



## **NURSING THE WOUND: THE LAW AND ETHICS OF DISABILITY MANAGEMENT IN WORKERS' COMPENSATION**

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#### I. Introduction

Beginning in the early 1990's, workers' compensation insurance carriers discovered the cost-saving and treatment advantages of disability management, giving rise to the now-ubiquitous nurse case manager. Still, nearly 30 years later, despite its proliferation, the profession remains vastly misunderstood, often seeming to exist only as an ambiguous and threatening figure on the periphery of an injured worker's claim.

For many injured-workers' attorneys, the increased utilization of nurse case managers merely represents a shifting business model of the adversarial party – resulting in, among other detriments, hastened treatment regimens and an undermining of the traditional doctor-patient relationship. In the most extreme examples, claimants' lawyers instruct their clients to refuse all communication with a nurse case manager, characterizing his or her presence as unwelcome, harmful, and driven by the sole motive of espionage. As is often the case in such delicate subjects, the truth value of these beliefs fall into a grayer area, with ample anecdotal evidence and widespread myth distorting the reality of just who these professional are, and precisely what they *do*.

With the use of nurse case managers now commonplace in workers' compensation claim management, both injured-worker and defense lawyers are better-equipped in their respective positions by fully understanding these professionals and the sphere in which they operate. It is the continued absence of information and education regarding nurse case managers that provides the backdrop and purpose for this paper.

Herein, the author seeks to provide some semblance of clarity, context, and guidance as to the proper and legitimate role of nurse case managers in the workers' compensation arena. To do so, this paper reviews the historical professionalization of disability managers, their modern role in workers' compensation claims today, and a sample of leading regulations and case law pertaining to the legal obligations, duties, and exposures which may present in the context of

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disability management.

## II. The Professionalization of Disability Managers

To properly conceptualize the disability management field, and its import to workers' compensation claims, it is critical to understand that disability managers exist in multiple forms; to wit, not all case managers are *nurse* case managers. As the name implies, this term only refers to registered nurses (RN) who engage in case management. Other backgrounds represented in disability management include social workers and those with a health or human services baccalaureate or master's degree.

### A. The Case Management Society of America

The late twentieth century saw the first major efforts to professionalize the disability management workforce in the United States. In 1990, the Case Management Society of America (CMSA) was founded, which today now stands as the leading non-profit and inter-professional association dedicated to the support, development, and advancement of case management.<sup>1</sup> In 1995, CMSA first introduced the *Standards of Practice for Case Management*, a comprehensive manual, or "code of conduct," for the professional disability manager.<sup>2</sup> Since then, the *Standards* have undergone multiple revisions, with the most recent finalized in 2016.<sup>3</sup> This publication offered the industry's first cohesive source for guidance related to the proper roles, responsibilities, principles, processes, and behavioral expectations in disability management.

As of 2016, the *Standards* defined case management as: "... a collaborative process of assessment, planning, facilitation, care coordination, evaluation and advocacy for options and services to meet an individual's and family's comprehensive health needs through communication and available resources to promote patient safety, quality of care, and cost effective out- comes."<sup>4</sup> CMSA's philosophy posits that, when an individual reaches an optimum level of wellness and functional capability, all parties benefit, including the client (the individual being treated), the health care delivery system, the payer, and the employer.<sup>5</sup> CMSA purports to achieve these results through communication, health education, identification of service resources, and service facilitation.<sup>6</sup>

The *Standards* establish a code of conduct for disability managers, similar to many other professions, such as physicians and attorneys. In this respect, the manager is tasked with:<sup>7</sup> (1)

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<sup>1</sup> CASE MANAGEMENT SOCIETY OF AMERICA, STANDARDS OF PRACTICE FOR CASE MANAGEMENT (2016) at 5.

<sup>2</sup> *Id.* at 3.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 11.

<sup>5</sup> *Id.* at 12.

