

### Fact Scenario for NCIC Conference

#### Ethical Interplays between Attorneys, Claims Adjusters, and Rehabilitation Professionals

Top Shelf employs Joe Worker when he falls and feels low back pain. The employer calls EMS who transports Joe to the hospital. The employer calls We Pay Claims Carrier to report the injury. Debbie Denial, the adjuster with We Pay Claims, immediately assigns a NCM from Quid Pro Quo Rehab to meet Joe at the hospital. The hospital diagnoses Joe with a lumbar strain and refers him to an orthopaedist.

Debbie Denial calls Joe the next day to take a recorded statement to determine if the claim is compensable. Joe asks, "Do I need a lawyer before I give a recorded statement?" The adjuster replies, "Why would you need a lawyer? Do you have something to hide?" Joe gives a recorded statement. The adjuster advises that We Pay Claims has accepted Joe's case and NCM Ratched with Quid Pro Quo will schedule an appointment with an orthopaedist. The adjuster and the NCM fail to file a Form 25N. The NCM also forgets to give Joe a copy of the Rehab Rules.

The NCM advises Joe of the appointment date with Dr. Cuts A. Lot. The NCM asks Joe to complete a Form 25C. During casual conversation, the NCM asks Joe if he has ever had a back injury. Joe replies that he had back pain a couple of years ago, but his pain resolved within a week or two. The NCM then asks Joe who treated his back pain and Joe responds Doc N.A. Box. Per the adjuster's standing request, the NCM asks Joe to sign a HIPAA release that the NCM sends to Dr. Box to request Joe's prior back records, which she provides to the adjuster.

Dr. Cuts A. Lot secures a MRI that shows a bulging disc. After reviewing the MRI, Dr. Lot recommends a multi-level fusion. The adjuster declines to authorize surgery and decides to schedule an IME with Dr. Pro D. Fence. Several weeks go by but an IME is not scheduled. The NCM follows-up with the adjuster to ask about the IME. During the conversation, the adjuster says that a \$100 Visa gift card from Quid Pro Quo has not arrived as thanks for referring Joe.

Joe becomes frustrated with his increasing back pain and the delays in scheduling so he hires an attorney, G. Money Bags. Joe's attorney convinces the adjuster to schedule an IME. After spending 15 minutes with Joe, Dr. Pro D. Fence does not recommend surgery and instead recommends conservative treatment to include physical therapy.

Joe has been out of work since the accident and has been receiving TTD benefits. During a routine phone call, Joe casually mentions to his attorney that he has been "helping out" at a friend's garage for several weeks. Joe says that he's not doing anything outside his work restrictions and that he's "really not working." He says he does odds-and-ends and that his friend pays him \$50 each day in cash. Joe also posts pictures of himself hanging out at the garage on Facebook. Joe's attorney tells Joe to stop "helping out" and to delete the pictures immediately.

As the claim progresses, tensions grow between Joe, his attorney, and the adjuster. Joe is upset because the adjuster does not pay his weekly TTD benefits consistently – some checks show up on Monday and others don't arrive until Friday. Joe is convinced the adjuster is purposefully trying to frustrate him so he'll settle his case.

Eventually, a weekly TTD check is more than 14-days late. Joe's attorney calls the adjuster to seek an automatic 10% penalty. The adjuster apologizes and explains that Joe fell off "auto pay." The adjuster claims to be swamped and says this was just a minor oversight. The adjuster tells Joe's attorney that We Pay Claims will issue a check immediately. The adjuster begs Joe's attorney not to file a motion for a 10% penalty because the adjuster's new supervisor will be angry. Wanting to preserve an otherwise good relationship with the adjuster, Joe's attorney, without consulting Joe first, agrees not to file a motion.

Citing increasing financial difficulties, Joe asks his attorney to loan him \$3,000 as an advance on settlement. Joe's attorney is concerned that Joe will retain new counsel if Joe's attorney does not loan him money, so Joe's attorney buys time by telling Joe the partners of the firm We, Make & Money need to decide about the loan.

As the case continues and tensions mount, the adjuster calls Joe's attorney and asks about settlement. The adjuster says that if a settlement can't be reached, the carrier will "voc the daylight" out of Joe. Joe's attorney talks with Joe about settlement. At his next physical therapy appointment, Joe asks the NCM about the value of his claim. She says, "Well, in the past, patients who have been recommended for surgery don't go back to work and settle their claims for hundreds of thousands of dollars. But, I don't know how much your claim is worth."

