WHAT PLAINTIFF'S LAWYERS LOOK FOR IN A CASE— AND HOW TO AVOID LAWYER INVOLVEMENT

Jay A. Gervasi, Jr.
Greensboro, NC

I. Introduction.

The vast majority of workers' compensation claims in North Carolina never involve a lawyer for the injured worker. This is, of course, what was intended by those who invented workers' compensation systems. Workers' compensation is supposed to be a simple, streamlined process for delivering benefits to injured workers, without issues of fault or damages. However, there are some cases in which legal representation makes sense. The purposes of this paper are to outline those circumstances under which representation of injured workers makes sense and to offer some opinions as to how employers can—legally and ethically—reduce the likelihood that representation will happen.

II. Basic principles of case selection and different types of law practices.

Before launching into the main subject of this paper, it is worth making mention of the impact of different philosophies that lawyers might have, regarding case selection. In the business of law practice, as in any business, an important objective is to make money. Therefore, most lawyers will tend to take cases that will result in fees for them. Plaintiffs' lawyers in workers' compensation cases are paid contingency fees, or a percentage of what their clients receive. All fees must be approved by the Industrial Commission. While there is no statutory amount set for fees, the Commission will usually award 25% of the amount of settlement or compensation obtained by the lawyer. A case in which the only issue is whether a $40 medical bill should be paid is not likely to attract much attention. Having said that, most lawyers will accept a certain number of cases that are not likely to produce desirable fees, out of a sense of civic duty or outrage. However, a lawyer who spends too much time on such cases, at the expense of those that pay the bills, will not long be n a position to help anybody.

Any sensible lawyer would prefer large, profitable cases to small ones. But there are varying philosophies as to which cases should be taken. The adherents to those differing philosophies can be divided, simplistically, into those lawyers who will accept representation in any case that can yield a fee and those who limit their practices to larger, more complex cases. Of course, reality is not so simple, since "big case" lawyers will sometimes take small cases, and vice versa, but most lawyers lean toward one end of the spectrum or the other. The reason for mentioning this difference in philosophies here is that the approach taken by a given lawyer will determine the types of cases he or she will accept, which will impact upon what can be done to avoid representation.

With lawyers who accept a greater variety of case levels, there is little that can be done to avoid representation. Such lawyers will often accept cases that do not involve significant controversy, gearing the representation toward processing of benefits. There is nothing wrong with that approach. Processing work by lawyers is common in other areas. Real estate lawyers do not generate a better litigation result for their clients than the clients could obtain on their own. They help people who are buying and selling houses to process complicated paperwork and to avoid pitfalls. The same is true of lawyers who prepare wills and other important papers. Likewise, lawyers can help injured workers through their workers' compensation claims, helping them to avoid mistakes, like settling too early or for too little, while making them more comfortable in a process with which the clients are unfamiliar.

Those lawyers will also take on denied cases that are not too complex, such as ones in which the primary issue is credibility and the medical issues are not complex. Again, there is nothing wrong with orienting one's practice toward those cases. Injured workers in those cases deserve representation, which they can rarely obtain from snooty "big case" lawyers. Large, complex cases are often frustrating, and every "big case" lawyer occasionally fantasizes about less irritating, less confusing cases. There is certainly a place for lawyers who work on them.

Just as there is little that can be done to avoid representation of injured workers in "processing-type" cases, there is little adverse message or threat to the employer in such representation. The mildly injured worker is generally going to be able to return to work without much complication, and the workers' compensation claim should not cause much consternation to the employer. If the employer is interested in deterring this kind of representation, the best way to do so is by treating the employee well enough that he or she is comfortable handling things without a lawyer. If the employer is irritated this kind of representation, some self-evaluation is in order.

The factors considered when deciding whether to accept representation in larger, more complicated cases is more complicated and will comprise most of the rest of this paper. It is a happy coincidence that the cases that involve the larger fees also generally require more sophisticated and time-consuming representation. While the "big case" lawyer may wish to believe that he or she will earn more by working on larger cases, and that is true to an extent, the overhead involved and limits on how many cases can be handled at a time shrinks the difference in income between "big case" lawyers and those who handle a more varied caseload. Thus, while "big case" lawyers are certainly attracted to their cases by money, the challenge presented by the cases is also a major factor. Again, this is an important piece of background information in evaluating whether a case will be attractive to a lawyer and how to avoid making it attractive.

III. Legal background.

Injured workers are entitled to three basic things from the workers' compensation system: payment of medical bills, compensation for total disability while unable to work, and compensation for partial disability, if the employee becomes able to work and has

either wage loss or permanent physical impairment. Usually, no fees are available for plaintiffs' lawyers from medical bills, so the focus, economically, is on compensation to the employee.

When injured workers are able to return to work without significant wage loss, but with permanent physical impairment, they are typically entitled to compensation under N.C.G.S. § 97-31. The most common situation involves a rating, in percentage terms, of permanent, partial disability, usually assigned by the treating physician, which is applied to the value, in weeks, of the damaged body part. Compensation is then due, at the same rate as the weekly rate of compensation for total disability, for the number of weeks represented by the rating. For example, a hand is worth 200 weeks of compensation. If an injured worker loses a hand, and is not entitled to more compensation under another rubric, she is entitled to 200 weeks of compensation, at the same rate she received while she was out of work. In the more common situation, in which the employee does not lose her hand, but suffers permanent damage, her doctor may opine that the employee retains a 20% loss of use of the hand. She would then be entitled to compensation for 20% of 200 weeks, or 40 weeks.

If the employee in that scenario were to accept 40 weeks of compensation in settlement of the permanent damage aspect of her case, she would retain a right to re-open her case within 2 years of the last payment of compensation, if her condition changed. In addition, she would be entitled to medical coverage after settlement that would continue until there was a two-year hiatus in medical treatment, and beyond that if ordered by the Industrial Commission. Cases arising before a date in 1994 can involve lifetime medical coverage without Commission order.

The employee and employer have the option of settling the claim with a "clincher" agreement, which ends the case forever. In the above scenario, a "clincher" would typically include payment of the rating, plus additional payment to compensate for the future rights given up by the employee. The amount is subject to negotiation, and either party can choose to fall back on settlement for the rating alone, with future rights left intact. If there is nothing unusual about the case, a case like the one described would likely be handled on a processing basis and would not particularly attract the attention of the "big case" lawyer.