<sup>6</sup> *Id.*

<sup>7</sup> *See generally id.* at 20-30.

identifying the client's care needs or opportunities that would benefit from case management interventions; (2) establishing care goals with measurable outcome indicators to be achieved within specified time frames; (3) maintaining qualifications, including current, active, and unrestricted licensure or degree in social work (for jurisdictions not requiring licensing), and supervised field experience; (4) adherence to all applicable federal, state, and local laws and regulations, including those related to client privacy and confidentiality; (5) advocating for the client to improve the quality of care and reduce health disparities; and (6) engaging in scholarly activities and maintaining familiarity with current knowledge, competencies, case management-related research, and evidence-supported care innovations. As of 2017, CMSA counted 36,000 disability managers amongst its members, organized throughout the country by 80 local and international chapters.<sup>8</sup>

### B. The Commission for Case Manager Certification

While CMSA serves as the leading professional organization of disability managers, actual accreditation is provided, and regulated, by the Commission for Case Manager Certification (CCMC). In March 1991, a National Task Force on Case Management convened in Dallas, Texas.<sup>9</sup> There, 30 professionals, representing 29 healthcare-industry stakeholders, came together in an effort to design a credentialing process governed by members of the community itself. By 1993, an examination was developed whereby case managers could obtain the official Certified Case Manager (CCM) credential; in its first year alone, the examination drew 12,000 candidates. Just three years later, in 1996, CCMC adopted a code of professional conduct. Finally, in 1999, CCMC was granted accreditation by the National Commission for Certifying Agencies.

Today, over 42,000 individuals hold the CCM certification.<sup>10</sup> Of those certified, 89% are registered nurses, 7% are social workers, and the remaining 4% come from other "allied health" backgrounds.<sup>11</sup> In numerous conversations held with industry professionals, it is this author's impression that disability management companies now require, or at least, strongly prefer, workers with the CCM certification.

### C. The Code of Professional Conduct

Perhaps most important as it relates to implications in the workers' compensation context, CCMC publishes the *Code of Professional Conduct for Case Managers*. Originally

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<sup>8</sup> CMSA, *CCMC strike collaborative agreement for professional case manager development*, COMMISSION FOR CASE MANAGER CERTIFICATION (June 13, 2017), <https://ccmcertification.org/press-releases/cmsa-ccmc-strike-collaborative-agreement-professional-case-manager-development>.

<sup>9</sup> *About CCMC*, COMMISSION FOR CASE MANAGER CERTIFICATION, <https://ccmcertification.org/about-ccmc> (last visited Jan. 12, 2018).

<sup>10</sup> *CCMC Through the Years*, COMMISSION FOR CASE MANAGER CERTIFICATION, <https://ccmcertification.org/ccmc-at-a-glance/> (last visited Jan. 11, 2018).

<sup>11</sup> *Id.*

adopted in November 1996, with the most recent revision completed in January 2015, the *Code* establishes standards for behavior, ethics, competency, legal compliance, advertising, and privacy.<sup>12</sup> Further, the *Code* provides extensive detail regarding the procedures involved where a case manager is alleged to have violated the same.<sup>13</sup>

At the outset of the *Code*, CCMC establishes eight principles by which CCMs are to conduct themselves. CCMs are to:<sup>14</sup> (1) place the public interest above their own at all times; (2) respect the rights and inherent dignity of all of their clients; (3) always maintain objectivity in their relationships with clients; (4) act with integrity and fidelity with clients and others; (5) maintain their competency at a level that ensures their clients will receive the highest quality of service; (6) honor the integrity of the CCM designation and adhere to the requirements for its use; (7) obey all laws and regulations; and (8) help maintain the integrity of the *Code*, by responding to requests for public comments to review and revise the *Code*, thus helping to ensure its consistency with current practice.

Browsing the *Code*, the reader is left with the impression that CCMs unequivocally view themselves as advocates for their clients (the disabled individual). This advocacy is often effectuated by educating the client in complex healthcare matters so that they may make their own informed decisions regarding treatment. Further, the manager operates at the center of the claim, interacting with, in the workers' compensation context, the injured worker, the injured worker's lawyer, the adjuster, and all treating doctors. Given this central location in a claim, case managers are often subjected to the various pressures of multiple parties involved in a claim – and their corresponding, often conflicting, interests.

