “rated age,” variance between annuity issuers is created by actuarial analysis of the claimant’s medical history and interpretation of that history with other mortality data. It is important to obtain quotations from several annuity companies in the structured settlement market whenever a substandard age rating is involved, because varying assessments by medical experts advising these insurers can result in substantial differences in benefits available for a given premium payment.

To hold down the cost for the client/insurer, a structured settlement consultant will try to obtain a “rated age” for impaired life expectancy for the claimant. For example, if the claimant is 40 years old but because of his injuries or lifestyle or unrelated health problems, the underwriters at a life company may give him a rated age of 45. This means the life expectancy is that of a 45 year old rather than a 40 year old, and an annuity offering the same payout costs less for a 45 year old than for a 40 year old.

There may be a significant spread in the rated ages as this is a very subjective process. However, a structured settlement consultant will combine the rated ages with the annuity rates to determine which life company offers the best benefit for the least cost. When more than one life company has similar rates, the rated ages can be the significant factor in determining where to place the business.

D. What does it cost to obtain rated ages?

There is typically no cost for obtaining these quotations. The annuity companies are seeking to “sell” their product and their profit is made off the annuity. The quotations are typically free of cost and fairly quickly obtained.
E. **Why is the present value of the cost of an annuity to fund future payments discounted when it is paid in a lump sum as opposed to weekly?**

In most states there is no requirement that the claimant receive a future stream of payments in a lump sum. In order for that “privilege,” the carrier can usually obtain a 10% to 20% discount off the present value cost of the annuity. Many claimants are anxious to have all of the money upfront despite the likelihood that an annuity would be in their best interests. This discount, in conjunction with the price of a rated age annuity, can save the employer/carrier a significant amount of money.

F. **Compare cost of rated age to PPD value.**

Where the claimant returns to work and has significant earnings, it is important to objectively quantify the potential case value on the basis of permanent partial disability as well as wage differential and compare the two. The typical workers’ compensation statute gives the claimant the right to “elect” whether they wish to proceed under a wage differential or a permanency award. In many states, permanency rates for amputations are higher than rates for other injuries, which might contribute to giving a permanency award more value than a wage differential award. Where multiple body parts are injured, however, the practitioner should be careful to use the higher amputation rate, only with respect to the amputation itself and not to the other injuries.
G. Examples:

American Settlement Corporation
6445 Powers Ferry Road
Suite 195
Atlanta, Georgia 30339

Structured Settlement Illustration for John Doe

<table>
<thead>
<tr>
<th>Cost</th>
<th>Expected Tax Free Benefit</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Monthly Payments for Life (No Rated Age 45) IRR 4.46%:</strong></td>
<td></td>
</tr>
<tr>
<td>$222,084.00 Beginning April 20th, 2014, $1,000.00, payable monthly for the life</td>
<td>$454,000.00</td>
</tr>
<tr>
<td><strong>Monthly Payments for Life (Rated Age of 50) IRR 4.98%:</strong></td>
<td></td>
</tr>
<tr>
<td>$207,435.00 Beginning April 20th, 2014, $1,000.00, payable monthly for the life</td>
<td>$454,000.00</td>
</tr>
<tr>
<td><strong>Monthly Payments for Life (Rated Age of 55) IRR 5.62%:</strong></td>
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</tr>
<tr>
<td>$191,659.00 Beginning April 20th, 2014, $1,000.00, payable monthly for the life</td>
<td>$454,000.00</td>
</tr>
<tr>
<td><strong>Monthly Payments for Life (Rated Age of 60) IRR 6.42%:</strong></td>
<td></td>
</tr>
<tr>
<td>$174,443.00 Beginning April 20th, 2014, $1,000.00, payable monthly for the life</td>
<td>$454,000.00</td>
</tr>
<tr>
<td><strong>Monthly Payments for Life (Rated Age of 65) IRR 7.51%:</strong></td>
<td></td>
</tr>
<tr>
<td>$154,827.00 Beginning April 20th, 2014, $1,000.00, payable monthly for the life</td>
<td>$454,000.00</td>
</tr>
</tbody>
</table>

Claimant: John Doe
Sex: Male
Date of Birth: June 1, 1969
Age: 45
Source of Quote: Liberty Life Assurance Co. of Boston
Date of Quote: February 20, 2014
Expiration Date: February 27, 2014
Funding Date: March 20, 2014

*This quote is subject to change and is not valid after the expiration date.

