

# Indiana Chamber of Commerce Employment Law Seminar Effective Management of Worker's Compensation

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# Today's Questions of the Hour!

- ▶ Has your company struggled with the management of worker's compensation claims?
- ▶ Does your management team understand when the company may have a defense to a worker's compensation claim?
- ▶ Is the company properly administering benefits – are we overpaying?
- ▶ Have you wondered how to reduce worker's compensation costs in your organization?
- ▶ How should the company handle companion employment issues, such as disability leave, FMLA, and ADA concerns?

# FOUR SIMPLE STEPS TO EMPOWERMENT

- ▶ STEP 1: Know the Law – Knowledge is Power
- ▶ STEP 2: Be Proactive in Claims Management
- ▶ STEP 3: Know Your Defenses to a Claim
- ▶ STEP 4: Control Your Hidden Costs by Handling Concurrent Employment Issues Correctly

# STEP 1: KNOW THE LAW

## Background

- ▶ Worker's Compensation is a no-fault system of compensation for employee injuries
- ▶ All employers with one or more employees are covered
- ▶ All employers must carry worker's compensation insurance or meet the requirements for self-insured status
- ▶ Worker's compensation claims are adjudicated before an appointed Hearing Member. Appeals are taken before a seven hearing member panel. Further appeals are taken to the Indiana Court of Appeals and then the Indiana Supreme Court

# STEP 1: KNOW THE LAW

## Workers Compensation Benefits

- ▶ Medical benefits – Indiana allows for future medical expenses only when ordered by the Board
- ▶ Limited wage replacement during disability
- ▶ Compensation for permanent loss of physical function, death or permanent disability

# STEP 1: KNOW THE LAW

## Selection of the Health Care Provider

- ▶ In Indiana, employers have the right to direct medical care.
- ▶ If an employee seeks unauthorized medical care on his own, it will typically be at his own expense. There are exceptions.



# STEP 1: KNOW THE LAW

## Lost Wages

In Indiana, employers are **required to reimburse** employees for wages lost due to attendance at doctor appointments.



When treatment is directed by the employer, such time will count as **hours worked** for purposes of computing overtime.

# STEP 1: KNOW THE LAW

## Temporary Total Disability (“TTD”)

- ▶ TTD is payable when an employee is unable to work due to his work-related disability.
- ▶ There is a seven-day waiting period before TTD is owed. If the disability lasts beyond 21 days, the first seven days becomes payable.
- ▶ TTD is payable at 66-2/3% of the employee’s average weekly wage and it is a non-taxable benefit.



# STEP 1: KNOW THE LAW

## Payment for Permanency

- ▶ Once an employee reaches maximum medical improvement (“MMI”), he may be assigned a permanent partial impairment (“PPI”) rating.
- ▶ PPI ratings are expressed in a percentage of loss of use and are assigned by a physician utilizing the AMA Guides to Permanent Impairment. An employer shall pay the PPI benefit according to the statutory value.
- ▶ If an employee is unable to return to ANY gainful employment, he may be entitled to permanent total disability (“PTD”) benefits. The PTD benefit is equal to 500 weeks of TTD or the statutory cap, whichever is less.
- ▶ Death benefits are also payable at 500 weeks of TTD or the statutory cap, whichever is less.

# STEP 1: KNOW THE LAW

## Know How to Recognize a Covered Worker's Compensation Injury...

- ▶ BY ACCIDENT – includes unexpected events or unexpected results
- ▶ ARISING OUT OF EMPLOYMENT – causal connection between the job and the injury
- ▶ IN THE COURSE OF EMPLOYMENT – examines the time and place of injury

# STEP 2: BE PROACTIVE

## First Steps – Notice Requirements

- ▶ Internal Incident Report
- ▶ Drug Testing Policy
- ▶ Reporting to your Carrier or Third-Party Administrator – First Report of Injury requirements
- ▶ OSHA log and/or OSHA requirements to report in-patient hospitalization of three or more employees or the death of an employee

## STEP 2: BE PROACTIVE

### Complete A Thorough Investigation

- ▶ Obtain the recorded statement of the injured employee (Carrier typically does this)
- ▶ Gather relevant documentation (PPE requirements, job instructions, work rules, MSDS sheets, first aid logs, employment file, maintenance records of equipment, photographs, witness statements, etc.)
- ▶ Involve legal counsel to assess the information and provide feedback
- ▶ Subrogation potential?