### III. The Role of Disability Managers in Workers' Compensation

In the handling and litigation of workers' compensation claims, the proper role, boundaries, duties, and obligations of the nurse case manager are paramount concerns for claimants, attorneys, employers, and insurance carriers. In the extensive commentary provided to this author by those throughout the workers' compensation and medical case management fields, several common themes emerge important to all parties involved; namely, advocacy, ethics, education, and communication.

#### A. Advocacy and Ethics

Barbara E. Holmes, renowned injured-workers' counsel, commented to this author that around 25% of her office's active files include the presence of a nurse case manager.<sup>15</sup> As the

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<sup>12</sup> Commission for Case Manager Certification, *Foundational principles: Newly revised Code of Professional Conduct provides a framework for ethical high-quality care*, ISSUEBRIEF, February 2015, available at [https://ccmcertification.org/sites/default/files/issue\\_brief\\_pdfs/23\\_-\\_updated\\_code\\_of\\_conduct.pdf](https://ccmcertification.org/sites/default/files/issue_brief_pdfs/23_-_updated_code_of_conduct.pdf).

<sup>13</sup> See generally COMMISSION FOR CASE MANAGER CERTIFICATION, CODE OF PROFESSIONAL CONDUCT FOR CASE MANAGERS WITH STANDARDS, RULES, PROCEDURES, AND PENALTIES (2015).

<sup>14</sup> *Id.* at 3.

<sup>15</sup> Interview with Barbara E. Holmes, Partner, Blaufeld Schiller & Holmes LLP (Jan. 3, 2018).

claimant's legal advocate, Attorney Holmes believes it necessary to ensure that the nurse case manager knows their legal limits and boundaries; to wit, a recent scenario unfolded wherein a client relayed to Ms. Holmes that the nurse case manager was joining the claimant *in the examination room* during appointments with the treating physician. Ms. Holmes was adamant that this behavior was unacceptable, contrary to the rights of the claimant under Pennsylvania law, and informed the manager accordingly.

Reflecting on the potential concerns of a nurse case manager's involvement in a claim, Ms. Holmes noted that such managers will always use the providers and resources *they* prefer. In doing so, her experience has been that a nurse case manager will often "wedge themselves" between the doctor-patient relationship, thereby challenging the authority and competency of the treating provider, and potentially creating mistrust between the claimant and his or her physician. Still, Ms. Holmes acknowledged that some benefits can be derived from the use of a nurse case manager, including more efficient referrals to specialists and physical therapy facilities, and increased access to diagnostic testing.

Ms. Ann Marie Loiseau, a former workers' compensation nurse case manager, and now serving in an academic faculty position, similarly represented that, as with any profession, you will indeed find both good and bad behavior.<sup>16</sup> In the time that she managed cases, Ms. Loiseau always viewed her role as an educator, coordinator, and advocate. She emphasized that nurse case managers are often assigned to claims where "red flags" have been identified; for this reason, it is no surprise that the involvement of a disability manager might naturally exacerbate the suspicion already present between the claimant and carrier.

Ms. Debbie Keisling, owner of Evaluation Specialists, an independent examination service – and who works closely with nurse case managers – noted that disability management requires a "return-to-work" mentality, but that the same is not inconsistent with also being the claimant's advocate.<sup>17</sup> She stated that the best nurse case managers are those advocating for the claimant's highest possible functionality – even if that means, in some cases, educating an insurance adjuster as to the disability's severity and necessary treatment. It was Ms. Keisling's experience that adjusters are typically receptive to the opinions of nurse case managers, and regularly follow their advice.

Ms. Michelle Repman-Pifer, owner of Presque Isle Rehabilitation Service, LLC, echoed these sentiments.<sup>18</sup> When asked what she would say to claimants' attorneys who express uneasiness towards the use of nurse case managers, Ms. Repman-Pifer responded "We are here to do our job – which is to assist the injured worker in the coordination and facilitation of medical treatment in a timely manner, with a goal of medical stability, recovery, and return-to-work when feasible. We all have the shared goals of making the worker healthier and advancing

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<sup>16</sup> Interview with Ann Marie Loiseau, Director of Services, Northeastern Rehabilitation Assoc. (Jan. 12, 2018).

