THE EXECUTIVES IN WORKERS' COMPENSATION

EWC NEWSLETTER

Resources to Help with Your Biggest Challenges, Insights from Industry Experts.

George the Bartender and an AMA Guides Clarification

or Back at the Bar, Be It Ever So Briefly[1]

BY STEVEN GREEN, SENIOR ASSOCIATE ATTORNEY AT KEGEL, TOBIN & TRUCE

FROM THE LOBBY BAR AT THE HYATT - It was the Monday after the first day of summer. After months of staying safer at home, I felt the need to enjoy a drink and unwind at an old familiar haunt, the Lobby Bar, as bars were slowly reopening after COVID-19 closures as long as social distancing rules were followed.

As I ambled in, I spied my friend Kim, the Hyatt's breathtakingly beautiful cocktail waitress, and after exchanging some pleasantries requested a mint julep, one of my favorite summertime refreshments.[2]

I surveyed the room and found two other regulars who had also returned, the infamous applicant attorney Ron Summers and noted defense attorney Frank Falls. They were off in a corner having a conversation that looked like it could come to blows.

Having been mentored by Joe Truce, formerly a managing shareholder at our firm and creator of *George the Bartender*, to try and diffuse such heated situations, I went over to their table, making sure to maintain a safe distance. I asked what the argument was about this time, as the two probably would never agree on whether the sky was blue or whether a glass was half-empty or half-full.

Ron told me that he beat Frank to the Medical

AUGUST 15, 2020

In This Issue:

Unit and obtained a chiropractic panel on a wrist/hand injury case. The chiropractor had rated the wrist based on range of motion and the hand based on grip loss, exactly as the treating doctor had done. The consultative rating had combined the two. Ron was taunting Frank that his client was going to get slammed at the upcoming trial.

Frank looked at me hopefully, expecting that I would have Joe's magic briefcase and could pull a case out of it to save the day.[3] He was a little crestfallen to see that I only had my laptop in hand.

I asked to see the report and read it, paying particular attention to the discussion of the AMA impairments. The QME merely listed the two impairments using their tables, without additional comment.

I told them that while I did not have Joe's magic briefcase, I did have my laptop. The details of their case reminded me a recent panel decision in *Sumudu Jayasuriya v. San Francisco Bay Area Rapid Transit District* (ADJ10440533) filed on April 20, 2020.[4] I brought it up on the laptop screen for their perusal.

In *Jayasuriya*, the applicant claimed an injury to their upper left extremity. The chiropractic QME issued two reports, noting in their first report a normal range of motion for the applicant's left wrist and reduced grip strength in their left hand. The QME's second report indicated that the applicant had a restricted left wrist range of motion resulting in a 6 percent upper extremity impairment, as well as reduced grip strength in their left hand to which the QME assigned 20 percent upper extremity impairment.

However, these reports were not backed up with any explanation as to why the QME decided to include a grip loss rating disallowed by the *AMA Guides to the Evaluation of Permanent Impairment (Fifth Edition)*, aka the Guides. The Workers' Compensation Judge (WCJ) issued a Findings and Award in favor of the applicant anyway. Defendant then filed a Petition for Reconsideration, contending that a new panel was necessary and that the applicant's disability rating should only be based on their loss of range of motion.

The Appeals Board granted the petition and essentially quoted the Guides on when grip loss can be used in addition to other upper extremity ratings. However, they noted that the PQME did not mention that the wrist loss of motion and the loss of strength were caused by "unrelated etiologic or pathomechanical causes," so the strict application of the Guides would not allow for combination of the impairments.

The Appeals Board then indicated that strict application was not necessary if the physician used their own judgment and provided a supported *Almaraz-Guzman* analysis. The Appeals Board set forth the four-prong test derived from *Milpitas Unified School District v Workers Comp. Appeals Bd. (Almaraz-Guzman)* (2010) 187 Cal. App. 4th 808, 75 Cal Comp Cases 837 as follows:[5]

> To properly rate an injured worker's disability using an *Almaraz-Guzman* analysis, the doctor is expected to: 1) provide a strict rating per the AMA Guides, 2) explain why the strict rating does not accurately reflect the applicant's disability, 3) provide an alternate rating using the four corners of the AMA Guides, and 4) explain why the alternate rating more accurately reflects the applicant's level of disability (*Id.* at 828-829).

The Appeals Board panel found that since the QME did not explain why the strict rating using the Guides did not accurately reflect applicant's disability, nor why combining the range of motion impairment with the grip strength impairment was a more accurate measure of applicant's disability, the report did not comply with *Almaraz-Guzman* and was therefore not substantial evidence upon which an Award could be based. Development of the record was ordered.

In some remarkable dicta, the Appeals Board noted that, in general, record development should first be supplemented by physicians who have already seen the injured worker, *but* in this case, it might be in everyone's best interest to select a different specialty. They also pointed out that the injury in this matter was limited to wrist and hand, the treatment was with orthopedic hand specialists, and the Medical Unit has a special code for an orthopedic hand specialist. They suggested the parties either agree to an orthopedic hand specialist AME, request a QME in that specialty, or request that the judge appoint an orthopedic hand specialist as a regular physician.

GEORGE'S KTT MINT JULEP

5 mint sprigs

1/2 oz simple syrup

2 oz bourbon whiskey

Crushed ice

Place mint leaves and simple syrup into a glass and muddle with a wooden spoon until fragrant. Add crushed ice and then pour the bourbon. