

WORKERS' COMP

BOTTOM LINE

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Management Strategies

How to design the most effective safety and claim management organization

by Martin F. McGavin

Developing the most effective roles and lines of authority for safety and claim management in your organization is fundamental to controlling costs. It is essential for operations managers to have the authority and incentive to take the measures necessary to reduce injuries and to take

steps to mitigate the cost of those that do occur by using strategies like return to work.

Despite the important role of operations managers, there are some functions that are best centralized, particularly for a company with many plants or many divisions. The key to success is striking the right balance between central control and ownership at the operations level.

What to centralize

The functions to centralize are those where you can add value by combining buying power or consolidating administration. These include:

- insurance buying,
- hiring a claims administrator if you are self-insured or in a fronted insurance program, and

(continued on page 2)

In This Issue:

Management Strategies

How to design the most effective safety and claim management organization 1

WC Issues & Trends

..... 1

Products & Services

'Best Doctors' offers improved care and reduced costs in managing catastrophic claims ... 3

Litigation Management

Developing your litigation philosophy 4

Cutting-Edge Claims

Comp claims for psychological injuries are among most complex legal issues 7

Safety & Health

Would bird flu pandemic be worse than 1918 outbreak? 8

WC Issues & Trends

Groups becoming more vocal about 'silent PPO' movement

Ever hear of "silent PPOs"? Chances are you will as the use of medical-provider networks (MPNs) for treating injured workers increases.

Reason: Two of the nation's most populous states — California and Texas — have instituted MPNs as part of recent reforms to their workers' comp systems to help control rising medical costs while assuring access to care for injured workers.

Meanwhile, traditional preferred provider organizations (PPOs) continued to spring up in connection with managed health-care initiatives to steer patients to providers who agree to offer treatment at a discount from their usual and customary charges. In

recent years, however, a "secondary discount market" has developed, with PPOs leasing their provider lists (and discounts) to organizations that may not have their own networks, including workers' comp plans.

Some health-care providers now are complaining that these "silent PPOs" are causing them to give discounts to health-care plans that they never contracted with — at a cost that may reach \$3 billion annually — according to the American Medical Association. Advocates for injured employees worry that the practice may undermine intended safeguards

(continued on page 5)

Editorial Board

Publisher

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jdimauro@quinlan.com

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Contributors

Nancy Germond
Michael Levin-Epstein
Martin F. McGavin

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Management Strategies

(continued from page 1)

- information management.

There also should be centralized “scorekeeping” and planning functions. Scorekeeping means gathering performance data from all locations or divisions and providing consolidated results to senior management. Receiving consolidated data allows senior management to compare performance between operations and units and to identify those that need improvement. Attention of this sort from senior management is one of the greatest drivers for safety and cost control within an organization.

Planning entails setting company-wide goals and strategies, particularly for safety. You’ll achieve reductions in injuries and illnesses — and your costs — much more quickly if there is a solid planning process that includes goals for safety improvements and injury reductions at all levels of the organization.

Integrating safety and claims responsibility

Integrating responsibility for safety and claims within your organization is important because the results are closely linked and because dividing accountability may lead to divided responsibility. When responsibility is divided, it’s difficult to hold anyone accountable for the final result.

If injury costs are increasing, for instance, you may ask the safety manager what may be done to turn the situation around. The safety manager may respond that fraudulent claims are the problem and blame the claims manager for not adequately investigating or denying claims that are clearly fraudulent. The claims manager is likely to say that too many people are being injured and it is the safety manager who needs to improve performance.

If both departments fell under the same leadership, however, there would

be no way to avoid accountability by blaming the other department.

Safety as an operational issue

Safety must be viewed as an operational issue and not the responsibility of the corporate safety department. A good analogy is quality. Twenty years ago, most factories had a production manager in charge of turning out units and a quality manager in charge of turning out quality, which usually meant inspecting, rejecting, and reworking defects. Back then, the number of defects was measured in parts per hundred. Now, whoever is in charge of production also is in charge of producing quality parts, not just volume. Under this approach, defects are measured in parts per million.

The key to success is striking the right balance between central control and ownership at the operation level.