<sup>17</sup> Interview with Debbie Keisling, Owner, Evaluation Specialists LLC (Jan. 10, 2018).

<sup>18</sup> Interview with Michelle Repman-Pifer, Owner, Presque Isle Rehabilitation Service, LLC (Jan. 10, 2018).

their recovery.”<sup>19</sup>

Ms. Repman-Pifer acknowledged that not every file requires a case manager – just as not every file demands an attorney. She stated that case management should be considered in cases where particular factors present, such as catastrophic injury; multiple co-morbidities; aggravations of pre-existing conditions; emotional distress; delayed treatment and progress in patient recovery; and poor communication between the insurance carrier, practitioner, and injured worker. Ms. Repman-Pifer cautioned that many other circumstances can develop during the life of a claim, creating a need for case management where one may not have existed before; this, she said, should be examined on a case-by-case basis.

Ms. Loiseau emphasized that a nurse case manager’s duty to the insurance carrier should always be disclosed to the claimant. This includes the obligation to relay all learned information to the adjuster. In this way, an honest conversation can be had between all parties involved, with all competing interests known and understood. She further noted that, if a nurse case manager only considers the cost variables of a claim, and thereby neglects the importance of quality of care, all parties are disadvantaged. Indeed, low-quality care often results in higher expenses over the life of a claim. Recalling experiences where adjusters balked at the cost or utility of a certain treatment prescribed, Ms. Loiseau, at times, found herself explaining to an adjuster that the applicable law *required* that the carrier provide the particular treatment modality at issue. In this respect, her ethical obligation was, ultimately, to the claimant’s recovery *and* the controlling law of her jurisdiction. Reflecting on her time as a nurse case manager, she stated, “There’s a lot of ethical dilemmas in case management – you have to stay true to being honest with the patient and their families. I always saw myself as a nurse first, and a case manager second.”<sup>20</sup>

#### B. Education

Ms. Loiseau indicated that she views the primary role of a nurse case manager to be that of educator. To wit, the educational aspect of the job often includes teaching “low health-literacy individuals” medical terminology, healthcare processes, and treatment options. Ms. Loiseau stated that a significant portion of workers’ compensation claimants know very little about the world of medicine, regardless of his or her educational background; in her experience, even highly-educated individuals can have difficulty understanding the complexity of their own treatment. This, in turn, creates a significant need for the nurse case manager’s expertise and experience navigating the world of medicine and healthcare.

#### C. Communication

Attorney Holmes noted that, if a particular claimant has trouble filtering communication or experiences high levels of stress, she may make an effort to communicate more regularly with the manager assigned to the case; conversely, if a claimant has some social savvy, she will permit them to communicate with the manager themselves, and simply instructs the case

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<sup>19</sup> *Id.*

<sup>20</sup> Interview with A. Loiseau, *supra* note 16.

manager to provide regular updates. Ms. Holmes made clear that she prefers to maintain cordial and respectful relationships with nurse case managers, noting that “if you go in with antagonism from the beginning, that’s how it will remain.”<sup>21</sup>

Offering suggestions for improving the relationship between injured-workers’ lawyers and nurse case managers, Ms. Holmes stated, “Once the case manager knows who the client is treating with, they could provide a list of providers that the insurer doesn’t typically have trouble with. Even more, they could communicate with the adjuster to approve medications, and be generally proactive. If they could call the adjuster and brief them on upcoming testing and new medication, the process would be smoother.”<sup>22</sup>

Ms. Loiseau endorsed this same perspective, stating, “It’s all about communication. As the nurse case manager, call the claimant’s lawyer, even if they have instructed you to stop talking to the claimant!”<sup>23</sup> In this sense, Ms. Loiseau suggested that better relationships could be fostered with open dialogue between all interested parties.

