Best Practices and Strategies for Investigating a Workers' Compensation Claim

Stephanie Gay, Holland Ferguson, Lawrence Baker

Investigating a potential workers' compensation claim or questionable claim (from the employer and carrier standpoint) requires thorough investigation and development of strategies for determining whether a compensable claim exists and the best method in prosecuting and defending the matter. In addition, the continuing nature of many claims requires having a strategy in place at the outset for addressing issues that inevitably arise during the life of a claim. This manuscript will focus on seven areas common in most workers compensation cases from the plaintiff attorney, defense attorney, and adjuster standpoint.

Gathering Medical Information

Plaintiff counsel perspective

As the burden of proof in most workers' compensation claims or issues falls on the claimant, it is critical to begin the process of obtaining medical evidence to support a claim as soon as possible.

Thus, at the time of initial intake, I start the process of gathering medical information directly from the claimant. I typically start with asking them where they have treated since the injury, what type of treatment have they received, etc. Our office then requests the medical records either from the Defendants pursuant to Rule 607 or we request the medical records directly from the providers, depending upon whether the claim has been accepted or is denied.

I also investigate pre-existing conditions at the time of initial intake. I typically ask the client if they have had any prior injuries or conditions affecting the body parts that were injured in the accident. If the answer is yes, I also typically inquire about whether these prior conditions were

the result of a workers' compensation claim, motor vehicle accident, etc. Depending on the length of time since this prior injury or condition, our office may also request the medical records for these injuries directly from the providers as it is not anticipated Defendants will have these documents. During this initial conversation I also usually talk to the client about the role that a pre-existing condition and/or prior claim can have on a pending workers' compensation matter.

As medical records come into our office, I review them and talk with the clients about the impact those records can have on a case- whether positive or negative. In particular, I will discuss with the client the history in the medical notes and how that aligns with the Industrial Commission filings. We will also discuss any pre-existing conditions noted in those records as well as the role that the physicians' opinions on treatment, restrictions and/or causation can play in a case. I find setting the groundwork early that the physicians' opinions are critical to case development helps to avoid surprises or confusion with my clients down the road.

In gathering medical evidence to support a case, our office also often has to determine whether the client needs a second opinion pursuant to N.C.G.S. 97-25, 97-27 and/or an initial orthopedic opinion in a denied claim. I talk to the clients about the very specific roles and limitations that these opinions and medical evidence can have in their workers' compensation case.

Adjuster perspective

- Adjuster should always send HIPAA release to claimant. Unfortunately, several providers still don't understand WC exception. Also, good to have if the injured worker has pre-existing condition(s).
- We encourage employers to identify a physician group to provide initial evaluation for non-emergent care for all employees. This can allow for receipt of medical records more quickly.

- Investigation to determine if pre-existing condition or concern injury occurred outside of workplace:
  1) Obtain medical records from injured workers' primary MD
  2) Interview claimant, co-workers and employer regarding pre-existing conditions or previous claims.
  3) Utilize medical search vendors (Master Trace or Trace America)

Defense counsel perspective

Defense counsel may become involved in a case at various stages in the life of the claim, including following a denial of compensability up to evaluating a case for settlement purposes, and everything in between. Irrespective of when defense counsel becomes involved in the case, medical records are critical for defending the various issues and properly evaluating the case for the carrier and employer.

Usually, the carrier or plaintiff counsel have already provided medical records to you related to the claim. Do not simply rely on the medical records that you are sent. A careful examination of those records may reveal pre-existing conditions, other physicians who previously treated or are currently treating claimant, and issues concerning cooperation with medical treatment being provided.

Generally, I like to request copies of full sets of medical records from each known medical provider who has treated, or is treating, claimant during a workers compensation claim. Normally, we also send discovery to plaintiff counsel asking them to identify all of plaintiff's treating physicians, physicians who may have treated plaintiff for any condition in the past three years and any physician who may have treated plaintiff for the same body part within the last 5 to 10 years, depending on the case. We also request HIPAA releases since, as noted above, many doctors still don't understand that workers compensation is an exception to needing such release.

As additional medical records are received, they must be scoured to determine if there are other medical providers that need to be contacted to obtain records, indications of plaintiff not cooperating with medical treatment, information related to plaintiff's moving toward maximum medical improvement and any restrictions that may be retained on a permanent basis that could impact return to work issues. Also note that any additional medical records obtained should be sent to plaintiff counsel and the adjuster so that everyone has a complete copy of medical information as the claim proceeds forward.

