"A TO Z"
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HOW TO EFFECTIVELY COMMUNICATE WITH ATTORNEYS

> "No brilliance is needed in the law. Nothing but common sense, and relatively clean fingernails."
>
> John Mortimer (1923-____)

> "A Judge knows nothing unless it has been explained to him three times."
>
> Proverb

I. INTRODUCTION

It seems that everybody has an opinion as to how the law functions in society or how the law should function in society. In *The Death of Common Sense*, Philip K. Howard wrote that in the United States, federal and state legislators have created:

> "a legal colossus unprecedented in the history of civilization, with legal dictates numbering in the millions of words and growing larger every day. Our regulatory system has become an instruction manual. It tells us and bureaucrats exactly what to do and how to do it. Detailed rule after

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> detailed rule addresses every eventuality, or at least every situation law makers and bureaucrats can think of. . . In the decade since World War II, we have constructed a system of regulatory law that basically outlaws common sense. Modern law, in an effort to be 'self-executing,' has shut out our humanity."

While one could argue that Mr. Howard's assessment has some application to what has developed in the Pennsylvania workers' compensation system, which seems to have developed statutes, regulations and judicial pronouncements that seek to address "every eventuality" that can be contemplated – oftentimes in favor of the claimant - I refuse to believe that the individual skill and diligence of the employer's Claims Administrator and its attorney cannot bring about the kind of fair and appropriate result that the lawmakers have presumably sought to achieve over the years.

Whether he or she works for an employer or a third-party administrator, the Claims Administrator faces a stiff challenge when asked to run a self-insured employer's workers' compensation program. Indeed, the Administrator must make certain that the program not only complies with a series hypertechnical administrative legal requirements, but must also marshal and develop the facts of each claim in order to make certain that the employer's perspective is properly "explained" to the workers' compensation judge ("WCJ").

One of the most important means of achieving the dual goals of "compliance" and "persuasive advocacy" is the establishment of an effective communication system between the Administrator and defense counsel.

II. THE ROLE OF THE CLAIMS ADMINISTRATOR

It is important to remember that the self-insured Claims Administrator has a unique position within the workers' compensation scheme. At times, he or she must act as an "employee relations administrator," a "benefits coordinator," a "utilization review expert," an "accident reconstruction expert," a "psychologist," an "accountant" and a "lawyer." Occasionally, a sophisticated workers' compensation claim will force the Claims Administrator to assume **all** of those roles simultaneously. While doing so can be extremely difficult, the Claims Administrator who develops a working knowledge of common medical, legal, labor and accounting issues will serve as an invaluable resource for defense counsel.

The first step in establishing an effective communication system is fairly mechanical.

Indeed, the Claims Administrator should undertake in order to facilitate this flow of information to and from counsel as follows:

(a) provide counsel a complete copy of the employee's personnel file;

(b) provide counsel a complete copy of the employee's dispensary file or medical file;

(c) provide counsel either a Statement of Wages form or raw wage information, including attendance records, documenting the employee's earnings during the five calendar quarter periods preceding the date of injury;

(d) insist that counsel provides a status report following any significant development in litigation;

(e) arrange meetings between counsel and all prospective witnesses;

(f) attend significant hearings or depositions;

(g) encourage on-site inspections of either the injury site or other significant locations with which defense counsel should be familiar;

(h) be prepared to videotape a relevant demonstration that will allow for a better understanding of the employer's perspective of the alleged work injury.

While it is true that providing files, reviewing status reports, attending important hearings or depositions and arranging meetings with important witnesses are essential practical steps that the Administrator should undertake in every case, he or she must also be prepared to assist defense counsel in ferreting out either bad claims or addressing the exposure inherent in compensable situations, by developing and employing certain investigative, legal and medical skills.

III. ENHANCING EFFECTIVE COMMUNICATION WITH DEFENSE COUNSEL

The discussion below outlines four elements that the Administrator should master in order to effectively interact with defense counsel:

1. "Developing the Facts of the Case." - It has been said that what separates the exceptional attorney from the average attorney, is not his or her knowledge of law, but how he or she develops and presents the facts of the case. Indeed, every workers' compensation attorney knows that an injury occurring "in the course of employment" is generally compensable under the Act. Where, however, the attorney fails to develop the specific circumstances of the work incident or the events leading up to the work incident, his or her knowledge of the general legal principle will oftentimes by wasted through his or her failure to uncover or apply an innocuous fact that could make the difference between victory and defeat.