Indeed, Ms. Repman-Pifer agreed, stating, “It really needs to be a collaborative effort between injured worker, employer, case manager, insurance company, and all providers involved.”<sup>24</sup> Reflecting on past claims, Ms. Repman-Pifer stated, “At the time of case closure, most injured workers are thankful for the assistance they receive from the case manager. The injured workers who share the same goals of the case manager are the ones who are most receptive to case management, and most likely to return to work depending on the severity of the injury and their job at the time of loss.” Commenting on prior positive experiences, she noted, “Not only are the injured workers thankful for the services they have received, but many times I have had claimants’ lawyers approach me, as the owner of the company, stating what a good job we have done assisting the injured worker with treatment facilitation and recovery. This is especially true in states where pre-authorization for medical treatment is required or no treatment guidelines exist.”

Ms. Keisling, too, emphasized the need for open dialogue between the nurse case manager, counsel, and adjuster. She recalled, in her experience, the trusting bonds she had formed with some of her locale’s most aggressive claimants’ attorneys, simply by always being accessible and honest. In being so willing to communicate openly with the injured worker’s lawyer, Ms. Keisling found that some became more willing to cooperate with her, and, at times, even pleased upon learning that she was involved in the managing of a claim.

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<sup>21</sup> Interview with B. Holmes, *supra* note 15.

<sup>22</sup> *Id.*

<sup>23</sup> Interview with A. Loiseau, *supra* note 16.

<sup>24</sup> Interview with M. Repman-Pifer, *supra* note 18.

#### IV. State Statutes and Regulations

Responding to the now-widespread use of nurse case managers, some legislatures and administrative agencies have passed legislation and regulations, respectively, regarding a disability manager's rights, duties, and obligations in a workers' compensation claim. As evidence of the need for authoritative guidance, some states, lacking established law, have issued policy statements in an effort to provide some measure of direction. The most notable examples are included here.

##### A. Colorado

Colorado, by statute, has instructed that the employer or insurer shall provide injured workers with a brochure, written in easily-understood language.<sup>25</sup> The law establishes what information the brochure must provide, including notice of "[t]he claimant's right to discuss with his or her doctor who should be present during a claimant's medical appointment, and the right to refuse to have a nurse case manager ... present at the claimant's medical appointment."

##### B. Georgia

State Board Rule 200.2 limits the use of case managers in non-catastrophic injuries, requiring employers and insurers to obtain consent of the injured employee, or their counsel, to work on the claim.<sup>26</sup> Consent is to be provided in writing anytime the manager wishes to attend a medical appointment. Notably, the consent may be withdrawn at any time.

Most striking, the consent of the injured worker is *not* required for a medical case manager to contact the worker's treating physician "for purposes of assessing, planning, implementing, and evaluating the options and services required to effect a cure or provide relief." Further, the use of a medical case manager is *required* in cases designated "catastrophic." The employee has no right to refuse such involvement. Rule 200.1 requires that those serving as medical case managers hold proper credentials, such as that of a Certified Rehabilitation Counsel (CRC), Certified Case Manager (CCM), Certified Rehabilitation Registered Nurse (CRRN), or Licensed Professional Counsel (LPC), amongst others.<sup>27</sup>

##### C. Indiana

The state of Indiana, in the absence of any formal legislation or regulation, has offered the following administrative guidance by the state's Bureau of Workers' Compensation:<sup>28</sup>

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<sup>25</sup> COLO. REV. STAT. § 8-43-203 (2016).

<sup>26</sup> GA. CODE ANN. § 200.2 (West 2017).

<sup>27</sup> GA. CODE ANN. § 200.1 (West 2017).

<sup>28</sup> *New Guidelines for Nurse Case Managers in Indiana*, INDIANA WORKERS' COMPENSATION INFORMATION PORTAL, (last visited Jan. 2, 2018) <http://www.workerscompindiana.com/2015/08/new-guidelines-for-nurse-case-managers-in-indiana/>.