Similarly, safety should be integrated into the responsibility of operations managers. Operations managers should report on safety results when they report on all other production results. Safety should be included in their bonus calculations, as are other important objectives like quality and productivity.

Cost allocation

The cost of work injuries should be allocated back to every operation. You should not only establish an annual experience-based budget, but also charge each operation for variances from the budget. For instance, if a plant is assessed a budget of \$200,000, but actual cost turns out to be \$350,000, the plant should receive a

From the Experts: Attorney Involvement

This month, our workers' comp expert, Martin F. McGavin, the workers' comp manager for a Fortune 150 company, answers a question on minimizing attorney involvement in workers' comp claims.

Question: We have had a significant problem with attorney involvement on even routine workers' comp claims, which we believe is driving up our costs. By trying to communicate more effectively with our employees about workers' comp, we're hoping to prevent employees from feeling that they need an attorney. As part of the dialogue, employees have asked specifically whether they should hire an attorney. What can — or should — we tell them about retaining an attorney?

Answer: It is okay to talk with employees about attorneys under two conditions. First, you must do so before they are represented. Once they are represented, you may no longer give them any advice about their claim. Second, you must be very careful to give them only accurate information. As long as you stick to these two guidelines, it definitely makes sense to talk to employees about attorneys. Tell them three things:

1. **You are going to pay everything that is due to them under the law — whether they are represented or not.** Be prepared to explain how benefits are calculated and the entire scope of benefits that may be due, including permanent partial disability (PPD). In most states, you are required to pay PPD, but in others, you are required to pay PPD only if the employee makes a claim. In either case, if you do not discuss PPD with employees, however, you are at a disadvantage because a lawyer will certainly bring it up on the first interview. Hearing about it from an attorney, but not from you, will only reinforce the perception that employees who have attorneys receive greater compensation.

2. **The state government oversees the benefits paid by employers and makes certain that employees are properly compensated.** If your state has an ombudsman program, advise injured employees and let them know how to contact the ombudsman if they have questions about their benefits.

3. **They must pay their attorney for advice.** When discussing fees, make sure you know how they are handled in your state. In most states, employees are responsible for the expenses required to develop their case, such as medical examinations, plus they must pay an attorney fee equal to 15-30 percent of the compensation awarded.

► Suggest to your employee that the smart thing to do is to let you pay the claim — with supervision from the state — and for the employee to avoid the expense for an attorney, unless and until he or she believes that you are treating them unfairly.

If you have a question for our workers' comp expert, email the editor, Carol Johnson Perkins, Esq., at cjp@quinlan.com.

charge for the additional cost. This makes operations managers accountable for controlling claim costs in addition to safety.

Finally, information is critical to the cost-allocation process. It does

no good to charge the costs to the operations if they are unable to see and understand the basis for the costs. To be effective, they must be able to identify the issues that result in cost so they can direct their re-

sources and efforts at addressing them. At minimum, they should see claim listings where they can see the cost impact of injuries and of decisions such as not returning an employee to alternative work.

Products & Services

'Best Doctors' offers improved care and reduced costs in managing catastrophic claims

by Nancy Germond

There's a new doc in town — in Boston, to be precise, but this player's ability to manage catastrophic or complex claims has employers taking notice. Best Doctors, founded in 1989 by two Harvard medical professors, be-

gan with the premise that "we could reduce medical-care problems if we could consult with and coach treating doctors, resulting in big improvements in medical outcomes," Best Doctors' President Evan Falchuk said.

Best Doctors entered the health-care arena in 1989. But, at the request of American Re, a leading provider of excess insurance, Best Doctors entered workers' comp care in 2001 with CatCare, a catastrophic injury-manage-

ment program.

"This is a fast-moving trend in workers' comp: to improve the quality of care and see huge savings. It's the Pareto distribution of costs," Falchuk said, referring to catastrophic injuries. "The big cost driver in those cases is the things that aren't done right."

'Our doctors are at the leading edge of the right standard of care.'

Patients generally are treated in their own community if the attending physicians agree to work with Best Doctors, Falchuk said. "The attendings are actually pretty open to it, surprisingly, because we always expected that it would be very difficult. About 90 percent of the time, the patients aren't moved. If you run into a doctor that is resistant ... then there's a problem with the doctor.