In some instances, communication with the doctor to address issues identified in the records may be needed. If such communication is necessary, it is imperative that counsel comply with NCGS §97–25.6. In addition, issues regarding second opinion evaluations and independent medical examinations may arise and, if so, it is imperative that defense counsel possess all possible medical records which could assist in obtaining a thorough opinion from the doctor.

Affirmative Defenses

Plaintiff counsel perspective

Investigating affirmative defenses to a claim such as intoxication and/or material misrepresentation pursuant to N.C.G.S. 97-12.1 begins at the same stage as gathering medical evidence noted in part I- initial intake. I find that the earlier I start exploring these issues with clients, the better they understand the role that these issues can play in their case.

With regard to intoxication, it is Defendants' burden to establish that the drug or alcohol use lead to intoxication and that the intoxication was the proximate cause of the injury. In investigating this issue, I start by trying to determine if Defendants can establish that the claimant was intoxicated or under the influence at the time of the injury. To that end, I typically ask the following questions of my client: When was the drug test conducted? How much time had passed from the time of the

incident to when the drug test was conducted? What type of drug test was done, urine or blood? What were the results, i.e. did you test positive for marijuana? Opiods? etc. What is the timing of the drug test in relation to medical care? Were any medications administered immediately after the injury which may have caused the positive test results? I also look for other evidence to argue that the intoxication was *not* the proximate cause of the injury. Here, the mechanism of injury can be helpful to claimants. For example, if my client was in a motor vehicle accident that was the result of being rear-ended by another driver, Defendants may not be able to establish that the intoxication was the cause of the injury because the driver that rear- ended Plaintiff was at fault for the accident.

As to material misrepresentation, and as noted above, I ask a lot of questions of my client at the time of intake to determine whether this may be a viable defense to the claim. From a claimant's perspective, the most important piece of evidence here is a full duty release between the prior condition and the current workers' compensation claim. If there is one, then Defendants will not likely be able to establish that there was a material misrepresentation. Further, it is also critical that Defendants be able to prove that the misrepresentation is causally related to the injury sustained. So, I will also look for ways to argue that even if there was a misrepresentation that the misrepresentation was *not* causally related to the injury sustained. Like intoxication cases, looking at the mechanism of injury can be very important here.

Adjuster perspective

Intoxication

- Employer should require post-injury drug/alcohol testing. Some may consider a random drug testing policy and pre-employment testing.
- Important to have doctor/urgent care to provide initial care for injuries not requiring ER treatment.
- Employer should contact adjuster immediately if MD or hospital refuses to do the drug test.

- 5 panel tests: THC, PCP, Cocaine, Opiates and Amphetamines
- 7 panel tests: THC, PCP, Cocaine, Opiates, Amphetamines, Benzodiazepines and Barbiturates
- 10 panel tests: THC, PCP, Cocaine, Opiates, Amphetamines, Benzodiazepines, Barbiturates, Methadone, Propoxyphene and Quaaludes.
- Urine vs. Blood – most toxicologists prefer blood
- Expert Witness (toxicologist)

Misrepresentation

- Most common I see:
  1. Misrepresentation of the employee's ability to perform a physically demanding job due to restrictions from a previous injury.
  2. Provide false documentation in the form of SS card, DL, Medical Card.
- Recommend pre-employment physicals & FCE's both of which can be done after job offer is made.
- Improve vetting process for employee hires to include E-Verify, DMV, references.
- Adjusters should ask questions of employer and employee to address these issues during course of investigation.
- Denial can only occur if 1) the employer relied on the material misrepresentation and would not have hired had they known the information was false 2) the material misrepresentation had a causal connection to the injury.

Defense counsel perspective

Intoxication (NCGS § 97–12) and misrepresentation (NCGS § 97–12.1) are the most common affirmative defenses raised in workers compensation claims. However, don't forget that an employee's intent to injure himself **or another** may also bar recovery. In addition, NCGS § 97–12 does allow for a 10% reduction of benefits if the employee fails to follow a safety rule which has been adopted by the employer **and approved** by the commission.

In order to determine whether an intoxication defense might apply, it is again imperative to obtain all of the medical records, including any results from lab tests performed. Generally, by the time defense counsel is involved in the case, any ability to perform alcohol or drug testing is long gone. As noted above by the adjuster, testing of blood samples is the preferred method of testing, but might not have been performed. If there is indication of potential intoxication, retention of experts may be necessary. In addition, it is important to properly question lay witnesses as to observations regarding plaintiff's actions and activities prior to injury. In addition, there may be other evidence available besides the drug test result to strengthen the affirmative defense.

