

**FIGHTING BACK AGAINST
CLAIM DEFENSE
CHALLENGES CREATED BY
THE CORONAVIRUS
PANDEMIC**

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Harriett Harried is a claim handling specialist at Brand X insurance.

She is about to have a

Terrible

Horrible

No Good

VERY BAD

DAY!!!



It's 6:00 am.

The alarm clock rings.

Harriet's tired eyes open, wishing it were Saturday. It's Monday. Her 2 kids have not left the house since March 17, 2020. It's August 31. Virtual school classes start in one week. She stumbles from bed, drinks 4 cups of coffee, skips her morning shower, (that's now a twice a week activity since March) and boots up her home office computer.

She already has 10 voicemails and 30 emails. Two claimants want to know why their checks are late. They say the mail normally arrives at 9:00. It's 10:00 and the mail carrier hasn't arrived yet.

Harriett opens a hearing report from a downstate defense counsel. The first paragraph reads, "Dear Ms. Harried: We are sorry to report that the Judge precluded your IME because the exam date occurred 10 days after the deadline set at the last hearing. We noted our exception Please call me to discuss appealing."

Harriett slugs down another cup of coffee, wishing it were the Irish version. She tried to get an IME date before the deadline set by the Judge, but the IME vendors are all backlogged. The exam date she got was the earliest one available.

Harriett did her due diligence and filed a letter in e-case 5 days before the hearing explaining this. (Harriett doesn't know that the Board has a 10 day backlog in document scanning. Her explanation letter is still not viewable in e-case. The Judge and her defense counsel did not know the letter existed.)

Next Harriett opens an email from a prominent local claimant attorney. (She recalls seeing his face on TV commercials during football games). The email demands a \$ 400,000.00 indemnity only settlement, accuses her of dilatory tactics, and threatens penalties because she has not yet forwarded reduced earnings payroll from the claimant's employer.

Harriett sighs. She requested the reduced earnings payroll from the employer 2 months ago, but her contact at the company is furloughed and she has not received responses from the other people she has tried contacting. She does not know if they are also furloughed.

And so it goes,

document after document,

email after email,

phone call after phone call,

the delays from COVID impact her cases, causing problems, and headaches.

What Is a Harried Claim Handler to Do?

The Reality of Our New World

- Delay is a side effect of the COVID social distancing requirements
- Delays Increase the Risk of Accidentally Waiving Rights/Defenses

Types of Delay

- Delayed production of witnesses and documents
- - Layoffs and furloughed employees
- - Little or no administrative staff working during shutdowns
- - Employees working from home without access to some or all records

Types of Delay

- Delayed production of routine claim information
 - Same causes
 - Examples:
 - C-240s
 - C-11s
 - Minor's Wage Expectancy payroll
 - Reduced earnings information
 - All routine information requests to employers

Types of Delay

- Delayed Medical Exams/IMEs
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 - Many medical offices and IME vendors shut down completely or almost completely in March, April, and May
 -
 - Many IME vendors still have backlogs they are trying to clear out
 -
 - Some specialties like psychology are more backlogged than others

Safeguard Strategies for Unavoidable Delay

- How do we minimize the risk of accidentally waiving rights/defenses?
- Some things just take longer now. Start the wheels turning ASAP to minimize delay.
- When delay is inevitable, lay a document trail of your actions and efforts to prove you have acted with due diligence

Safeguard Strategies for Unavoidable Delay

- Examples:
 - Dates and methods used when attempting to contact employer administrative staff with requests for information, documents, and witnesses.
 - When possible, produce explanations for delayed responses from employers (i.e.. staffing reductions, furloughs, staff working from home, etc.)

Safeguard Strategies for Unavoidable Delay

- Copies of emails/documents sent and/or received
- Dates phone messages left, the number the message was left at, and a brief summary of the message
- Affidavits describing actions you have taken. (Defense counsel can assist with preparing these).
- Anything else that can be used to prove you have acted with due diligence

Safeguard Strategies for Unavoidable Delay

- Creating a document trail by itself is not enough, you need to do something with it
 - File copies in the e-case file so they are in the record
 - Send copies of the documents to defense counsel for use at hearings and preparing time extension requests

Safeguard Strategies for Unavoidable Delay

- Notify defense counsel of any reasons for delays in producing witnesses, documents, or other information before hearings and before Board imposed deadlines expire
 - This allows defense counsel to submit time extension requests before deadlines expire and raise and address these issues at hearings
 - Waiting until after a hearing or Board imposed deadline passes to explain a delay almost always results in waiver

Safeguard Strategies for Unavoidable Delay

- Board Processing Delays
- Documents are sometimes not viewable in e-case for as long as two weeks after they are scanned by the Board
 - This is a major change from pre-COVID times when scanned documents were usually viewable in e-case within a day or two after scanning