# STEP 2: BE PROACTIVE

## Implement Useful Policies

- ▶ Maintain and update a worker's compensation policy
- ▶ Communicate with the injured worker regularly – use form letters
- ▶ Effectively manage a light duty/modified duty program
- ▶ Limit the Company's TTD/TPD exposure by returning workers to light duty positions
- ▶ Consistently enforce ALL employment policies

## STEP 2: BE PROACTIVE

### Use the WC Act to Cut Costs

- ▶ Direct the employee's health care
- ▶ Use independent medical exams or utilization reviews
- ▶ Document non-compliance with medical care to suspend benefits
- ▶ Consider surveillance, when appropriate
- ▶ Document a decline of a light duty job to suspend TTD payments
- ▶ Consider using nurse case managers in complex cases
- ▶ Consider using legal auditing services

# STEP 3: KNOW YOUR DEFENSES

In Indiana, the statutory defenses to a worker's compensation claim include:

- ▶ self-inflicted injury
- ▶ intoxication
- ▶ commission of an offense
- ▶ failure to use a safety device
- ▶ failure to obey written and posted safety rules
- ▶ failure to perform a statutory duty



## STEP 3: KNOW YOUR DEFENSES

Monty McQuick trips over a hose while working for Buckets of Suds, a local bar. He lands on his knee and complains of immediate pain, which is accompanied by swelling and redness. His supervisor sends him to DashCare, an immediate care facility that has partnered with Bucket of Suds for worker's compensation injuries. Monty undergoes a drug test which comes back positive for marijuana. What happens to Monty? What if the drug screen shows a bac level of .10?

## STEP 3: KNOW YOUR DEFENSES

Assume Monty is fired for a positive drug screen. Two weeks later he needs surgery for the knee injury and will be off work for four weeks. Can Bucket of Suds deny the claim for surgery? Can they deny the claim for TTD for the four weeks of lost time? What if Monty instead has light duty restrictions for the four weeks?

# STEP 3: KNOW YOUR DEFENSES

## Liability for Recreational Activities

- ▶ Releases that purport to waive an employee's right to worker's compensation are invalid.
- ▶ Recreational or voluntary activities may be covered under worker's compensation if they are encouraged or sponsored by the employer and the employer derives a benefit from the activity.
- ▶ Do you think injuries occurring at an employee appreciation luncheon would be covered? How about at a company-sponsored wellness screening? A company picnic softball game?

# STEP 3: KNOW YOUR DEFENSES

## Liability for Recreational Activities

A group of employees want to assist in the disaster relief efforts resulting from recent tornado damage in their state. They are out of all vacation time so they ask their employer, Flashjam, a producer of MP3 players, if they can take off work to assist with relief efforts. Flashjam supports humanitarian efforts and it decides to provide paid leave for all employees who wish to take up to a two-week mission trip for this purpose. Flashjam places a sign-up sheet in its facility noting the voluntary nature of the program but encouraging those who want to help to submit forms for leave approval. Flashjam provides a bus for employee transportation and provides the employees going on the mission trip with a box of MP3 players to give away to the disaster victims. All employees sign an agreement that acknowledges they are not in the course and scope of employment during the mission trip. While on the trip, one of the employees falls from a partially collapsed roof and dies. Is he entitled to worker's compensation death benefits?

# STEP 4: CONTROL YOUR HIDDEN COSTS

## Interaction with Other Employment Laws & Policies

- ▶ Employer Leave Policies
- ▶ OSHA & IOSHA
- ▶ FMLA
- ▶ ADA & ADA AAA
- ▶ Retaliation

# STEP 4: CONTROL YOUR HIDDEN COSTS

Tim T-Bo worked full-time for Bottoms Up Brewery ("BUB") for four years prior to quitting to try out for the Indianapolis Colts. After a short, unsuccessful NFL career, T-Bo begged and BUB agreed to rehire T-Bo in an hourly production capacity even though BUB was only producing at 75% capacity. Almost immediately, T-Bo began experiencing back pain while at work. T-Bo did not initially report the back pain to BUB, but he did seek medical treatment from his family physician. Despite conservative treatment, T-Bo's back pain continued to increase. T-Bo was recently issued temporary work restrictions that are inconsistent with his job duties. BUB's policy is that it does not accommodate temporary work restrictions stemming from a non-work-related injury. At this time, T-Bo has been working for nine months since being rehired.