The Indiana Worker's Compensation Board has issued guidelines for the use of Nurse Case Managers ("NCM") in the administration of compensation claims. A NCM may be involved in a claim to schedule appointments, help facilitate care suggested by the medical provider, and to report back to the employer and/or carrier. However, a NCM should not express opinions, to either the injured worker or the medical provider, regarding an injured worker's course of medical care or otherwise attempt to influence the process. Additionally, a claims adjuster should not attempt to direct the care provided to an injured worker by the authorized treating doctor.

#### D. Michigan

On its website, the Michigan Workers' Compensation Agency (WCA) has published informative "Frequently-Asked-Questions" for injured workers. Addressing nurse case managers, the WCA states:<sup>29</sup>

Nurse case managers are advocates of proper medical care and treatment, and they can be tremendous advocates for your safe return to work. Case managers can act as liaisons in the claim management process, and are tasked with coordinating the activities of the various medical professionals and necessary community resources, all while working with the insurance claims adjuster to achieve maximum functional outcomes as quickly and safely as possible. The ultimate goal is a safe return to work.

The WCA material notes that the Michigan Workers' Compensation Act does not specifically address nurse case management services. However, curiously, it instructs that the injured worker has the right to request a new case manager, or deny further case management assistance entirely.

#### E. South Carolina

In South Carolina, a 2012 statute establishes that any employee seeking treatment for a disease or injury for which workers' compensation benefits are sought necessarily consents to the release of medical records related to such treatment.<sup>30</sup> The medical records must be released to the insurance carrier, employer, their respective attorneys, and certified rehabilitation professionals. Failure to produce these requested documents within 30 days may result in a monetary fine.

The statute goes on to note that a health care provider, who examines or treats an employee for a workers' compensation claim, may discuss or communicate the worker's medical history, diagnosis, causation, treatment, prognosis, work restrictions, and impairments with the

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<sup>29</sup>*Medical Benefits*, DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS, WORKERS' COMPENSATION AGENCY <http://www.michigan.gov/wca/0,4682,7-191-79556-407200--,00.html> (last visited Jan. 7, 2018).

<sup>30</sup> S.C. CODE ANN. § 42-15-95 (2007).

carrier, employer, their respective attorneys, or certified rehabilitation professionals *without the employee's consent*. The employee need only be notified within a timely fashion prior to the communication, advised of the nature of the communication, and provided a written copy of the questions at the same time they are submitted to the provider. The employee must then be supplied a copy of the responses offered by the provider. Notably, the statute forbids any discussion or communication that conflicts with, or interferes with, the employee's examination or treatment.

#### F. Vermont

Under Vermont law, the use of medical case management is *non-voluntary*; the injured worker has no authority to request or deny the use of a case manager in his or her claim. The Vermont Department of Labor has provided guidance related to the use of medical case management.<sup>31</sup> The Department defines such management as “the planning and coordination of health care services appropriate to achieve the goal of medical rehabilitation.” This type of management may include care assessment, including a personal interview with the injured worker, assistance in developing, implementing, and coordinating a medical care plan, and evaluation of treatment results. The Department further notes that the goal of case management is to assist the injured worker in understanding all available treatment options, better enabling them to make an informed choice regarding their health.

The Department indicates that most medical case managers are registered nurses. In fact, the Vermont workers' compensation system actually *requests* that managers obtain licensure from the Vermont Board of Nursing. If case managers lack the requisite work experience in the Vermont workers' compensation system, the Department then advises that such individuals first work as interns under the direct supervision of an experienced case manager. The Department's guidance on this subject identifies the case manager as an agent of the employer and insurance carrier, and cautions that they may therefore ask questions “to perform activities that are beneficial to the employer/carrier.” For this reason, the case manager is encouraged to provide a “disclosure statement,” formally notifying the worker of this relationship.

The Department goes on to suggest that case managers can provide benefits to the injured worker, such as providing referrals to physical therapy providers, diagnostic testing facilities, and specialists. In the event a dispute arises from medical case management, the Department advised that informal resolution be pursued. However, the Department indeed accepts the submission of complaints by letter, and can provide informal conferencing to reach a satisfactory resolution.

