

**CASE AND CLIENT EVALUATION / HOW TO AVOID AND REDUCE STRESS  
INHERENT IN REPRESENTING INJURED WORKERS**

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An undeniably unpleasant connection exists in the Applicant's attorney's assessment of a client's injury and case valuation: the more gruesome the injury, the more the case is worth. A surgically fused disc is worth more than back strain; a neck is worth more than a knee; an amputation is worth more than a small slice. Legislatures have recognized this fact and assigned valuations. Workers comp attorneys also have a curiously ambivalent attitude toward clients inclined to mitigate their damages (i.e., those who return to work soon after their injury or fight through the pain and continue to work). While these clients are admirable as social role models, such laudable mitigation substantially diminishes the value of a claim.

My own screening technique involves the use of an intake checklist (attached). My questions, in descending order of importance, are as follows:

1. Is the client currently represented by a lawyer? If so and they are "lawyer shopping", I routinely will not handle the case. Additionally, I prefer to have one enemy (the insurance carrier), not another adversary attorney sitting on the sidelines claiming a chunk of the fee.
2. How did the case get to me? If lawyer referred and there is a fee division, while that does not diminish the advocacy, it obviously reduces the amount of the attorney fees. If a former client or other referral, the claim routinely has enhanced value. If

Yellow Pages referral source, I screen more assiduously. I also ask about how many others they have contacted to assess whether a dozen other lawyers have already characterized the claim as a “loser”.

3. Is the client still working? If they are still working, the likelihood is that they do not have a physician-diagnosed condition serious enough to warrant a disability.
4. Is the injury scheduled or unscheduled? Many states differentiate between scheduled (essentially limb injuries) from unscheduled (essentially back and torso injuries). The latter allow a loss of earning capacity recovery in the event of an inability to return to work, while the former are limited to functional permanency. For example, in Wisconsin a back injury with a 10 pound permanent restriction and 10% permanent disability is worth \$18,400.00. A shoulder injury with the same 10% permanent disability and a 10 pound restriction which precludes the employee from returning to work would result in \$9,200.00. However, the back injured employee would be able to be referred for a loss of earning capacity. (Assume a \$20/hour carpenter who can now only work at a \$10/hour job, the recovery would be for a 50% permanent partial disability, or \$90,000.00, while the shoulder injured carpenter who could not return to work would be limited to his \$9,200.00.
5. Is there a doctor who currently substantiates a disability from work? If not, and the employee is doctor shopping, the claim has a diminished value and I routinely will not take the case until the employee has found a doctor who will substantiate the disability. I do not refer clients to doctors. An office note indicating “client seen at the request of her attorney” diminishes (in the eyes of a judge and insurance carrier) the doctor’s objectivity, credibility and the value of the claim.

6. What offsets apply to the claim?

If a client is off work on a disability, offsets may include:

- Social Security Disability.
- Unemployment Compensation.
- Long Term Disability.
- Short Term Disability.
- Public Assistance Programs.
- Child Support.
- Pension Retirement Benefits.
- Third Party Accident Recovery.

While these collateral benefits will not preclude a recovery, they substantially diminish the amount of the recovery available to the client (and hence to the attorney). Careful consideration should be given to whether or not pursuing the worker's comp claim results in **any** net recovery for the claimant. Particularly in the case of third party accident recoveries, careful explanation of your State's distribution formula should be explained so that the client is not surprised when he has to pay back to the worker's compensation carrier out of the proceeds of the third party recovery.

7. Explore the mechanism of injury specifically.

The more vague and imprecise the mechanism of injury, the less likely compensation will result. Compare the client's rendition of the injury to the emergency room records and the treating physician records. The specific complaints made in the emergency room to the ER nurse/physician are often the most

significant history as determined by an Administrative Law Judge. ALJs routinely indicate the best history is given at time of crisis (first doctor visit, emergency room). Find out whether the employee was driven by ambulance or a co-worker or a family member and obtain information with regard to the history of injury from those sources. Through reviewing medical records, an analysis of the discrepancies in medical history, specifically with regard to how the injury occurred, will help clarify the value of claim. This is especially so if causation is at issue and the independent medical examiner has determined that the accident was not a sufficient mechanism of injury to cause the disability about which the client complained.