"We use a very collegial approach [with the doctors]. We are accredited to give continuing education medical credits to the attendings. Doctors need the credits to maintain their licenses. They typically get them by going to seminars in static learning environments," Falchuk said, so receiving accreditation while working appeals to most physicians.

What can Best Doctors do that local case managers can't? "For catastrophic care, we use local case managers that we've vetted. We send

them into the hospital to obtain real-time information from the attending. They're our eyes and ears on the ground. But the real impact is the doctor on our end, a renowned expert, giving the attending guidance. Our doctors are at the leading edge of the right standard of care.

"That's where you effect change," Falchuk added.

Best Doctors also offers the Legacy Program, which designs an action plan on difficult claims. These may be injuries with co-morbidities, suspect causation, or prescription pain medication overuse.

Is Best Doctors cost effective? American Re, which owns 4.9 percent of the privately held Best Doctors, recently completed a five-year study of cases referred to CatCare. Savings included a 19.7 percent reduction in permanent disability, a 53 percent reduction in legal representation, and a reduction in acute medical care costs by an average of \$287,567 per case. Rehabilitation cost savings were estimated at \$69,200 per

case. Legacy provided Am Re with an average cost reduction, projected 10 years out, of \$518,000 per case.

Best Doctors' costs depend on how long the case remains in the system, Falchuk said, a decision made by each adjuster. CatCare fees range from \$15,000 for a month to \$50,000 for a year, and include case management and consulting doctor's fees.

The Best Doctors list comes from surveys conducted of doctors and is updated frequently. The list is available only to subscribers, but the Legacy and CatCare programs are available on a one-shot basis.

► For more information about Best Doctors, visit its website at <http://www.bestdoctors.com>.

Nancy Germond, ARM, AIC, is the president of Insurance Writer, located in Jefferson City, Mo. She is a second-generation insurance professional and may be reached through her website, <http://www.insurancewriter.com>.

Targeting medical mistakes

"The biggest cost drivers are the medical mistakes," according to Bruce Sundquist, American Re's vice president of health-care claims. "An astounding 58 percent of the cases we reviewed were not correctly diagnosed or had the wrong medication prescribed. It's scary, really.

"When we started the program, we thought we'd be spending more in acute medical care because of the experts involved. What we found as we went along was just the opposite, because so much of what we pay for in medical care is suboptimal treatments."

Litigation Management

Developing your litigation philosophy

by Martin F. McGavin

A starting point for your litigation-management program is to develop an overall litigation philosophy. An overall philosophy leads to a consistent approach for the management of every case. It tells your strategic partners

and your employees what to expect when a claim is filed.

Pragmatic or aggressive?

Many in the workers' comp industry, including most insurers and many

This is the second in a 10-part series on managing workers' compensation litigation.

attorneys, take a pragmatic approach to

defending comp claims. They believe that there will always be claims and litigation, so the wisest course is to settle claims as quickly as possible for the least amount of money.

Taking the short-term view may make sense if you are an insurer whose typical partnership with an insured is a one-year policy period. It also may make sense to an attorney who evaluates cases based solely on what is in the file folder of each case.

As an employer, you are in a different position: You can't afford to take short-term measures when dealing with your workforce. You cannot look at every file as an individual event because its outcome will help shape employee expectations and future employee actions — as well as the expectations and actions of their attorneys.

An aggressive defense posture is the most effective way to control your overall workers' comp costs. In fact, the people who are the most successful at managing litigation are not necessarily the most skilled; they're the ones who are naturally aggressive when defending claims. They usually are the people who can't stand to lose or to see people collecting money to which they are not entitled.

What does it mean to be aggressive?

Being aggressive does not mean that you routinely deny claims or are intransigent about settling. It involves three basic strategies:

1. Carefully investigate claims. Delve into reported injuries to make sure that they really occurred in the workplace. This includes taking

statements, talking to witnesses, and obtaining and carefully evaluating prior medical records when a claim is for "aggravation" of a preexisting condition.

