Every adjuster who has been handling workers compensation for a while has heard a disgruntled employee say, “I am going to sue that doctor.” As Americans have some of the best medical care in the world, a lot of people expect their doctor to make their pain go away and their injury heal without any residual. Often that is not the case. Even the best doctor will not alleviate all medical conditions.

An employee’s failure to recover to pre-injury physical condition is not medical malpractice. For medical malpractice to exist, there must be some degree of professional negligence. Other than the physicians, there can be medical malpractice by hospitals, therapists, dentists, nurses, chiropractors, and other medical providers. (WCxKit)

Four qualifications to designate medical malpractice that could impact a workers compensation claim:
1. The doctor, hospital, or other medical provider is assigned to provide the medical care requested.
2. The doctor, hospital, or other medical provider has failed to provide the medical care at the same level of medical expertise that another medical provider in the same medical specialty would have provided.
3. Failure to provide the expected medical care resulted in an injury to the employee.
4. Failure to provide the medical care at the appropriate level resulted in damages (if there are no financial damages the employee will be unable to find a lawyer to pursue the claim).

In those instances where a surgeon performs a laminectomy that fails, or the employee develops reflex sympathetic dystrophy or fibromyalgia, it does not mean there is medical malpractice. It usually means the employees physical condition was not sufficient to withstand the stress the surgical procedure caused his body.

However, in the rare cases when a medical provider gave inferior medical service, the employee is right to obtain an attorney to pursue a medical malpractice claim. Unfortunately, the attorney will usually talk the employee into allowing the attorney to also represent them in their workers’ compensation claim.

When the attorney for the employee starts pursuing a medical malpractice claim in conjunction with the workers’ compensation claim, it is absolutely essential that the adjuster and nurse case manager work closely with a utilization review specialist. The reason for this is to keep the medical care for the workers’ compensation claim, and the cost associated with it, separate from the cost of the medical care needed to correct the alleged medical malpractice. The reason to do this is to document what can be recovered through subrogation. If the adjuster does not carefully document the additional cost due to the medical malpractice, the workers compensation insurer can get shut out of any financial recovery from the professional liability insurer when the medical malpractice claim is settled.
All states will compel the workers compensation insurer to pick up the cost of additional medical care needed due to a failed effort to medically treat an injury. The workers compensation board or industrial commission will not get involved in the question of medical malpractice.

Because damages an injured employee can recover from a medical malpractice will greatly exceed the potential recovery for the workers compensation claim, the attorney handling a medical malpractice claim will generally spend most of her time and attention on the medical malpractice claim. However, to maintain the value of the medical malpractice claim, the attorney will delay the settlement of the workers compensation claim for as long as possible. This has a negative impact on the workers compensation claim as the longer the claim stays open, the more it will cost.(WCxKit)

If you hear an employee threatening to sue the doctor over “medical malpractice,” suggest to the adjuster and to the employee the need for another doctor to evaluate the employee. When the second doctor evaluates the employee’s medical condition, in 99 percent of the cases they will find the first doctor acted with appropriate medical care.

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