

CASE STUDY: THE THREE BEARS AND DEFENDING A WORKERS' COMPENSATION CLAIM

Once a company rejects a workers' compensation claim, the claim will be set for a hearing. The outcome of the hearing is obviously critical in controlling future workers' compensation premium costs. A win or loss at the hearing could mean the difference between thousands of dollars either saved or spent on future premium payments. Therefore, it is essential that companies understand what options exist for representation at these hearings and how those options can impact the hearing's outcome. An examination of those options and an actual case study illustrating the potential financial impact of those different options on a company's premiums is presented below.

Three models exist for representation of companies at the hearing:

1. No cost/non-attorney approach: Using the third party administrator's ("TPA") hearing representative ("Baby Bear" model); or
2. Bundled Cost/contracted attorney approach: Using the TPA's contracted attorney ("Mama Bear" model); or
3. Modest Cost/dedicated attorney approach: Hiring outside counsel to defend the company at a hearing ("Papa Bear" model).

The Claim

Ace Company terminates Joyce for falsifying company expense reports. One week later, Ace company receives notification that Joyce has filed a workers' compensation claim because of a back injury she allegedly sustained on her last day of work. Joyce's chiropractor disables her from employment for at least 60 days. The company rejects Joyce's claim based on:

1. Joyce's delay in reporting the claim, in violation of the company's accident reporting policy;
2. Joyce's failure to get drug-tested immediately following her alleged injury, in violation of the company's post-accident drug testing policy;
3. the absence of any witnesses to Joyce's alleged injury; and
4. the suspicion that Joyce fabricated the claim because she knew she was about to be terminated anyhow.

Based on the Company's rejection of the claim, the claim was set for an Industrial Commission hearing. The first thing Joyce did when she found out a hearing was set was to hire an attorney. Ace had three options for defending itself at the Industrial Commission hearing:

A. TPA HEARING REPRESENTATION - No Attorney:

Advantage:

\$0 for attorneys' fees.

Disadvantage:

TPA hearing representatives, as non-attorneys, are **prohibited** from:

- a. Cross-examining (or even questioning) Joyce at the hearing;
- b. Questioning the company's own witnesses about the basis for rejecting the claim, including Joyce's termination (although the witnesses could testify on their own at the hearing and could answer Joyce's attorney's questions); and
- c. Making legal arguments at the hearing; Ace's TPA cannot argue that Joyce was discharged for just cause and therefore Joyce is not entitled to lost time wages even if her claim was found to be legitimate;

Hoping to save money, Ace chose this option. Ace won at the first hearing, but lost at the second hearing. The financial impact on Ace was as follows:

Annual Premium before Claim ¹	Annual Premium after Claim ²	Number of Years of Impact	Total Impact on Premiums ³
\$22,000	\$34,000	4	\$25,000-\$35,000

¹ In Group (Companies with no workers' compensation claims are aggregated into groups of like-kind industries and are eligible for premium discounts)

² Rejected from Group

³ Estimate only; continued revisions by BWC to reserve formulas make projections of future premium costs somewhat uncertain.

B. BUNDLED COST/CONTRACT ATTORNEY:

Advantage:

\$0 for attorneys' fees; attorney hearing representation

Disadvantage:

- 1. Reduced preparation time due to attorney's receipt of TPA claim file typically no more than 1-2 weeks prior to hearing;
- 2. Shorter coordination time for identification and preparation of witnesses and documents due to reduced preparation time; and

3. Minimal ongoing relationship with company, thereby reducing-or missing-opportunities for making recommendations for improvements to, or missing trouble spots in, the company's workers' compensation program and policies.

C. MODEST COST/DEDICATED ATTORNEY:

Immediate Advantage:

1. Average cost of services: \$1,500-\$2,500 (typically \$150/hr.) all inclusive.
2. Attorney involved in claim at outset, allowing for:
 - a. maximum preparation time of witnesses;
 - b. early anticipation of potential problems with case with sufficient lead time to correct weaknesses;
 - c. compliance with Industrial Commission time-sensitive hearing requirements including submission of request for court reporter and request for additional hearing time to ensure thorough presentation of defense case;
 - d. ongoing relationship with human resources personnel, resulting in regular dialogue to proactively address other workers' compensation problems/issues; and
 - e. improved claims management due to attorney's intimate knowledge of company's claims history and familiarity with problem claims and solutions for resolution.

Long-term Advantage:

Ongoing attorney relationship is especially valuable in cases of serious injury where the possibility of a Violation of Specific Safety Requirement ("VSSR") claim (paid directly by the employer) exists and the immediate investigation of the worksite following the injury is critical to the successful defense of the claim.

Disadvantage:

Minimal defense costs (typically \$1,500-2,500).

People buy insurance to protect against risk. Deciding on the correct hearing representative model for your business is no different. Hiring an attorney to defend your company at a hearing may cost slightly more initially, but minimizing the risk of loss may well be worth the investment. Just ask Ace.

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experience defending employers in workers' compensation cases and counsels employers in reducing workers' compensation premiums and preventing workers' compensation fraud and abuse. Steve can be contacted at (216) 831-0042, or sdlott@meyersroman.com.