Remember, a test result consistent with intoxication or under the influence from a medical test generally accepted in the scientific community creates a rebuttable presumption of impairment from the use of alcohol or a controlled substance. Also keep in mind that to the intoxicant cannot have been supplied by the employer or supervisor.

In order for the misrepresentation defense to apply, defendant must show a willful misrepresentation that the employer relied upon in hiring the employee, which has a causal connection to the injury. It is imperative that early communication with the employer is made to determine if this defense may apply. When responding to a hearing request, it is best to include all other available defenses that may become available to protect raising this defense at a later date if information is obtained regarding misrepresentation.

Normally, obtaining the entire employment file is necessary for responding to discovery and request from plaintiff counsel anyway, and defense counsel should be certain to ask for any pre-employment physical examinations or questionnaires that may have been completed. Keep in mind that certain conditions that may have caused the accident (as opposed to the injury) might also apply. For example, an employee driving a truck who has had prior episodes of seizures or blacking out, but does not include that on his DOT physical questionnaire, may be prohibited from any recovery.

You also need to discuss with the employer the issue of whether they would have still employed the claimant even if they were aware of the misrepresentation.

Average Weekly Wage Issues

Plaintiff counsel perspective

At the time of intake, it is important to begin the process of identifying any potential average weekly wage issues. I start by asking the hourly rate of pay and hours worked or salary of the claimant. If the claimant worked in temporary or contract employment, we also start the process of discussing how the Tedder v. A&K Enterprises case can impact the calculation of their average weekly wage. I often look for ways to distinguish the facts of Tedder from the facts of the case I have at the time of intake. This usually involves analyzing whether the claimant was aware that the assignment was a temporary assignment of known duration vs. an assignment that though through a temporary agency could result in long-term employment.

I also routinely investigate whether the average weekly wage calculation of Defendants is correct. This involves obtaining a copy of a properly completed Form 22 as well as all wage documentation to support the Form 22. I have found that some employers omit overtime and certain bonuses from the calculation of average weekly wage so the underlying wage documentation is key to showing the carrier that there is an error on the Form 22 and therefore an error in their calculation of the average weekly wage.

Adjuster perspective

How can you compute a fair average weekly wage and compensation rate when the injured worker…? Most common issues we see arise due to one of 3 factors.

1) Injured employee is hurt within the first few days of employment
2) Injured worker is an employee of a subcontractor
3) Employee has been paid in cash
    - Is there a similar employee? Someone that performs the same job and the same wage.
    - Negotiate average weekly wage.
        - If business is seasonal or dependent on weather, obtain attendance information on another employee and use those dates with agreed rate of pay of injured employee.
        - Seek industry average rate of pay for occupation.
        - If employee worked previously in the same position with another employer, ask for pay stubs or W2 from previous employment.
    - Contact the subcontractor to complete F22
    - Obtain payment stubs or tax info from injured worker directly if he works for sub
    - Annual Social Security Statement

Defense counsel perspective

Even if a Form 22 wage chart has already been completed, or if disability benefits are already being paid, it is still important to obtain wage information from the employer. Often, the employer will only have weekly pay stubs or other information obtained from a payroll service without including the actual days worked. While the Form 22 is the preferable method of calculating the average weekly wage, there is nothing in the statute requiring use of that Form. However, the employer must be able to verify that plaintiff has not missed more than seven consecutive days during any 52-week period prior to the date of injury. In addition, complete wage and payroll records are needed if a Form 22 is not going to be completed.

Issues involving employees who have not worked a full year prior to injury need to be addressed as well. Information regarding a similar employee, or issues under Tedder, may arise as to whether or not the average weekly wage has been previously calculated correctly. As a defense attorney, you can be certain that plaintiff counsel will be seeking information regarding wages as soon as you become involved in the case, even if the case has

previously been accepted and benefits are being paid. Early resolution of any issues regarding wages is imperative in properly evaluating the exposure on the case for your client and in attempting to negotiate resolution of the case with plaintiff counsel.

If the claimant was working for a subcontractor, but is covered under your general contractors policy, be certain to coordinate obtaining information from the subcontractor with the general contractor so that you are not "stepping on any toes" in the business relationship.