8. Review relevant medical records.

Obtain only the medical records arguably relevant to your client's worker's comp injury. If you are going to be anal retentive about every claim, you will drown in irrelevant medical histories, have to rent additional storage space for extraneous medical records, and waste time on analysis of medical records that are not going to make a difference in the client's case. Clients routinely want to paper the file with every diagnosis and condition they have ever experienced. While you cannot ignore conditions that are arguably relevant, ancient diagnoses will not help you focus on the current disability.

9. Does the doctor's diagnosis fit a recognized category of compensable claims?

While kudos go to lawyers who take on "cutting edge" cases, having a client with a regularly accepted diagnoses help case value. Diagnoses such as multiple chemical sensitivity (MCS), fibromyalgia, thoracic outlet syndrome, even reflex sympathetic dystrophy are not widely accepted and viewed with skepticism by ALJs.

Additionally, these diagnoses are routinely the “dumping ground” for claims in which the doctors cannot find a more viable cause. The psychosomatic component in these cases is large, and the time expended on irrelevant “hand holding” extensive.

10. Miscellaneous Factors:

These include:

- Psychological history.
- Client’s criminal record.
- Family situation – married, single, divorced.
- Low/high maintenance personality.
- Age.
- Intelligence / Education.

While these extraneous factors may not bear directly on case value, they have a lot to do with avoiding and reducing stress inherent in representing injured workers.

Psychological History.

A client with a significant mental health history may drive **you** crazy with irrelevant telephone calls and inappropriate behaviors. A personality disorder that resents authority and is narcissistic will result in second guessing every move and result in dissatisfaction no matter how successful the result achieved. Obviously, a claim with a psychological component (PTSD, post-injury depression, etc.) will be diminished by a history of pre-existing psychological treatment.

Criminal Record.

While a criminal record should not diminish a worker’s compensation claim, it often

signals trouble. A prior criminal record routinely finds a way to creep into the negotiations (insurance carriers regularly perform criminal background checks). If fraud, battery, assault or any one of a half dozen other claims appears, it diminishes the claim valuation, not necessarily because it will enter the record (unless relevant to facts in the case) but because the paying entities challenge the client's credibility on all other issues.

#### Family Situation.

The spouse of a married client who is a permanent and total disability candidate will be eligible for dependent death benefits upon the client's death. A single person with no dependents will not be eligible for such an award and therefore the value of the claim is diminished in these cases. The obligation to pay child support for many divorced clients can substantially diminish the amount of net recovery available. Additionally, it creates headaches at the time of distribution in a compromise if a child support Order is in effect from the Family Court.

#### Low and High Maintenance Persona.

After thirty seconds, many experienced attorneys can evaluate whether the client requires "hand holding" (i.e. several telephone calls to report the most insignificant detail) or whether the client will be content in a trusting relationship and allow you to do your job without second-guessing. An office full of the latter clients reduces stress; a handful of the former creates havoc and high blood pressure.

#### Age.

The younger the client, the more substantial the benefit for a loss of future earning capacity. Additional benefits for disfigurement and retraining may be available for a

youthful client and not available for an older client. A DVR counselor will not likely try to retrain a truck driver with a 10<sup>th</sup> grade education in his mid-50s, reasoning that by the time he finishes an associate or college degree he will not be of employable age. Conversely, an older injured worker with transferable skills is more likely to be deemed permanently and totally disabled.

Intelligence / Education.

This is a double-edged sword. The lesser educated individual with English as a second language is more likely to be considered permanently and totally disabled than an articulate educated individual with transferable skills. However, if the claim is scheduled (where retraining is the only benefit and not a loss of earning capacity), the lack of a formal education may be a higher hurdle in obtaining retraining benefits.