#### V. Leading Case Law

Despite the regularity in which nurse case managers are now utilized in workers' compensation claims, limited precedential authority exists establishing the legal duties, obligations, and exposures applicable to these professionals. Therefore, for those jurisdictions in which no authoritative precedent exists, it is submitted that guidance can be derived from cases

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<sup>31</sup> *Medical Case Management*, VERMONT DEPARTMENT OF LABOR, <http://labor.vermont.gov/workers-compensation/adjusters-attorneys-insurers/medical-case-management/> (last visited Jan. 1, 2018).

addressing similarly-situated parties, such as plant doctors and nurses, and contracted third parties. With these considerations, the following precedents have been selected as representative of the leading disputes involving nurse case managers – or similar third parties – and the analytical framework which has been applied to their potential liability.

#### A. Florida

In a Florida case, a nurse case manager, who revealed sensitive information regarding the claimant to his employer, was held entitled to the standard statutory immunity provided employers under the state’s Workers’ Compensation Act.<sup>32</sup> There, an injured worker, who was receiving workers’ compensation benefits, was assigned a nurse case manager. Frustrated with the handling of his claim, the worker expressed to the case manager his anger over the ordeal, and insinuated that he may retaliate with violence. The nurse case manager thereafter emailed the employer, seeking advice on how best to handle the situation. Eventually, the Miami Police Department became involved, resulting in a criminal investigation.

The claimant filed suit against the workers’ compensation insurance carrier, alleging a variety of torts, including negligence, defamation, libel, fraud, and intentional infliction of emotional distress. The court dismissed all counts, holding that the nurse case manager’s actions did not rise to the level of separate and independent torts, as required to establish a claim outside the statutory immunity provided the employer under the Workers’ Compensation Act. The court characterized the nurse case manager’s conduct as, at worst, amounting to simple negligence; ultimately, her conduct was interpreted as a mere attempt to solicit guidance from her superiors.

#### B. North Carolina

In a North Carolina case, plant nurses, negligent in their care of an injured worker, were also held entitled to statutory immunity under the state’s Workers’ Compensation Act.<sup>33</sup> There, the claimant was an employee of Smithfield Packing, and the defendants – registered nurses – were employed by the Smithfield Packing Medical Clinic. The claimant was injured in the course of employment, and sought medical treatment from nurses at the clinic. Over the course of the following days, the claimant returned to the clinic a total of four times, alleging continued symptoms related to the injury, and received various treatments from multiple nurses. None of these visits resulted referral to a medical doctor. Finally, claimant presented to a hospital, where she was diagnosed with a complete Achilles tendon tear and septic ankle – an injury far more severe than that identified by the clinic’s nurses.

The claimant filed suit against the nurses, alleging negligence in the care and treatment provided. Dismissing the case, the court held that the state’s Workers’ Compensation Act provides exclusive protection, beyond the employer itself, to those conducting the employer’s business. Both defendants in the case were registered nurses, employed by the employer at the company’s medical clinic, and were considered to be conducting the employer’s business when

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<sup>32</sup> Marshall v. Amerisys, Inc., 943 So.2d 276 (Fl. Ct. App. 2006).

<sup>33</sup> Johnson v. Jonathan Gooden, R.N., 791 S.E.2d 283 (N.C. Ct. App. 2016).

the alleged tortious acts occurred. Therefore, the court concluded, the claimant's remedy was limited to that provided under the Workers' Compensation Act.

### C. Pennsylvania

In a leading Pennsylvania case, a tort suit was permitted to proceed against a nurse case manager where the alleged negligence that occurred was independent of the original work injury.<sup>34</sup> There, the claimant had suffered an orthopedic injury and sometime later developed psychiatric symptoms. A nurse case manager was assigned to the claim, who informed the claimant that, in order to continue receiving benefits, he was required to submit to the treatment deemed necessary by the insurer. The claimant subsequently underwent electrical shock therapy, which resulted in severe adverse effects. It was later revealed by another physician that the claimant's psychiatric complications were not work-related, but instead, service-related Post Traumatic Stress Disorder associated with his experiences in Vietnam.