Safeguard Strategies for Unavoidable Delay

- Defense counsel, the Judge, and claimant's counsel will not know documents exist if they are scanned but not viewable at the time of a hearing
 - This creates a serious risk of accidentally waiving rights/defenses
- Bring important documents to defense counsel's attention before hearings/depositions, and fax or email copies to counsel

Safeguard Strategies for Unavoidable Delay

Board Scanning Errors

- The Board is accidentally scanning documents into the wrong e-case file with alarming frequency
- This is common when claimants have multiple files traveling at the same time

Safeguard Strategies for Unavoidable Delay

- Examples:
 - Documents attached to a PH 16.2 accidentally scanned to a different file
 - Applications for Board review for two different files both accidentally scanned into the same file
 - Exhibits and other trial documents scanned into the wrong file
 - Large stacks of documents accidentally split up with different portions scanned into different files

Safeguard Strategies for Unavoidable Delay

- Mitigation Strategies
 - When possible, avoid having multiple WCB numbers on documents to minimize the risk of scanning errors
 - Even when this practice is followed, it does not always work. (The Board's capacity for administrative error is truly impressive)

Safeguard Strategies for Unavoidable Delay

Mitigation Strategies

- If you notice scanning errors by the Board, file a letter in each relevant e-case file documenting the scanning error
 - This minimizes the risk of future confusion
 - This also minimizes the risk of an opponent try to claim the error was yours rather than the Board's

Safeguard Strategies for Unavoidable Delay

- Handling DVDs and Other Hard Copy Items
 - If defense counsel is working from home, these may need to be mailed directly to counsel's home address.
 - Special arrangements may need to be made for delivering these items to claimant's counsel and the WCLJ because many of them are also working from home.

Safeguard Strategies for Unavoidable Delay

- Board Scheduling Hearings and Trials Without Specific Dates
 - Some Judges are still not providing “dates certain” for trials and other types of hearings.
 - Be vigilant in monitoring files for hearing notices
 - These should be forwarded to defense counsel ASAP to minimize scheduling conflicts
 - Notify witnesses of trial dates/times and have them contact defense counsel before trial hearings

Safeguard Strategies for Unavoidable Delay

- The Board Casting a Blind Eye to Periods of No Medical Evidence
 - Arguments can be made that this should not apply if the period at issue occurred before the governor's New York on Pause executive orders took effect
 - Arguments can also be made that this should not apply if claimant lives in a state with no major COVID spike or where no legal restrictions on social distancing were imposed.

Safeguard Strategies for Unavoidable Delay

- An argument can be made that this should no longer apply for recent periods of no medical evidence for New York State claimants if the claimant's doctor is seeing patients & claimant simply has not scheduled an appointment

Labor Market Attachment

- The Board currently has a moratorium on labor market attachment litigation while the Governor's New York on Pause executive orders remain in effect.
 - The moratorium does not apply to periods of time before the executive orders took effect.
 - An argument can be made that there is no reason why the moratorium should be applied to claimants living in states with no legally imposed social distancing restrictions.

Labor Market Attachment

- Inconsistency of application. Some Judges are occasionally deciding labor market attachment issues on their merits. Most are not.
- Be careful not to confuse labor market attachment with lack of causal relationship for lost wages or voluntary withdrawal from the labor market. These 2 things are different legal issues from labor market attachment and are not covered by the Board's moratorium on labor market attachment litigation.

Labor Market Attachment

- Labor market attachment is at issue when a claimant is trying to produce proof of their efforts to find work
- In contrast, voluntary withdrawal and lack of causal relationship for lost wages are at issue when something unrelated to the claimant's injury causes the claimant to stop working or earn less money.

Labor Market Attachment

- **Nuclear Option Arguments:**

1. The Board's moratorium is an illegal blanket rule violating the due process rights of all carriers and employers in New York State. The Board cannot deny a legitimate request to develop the record on labor market attachment. Parties to workers' compensation cases have a due process right to call witnesses, present evidence, and develop a position on the record. Hecht v. Monaghan, 307 N.Y. 461 (1954); Angelo v. NYS Ass'n of Learning Disabled, 221 A.D. 2d 832 (1995). This argument would likely have to go to the Appellate Division.

Labor Market Attachment

- **Nuclear Option Arguments:**

All of New York is now in some phase of reopening, so there is no legal reason why a claimant cannot **try** to find work meeting their restrictions and produce proof of their efforts.

Since no public health policy rule prohibits a claimant from trying to find work, the Board has a legal obligation to discharge its judicial duties by presiding over and deciding litigation on labor market attachment issues

Out of State Claimants

- Not all states are treating COVID the same
- Some states have tighter restrictions than others on activities
- Getting IMEs or updated treating physician reports may be more difficult from states experiencing recent COVID spikes
 - Take action to protect your rights and defenses against accidental waiver
 - Lay a document trail to prove you acted with due diligence



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