2. Make a commitment to follow through on the decision you make. If you decide to accept a questionable claim, don't treat the employee as if you are accepting the claim with reservations. Rather, make a commitment to see that the employee receives all necessary medical care, all benefits to which he or she is entitled, and all necessary assistance with rehabilitation, especially transitional work.

If you deny a claim, proceed with the expectation that you are going to trial and that you are going to prevail. Be prepared to incur the cost and to expend the effort necessary to prepare a defense that will give you the best chance of winning. If you are not willing to make this commitment, you are better off accepting the claim and working to rehabilitate the employee as quickly as possible.

3. Know when to settle. Usually, it's best to settle when your motive is to avoid claims with catastrophic costs. For example, if you're faced with a claim by the family of an employee who smoked, was overweight and a heavy drinker, and who died at home from a heart attack, you might find that it makes sense to settle rather than defend. That is because of the amount at risk. This sort of case could cost a half million dollars if you lost. Even if there is only a slight chance of losing, it may make sense to make a small settlement rather than risking a half million-dollar claim.

By comparison, it may not make sense to settle a minor back claim with a limited period of disability, even if the settlement is small. If you lose at a hearing, the cost would not be catastrophic, yet settling could send the wrong message. Employees — and their attorneys — might conclude that you will pay something to settle any type of claim. If so, some employees and some attorneys would be willing to file just about any type of claim. Then the short-term savings from a quick settlement will be more than offset by the additional claim volume.

A good test to decide when to settle a minor dispute is to look at it from the employee's perspective. Was it easy money for the employee, which would only encourage others to file more claims? Or, did the employee have to fight long and hard to obtain the settlement? If so, the message to the employee and to other employees is that there will be no easy money.

Determining your philosophy is a necessary first step to litigation management. It will help determine how you approach every aspect of litigation management, and it will provide critical background information for selecting your strategic partners.

Martin F. McGavin is the workers' compensation manager for a Fortune 150 company. He is responsible for developing company-wide safety and claims strategy for 50,000 employees at more than 600 sites throughout all 50 states.

WC Issues & Trends

for workers, while regulators are concerned that they don't have adequate information on, or controls over, the burgeoning practice.

Some states have moved to regulate silent PPOs and more appear to be heading in that direction as pressure from health-care providers intensifies.

(continued from page 1)

If the problem with unauthorized discounts continues, they warn, doctors and other providers may start pulling back from treating injured workers.

OSHA News

● Resources to keep workers safe in hot weather

“Summer is just around the corner and the combination of heat, humidity, and physical labor can be dangerous for those working outdoors,” Occupational Safety and Health Administration (OSHA) Administrator Ed Foulke said in a statement. The two most serious forms of heat-related illnesses are heat exhaustion (primarily from dehydration) and heat stroke, which could be fatal. Signs of heat exhaustion or heat stroke need immediate attention. Recognizing those warning signs and taking quick action can make a difference in preventing a fatality.

Working Outdoors is an OSHA fact sheet that offers advice on ways to protect against exposure to ultraviolet radiation (UV), precautions to take if working in extreme heat, and how to protect against Lyme Disease and the West Nile Virus. The fact sheet also offers information links for teenagers working at summer jobs.

OSHA's Heat Stress Card lists tips to prevent many heat-related deaths and injuries. Available in English and Spanish, this laminated card is free to employers to distribute to their workers. It offers a quick reference about heat-related injuries, including warning signs, symptoms, and early treatment.

Protecting Yourself Against Harmful Sunlight is a pocket card that explains how to perform self-examinations to detect early stages of skin cancer. The card, available in English and Spanish, also describes common physical features of skin cancer that may be caused by exposure to the sun.

► For more information, visit <http://www.osha.gov>.

Independent contractor status is front burner issue again

Insurance carriers and state regulators again are giving closer scrutiny to how employers are dealing with “independent contractors” to ensure that these workers actually qualify as independent contractors rather than as employees.

Statutory and regulatory requirements vary among jurisdictions on the status of independent contractors. But many states require an employer who hires an uninsured independent contractor to provide workers' comp benefits for that worker.

Failure to comply with the applicable laws and regulations may result in problems if claims are filed against an employer's workers' comp policy, legal experts warn. If the employer is not shielded by the “exclusive remedy”

protection of workers' compensation, additional liability could result. Experts also warn that, in some instances, there may be insufficient workers' comp coverage — or general liability insurance coverage — to provide the protection employers believe they have.

As a result of recent schemes involving misclassification of employees and independent contractors in some states, insurers and regulators are putting more emphasis on ensuring that employers are following the applicable rules on how to classify, report, and treat independent contractors. And they advise employers with any questions to call their carriers or state workers' comp agencies.

States encourage ergonomic efforts to help reduce workplace injuries

Efforts continue at the state level to encourage employers to look at ergonomic measures in their workplaces to reduce injuries.

Legislators in several states have proposed measures that would require employers to develop and implement ergonomic measures and procedures. These bills often include incentives for taking such action or penalties for failing to do so.

Repetitive stress injuries and musculoskeletal disorders are the primary problems targeted by the proposals.

Proponents argue that such injuries, in addition to increasing workers' comp losses, may leave employees with chronic pain and force them to leave the workforce early, resulting in higher societal costs.

But opponents argue that, while the proposals may be well intentioned, they would be too burdensome on employers, particularly small businesses. They say that such decisions are best left to employers and their insurance carriers, and, therefore, should not be mandated.

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Cutting-Edge Claims

Comp claims for psychological injuries are among most complex legal issues

by Michael Levin-Epstein

Workers' comp claims for psychological injuries are among the most variable, complex, and vexingly difficult legal issues to resolve, involving a set of often changing rules and regulations.

The key constant: If workers can pinpoint some physical injury as causing, or occurring with, their psychological problem, they're far more likely to prevail.

States differ in their treatment of claims based on psychological injuries. In Colorado, for example, when psychological claims aren't based on physical injuries, there is a higher standard for determining causation and a limitation on temporary disability benefits that may be earned, according to attorney Steve Jouard, a partner in the law firm of Ray, Jouard and Pickering in Fort Collins. It's much easier to prevail on a mental-impairment claim where there is a physical injury involved, he added.

In Pennsylvania, workers' comp psychological claims, whether or not accompanied by physical injury, have tended to require a heightened burden of proof in recent years, according to attorney Valerie Faeth, with the law firm of Cohen and Grigsby in Pittsburgh. Essentially, claimants need to show "abnormal working conditions," which are dependent on the particular employee's circumstances and environment. For example, Faeth said, for a police officer, "it would not be abnormal to be shot at or to witness a murder," while, for other workers, it certainly would be. Claims based on psychological problems related to sexual harassment at work of-

ten prevail, however, "because it's never normal to be subjected to sexual harassment."

States differ in their treatment of claims based on psychological injuries.

Not surprisingly, there is disagreement among the states and legal experts as to whether, and to what extent, claims for psychological injuries can "stand alone" without a connection to a physical injury. Last December, by a 5-2 vote, the Ohio Supreme Court weighed in on the issue by endorsing what it described as "the long-standing principle" that psychological trauma unaccompanied by a physical injury is not compensable under the state workers' compensation act.

In California, recent workers' comp reforms in California aimed at preventing the overuse of medical services for comp claims may have backfired where psychological injuries are concerned, according to prominent California forensic psychiatrist James O'Brien. The reforms mandate the use of guidelines for dealing with workers' comp claims, but they don't cover depression. What's left is an evaluation of psychological injuries based on "descriptions that are very subjective, and often dependent on patients' self-reporting," including such conditions as impaired sexual function, said O'Brien. And the validity of those kinds of claims becomes difficult to determine independently.

Terrorism Insurance

● Actuaries assess national terrorism risk

A national framework for terrorism risk is necessary if terrorism coverage is to be widely and readily available, according to the American Academy of Actuaries, which submitted its Terrorism Risk Insurance Analysis to the President's Working Group on Financial Markets.

"A large chemical, nuclear, biological, or radiological (CNBR) terrorist attack on New York City could cause insured losses of \$778 billion," Michael McCarter, chairperson of the Terrorism Risk Insurance Act subgroup, said in a statement. "Without a national framework for managing terrorism risk, insurers would be exposed to losses far greater than they could sustain — significantly damaging their ability to provide the ongoing insurance coverage that is essential to the stability of the entire economy."