In some occupational disease claims (asbestos, for example), a Social Security earnings statement may be needed to determine the correct average weekly wage. Also note that, in some instances, benefits such as lodging and meals may have to be included in calculating the average weekly wage.

Gathering Lay Witness Evidence

Plaintiff counsel perspective

This also begins at the initial intake stage by asking the claimant whether there are any eyewitnesses to the incident, any supervisors to whom the claim was reported as well as what any other co-employees may or may not know about what transpired. If possible, I always try to obtain the full names of each of these individuals from the outset. I will also try to obtain any additional lay witness information and/or corroborate the information I already have through interrogatories sent to Defendants. The Form 19, incident reports and other employment file materials obtained through the Rule 607 process can also have very helpful information as it pertains to lay witnesses.

Adjuster perspective

- Encourage employer as a regular course of business to obtain signed written statements from witnesses to accidents.
- Adjuster should contact witnesses for recorded statement

- Depending on the extent of injury and number of witnesses, adjuster should consider an on-site visit with face to face interviews.
- Interview of witnesses should include address and contact information in the event the witness changes employment.
- The adjuster should be able to "draw a picture" of how accident occurred after interviewing claimant and all witnesses. If you don't understand what happened, then you have not asked the right questions.
- Other information from witnesses:
    - claimant's demeanor – anything different/unusual today as compared to yesterday.
    - Known conditions or injuries
    - Drug/Alcohol use
    - Proper use of safety equipment
    - Intentional Injury

Defense counsel perspective

In gathering additional evidence, the **starting** point is information that the adjuster has obtained in completing their investigation into the claim. This likely will include a recorded statement of the claimant, as well as potential interviews with the employer and, possibly, other witnesses. Again, this is simply the starting point for your investigation. Continued contact with the employer is recommended, including obtaining any investigative file related to the accident. If any written statements were prepared by the claimant or others, those need to be obtained. In addition, sometimes, the employer has taken photographs or gathered other evidence (such as surveillance video) which may be useful and which the adjuster may have overlooked because they were unaware it existed.

If there is any question regarding the accident itself, I prefer to meet in person with the employer and the witnesses who still work for the company. In addition, I like to visit the job site where the accident occurred to get a clear picture of exactly what happened. Sometimes, obtaining photographs at that time can also be useful at a later hearing. A job site visit is also useful if issues regarding return to work arise later, especially in cases involving permanent restrictions. Contact with the employer can also provide useful information in defending a denied claim, especially where

there are questions regarding the circumstances of the accident and when it was reported.

In cases involving serious injury, there may be additional investigation performed by outside agencies such as OSHA or a police or fire department. Be certain to obtain that information as well and discuss with your employer any fines that have been assessed and whether they were paid or contested.

Employment Relationships/Coverage Issues

Plaintiff counsel perspective

The first step to analyzing an employment relationship/ coverage issue is determining whether the claimant may qualify as an independent contractor rather than an employee. To that end, I review the factors set forth in Hayes v. Board of Trustees of Elon College and ask questions as to the nature of the claimant's employment with the alleged Defendant-Employer. They key here is determining whether the employer had actual control over the work being done by the claimant at the time of the injury. If there was sufficient control then the claimant should qualify as an employee rather than an independent contractor.

In addition, I review the statutory language of 97-19 with the claimant and send discovery to Defendants – both the general contractor or statutory employer and the subcontractor. The discovery is specifically designed to determine whether the general contractor followed the statutory requirement of obtaining a certificate of insurance from the subcontractor prior to subletting the work as well as whether the subcontractor had a policy of insurance in effect at the time of the injury.

Adjuster perspective

- Independent Contractor vs. Direct Employee

- is engaged in an independent business, calling or occupation
- is to have the independent use of his special skill, knowledge, or training in the execution of the work;
- is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis;
- is not subject to discharge because he adopts one method of doing the work rather than another;
- is not in the regular employ of the other contracting party;
- is free to use such assistants as he may think proper;
- has full control over such assistants; and
- selects his own time.

Other important information for adjuster to determine if claimant is an independent:

- Method of payment (hourly tend to be employees)
- W2 vs. 1099 – some employers try to work around the law to avoid purchasing WC coverage or they don't want the burden of withholdings. Never assume a 1099 worker is an independent.
- Who supplies the materials, tools or other service equipment?
- Does the injured worker do jobs for other contractors?