11. Deflect irrelevant inquiries; delegate.

Clients like “face time” with lawyers. Nonetheless, we are routinely bombarded with questions, at best marginally related to the claim: fuel vouchers, auto repossession, landlord/tenant disputes, bankruptcy proceedings, private health insurance forms, child support, personal loans, etc. To the extent that you must review a private health insurance form to insure that it is consistent with your worker’s compensation claim, monitor it but consider the limits of your representation; consider the client bankruptcy issues, but only to the extent that a medical bill is discharged in bankruptcy so that you need not worry about a medical bill lien.

Paralegals are often better hand holders than attorneys. Most of the work in this context should be delegated, including

- Bill collectors.
- Medical record requests.
- Authorizations.
- A good rule of thumb: do not do anything your assistant can do as well (or better).

Maintain good humor (see attached article “In the Trenches”).

## 12. Evaluating damages in worker’s compensation.

From case intake through settlement discussions, realistic evaluation of damages is a significant component of applicant attorney’s role. A lawyer’s assessment of damages helps determine whether and how a case is tried, and in large part determines whether or not a case is settled. Basic components (and some esoteric nuances) guide applicants’ lawyers in this quest.

### I. The Basics.

Scheduled versus Unscheduled Injuries. Many states distinguish between torso (scheduled) and limbs (unscheduled) injuries. The former cannot lead to a loss of earning capacity claim in the event disability includes return to work, which the latter can. Your State may have an equivalent threshold distinction.

- A. Unscheduled. Torso injuries may lead to loss of earning capacity beyond functional permanency. Employer’s return to work decision is crucial, and permanent limitations precluding return to work trigger vocational rehabilitation and loss of earnings benefits. Vocation expert is required.
- B. Scheduled Injuries. Benefits limited to Temporary Total Disability, Permanent Partial Disability and, if no return to work, Vocational

Rehabilitation maintenance benefits.

1. Significance of Correct Wage Calculation.

- a. Part time worker is escalated to full time.
- b. Include “regular overtime” and “other consideration” (board, lodging, rent).

2. If no return to work for injury employer, always consider disfigurement, if visible scars.

C. If appropriate, explore post-traumatic mental injury.

1. Additional Temporary Total Disability period.
2. Functional Permanent Partial Disability.
3. Loss of Earning Capacity claim appropriate if post-traumatic mental injury precludes return to work, even if scheduled traumatic injury.

II. Employer’s Return to Work / Accommodation Decision Crucial.

A. Consider applicable State penalties against employer for refusal to rehire.

B. Consider accepting legitimacy of employer’s refusal to rehire decision and explore the following:

1. Vocational Rehabilitation retraining (particularly significant if scheduled injury).
2. Loss of earning capacity claims if unscheduled injury. (Need vocational expert to assess loss of earning capacity and include Social Security Disability findings.)

III. Calculation Esoterica.

A. Interest credit reduction on lump sum advancements and present value

calculation of future benefits for Permanent Partial Disability and Loss of Earnings Capacity.

B. Offsets / impact on claim value.

1. Social Security offset, 80% ACE calculation. Applicant can only receive, when Social Security benefits and worker's compensation benefits are combined, a total of 80% of overage current earnings, calculated by Social Security. Note: In the nine "Reverse Offset" states, Triennial Social Security index increases worker's compensation insurance carrier's liability and reduces offset annually, based upon CPA increases to average current earnings figure.
2. Governmental Assistance Offset. In many states, welfare recipients (for either monthly payments or medical expenses) must repay governmental units from the proceeds of their worker's compensation claim based on a formula for distribution. In Wisconsin, for example, the worker's compensation carrier reimburses the governmental unit the lesser of the amount of welfare assistance provided or two-thirds of the amount of the award or payment remaining after deduction of attorney fees and costs.
3. UC / WC. Unemployment compensation must also be repaid if worker's compensation is paid for the same period.
4. Offset sick pay provided by non-industrial insurance policy. Reimbursed if found compensable at hearing; the same applies to short and long term insurance policies and disability retirement policies if

they contain offset provisions.