The Claims Administrator who pursues and analyzes the innocuous facts of the case early on will be better able to provide defense counsel with the tools necessary to effectively apply the relevant law.

Indeed, there can be no question that a proper development of the facts surrounding the alleged work incident, including the events leading up to the incident, is necessary to provide the WCJ with the kind of full perspective that will ultimately afford the employer a better chance of prevailing.

Typically, claimant's counsel seeks to provide the WCJ an overly **narrow** perspective of the claim, i.e., the specific facts of the alleged work injury.

The employer who allows the claimant to present such a narrow perspective typically loses the case.

Below are two Perspectives of the same injury - one provided by the typical claimant's counsel and one provided by diligent defense counsel:

Perspective No. 1	**Perspective No. 2**
(a) Claimant's job required him to lift and store heavy packages.	(a) Three months before his alleged work injury, claimant performed a clerical position that afforded him free access to a telephone, little direct supervision and flexible working hours.
(b) While performing his regular duties, claimant sustained a severe low back injury.	(b) Claimant was transferred out of the clerical position to the more labor-intensive position along with three co-employees.
(c) Claimant's condition became so severe that three weeks after the incident, he was forced to stop working.	(c) Following the transfer, claimant and his three co-employees filed grievances through their local union challenging the transfer.
	(d) Two days before his alleged work injury, claimant learned that his grievance had been denied.
	(e) On the same day that claimant suffered his alleged work injury, two of his three co-employees suffered similar injuries under similar circumstances.

In the context of "Perspective #1" claimant's counsel will typically present expert medical testimony supporting claimant's claim that he did, in fact, suffer a soft tissue injury to his low back while performing his job.

In response to the narrow factual backdrop afforded by "Perspective #1" defense counsel will typically present expert medical testimony establishing a lack of objective evidence supporting the injury. Constrained by the date of his or her examination the IME doctor will usually observe that the claimant offered a series of subjective complaints that could not be explained by his objective findings and will therefore generally conclude that the claimant sustained a low back strain/sprain that was resolved as of his or her examination e.g. "**By history**, it appears that Mr. Johnson suffered a low back strain . . . . "

Faced with little more than conflicting medical evidence, the WCJ presented with "Perspective No. 1" will defer to the claimant's expert and grant disability benefits either on an indefinite basis or for a limited period of time.

On the other hand, the WCJ presented with "Perspective No. 2", will be more likely to find that the alleged work injury did not occur, but was prompted by the employee's dissatisfaction with his job transfer and his inability to rescind the transfer through the grievance process. The presentation of the claim in a more developed factual context, will render the defense expert's inability to find any objective evidence of injury more understandable and far more compelling.

In other words, under "Perspective No. 2", the medical evidence no longer represents the **primary** basis for the employer's defense of the claim, but **supplements** the primary factual theory developed by the diligent Claims Administrator.

So, how does the Claims Administrator help defense counsel provide the kind of factual backdrop set forth in "Perspective #2"?

WHAT THE CLAIMS ADMINISTRATOR SHOULD DO:

(a) Inspect the site of injury;

(b) Interview all witnesses to the incident;

(c) Interview the employee's immediate supervisor in order to determine whether the employee had any motivation for concocting a work injury;

(d) Review the employee's personnel file in order to determine whether he or she was on probation, had been disciplined recently, had been demoted recently or had his or her job duties or working hours recently changed;

2. "Analyzing the Medical Issues of the Case" – What makes workers' compensation practice so unique and so interesting is that it involves such a variety of medical issues. Over the course of time the typical workers' compensation Administrator will probably have to address ailments ranging from "carpal tunnel syndrome" to "asbestosis" to "depression." Although a precise understanding of the medical issues presented in every case would be asking too much of any Administrator, a basic understanding of the most common conditions seen will facilitate the Administrator's ability to assist defense counsel in effectively defending a questionable claim.