- **Statutory Employee (G.S. 97-19)**
  - Employee of an uninsured contractor.
  - Employer should never allow subcontractor to begin working before obtaining COI.
  - Employer should require COI come from an agent/insurance carrier as subcontractor could forge or falsify a COI. This also allows agent to record all certificate holders who need to be notified should policy cancel.

- **Coverage Issues Due to Policy Cancellations (I see these 2 commonly)**
  1) Cancellation for nonpayment of premium
  2) Willful failure by insured to institute reasonable loss control measures

- Insured must be given written notice of cancellation of not less than 15 days before the proposed effective date of cancellation.
- Notice must be given by registered or certified mail with return receipt requested. ****Effective 7/1/18 *notice of intent to cancel given by registered or certified mail shall be conclusively presumed completed 3 days after the notice is sent if, on the same day that notice is sent by registered or certified mail, the insurer also provides notice by first class mail and by electronic means if available as defined in G.S. 58-2-255(a) to the insured and any other person designated in the policy to receive notice. Any such supplemental notice given by electronic means shall be effective for the limited purpose of establishing this conclusive presumption.*
- GS 58-2-255 (a) defines electronic communication as delivery to an electronic mail address or an electronic account which a party has consented to receive electronic communications.
- Notice must show the precise reason for cancellation

Defense counsel perspective

If you are alerted to a coverage issue, work with the adjuster to make certain that issue is resolved as soon as possible from the start of your involvement in the case. Be certain that any purported cancellations were properly obtained, if the allegation is that the policy was canceled. In some instances, there may be issues regarding whether the policy was properly obtained and the information provided in obtaining the policy was fraudulent. Generally, there will be separate defense counsel involved in those two issues, one representing only the carrier and one representing only the employer. If coverage issues arise after you have been retained to represent both employer and carrier, you may need to withdraw your representation of either depending on the circumstances.

Issues regarding whether the claimant is alleged to be an independent contractor must be fleshed out at an early stage as well. Factors identified by the other presenters in this manuscript need to be considered in determining whether the individual was truly an independent contractor or really an employee. Generally, it comes down to the amount of control

exercised by the employer. If there are any written documents setting out the relationship between the employer and the claimant, those need to be obtained and reviewed, although that alone will not answer the question, and additional information must be gathered.

Subcontractor issues may also arise, if you are retained represent a general contractor. Be certain to review the rules under NCGS §97–19 for establishing when a claimant may be considered a statutory employee. Please keep in mind that NCGS § 97–19 only provides protection for *employees* of the subcontractor who did not have insurance and **do not apply to the subcontractor himself**. This is one area that many practitioners and adjusters do not fully understand.

Return to Work/Termination Issues

Plaintiff counsel perspective

In investigating return to work issues, I first determine whether the claimant is at maximum medical improvement yet. If the claimant has not reached maximum medical improvement then the light duty being offered by Defendants must be approved by the treating physician and it must be with the employer of injury. The position can be make- work or noncompetitive employment. By contrast, if the claimant is at maximum medical improvement, then the position must not be make-work, be within 50 miles of the claimant's residence at the time of the injury or current residence if the claimant had a legitimate reason to relocate and the position must consider all of the employee's physical and mental limitations. N.C.G.S. 97-2(22). I also routinely argue that even if the claimant is at maximum medical improvement Defendants have to seek approval of the position by the treating physician before Plaintiff can be compelled to return to work.

When a claimant is terminated during the pendency of the case (usually while working in a light duty capacity), I begin by analyzing why they were terminated. The following questions routinely come up here: (1)

Was the employee warned for this before his injury? (2) Was there any warning for this after the injury? (3) How many warnings were given both before and after the injury for this type of issue? And (4) how interrelated are the issues that lead to the termination and the injury itself? i.e. if the employee was terminated due to absenteeism, were the absences related to his compensable injury? Or not?

I then follow the Seagraves v. the Austin Co. of Greensboro analysis and encourage my clients to start looking for other light duty work. I also ask that they keep a record of the places that they have been looking for work as this can be very probative evidence of ongoing disability due to the injury and can result in temporary total or partial disability benefits being awarded by the Commission.

Adjuster perspective

In an effort to minimize return to work issues, we try to assist our insureds in developing the following:

- Job Descriptions/Video of Job with the assistance of a vocational expert
- Light Duty Programs
- Utilization of occupational clinics or urgent care facilities. Many of these clinics will meet with the employer to understand the nature of their business and work availability after injury.