The claimant filed suit against the insurance carrier and nurse case manager, alleging negligence in directing and coordinating medical care. The appellate court held that the claim was permissible as falling outside the protections of the exclusive remedy; to wit, the suit did not merely allege "bad faith" – a tort barred by the employer's immunity under the Workers' Compensation Act. Here, the tortious conduct was unrelated to the actual processing of the compensation claim and, instead, constituted an activity "subsequent to and independent of" the work injury itself.

### D. South Carolina

In an unreported South Carolina case, a nurse case manager, who failed to accurately inform the claimant of his medical diagnoses, was held immune from tort, pursuant to the exclusive remedy of workers' compensation.<sup>35</sup> There, the claimant was receiving workers' compensation benefits when a nurse case manager was assigned to his case. In the course of coordinating the claimant's care, the nurse case manager failed to properly and accurately inform the claimant of his true diagnoses, resulting in an exacerbation of his condition. Consequently, the claimant brought suit for negligence, breach of fiduciary duty, and breach of good faith and fair dealing.

The court noted the longstanding principle that employers are immune from tort actions by their employees for work-related accident or injuries via the Workers' Compensation Act's exclusive remedy. This immunity extended to the employer's carrier *except* where the carrier stood in the position of a third party, unrelated to its function as a compensation carrier. The court determined that this exception did not apply, instead finding that the nurse case manager was an employee of the carrier, acting in the scope of her employment, and in furtherance of the carrier's function as an insurance carrier service to its employer-client. Therefore, the insurer, and by extension, the nurse case manager, was entitled to statutory immunity from tort liability.

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<sup>34</sup> *Taras v. Wausau Ins. Cos.*, 602 A.2d 882 (1992), appeal denied, 615 A.2d 1313 (1992).

<sup>35</sup> *Altstaetter v. Liberty Mutual Corp.*, 2007 S.C. Upub. LEXIS 356 (S.C. Ct. App. 2007).

## E. Analysis

A review of these precedents reveals that common themes emerge amongst the sampled jurisdictions; namely, the starting position of most courts' analyses focuses on the default presumption that all work-related injury claims fall within the exclusive remedy provided by a state's workers' compensation statute. However, in circumstances where courts have permitted tort claims related to nurse case managers and treatment rendered by the insurer, the tortious acts at issue can be characterized as arising separately and distinctly from the original work-related injury. In this respect, the damages alleged are not a natural result of negligence in the claims handling process or coordination of treatment. Instead, the threshold for independent tortious conduct is typically met by actions having a non-work-related genesis, committed by actors outside the scope of the traditional employer-employee relationship.

It is this type of factual scenario which presents potential exposure to the nurse case manager in a number of jurisdictions. Still, in cases where the alleged negligence or intentional act maintains a causal nexus with the work injury, the exclusive remedy largely remains intact, granting immunity to the nurse case manager in his or her capacity as an extension of the employer and carrier.

## VI. Conclusion

In nearly every state, workers' insurance carriers now regularly utilize nurse case managers as a method of containing costs, improving recovery outcomes, and increasing the overall efficiencies of claims. It is this author's impression, based on extensive research, and conversation with "industry insiders," that the nurse case manager will continue to be a prevalent figure in the workers' compensation community. For this reason, injured workers, counsel, employers, and carriers should all seek a professional, respectful, and courteous working relationship with nurse case managers; such camaraderie is imperative for all parties to derive the maximum benefits that have been proven attainable from the disability management model. Any parties harboring suspicion towards the mere concept of the nurse case manager are reminded of the extensive ethical and professional standards by which these individuals are held.

In this respect, where a nurse case manager acts within the bounds of the *Code* and law, and serves as an advocate for the claimant's maximum functionality, a common goal is shared amongst all actors involved in a claim. Positive outcomes of this professional synergy can manifest in faster healing times, reduced overhead in the management of claims, and fewer injured workers frustrated by the medical complexities and governmental bureaucracies that lead to extended litigation and, ultimately, prolonged disability.