Below are two Perspectives addressing the etiology of alleged physical symptoms:

Perspective No. 1	**Perspective No. 2**
(a) Claimant, an elementary school teacher, claims to have been struck on the neck by a ladder being carried by a janitor down a school hallway.	(a) A review of claimant's medical history reveals that during the past year, he received substantial psychological counseling for "histrionic personality syndrome," a condition that, according to the DSM-V causes the individual to exaggerate or embellish minor events in order to gain the attention of others.
(b) Claimant immediately complains of neck pain and pain radiating down both arms, while teachers and students gather around him and encourage him to seek ER treatment, which he refuses.	(b) Medical records further establish that three weeks before the work incident, claimant sought treatment from his family doctor to whom he complained of pain, tingling and numbness radiating down both arms.
(c) Claimant ultimately undergoes a cervical laminectomy/fusion procedure that disables him from working for over six months and that results in a substantial medical bill.	(c) Following his review of claimant's medical information, an examining physician concludes that claimant's symptomatology was not caused by the work incident at issue.
(d) The claim is accepted.	(d) Interviews with witnesses to the alleged work incident question whether claimant was actually struck and comment upon claimant's dramatic reaction to the entire event. (e) The claim is denied.

The knowledgeable Claims Administrator, whose analysis is set forth in "Perspective No. 2", reveals an understanding that pain, tingling and numbness in the upper extremities are symptoms typically associated with nerve root involvement of the cervical spine, e.g. a disc herniation at C-6-7. The Claims Administrator's review of the

claimant's past medical history prompts her to question whether the claimant's eventual need for surgery was **not** caused by the work incident, but by a pre-existing condition.

Plus, the Administrator's discovery that the claimant suffers from a non-work-related psychological condition that causes him to embellish events for the attention of others, and her discovery that claimant reacted in a dramatic way to the event, could support the notion that he was never actually struck by the janitor's ladder on the date in question, but convinced himself that he was struck in order to gain the attention of teachers and students.

In "Perspective No. 1", the Claims Administrator accepts the claimant's allegation that he was struck in the neck by a ladder, while failing to investigate or appreciate the significance of the pre-existing symptomatology or the claimant's psychological condition. In other words, the Claims Administrator in "Perspective No. 1" probably accepted a claim that should not have been accepted.

There are certain steps that the Claims Administrator can take to properly analyze the development of symptomatology.

WHAT THE CLAIMS ADMINSTRATOR SHOULD DO:

(a) Obtain from the employee an authorization form allowing the employer access to his or her medical records. The Administrator should have the claimant execute a **HIPAA Approved Authorization Form** in order to facilitate access to "Protected Health Information."

If the HIPAA Authorization is not obtained, the health care provider who treated the injured worker months or years before the work injury at issue, may refuse to provide information. Or, claimant's counsel, relying upon Rule 4003.6 of the Pennsylvania Rules of Civil Procedure, may refuse to allow the Administrator or defense counsel access to the records of the claimant's treating physicians. See Marek v. Ketyer, 1999 Pa. Super. 116, 733 A.2d 1268 (1999))

(b) Request documentation from all panel physicians consulted by the employee. The Administrator should be aware that in the last few years claimants' counsel have taken the position that a "panel provider" is a "treating provider" thereby requiring the use of a HIPPA Approved Authorization form in order to gain access to the panel records;

(c) Review the employee's past medical history by reviewing his dispensary records;

(d) Use various resources such as the DSM referred to above, or the AMA Guides to the Evaluation of Permanent Impairment or even online resources such as "WebMD" to review and assess symptoms and diagnoses;

(e) If possible, perform an insurance "Index Check" in order to determine whether the employee has experienced similar symptomatology in the past in the context of civil litigation or workers' compensation litigation; and

(f) Submit correspondence to the Bureau of Workers' Compensation requesting all documentation compiled/maintained in connection with the particular

employee – such a request will assist in fully developing the claimant's past medical history and litigation history.

3. "Analyzing the Law of the Case." - Although in some legal circles workers' compensation law is viewed as a fairly simple area that does not require intense study, just the opposite is true. In fact, workers' compensation law can be very technical. Moreover, it is an area that seems to change very quickly with legislative enactments, regulatory pronouncements and a constantly evolving body of case law. A lack of knowledge or a misunderstanding of the workers' compensation law can cause the unwitting practitioner to either take inappropriate action or to fail to take appropriate action in response to a claim.

While the Claims Administrator cannot be expected to develop the kind of encompassing knowledge of the law that counsel should possess, he or she must, nevertheless, strive to understand certain aspects of the law, in order to effectively assist defense counsel.