5. Third party offset formula for third party tort recovery (but UM, UIM or consortium claims exempt from formula).

IV. Other Considerations.

- A. Severance Agreement. Employer may add some component for a “buy out” of employment rights, waiver of discrimination claims and termination of employment.
- B. Continuation of medical benefits (from new employer, Medicare, or spouse’s policy) may affect decision to resolve.
- C. Future medical expenses.
  1. Sometimes can be estimated, including surgical cost, pharmaceutical, therapeutic.
  2. Holding open medical expenses, even on final orders, may boost resolution value. (Some states, like Massachusetts, statutorily preclude medical closure of claims.)

V. Merits of Case.

- A. Percent reduction for likelihood of non-compensability.
  1. Doctor’s / Expert’s credibility.
  2. Client’s credibility.
  3. Accident and treatment facts.
- B. Intangibles.
  1. ALJ assigned.
  2. Likelihood of appeal versus client’s present money needs.

**WORKER'S COMPENSATION SUMMARY SHEET**

Claimant's Name: \_\_\_\_\_ DOI: \_\_\_\_\_ DOB: \_\_\_\_\_ SSN: \_\_\_\_\_

Employer: \_\_\_\_\_ WC Carrier: \_\_\_\_\_

Type of Injury/Area of Body/Diagnosis: \_\_\_\_\_ Mechanism Of Injury: \_\_\_\_\_

**WAGE INFORMATION**

AWW:\$ \_\_\_\_\_ (\$ \_\_\_\_\_ /hr) = WC Rate \$: \_\_\_\_\_ Resp. Admits: \$ \_\_\_\_\_ / WC Rate \$: \_\_\_\_\_

**TTD/TPD/OFFSETS**

TTD CLAIMED: Dr. \_\_\_\_\_

\_\_\_\_\_ through \_\_\_\_\_ = \_\_\_\_\_ # wks @ \$ \_\_\_\_\_ = **TTD Total \$** \_\_\_\_\_

\_\_\_\_\_ through \_\_\_\_\_ = \_\_\_\_\_ # wks @ \$ \_\_\_\_\_ = **TTD Total \$** \_\_\_\_\_

TTD Paid: \_\_\_\_\_

TPD Claimed: \_\_\_\_\_

S&A Received: \_\_\_\_\_

Offsets-SSD/UC/C-MS/AFDC: \_\_\_\_\_

CLOSED PERIOD SSD  Yes  No

200 Weeks Pre-existing  Yes  No

102.35  Yes  No; UC won  Yes  No

**HP/PPD/RESTRICTIONS**

Healing Plateau: \_\_\_\_\_ Permanent Restrictions: \_\_\_\_\_ Date Letter sent to ER: \_\_\_\_\_ Response: \_\_\_\_\_

PPD: \_\_\_\_\_ % Body part: \_\_\_\_\_ Dr. \_\_\_\_\_ # of wks @ \$ \_\_\_\_\_ = **PPD Total: \$** \_\_\_\_\_

Objective testing: \_\_\_\_\_ Surgeries: \_\_\_\_\_

**MEDICAL EXPENSES**

Exposure: \$ \_\_\_\_\_ Out of Pocket: \$ \_\_\_\_\_ Outstanding: \$ \_\_\_\_\_

Subrogation Lien: \$ \_\_\_\_\_ Government Lien: \$ \_\_\_\_\_ (notice?) \_\_\_\_\_

**DVR ENTITLEMENT**

Counselor: \_\_\_\_\_ Education level: \_\_\_\_\_ Employer refusal letter: \_\_\_\_\_

