

No Discovery, No Problem: How To Provide An Effective Defense To Disputed Claims

By [Steve Getty](#)

The Illinois Workers' Compensation Act ("the Act"), 820 ILCS 305, differs from the Illinois Rules of Civil Procedure in that it does not provide guidelines nor require formal discovery practice. The lack of true civil motion practice and what limited motions are made available under the Act can be difficult to navigate. Petitioners often have a prior medical history that is relevant to their workers' compensation claim and care, but the Act does not require claimants to provide any information on their present injuries, past medical history, or current treatment. However, various methods of factual investigation can be used in the absence of formal discovery to mount a strong defense to the petitioner's claim.

Subpoena Power

The lack of formal discovery requirements in workers' compensation cases provides unique but not insurmountable challenges. Without a thorough assessment of the petitioner's current and past medical history, defenses to a claim can be easily overlooked. The primary way respondents can diligently investigate claims is to analyze medical records obtained through the use and issuance of subpoenas. The petitioner avails himself of the Illinois Workers' Compensation Commission's authority by submitting an Application for Adjustment of Claim, giving the respondent a legal basis for investigating the claimant's allegations via subpoena to witnesses, medical providers, secondary employers, etc. An important part of the investigation process is determining if there are inconsistencies between the respondent's records and what the Petitioner alleges to their treating physicians.

According to Section 8 of the Act, "every hospital, physician, surgeon, or other person rendering treatment or services in accordance with the provisions of this Section shall upon written request furnish full and complete reports thereof to, and permit their records to be copied by, the employer, the employee or his dependents, as the case may be, or any other party to any proceeding for compensation before the Commission, or their attorneys." 820 ILCS 305/8(a).

Pursuant to Section 16 of the Act, serving a subpoena for the petitioner's medical records is necessary, as well as payment of the statutory fee and travel expenses, to obtain records. Because records are often mailed, faxed, or emailed to the respondent, the travel expense to appear pursuant to the subpoena is often unnecessary. The witness fees for subpoenas are calculated at \$20.00. Most medical providers are willing to comply with the Commission issued subpoena and release the petitioner's medical records. Sometimes, however, a facility will require a signed authorization from the patient before the relinquishment of records. The providers requiring authorization usually cite HIPAA regulations or the primary facility being located outside the state of Illinois and therefore outside the Commission subpoena powers. This is especially true with facilities located near the borders of Missouri, Kentucky, Iowa, Wisconsin, and Indiana, with the primary facility in another state. Generally speaking, if a provider fails to respond to a subpoena request of a party to litigation, remedial measures can be taken. First, an arbitrator with the Commission can review the subpoena to determine if the request was properly served and relevant. If the arbitrator finds the subpoena was proper, he or she will sign the application to enforce the matter in circuit court.

When issuing subpoenas and contacting providers, you should always be cognizant of the extent of communication and interaction with the provider so as not to overstep the limitations outlined in *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581 (1st Dist. 1986). *Petrillo* prohibits the respondent or its representative from communicating directly with a treating provider regarding the claimant's treatment in an *ex parte* manner. Any *ex parte* communication would be a violation of *Petrillo*, and the information garnered therefrom would not be allowed in evidence. You have the right to contact the facility in order to request medical records, inquire as to the next visit date, or clarification on a point that is important for ministerial issues (i.e., missing documents, billing codes, etc.), but you do not have the right to share outside records or information with the treater without the petitioner's consent and

knowledge. However, *Petrillo* does not apply to physicians retained by the respondent for Independent Medical Examinations (IMEs) or record reviews.

Medical Canvassing

As an alternative or in addition to the subpoena process, medical canvassing can often aid in uncovering and verifying important information and treaters for the defense of a claim. Through this method, respondents can obtain treatment information such as admission and discharge, prescription history, and imaging dates. Through issuance of subpoenas for medical records for the facilities identified, defense counsel can investigate inconsistencies regarding date, time, and method of injury, opening the floodgates for various valuable defenses.

Independent Medical Exams

An Independent Medical Examination ("IME"), per 820 ILCS 305/12, can be an important tool in the course of investigating or defending a claim. An IME is a medical examination performed by a healthcare practitioner that does not have a prior treating relationship with the petitioner. IMEs are designed to gather an unbiased conclusion of the petitioner's medical history, mechanism of injury, and illnesses so that decisions can be based on factual evidence rather than unsupported opinions. It is common for attorneys to request than an IME be conducted when they have doubts about the nature or cause of a petitioner's disability, functional capacity, and/or potential for rehabilitative treatment. Section 12 of the Act also allows for an employer to request a claimant to undergo an examination by a duly qualified medical practitioner or surgeon selected by the employer. Generally, the purpose of this exam is to determine causal connection, assess maximum medical improvement, determine the ability to return to work, and determine the nature and extent of the injury. This IME expert physician can provide insight into the defense of the claim by providing opinions regarding their subjective and objective findings, the relationship of pre-existing conditions to current complaints, and the reasonableness of recommended treatment. Although a pre-existing condition is not an absolute bar to a workers' compensation claim, it does provide a viable defense when the IME expert physician suggests that: the claimant's accident did not cause his or her condition of ill-being, claimant's condition is causally related to the pre-existing condition, or at most, claimant experienced a temporary aggravation of his or her pre-existing condition.

Surveillance and Social Media

Surveillance can be a great tool for acquiring investigative evidence and is typically done through the examining surveillance provided by an employer or private investigator. Private investigators are sometimes hired to prove that an injury is not what the claimant has alleged. Through the ever-increasing use of social media by more facets of the population, more investigative paths for respondents looking to uncover vital information or evidence contradicting the degree of injury have opened beyond using a PI. Through social media, we can see what many of these claimants are up to outside of work. For example, a petitioner might allege that they are incapable of sitting or standing for periods of time, but a review of an Instagram or Facebook post may suggest otherwise. Valuable information can be recovered from social media metadata including IP addresses, dates and time of posts, etc., collection of which aids in admissibility.

Additional valuable information can be obtained from a skip trace used to analyze online directory services, fraud screening, background checks, and identity verification for consumers and businesses. As outlined above, through the investigation of records and even social networks, these informal discovery methods will contribute to and provide an effective defense against disputed claims.

Conclusion

The defense of workers' compensation claims relies heavily on the use and issuance of subpoenas, investigation of treatment records received through the issuance of subpoenas, and other informal discovery such as medical canvassing, surveillance, social media sweeps, skip tracing, and use of respondent records to contribute and provide for an effective defense against disputed claims. When it

comes to the defense of workers' compensation claims, this informal mode of discovery provides insurance carriers, TPAs, and employers with a prompt and sufficient picture of a claim as well as supportive evidence to reach the most favorable outcome. These quasi-discovery methods of investigation can be of great avail to defense counsel when it comes to quickly and thoroughly evaluating claims and developing the most effective and pragmatic defense strategy.