The discussion below addresses areas of the law with which the Administrator should have a working knowledge.

The manner in which so-called "medical only" claims should be administered is an area of the law that came to the forefront of workers' compensation practice seven years ago when the Commonwealth Court issued its ruling in Lemansky v. Workers' Compensation Appeal Board (Hagan Ice Cream), 738 A.2d 498 (Pa. Cmwlth. 1999).

The court's instruction in that case that **all work injuries** - including work injuries where there is no lost time - must be administered **formally,** through the filing of Notice forms with the Bureau within twenty-one days of the injury, has prompted much discussion and much controversy in the workers' compensation community over the past few years.

Most recently, the discussion and the continuing analysis of the issue by the Commonwealth Court have resulted in promulgation of the "Medical Only Notice of Compensation Payable" – a form that is being used more and more often by Administrators.

Despite this regulatory response to Lemansky and its progeny, the judicial notion that "all claims are created equal" continues to result in a fundamental disconnect between the view of the courts, the statutory law and general claims handling practice. It has also resulted in confused results before WCJs. See Orenich v. Workers' Compensation Appeal Board (Geisinger Wyoming Valley Medical Center), 863 A.2d 165 (Pa. Cmwlth. 2004) (penalties **awarded** where defendant fails to formally administer medical only claim); Brutico v. Workers' Compensation Appeal Board (U. S. Airways), 866 A.2d 1152, (Pa. Cmwlth. 2004) (penalties **not awarded** where defendant fails to administer medical only claim).

The "disconnect" is exemplified by certain Bureau pronouncements such as Section 127.405 of the Medical Cost Containment Regulations, which allows an

employer to challenge the reasonableness and necessity of treatment even where the claim has not been formally administered:

> §127.405. **UR of medical treatment in medical only cases.**
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> (a) **In medical only cases, where an insurer is paying for an injured workers' medical treatment but has not either filed documents with the Bureau admitting liability for a work-related injury nor has there been a determination to the effect,** the insurer may still seek review of the reasonableness or necessity of the treatment by filing a request for UR. (emphasis supplied).
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> (b) If the insurer files a request for UR in a medical only case, then the insurer shall be responsible for paying for the costs of the UR.
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> (c) If the insurer files a request for UR in a medical only case, then the insurer shall be liable to pay for treatment found to be reasonable or necessary by an uncontested UR Determination.

The "disconnect" is further evidenced by the fact that informal administration of minor work injuries is consistent with the plain language of the Act, including the limitations provision of Section 315, which provides, in pertinent part, as follows:

> "In cases of personal injury all claims for compensation shall be forever barred, unless, within three years after the injury, the parties shall have agreed upon the compensation payable under this article; or unless within three years after the injury, one of the parties shall have filed a petition as provided in article 4 hereof…**Where, however, payments of compensation have been made in any case, said limitations shall not take effect until the expiration of three years from the time of the making of the most recent payment prior to date of filing such petition;** Provided, That any payment made under an established plan or policy of insurance for the payment of benefits on account of non-occupational illness or injury and which payment is identified as not being workmen's compensation shall not be considered to be payment in lieu of workmen's compensation, and such payment shall not toll the running of the Statute of Limitations." (emphasis supplied).

Consistent with the foregoing statutory instruction, the Commonwealth Court has confirmed that where the employer does not formally accept a work injury under the Act, but **voluntarily** covers medical bills incurred by the employee following the occurrence of a work injury, the employee will be protected against any subsequent effort by the employer or insurer to avoid full liability under the Act – that under such circumstances a tolling of the three-year statute of limitations under Section 315 will result, thereby extending the time during which the employee can file a Claim Petition seeking indemnity benefits or additional medical benefits that his employer has refused to provide. See Scheffler v. Workers' Compensation Appeal Board (Kocher Coal, Inc.), 745 A.2d 697 (2000); Levine v. Workers' Compensation Appeal Board (Newell Corp.), 760 A.2d 1209 (Pa. Cmwlth. 2000); Golley v. Workers' Compensation Appeal Board (AAA Mid-Atlantic, Inc.), 747 A.2d 1253 (2000).