This certifies that there are no financial incentives, service fees or rebates provided to the defendant(s) and/or their insurer(s) by American Settlement Corporation. The indicated cost of this quotation is the actual cost that will be paid by the defendant(s) and/or its insurer(s) if this case is settled with a structured settlement.

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Prepared By: Joe Pigott (JPigott@amersettlecorp.com)

H. Impact of companion civil cases

The typical workers' compensation statute provides a right of recovery on the part of the employer or the employer's workers' compensation carrier for certain percentages of amounts recovered in companion third party civil cases. The amount can be reduced where the employer bore liability for the accident. A realistic assessment needs to be made of the employer's potential liability.
A determination should be made as to whether the employer should waive some or all of its workers’ compensation lien.

Practically speaking, it is best to have the workers’ compensation case resolved prior to resolution of the companion civil case so that the amount of the potential lien is defined.

I. Tactics for use of rated age annuities in resolving high exposure cases

It is typically necessary to pay a significant sum of money in a lump sum, in addition to monies structured in an annuity. Typically the claimant’s attorney will want his or her fees upfront from the lump sum money and psychologically the claimant themselves will want to receive a sizable lump sum money upfront in order to agree to the settlement.

Give the claimant multiple options with respect to the structure amount

Offer the structured sum or all of the attorney’s fees

Be creative with the lump sum money. Find out what is important to the claimant!

- $10,000 on a gift card
- Purchase a boat?

Arrange in-person settlement meeting that includes the claimant, the claimant’s attorney, the structured settlement specialist, the adjuster and the defense attorney

Consider how much money in the structure should be “guaranteed”

Find out what concerns the claimant has

- TTD until contract approval
- Advance needed medical supplies and prescriptions (for example; catheters to paraplegics, sleeves to amputees, and pain medication to those in chronic pain).

Hire a professional administrator for an accompanying Medicare Set-Aside Account so the claimant does not have to worry about its administration.

Future medical

Consider leaving future medical rights open initially with the opportunity to fund a Medicare Set-Aside Account later in time. Experience shows that the frequency of treatment may diminish over time as the claimant adjusts to their disability and the cost to fund a Medicare Set-Aside,
priced two or three years after settlement, might be significantly less than at the time of the settlement.

VII. CASE STUDIES

A. Use of rated age annuity to reduce case value

56 year old male laborer incurs back injury lifting heavy stones.

MRI shows severe spinal stenosis and moderate central disc protrusion at L2-3 which is excised via discectomy.

Permanent sedentary physical restrictions complicated by use of narcotics for chronic pain.

Average weekly wage - $953.05.
Temporary total disability rate - $635.36.
Permanent total disability rate - $635.36.
Permanent partial disability rate - $571.83.

Comparison of case value: chronological v. noted age

Permanent total disability case value based on a 56 year chronological age with life expectancy of 25 years at a 5% discount rate - $465,645.00.

Case value based on rated age of 64 years with life expectancy of 18.5 years - $399,000.00.

B. Wage differential versus permanent partial disability comparison

44 year old white male lineman, married with three children, struck by a car resulting in amputation of right leg, left distal tibia fracture with open reduction internal fixation, and fractured lumbar spine process, lacerated spleen, lacerated liver, partial collapsed right lung, and concussion.

Average weekly wage - $1,144.94 ($28.62/hour).

Temporary total disability paid 69 4/7th weeks.

Claimant returns to work as a lineman, earning $27.83/hour (would have earned $30.93/hour).

Case value: present value of wage differential at 5%, approximately $125,000.00.
Permanent partial disability case value

100% of a leg = $137,920.00.
47% of a left leg - $42,752.80.
12.5% of a person as a whole for miscellaneous injuries - $33,385.00.
Total - $213,509.00.