IPE DATED: \_\_\_\_\_ Type of Program: \_\_\_\_\_

\_\_\_\_\_ # of Weeks: @ Weekly rate: \$ \_\_\_\_\_ meals/mileage: \$ \_\_\_\_\_ **Retraining Total: \$** \_\_\_\_\_

**LOSS OF EARNING CAPACITY CLAIM – Expert: \_\_\_\_\_**

\_\_\_\_\_ % # of wks: \_\_\_\_\_ @ \$ \_\_\_\_\_ Total: \$ \_\_\_\_\_ **PV: \$** \_\_\_\_\_

\_\_\_\_\_ % # of wks: \_\_\_\_\_ @ \$ \_\_\_\_\_ Total: \$ \_\_\_\_\_ **PV: \$** \_\_\_\_\_

**DEFENSE MEDICAL REPORT**

\_\_\_\_\_ dated: \_\_\_\_\_

ty: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

rictions: \_\_\_\_\_

\_\_\_\_\_ dated: \_\_\_\_\_

ty: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

rictions: \_\_\_\_\_

PPD: \_\_\_\_\_ % Need for future Tx/Sx  Yes  No

Body part: \_\_\_\_\_ # of wks: \_\_\_\_\_ @ \$ \_\_\_\_\_ **PPD Total: \$** \_\_\_\_\_

**DEFENSE VOCATIONAL REPORT – Expert: \_\_\_\_\_**

\_\_\_\_\_ % # of wks: \_\_\_\_\_ @ \$ \_\_\_\_\_ **Total: \$** \_\_\_\_\_ **PV: \$** \_\_\_\_\_

\_\_\_\_\_ % # of wks: \_\_\_\_\_ @ \$ \_\_\_\_\_ **Total: \$** \_\_\_\_\_ **PV: \$** \_\_\_\_\_

1. **TTD: \$** \_\_\_\_\_

2. **PPD: \$** \_\_\_\_\_

3. **MED: \$** \_\_\_\_\_

4. **DVR: \$** \_\_\_\_\_

5. **LOEC: \$** \_\_\_\_\_

**Stip: \$** \_\_\_\_\_ / \_\_\_\_\_

**L. Comp: \$** \_\_\_\_\_ / \_\_\_\_\_

**F. & Final \$** \_\_\_\_\_ / \_\_\_\_\_

Column editor: John W. Welter

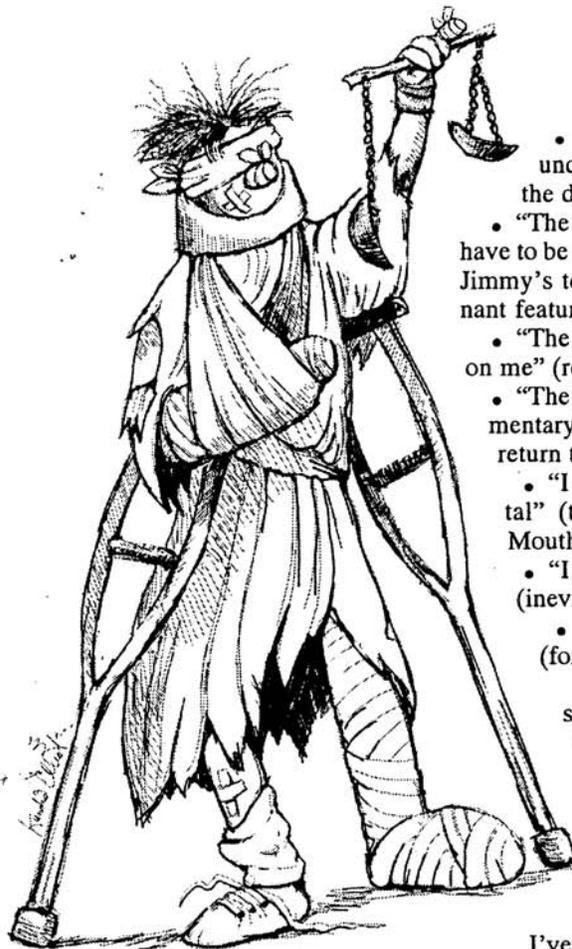
**M**ilwaukee attorney Thomas M. Domer frequently represents injured workers in worker's compensation claims statewide. It is a practice area that, while serious, certainly has its lighter side. We hope this month's column, written by attorney Domer, and inspired, he says, by attorney Pat Gillick, tickles your funny bone.