Accordingly, where, in the context of a "medical only" claim, the employer does **not formally administer** the work injury at issue but continues to provide the employee with medical benefits on the basis of an acknowledged work injury, the three-year statute of limitations period set forth in Section 315 of the Act will toll.

If at some point, the employer chooses, for whatever reason, to stop providing medical coverage, the claimant will be afforded the benefit of an extended limitations period to file a Claim Petition seeking whatever relief the employer has refused to provide.

The diligent Administrator should be familiar with the "course of employment" rules that can arise in any number of factual contexts. Where, for example, the employee's injury occurs while the employee is attending to a personal matter on the employer's premises Wright v. Workers' Compensation Appeal Board (Larpat Muffler,

Inc.), 871 A.2d 281 (Pa. Cmwlth. 2005) or occurs immediately following the end of the employee's shift in close proximity to the employer's premises PPG Industries, Inc. v. Workmen's Compensation Appeal Board (Uleski), 542 A.2d 621 (Pa. Cmwlth. 1988); Thomas Jefferson University Hospital v. Workmen's Compensation Appeal Board (Cattalo), 601 A.2d 476 (Pa. Cmwlth. 1991); Epler v. North American Rockwell Corp., 482 Pa. 391, 393 A.2d 1163 (1978) or occurs while the employee is apparently on a special mission on behalf of the employer City of Monessen School District v. Workmen's Compensation Appeal Board (Hays), 624 A.2d 734 (Pa. Cmwlth. 1993) or occurs where the employee is participating in a company sponsored athletic event. Scott v. Workmen's Compensation Appeal Board (Packaging Corp.), 536 A.2d 492 (Pa. Cmwlth. 1980).

The Administrator should also be familiar with certain defenses such as the "violation of positive company order" rule, which provides that an injury seemingly occurring in the course of employment will be declared non-compensable where (1) the injury is, in fact, caused by the employee's violation of a particular work order or work rule issued by employer's; (2) the employee actually knew of the work rule or order; and (3) the rule or order implicated an activity not connected with the employee's work duties. See Nevin Trucking v. Workmen's Compensation Appeal Board (Murdock), 667 A.2d 262 (Pa. Cmwlth. 1995) (injury not compensable where truck driver injured while attempting to change tire of truck in violation of positive company order).

Every Claims Administrator should also be thoroughly familiar with substantive and procedural aspects of the Unemployment Compensation, Social Security "Old Age" benefits, severance pay and pension benefits, "off-sets" provided for by Section 204(a) of the Act and, of course, with the parameters of invoking the Impairment Rating

Regime contemplated by Section 306(a.2) of the Act, as recently construed by the Supreme Court in Gardner v. Workers' Compensation Appeal Board (Genesis Health Ventures), ___ Pa. ___ (2005)(the Court establishes two avenues for obtaining an Impairment Rating sufficient to modify the injured worker's weekly disability benefits from total to a capped partial disability entitlement).

Finally, the Administrator must be mindful of the many time deadlines that can apply in every Pennsylvania workers' compensation claim:

(1) Filing an Employer's Report of Injury - within seven (7) days of the date of injury - Section 438(b).

(2) Filing a Notice of Compensation Payable/Notice of Temporary Compensation Payable, Medical Only Notice of Compensation Payable or Notice of Compensation Denial - within twenty-one (21) days of the date of **injury** - Section 404.1(a).

(3) Withdrawing a Notice of Temporary Compensation Payable - within ninety (90) days of the issuance of the "NTCP" and cannot be filed later than five (5) days after the last payment made - Section 406.1(5)(i).

(4) Filing an Answer to Claim Petitions - within twenty (20) days of the circulation date of the WCJ Notice of Assignment - Section 416.

(5) Filing an Appeal Challenging a WCJ's Adjudication - within twenty (20) days of the circulation date of the WCJ adjudication - Section 423(a).

(6) Filing a Cross-Appeal Challenging a WCJ's Adjudication -- within fourteen (14) days of the filing of the opposing party's appeal or within twenty (20) days of the circulation of WCJ's adjudication whatever period is longer. Section 423(b).

(7) Filing a Petition for Review Challenging the Adjudication of the Workers' Compensation Appeal Board - within thirty (30) days of the circulation date of the WCAB adjudication - Rule 1512 of the Pennsylvania Rules of Appellate Procedure.

