

Ethical Issues Facing a Workers' Compensation Practitioner

HYPOTHETICALS

1. **Charlene Russo:** Your client was injured at a time when 31-307(e) applied to reduce temporary total benefits by the amount of social security retirement benefits. An approved Voluntary Agreement is on file.

For three (3) years, your client has been receiving weekly temporary total checks sent directly to the client's home. You noticed in reviewing the file that he reached full retirement age (for social security purposes) over a year ago.

- (a) What are your ethical obligations to your client?
 - (b) What are your ethical obligations to the respondents?
 - (c) The respondents now contact you to discuss an alleged overpayment. What are your ethical obligations regarding obtaining information for them if no Form 36 has been filed?
 - (d) At the respondent's request, you contact your client about his receipt of TT and SSR at the same time and inform him that a claim for overpayment is likely. He refuses to give you the information you have requested to allow the respondents to make their claim of overpayment. What do you do?
 - (e) Your client understands that he/she has been overpaid, but does not have the ability to repay the compensation carrier for the overpayment and if his/her checks are cut off he/she will lose their home. You decide you don't want to cooperate with helping the carrier make its overpayment claim. What are your obligations?
2. **Patricia King:** The claimant alleges injuring his knee slipping on a wet spot on the shop floor. The employer denies that claim, alleging that the incident did not happen. The employer has hidden security cameras in the shop which record all activity. The employer shares with respondent's counsel the video of the alleged incident, which confirms the injury which the employer has mandated must be denied.
 - (a) What is the ethical obligation of respondent's counsel with regard to the disclosure of the video without a request for it?
 - (b) What is the ethical obligation of respondent's counsel with regard to the disclosure of the video with a request for it?
 - (c) If the video shows the injury did not happen, how if at all does this change the answer?
 3. **John Logan:** Your client, the employer (who has over 200 employees), flat out refuses to release available video tape even though you as his counsel have seen that it supports the claimant's claim of injury and have recommended that he do so. In addition the client

employer won't agree to accept the claim and pay, again despite your recommendations to the contrary.

- (a) Your client, the insurer, recognizes its contractual obligation to pay the claim but refuses to do so based upon the client's instructions. What are respondent's counsel's obligation to his client, the employer, and his client, the insurer?
- (b) Your client the insurer decides to accept the case over it's insured's demands. What do you do?

OR

You are asked by the client, the insurer, to defend a Form 36 that alleges the injured worker's claimed care is palliative and therefore not payable under the Act. You appear at the hearing where your client, the employer, appears and insists that the carrier pay for allegedly palliative care. What do you do?

OR

You are asked to become involved at the Workers' Compensation Commission on behalf of several employers with periods of coverage on an asbestos claim. The employer is the same, the various carriers have limited exposure and are not the 299b carrier. What do you do?

- 4. **Charlene Russo:** The claimant, through counsel, has made a claim for total disability under Osterlund. Counsel for both parties have reached an agreement on a settlement figure that each will recommend to their respective clients. The claimant then discloses to her lawyer that he/she has been diagnosed with a treatable form of cancer but with an uncertain prognosis. She prefaces this disclosure with "*don't tell anyone, not even my husband.*" What is claimant's counsel's ethical obligation to disclose this to opposing counsel?
- 5. **John Logan:** An existing client, Gladys, refers her boyfriend, Herb, to you for a contested work injury. The respondents allege that the injury occurred at home. You discover that preclusion may lie and take the case. Preclusion is litigated to a Formal Hearing, and the Trial Commissioner precludes the respondents. The respondents then issue a Voluntary Agreement, which is approved. Benefits are paid, and treatment authorized. A few months later, you get a call from Gladys, who asks a question about her case. At the end of the conversation, she says, "*You know, Herb didn't get injured at work.*" Ethically, how should you handle this?
- 6. **John Logan:** Your client has a significant surgical back injury. After a 2 level lumbar spinal fusion, he is diagnosed with failed back and chronic pain. He has been referred to pain management which was initially authorized by the workers' compensation carrier. The claimant's active treater is now a pain management physician who tells him that he needs long term narcotic medications to control his intractable pain. These medications have been recommended and paid for, for over a year by the carrier. The carrier obtains an RME with a different pain doctor who agrees with the diagnosis of failed back and chronic pain, but states that the long term narcotics are not reasonable and necessary medical care and that the side effects of these medications are more detrimental to the claimant's health than they are helpful for his diagnosis. The RME doctor recommends a detoxification program and gradual weaning onto non-narcotic medication options. The Commissioner is going to schedule a CME with a doctor who you know from experience will agree with the RME physician and you advise your client of

the affect a CME has on his claim. You further advise that he needs to make an attempt to wean from the medications to avoid the CME being scheduled and show good faith to the Commissioner in an attempt to try to wean. Your claimant refuses to take your advice and refuses to even attempt to wean himself from the medications or enter a program to assist him with reducing and discontinuing his medications. You feel his refusal to take your advice has disrupted your relationship with the client and you tell him you think he should find alternative counsel. He refuses to let you withdraw. What do you do?

- (a) Do you have to proceed through the CME whose results you can predict?
- (b) If all goes as anticipated, are you now obligated to try the issue of medical treatment, despite a CME that is contrary to the claim you are asserting?
- (c) Your client tells you that his medications aren't working well and he has started smoking pot on the side which does help alleviate his pain. What do you do?
- (d) And, we probably should have one dealing with a claimant on heavy dose of opioids who doesn't want to wean and believes he needs them to function. Can you try this one?

7. **Patricia King:** Your client has a loose relationship with reality which you didn't realize at the time you took on the case. As the case progresses, you have instances where the claimant refuses to accept your counsel. As the issues get more heated, the claimant's medical records start to show evidence of the claimant's anger toward his counsel. As his counsel, you read these records and become concerned for your safety and the safety of your staff. At this same time, you are preparing for a scheduled Formal Hearing to help your client obtain psychiatric care which he clearly needs. What do you do?

- (a) You know your client would be better if he would just take his meds and you tell him so. This increases his anger toward you what do you do?
- (b) You fear that this has escalated to a point where you fear for your safety and the safety of others but the client has never directly threatened you or anyone else. What are the implications of this?

8. **Charlene Russo:** You are defense counsel. Your largest client advises you that he has obtained a Medicare Set-Aside based upon all accepted body parts including a contested C4/5 which was contested due to a pre-existing cervical injury 5 years prior. Your client advises you that this MSA is much too high. The client then sends you a second MSA and advises you that he did not send all the medicals to the MSA vendor and left out the contested C4/5 surgery. As defense attorney you know that the C4/5 will be found compensable but your principal rejects your advice. You then go to a settlement conference and submit the second MSA but do not advise Claimant's counsel or the Commissioner that the medical records supporting a C4/5 compensability were not sent to the MSA vendor.

- (a) Should you have submitted the second MSA under the facts above?
- (b) Your client takes the first MSA away from you and says "now you don't have it so you can't turn it over. What do you do?"

- (c) You are claimant's counsel and learn about the first MSA by way of an email gone astray. As Claimant's counsel do you recommend the settlement based on the second MSA to your client? To the Commissioner?
- (d) At a hearing claimant's counsel comments that material medical reports are not referenced in the referred MSA proposal. The Commissioner tells her that isn't her issue, don't worry about it. Should she?