## STEP 4: CONTROL YOUR HIDDEN COSTS

- Q: Does T-Bo qualify for leave under the FMLA?
- Q: Is it appropriate for BUB to refuse to consider accommodating temporary work restrictions stemming from a non-work-related injury?
- Q: Can BUB accommodate temporary work restrictions stemming from a work-related injury but not accommodate the same temporary work restrictions stemming from a non-work-related injury?

# STEP 4: CONTROL YOUR HIDDEN COSTS

T-Bo applies for short-term disability benefits, however, his request is denied because T-Bo checked "yes" to the following question on the application:

- ▶ Is your illness or injury work-related:  Yes     No

T-Bo complains to Human Resources that he has no income while out on leave. Human Resources conducts an investigation and, when pressed, both T-Bo's Supervisor and Superintendent admit that they were aware that he had complained about back pain while working. However, both also reported that T-Bo never specifically told them that the back pain was work-related and therefore they followed the "don't ask and I hope that they don't tell" rule. Human Resources was not familiar with this training module which involved the Vice President of Operations chastising his production team any time there was a reportable injury that resulted in BUB incurring worker's compensation costs. In an effort to save BUB money and avoid being singled out for ridicule, T-Bo's Supervisor and Superintendent attempted to avoid the issue of work-related injuries as much as possible.

## STEP 4: CONTROL YOUR HIDDEN COSTS

- Q: What should Human Resources do with the information it learned during the course of its investigation?
- Q: What measures should BUB have implemented to avoid the above situation?

# STEP 4: CONTROL YOUR HIDDEN COSTS

Human Resources interviews T-Bo and he confirms that on more than one occasion he mentioned to management that he was experiencing significant back pain while performing his job duties and responsibilities. After this interview, Human Resources immediately contacted its worker's compensation carrier and reported the claim.

Q: Once the claim has been reported to worker's compensation, should BUB have any further involvement with the worker's compensation claim?

T-Bo remains out on leave for three months. Just when BUB hoped T-Bo would return to work, it learns that T-Bo is scheduled for back surgery and will need at least another eight weeks of leave to rehabilitate. Fortunately for T-Bo, the company's Leave of Absence Policy provides for a cumulative total of up to six months of continuous medical leave.

Q: What, if anything, should BUB do when T-Bo's FMLA leave expires?

# STEP 4: CONTROL YOUR HIDDEN COSTS

T-Bo undergoes surgery and begins the rehabilitation process. His treating physician reports that T-Bo is making slow but steady progress towards a full recovery. Five months into his leave, T-Bo is released to return to work by his treating physician. The physician establishes some work restrictions which he believes may be permanent.

Q: What, if anything, should BUB do next with regard to T-Bo's potential return to work status?

T-Bo disregards BUB's request to engage in the interactive reasonable accommodation analysis. T-Bo retains an attorney who states that he is in the process of obtaining an independent medical evaluation because he does not believe that his client has recovered sufficiently to return to work.

Q: Could BUB terminate T-Bo's employment for insubordination?

# STEP 4: CONTROL YOUR HIDDEN COSTS

Near the expiration of the six months of medical leave, BUB is provided with a copy of T-Bo's IME report. The report recommends a series of tests to determine whether T-Bo needs additional back surgery. After a discussion with the worker's compensation carrier, it is determined that the tests should be conducted.

Q: What should BUB do if the results of the tests will not be available until after T-Bo's entitlement to six months of medical leave expires.

The results of the tests indicate the T-Bo may benefit from additional surgery. T-Bo's IME doctor issues a supplemental report that T-Bo cannot lift more than five pounds occasionally and that he must constantly alternate between sitting and standing. It appears from the report that these restrictions are permanent, particularly if T-Bo elects to forego further surgery. The issuance of the report was delayed due to a death in T-Bo's family. T-Bo was required to fly to Honduras for the funeral. The worker's compensation carrier obtained some surveillance that pretty clearly indicates that T-Bo is not as disabled as his IME physician's report suggests.

Q: Based on this information, how should BUB proceed?

Questions?