Cost-Saving Actions for Workers' Comp

NEARLY 100,000 CLAIMS IN 2005 RESULTED IN MORE THAN $400 MILLION SPENT ON BENEFITS

BY JASON D. GUINASSO

The Nevada Department of Business and Industry, Division of Industrial Relations, reported that 96,261 claims for occupational injuries, occupational diseases and claim reopenings were reported in Fiscal Year 2005, resulting in $418,238,059 being spent on workers' compensation benefits. In this regard, $186,829,276 was spent on medical care, $202,447,610 was spent on cash compensation expenditures (including temporary total disability, temporary partial disability, permanent total disability, and permanent partial disability), and $28,961,172 was spent on vocational rehabilitation expenditures (including $12,856,060 in vocational rehabilitation maintenance payments, $6,794,654 in vocational rehabilitation lump sum buyouts, and $2,746,106 paid for providing vocational rehabilitation programs).

To combat the rising costs of workers' compensation, individual employers and their insurers spend a substantial amount of time and money on improving safety in individual workplaces and effectively administering claims. However, many employers miss a virtually cost-free opportunity to protect their experience ratings and save money on their workers' compensation premiums. By simply obtaining information about and understanding their employees' past and present physical condition and medical history, employers and their insurer can qualify for a reimbursement bene-

Performing the job successfully requires training. Without training we are destined for failure.

fit from the State of Nevada, obtain apportionment of past injuries or conditions, or shift liability to another employer and insurer. In this regard, employers must consider: (1) whether their employee(s) has sustained any significant past occupational injuries or occupational illnesses; (2) whether their employee(s) has received treatment and care for any prior non-occupational injuries or illnesses; (3) whether the pre-existing injuries or conditions of their employee(s), whether work-related or non-work related, will be aggravated by his or her job duties.

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However, great caution must be taken when an employer attempts to obtain answers to the foregoing questions. In this regard, the Americans with Disabilities Act ("ADA") generally prohibits employers from requiring medical examination and making inquiries of an employee regarding whether such employee has a disability or as to the nature and severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity. The statutory language makes clear that the ADA's restrictions on inquiries and examinations apply to all employees, not just those with disabilities.

Importantly, the Equal Employment Opportunity Commission (EEOC) has issued enforcement guidelines regarding the use of pre and post employment disability related inquiries and medical exams. These guidelines provide guidance on the EEOC's interpretation of the limitations imposed by the ADA on disability related inquiries and medical exams. The EEOC guidelines take the position that under the ADA, an employer's ability to make disability-related inquiries or require medical examinations must be viewed in three stages: pre-offer, post-offer, and after employment begins:

- At the first stage (prior to an offer of employment), the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job.
- At the second stage (after an applicant is given a conditional job offer, but before he starts work), an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category and the information is kept confidential. NOTE: An employer may not refuse to hire a person based upon the results of the examination, unless the reason is job-related and justified by business necessity.
- At the third stage (after employment begins), an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.

Nevertheless, navigating through the ADA concerns and obtaining information about an employee's past and present physical condition can provide three distinct benefits to a Nevada employer who obtains this information.

First, Nevada provides employers who knowingly employ a person with a pre-existing permanent physical impairment with the opportunity to obtain reimbursement for most of the costs of a workers' compensation claim to the subsequent injury fund (SIF). This opportunity to apply for SIF reimbursement can only be enjoyed by employers who provide their insurer or third party administrator with verification of their knowledge of the employee's impairment at the time of hire or retention of the employee after obtaining knowledge of impairment.

Second, the rating of a permanent partial disability (PPD) must be apportioned if there is a preexisting permanent impairment or intervening injury, disease or condition. The opportunity for apportionment on a PPD rating is significant because PPD ratings are often the most costly component of a workers' compensation claim.

Third, discovering whether a new hire has a pre-existing occupational injury or illness can set an employer up for shifting liability of a workers' compensation claim to a subsequent employer or prevent liability for an occupational injury or disease from being shifted to itself under the last injurious exposure rule. The basic requirements for shifting liability under the last

injurious exposure rule in successive employer/occupational disease cases, include: (i) occupational exposure to the disease causing agent; (ii) pathological evidence of disease related to the disease causing agent; and (ii) successive employment environments which exposed the worker to the disease causing agent. However, in successive employer/successive injury cases, the Nevada Supreme Court articulated a slightly different standard for shifting liability under the last injurious exposure rule, a standard which includes the following factors: (i) the presence of a pre-existing work-related disabling injury or condition; (ii) an intervening work-related trauma, amounting to an "injury" or "accident" under workers' compensation law, and (iii) a competent medical opinion that the intervening work-related trauma independently contributed to the subsequent disabling condition.

FOR YOUR FILES:

- **Where has your employee worked in the past?**
- **Do present and past work environments expose the employee to risk of an occupational disease?**
- **Has this employee ever filed a comp claim in the past?**

In accordance with the foregoing, an employer should obtain and file answers to the following questions about each of their prospective or current employees:

- Where has your employee worked in the past? Create a list of past employers from at least the past ten years. This list can usually be found on an employment application.
- Are the job duties, work environment and associated risks the same as those job duties, work environment and risks the employee is exposed to at your job site?
- Do the job duties require repetitive movement/lifting? If yes, to which body parts?
- Does the present and past work environment expose the employee to the risk of developing an occupational disease?
- Has your employee filed a workers' compensation claim in the past for an injury or occupational disease arising out of and in the course of employment? If yes, for what injury or occupational disease?
- Are there risks in the job duties or employment environment of your work site that could aggravate the past injury or occupational disease?

Although often overlooked by employers, gathering information about an employee's past and present physical condition upon hire is a low-cost action managers can take to save their companies and their insurers money on claims, protect their companies' experience ratings and keep their companies' premiums low.

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