C. Tactics to successfully resolve catastrophic injury and paraplegia

48 year old ironworker falls 35 feet from a roof of a building incurring a burst fracture at T11, resulting in paraplegia as well as compression fractures T9-10, comminuted nasal fracture, fractured ribs 1, 9 and 11, ruptured tympanic membrane on the right, right temporal skull fracture, subarachnoid hemorrhage, left pulmonary contusion, lacerations to head and left elbow.

Statutory permanent total disability.

D. Successful use of surveillance to contradict significant permanent restrictions and secure compromise settlement

51 year old male painter with compensable injury undergoes total left knee replacement with permanent restrictions of sedentary work, maximum lifting of five pounds, no climbing stairs or ladders, no kneeling or squatting, no working around high speed or moving machinery.

Surveillance performed one day after claimant’s annual examination, at which time his restrictions were confirmed and corroborated based on his history, notwithstanding a fairly benign examination.

Surveillance shows claimant engaged in heavy work over a protracted period of time while on his feet, including working around and with heavy machinery.

Temporary total disability suspended for non-cooperation.

Claimant’s attorney invited for surveillance viewing.

Initial demand odd-lot permanent total disability, totaling $525,000.00.

Settlement - $190,000.00, representing 27% loss of a person as a whole.

Claimant concerned regarding possible “fraud.”
Bruce is a past Chair of our state-wide workers’ compensation practice group and has spent his entire legal career with Heyl Royster beginning in 1982 in the Peoria office. He concentrates his practice in the area of workers’ compensation, third-party defense of employers, and employment law.

He served as a technical advisor to the combined employers group in the negotiations which culminated in the 2005 revisions to the Illinois Workers’ Compensation Act. More recently, Bruce worked as a technical advisor to the Illinois Chamber of Commerce as well as a number of Illinois legislators and State agencies in the process that resulted in the 2011 Amendments to the Illinois Workers’ Compensation Act. Bruce was appointed by Mitch Weiss, Chairman of the Illinois Workers’ Compensation Commission, to a committee of attorneys who reviewed and made recommendations for revisions to the Rules Governing Practice before the Workers’ Compensation Commission.

Bruce has defended employers in thousands of cases during the course of his career. As a result of his experience and success, his services are sought by self-insureds, insurance carriers, and TPAs.

Bruce is an Adjunct Professor of Law at the University of Illinois College of Law where he has taught Workers’ Compensation Law to upper-level students since 1998. Bruce has co-authored a book with Kevin Luther of the firm’s Rockford office entitled Illinois Workers’ Compensation Law, 2013-2014 Edition, which was published by West. The book provides a comprehensive, up-to-date assessment of workers’ compensation law in Illinois.

Bruce is a frequent speaker on workers’ compensation issues at bar association and industry-sponsored seminars. Bruce has served as Vice-Chair of the ABA Committee on Employment, Chair of the Illinois State Bar Association Section Council on Workers’ Compensation, and currently serves on the Employment Law Committee of the Chicagoland Chamber of Commerce and the Illinois Chamber of Commerce Workers’ Compensation Committee. He has been designated as one of the “Leading Lawyers” in Illinois as a result of a survey of Illinois attorneys conducted by the Chicago Daily Law Bulletin; another survey published by Chicago magazine named Bruce one of the “Best Lawyers in Illinois” for 2008.

Publications

Public Speaking

Professional Recognition
- Martindale-Hubbell AV Preeminent
- Inducted as a Fellow in the College of Workers’ Compensation Lawyers
- Selected as a Leading Lawyer in Illinois. Only five percent of lawyers in the state are named as Leading Lawyers.
- Named to the Illinois Super Lawyers list (2012-2014). The Super Lawyers selection process is based on peer recognition and professional achievement. Only five percent of the lawyers in each state earn this designation.

Professional Associations
- Illinois State Bar Association (Past Chair Workers’ Compensation Law Section Council)
- Champaign County Bar Association
- Illinois Association of Defense Trial Counsel (Member, Workers’ Compensation Committee)
- Defense Research Institute
- Illinois Self-Insurers Association

Education
- Juris Doctor, Washington University School of Law, 1982
- Bachelor of Arts-Finance, University of Illinois, 1979

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