The actuaries were not able to identify any insurance, reinsurance, or capital-market solution that could finance such potential insured losses from a large CNBR event. With their solvency threatened, insurers would be forced to limit their exposure to losses from a terrorist attack. For workers' comp and group life insurance, an insurer could reduce its terrorism exposure only by limiting the availability of the underlying coverages.

The academy's analysis will assist the president's working group as it prepares a report about the long-term availability and affordability of terrorism insurance. The report is due to Congress by Sept. 30, 2006.

► To view the analysis in its entirety, visit <http://www.actuary.org>.

WC Law Bulletin

● No benefits for willful safety violation

Many states deny benefits for injuries caused by a worker's violation of an employer's safety rule. In Wyoming, for example, the state supreme court recently upheld the denial of benefits to a certified nursing assistant who hurt her back while lifting a patient by herself — in violation of the nursing home's "two-man lift" rule. The rule that certain patients needed two people to lift them was designed to prevent injuries to patients and staff. The nursing assistant, at work on the graveyard shift, said that no one was available to help her lift the patient, who insisted on getting out of bed to use the restroom.

The court ruled that she was not entitled to benefits because her injury was the result of a serious violation of the nursing home's safety policies. Through her training, she knew about the policy and knew that a violation would result in disciplinary action. In fact, she hurt herself and nearly dropped the patient, which were exactly the dangers that the policy was designed to prevent.

Citation: Perry v. State ex rel. Wyoming Workers' Safety and Compensation Division, Supreme Court of Wyoming, No. 05-54 (2006)

To complement the cost-cutting information you get in *Workers' Comp Bottom Line*, Quinlan Publishing offers a companion newsletter, *Workers' Compensation Law Bulletin*, the authoritative source for the latest developments in workers' comp law across the country.

To read more on the *Perry* case, phone us toll-free at (800) 229-2084 and ask for a free copy of the July 10, 2006, issue of *Workers' Compensation Law Bulletin*.

Safety & Health

Would bird flu pandemic be worse than 1918 outbreak?

There is a 20 percent chance that the next influenza pandemic will be worse than the 1918 outbreak, which killed more than 20 million people worldwide, according to a probabilistic model for assessing the risk of influenza pandemics across multiple countries recently unveiled by Risk Management Solutions (RMS).

Many published studies have already illustrated the effects of various pandemic scenarios, most commonly a repeat of the 1918 influenza pandemic that had a mortality level of 0.67 percent in the United States and even more severe effects in other countries. More severe pandemics are possible, however, and probabilistic estimation of virus characteristics incorporating the recent H5N1 virus, which recently caused avian flu in Asia, suggests that there is a one-in-five chance of a pandemic that is more severe than that experienced in 1918. H5N1 has viral characteristics that will increase the likelihood of a virulent pandemic if it provides genetic material for human-to-human influenza transmission.

Many companies may be underestimating their risk if they assume that the 1918 pandemic is the worst-case scenario. The RMS model is intended to help insurers assess the losses that they will experience from pandemics with all of the different permutations of potential characteristics and outcomes.

Although a number of pandemic influenza scenarios have been publicized, effective risk management requires quantification of not only the severity of an event, but also the likelihood of the event occurring.

The RMS model incorporates more than 1,800 pandemic influenza scenarios that take into account such factors as likelihood of the pandemic occurring, infectiousness and lethality of the pandemic, demographic impact, country of outbreak, vaccine production, and national countermeasures.

Many companies may be underestimating their risk if they assume that the 1918 pandemic is the worst-case scenario.

"Pandemic influenza could potentially deal insurers a triple whammy, simultaneously causing unprecedented life and health claims losses, investment portfolio downturns at a time when insurers most need liquidity, and reduced staff and management productivity through the spreading of sickness among company personnel," Dr. Andrew Coburn, RMS project lead on influenza pandemic risk modeling, said in a statement. "Moreover, influenza pandemics can last two to three years, making it essential for insurers to put in place a multi-year risk management strategy that considers the reinsurance crunch that will likely occur in the event of a pandemic."

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