The parties schedule a voluntary mediation so the adjuster retains defense counsel. Defense counsel, M. L. Practiss, serves discovery regarding Joe's education and work history. Discovery is due two months before mediation. Joe's attorney asks defense counsel for a 10-day extension of time. The defense attorney asks the adjuster about the extension, but the adjuster refuses. The defense attorney advises Joe's attorney that an extension will not be granted. Since the adjuster never filed a Form 60, the defense attorney decides to contact witnesses. The defense attorney, who represents the employer on a regular basis, is aware that one of the eyewitnesses to Joe's fall is represented by counsel in a different matter. The defense attorney calls the eyewitness and asks only about Joe's fall; the defense attorney does not ask the eyewitness about his case. As part of the investigation, the defense attorney also calls Drs. Cuts A. Lot and Pro D. Fence to ask about their causation opinions. The defense attorney never tells Joe's attorney about those discussions.

Joe's attorney meets with Joe and his wife to discuss claim value. Joe's wife seizes control of the meeting. She does all of the talking; Joe hardly says a word. After Joe's attorney talks about the value of the case (which is in the neighborhood of \$100,000), Joe's wife angrily responds that the evaluation is too low and accuses Joe's attorney of "working for the insurance company." Joe's wife proclaims, "We won't settle for anything less than \$300,000!" Joe's attorney explains that \$300,000 is beyond Joe's "best case" recovery under the WC Act, and repeatedly tries to get Joe – and his wife – to understand what is and isn't recoverable. Joe's attorney explains the value of ongoing TTD benefits and further explains that it would be helpful to know if the employer can accommodate Joe's future work restrictions. Joe's attorney cannot contact the employer since counsel represents the employer. Joe notes he has a good relationship with his employer and can ask the employer about his return to work options. Joe's attorney replies, "That would be awesome. Please let me know what the employer says."

After the meeting, Joe's attorney sends Joe an email to summarize the factors considered in the claim evaluation and reiterates a settlement range of \$100,000. Joe's attorney sends the email to Joe's only email address – his work email. Unbeknownst to Joe or his attorney, the employer has been monitoring Joe's emails to make sure the employer does not miss important business while Joe is out of work. When the employer sees the email from Joe's attorney, the employer forwards the email to defense counsel, who reviews the settlement evaluation.

The defense attorney is 20 minutes late for mediation. During the opening statement, the defense attorney suggests that Joe faked his injury and notes that neither of the doctors will give a causation opinion so the case is not compensable. Joe's attorney is furious, but the mediator encourages Joe's attorney to move forward. During negotiations, Joe's attorney grows increasingly frustrated with the nickel-and-dime offers of the defendants. Joe's attorney asks the mediator if the mediator has spoken to the adjuster. The mediator advises that the defense attorney always asks the mediator to leave the room when contacting the adjuster. Joe's attorney suspects that defense counsel is not advising the adjuster of each offer and counteroffer. Joe's attorney reaches a breaking point and asks to speak with defense counsel privately. The mediator hears Joe's attorney screaming at defense counsel: "You are the sleaziest, most unethical, dag-gum, blankety-blank attorney in the State." The mediation impasses.

Following mediation, and after several months of late TTD checks, Joe asks his attorney about settlement. Because Joe's attorney has not spoken to defense counsel since mediation, Joe's attorney sends another settlement offer via email to the defense attorney with a "cc" to the adjuster. Upon seeing the adjuster copied on the email, the defense attorney becomes incensed, calls Joe's attorney, says an array of nasty things, and threatens to report Joe's attorney to the State Bar.

Eventually, the defense makes a final offer of \$50,000. Joe's attorney tells Joe about the offer but strongly advises Joe *not* to accept. Joe expresses a strong desire to accept the offer. Joe's attorney tells Joe that the offer is well below the claim's value and that he would be "crazy and stupid" to accept the offer. Nevertheless, Joe instructs Joe's attorney to accept the offer.

Joe's attorney immediately calls defense counsel to accept the \$50,000 offer. The defense attorney begins to draft a clincher.

The next morning, Joe and his wife call his attorney to advise that Joe has changed his mind and no longer wants to settle his case. Joe's attorney immediately calls defense counsel and advises that the "deal is off." The defense attorney says the parties reached a verbal and binding agreement and defendants will file a motion to enforce the settlement with the Industrial Commission. After the call, Joe's attorney begins to wonder if he can continue to represent Joe.