## Worker's compensation malaprops

The serious business of representing injured workers often is punctuated by interesting commentary from clients and their families. Perhaps because of the dire circumstance in which injured workers find themselves, or their limited understanding of the system that grants or denies benefits, the tendency to overstate or misstate runs rampant in worker's compensation claims.

Some injury victims tend to hyperbolize. Routine and simple Tens Unit therapy becomes "shock treatment." Lack of knowledge about diagnoses adds to the confusion. For example, an injured worker diagnosed with fibromyalgia expressed his displeasure with his physician's assessment: "The doctor told me I had 'fiber my allergy,'" the client complained, "but I've never had any allergies before."

Most of the confusion injured workers express involves the medical procedures, the identity of mysterious doctors ("I have to see a urologist for my head") or the process itself ("I want a free constellation" or, alternatively, "free consolation"). In this latter category, sometimes the malaprops become Freudian slips, as in "I want my worker's confiscation" or "My address and phone number was changed without my knowledge," leading to the inevitable result: "My payments had been unstopped." The applicant who believed that "the insurance company is reliable for the



injury" would soon be disenchanted, and feel as his compatriot did that he was "caught between a rock and a hot plate." Sometimes, contact with a client is like a roll of the dice. "I called before and spoke to a female paramutual at your firm."

The most imaginative self-reports involve medical diagnoses and treatment, as follows:

- "I pinched my psychotic nerve" (the inevitable response: I'll bet that drives you crazy).
- "I have genital arthritis" (gives new meaning to severe joint pain, restricted range of motion and inflammation).
- "She's been elevated by Dr. Jones" (to some unknown status).

- "The doctor has taken her under his arm" (one hopes that the doctor showered).
- "The doctor told me my nose would have to be Carterized" (and you thought Jimmy's teeth were his most predominant feature).
- "The doctor performed two testes on me" (redefines exquisite pain).
- "The doctor said my limits are sedimentary" (this muddies the water for return to work).
- "I went to Mount Sinus Hospital" (to hear the Sermon on the Mouth?).
- "I hurt the cartridge in my knee" (inevitably leads to being fired).
- "I went to my choirpractor" (for vocal manipulation?).
- "I have loose veins from standing on them all day at work" (ouch).
- "Because of the nerves in my wrist, I can't do any competitive lifting" (obviously rules out Olympic tryouts).

• "With the medication, I've lost my equaliberty" (and undoubtedly become a prisoner of pain).

- "Does the fact that I'm on unemployment have any remorse on this case?" (Yes, you'll be sorry you applied).
- "Returning to work there would be like walking on fine eggs because they'll find any excuse to determinate me" (including smelly feet).
- "My prostrate is all right" (especially when I lie down).
- "I suffer from carpool tunnel" (obviously a commuter's condition).
- "I have corporal tunnel" (supra, the military version).
- "The insurance doctor is at one end of the spectre and mine is at the other" (a spooky thought).
- "My past jobs were machinist and artificial inseminator" (what kind of vocational retraining is required here?).

This work is never dull. Heretofore unheard of diagnoses and treatment regimens (or is it regiments?) march across the desk and over the phone lines daily.

Please send your submissions for "In the Trenches" to Joyce Hastings, State Bar of Wisconsin, P.O. Box 7158, Madison, WI 53707-7158. We're looking for contributions on interesting trial techniques, vignettes or war stories our readers might find of interest.