(8) Filing a Retrospective UR of Medical Treatment - within thirty (30) days of the receipt and medical report for the treatment at issue. Failure to comply with the thirty day time period will result in a waiver of retrospective review.

(9) Filing a Petition for Review Challenging a UR Determination - within thirty (30) days of receipt of the URO's determination - Section 127.552 of the Bureau Regulations.

An employer's failure to meet certain time restrictions can have serious ramifications. Accordingly, it is incumbent upon the Claims Administrator to diary all aspects of a workers' compensation claim in order to make certain that all deadlines are met. By doing so, he or she will make certain that a non-compensable claim is not unwittingly accepted and that needless counsel fees and penalties are not incurred.

There are a number of ways to monitor legal developments in workers' compensation law.

WHAT THE CLAIMS ADMINISTRATOR SHOULD DO:

(a) Attend seminars/work shops where legal updates are provided.
(b) Purchase a workers' compensation legal text.
(c) Request that defense counsel provide periodic updates addressing changes in the law.
(d) Ask defense counsel for clarification of a troubling legal issue.

4. "Continuing to Investigate." – Workers' compensation claims are by their very nature "organic" – they live and grow over days, weeks and sometimes years. For that reason, it is important to remember that while a claim is in litigation or in limbo, the Claims Administrator should continue to monitor and communicate to defense counsel all available means of reducing the employer's exposure including the following:

(a) Surveillance - Obtain periodic surveillance in order to determine the claimant's activity level, e.g., the claimant may have returned to work without notifying the employer, the claimant may be engaged in activity inconsistent with his or her supposed disability, the claimant may be incarcerated or may be involved in a meretricious relationship.

(b) Medical Treatment - Continue to monitor the claimant's medical treatment. By doing so, the Claims Administrator oftentimes will find evidence that the presumed work injury was not, in fact, caused by work activity, but was in fact caused by an event or condition completely unrelated to the employee's work or that the treatment being provided relates to events or conditions completely unrelated to the compensable injury.

(c) Return to Work - One of the more frustrating aspects of a work injury arises when during the course of litigation, the claimant's treating physician releases the claimant to return to work with a seemingly endless series of restrictions. It is a reality of workers' compensation life that once an injured employee becomes comfortable remaining out of work - while continuing to collect substantial weekly disability benefits - his or her motivation to return to work soon begins to wane. It is incumbent upon the pro-active employer, therefore, to make every effort to prevent the injured employee from becoming comfortable with a sedentary lifestyle. The effective Claims Administrator will take every opportunity to help create or maintain a viable modified employment program that will force the injured employee to continue to work and, hopefully, to eventually return to his or her pre-injury job. In order to properly administer such a program, the Claims Administrator must: (1) understand the technical requirements of Kachinski which continues to apply to a job offer made by the claimant's employee; (2) closely monitor the claimant's medical condition by not only reviewing reports and records, but by soliciting input either from the treating physician or examining physician; (3) convince the appropriate persons responsible to either create light-duty positions or modify existing positions to conform with typical restrictions imposed in cases involving the back, neck, upper extremities and lower extremities; and (4) make certain that the employee is offered a suitable job by the employer, if one is available **or** make certain that the employee is notified that no

suitable position is available with the employer before a Labor Market Survey is instituted on his behalf.

(c) Claimant Receipt of Benefits/Third-Party Damages – The Claims Administrator should create a system designed to monitor an injured employee's receipt of benefits – Social Security Old Age, Unemployment Compensation, Pension/Severance – or damages - in the form of a third-party award arising out to the work injury at issue - in order to take advantage of those "off-sets" and reimbursement entitlements provided by the Act. Establishing a diary that will issue a Verification form to the worker every six months would be one element of the system as would, perhaps, a regular letter to the injured worker requesting the relevant information.

IV. CONCLUSION

Although there are many problems inherent in the workers' compensation scheme, I remain convinced that through appropriate litigation, the fraudulent or embellished workers' compensation claim can be effectively defended. The ability of defense counsel to effectively represent the interests of an employer can be tremendously enhanced through the efforts of a knowledgeable and diligent Claims Administrator. Indeed, the Claims Administrator who properly investigates, properly scrutinizes, and properly monitors a workers' compensation claim can be an invaluable resource to defense counsel, one that can make the difference between effective and ineffective claims handling in a matter litigated before a WCJ.