Terminations:

- The adjuster should never give legal advice regarding termination of an employee. Encourage contacting an Employment lawyer and following guidelines as set out in employee handbook.
- WC policies exclude defense and compensatory damages for terminations due to an employee alleging wrongful discharge under the Coverage B General Liability section of the policy. I always recommend the adjuster obtain a coverage opinion prior to denying the policyholder legal representation under Part B.

Defense counsel perspective

Return to work issues can be particularly complex, depending on when the defense counsel gets involved in the case. If plaintiff has not yet reached maximum medical improvement, any light duty job that the employer makes available, and that is approved by the physician, is suitable employment. Alternatively, if plaintiff has reached maximum medical improvement, the job does not have to be approved by the physician, but the job must be one that is available in the competitive market and which can be performed within plaintiff's physical limitations. Therefore, obtaining job descriptions (preferably both written and video), as early as possible, of plaintiffs pre-injury job is important as a first step in deciding the type of work they can be performed by plaintiff within any restrictions that are retained. If plaintiff cannot return to their prior position, any job descriptions of jobs being offered are also useful.

Often, both claimant and the employer wish to end the work relationship as part of a settlement of the workers compensation claim. If you become aware that this will be needed, you should alert plaintiff counsel as early as possible to make certain they can discuss this with their client.

Especially in cases where claimant has been out of work for an extended period of time, the employer is no longer able to keep the job available while claimant is recovering from the injury. In some circumstances, because of that, claimant may be terminated from employment.

Defense counsel may often be contacted by the employer asking about whether or not they can terminate an employee and what the impact will be regarding their workers compensation claim. My consistent advice to employers is that they should treat the claimant as they would any non-injured employee. Therefore, if a claimant has gone back to work or is still working, but had a pending workers compensation claim, it should not impact how the employee is treated in any regard. By treating all employees the same, irrespective of whether they have a workers

compensation claim, the employer avoids any issues a claimant could raise under Seagraves.

Third Party Claims/Subrogation

Plaintiff counsel perspective

In dealing with and investigating third party claims, I often rely on other colleagues at my office to analyze whether there is a third- party claim at all. Some of the questions that arise here from our perspective are: (1) is there even a third-party that could be found liable? i.e. this cannot be a co-employee and if they were working through a temporary agency, then there may not be a viable third-party to sue; (2) was someone negligent? (3) did that negligence cause the injury?; and (3) is there evidence of contributory negligence? as this could be a bar to the claim.

Subrogation from my perspective is not a primary concern – it does routinely come up during settlement discussions but because I rely on other colleagues at my office to handle the third- party claim, I very rarely investigate or address the third party claim and their subrogation rights pursuant to N.C.G.S. 97-10.2 during the pendency of the workers' compensation matter.

Adjuster perspective

- The adjuster's toughest job may be explaining to the insured that their best day is getting 1/3 of the lien back.
- Investigation should include the gathering of police reports
- Determine if experts are needed (i.e. Engineers, accident recreation team)
- Statements from witnesses and injured worker
- Consider visiting accident site for pictures or video
- Remember 3rd party claim could take years, so adjuster should document well in preparation of possible litigation

Defense counsel perspective

Information regarding potential subrogation and third-party liens should be obtained as soon as possible when defense counsel is involved in the case. First, it must be determined if a different adjuster is handling the subrogation matter, as opposed to the one handling the underlying workers compensation claim, as various carriers handle that issue separately. It is usually best to try and address both the underlying workers compensation claim and the third-party lien issue at the same time, if possible, and if claimant is represented by the same firm or attorney on both issues.

Information regarding the potential limits of coverage in the third-party action, as well as the strength of any third party claim will factor into evaluating the strength of recovery of the subrogation lien. In addition, it is imperative to know if the workers compensation claimant is intending to pursue a third-party action against potentially negligent parties.

Defense counsel should be aware of, and make sure the adjuster is aware of, the statute of limitation for pursuing any third-party action. Note that NCGS §97-10.2 allows the employer to file suit in a third-party action only until 60 days prior to the statute of limitations, after which the employee retains the exclusive right.

Make sure the carrier and employer are aware that it is unlikely they will ever recover the full amount of the workers compensation lien in any third-party recovery since attorney's fees and costs incurred by plaintiff in pursuing the third-party action will be deducted. In addition, plaintiff can petition the Superior Court judge to reduce or eliminate the workers compensation lien once a settlement or judgment is obtained.

Therefore, negotiating the lien at the same time as trying to resolve the workers compensation claim is of benefit to all parties involved.