

From: Don Drinko  
Sent: Wed Aug 25 16:21:57 2010  
Gallagher Sharp Shop Talk: Workers' Compensation

**Question: What are some factors which may weigh against pursuing an appeal from a BWC or ICO order?**

I recently handled a claim for a client involving a request for several additional allowances. The medical evidence supporting the request was not strong, and we had several excellent arguments, but we lost at every stage of the appeal process. During our "post-mortem" discussions, we concluded that the claim had too many "green flags," i.e., factors which almost always come down in favor of the claimant. What are some of these "green flags"? When should an employer consider retiring to fight another day?

Initially, I should note that each claim is different, and it is impossible to generalize about whether an appeal should be filed. However, the following factors are clearly "green flags" favoring the claimant.

**Compelling Claimant** - Hearing officers love claimants who come to hearings to plead their case. The most difficult hearing for an employer to defend is one where the claimant will attend and testify in an eloquent manner;

**Treatment Issues** - Hearing officers look skeptically at attempts by employers or MCOs to deny treatment. Doing so without contrary medical evidence is a particularly difficult task;

**"No Lost Time"** - In my case, the claimant was seeking the additional allowances solely for the purpose of obtaining approval for a course of treatment that was already provided. When she argued that she would not be seeking lost time, the shift in the hearing officer's mood was palpable;

**Contemporaneous Report** - For allowance issues, a failure to report for a period of several hours, up to a day or two, is difficult to base an appeal on absent an intervening incident, such as a termination; and

**Continued Employment** - If settlement is not possible because the claimant continues to work with the company, this would be a factor against an appeal, particularly for treatment issues.

There are many other factors that weigh in favor of an appeal, such as the potential for future treatment, the potential for future additional allowances, the possibility of obtaining new evidence, the possibility of settlement, or a need to change a workplace culture. In evaluating claims, employers would do well to consider if too many "green flags" are present, and discuss them with their representatives.

Donald G. Drinko, Esq.  
Certified Workers' Compensation Specialist,  
Ohio State Bar Association  
Gallagher Sharp  
1501 Euclid Avenue  
Cleveland, OH 44115  
Direct: 216.522.1326  
[www.gallaghersharp.com](http://www.gallaghersharp.com)  
[ddrinko@gallaghersharp.com](mailto:ddrinko@gallaghersharp.com)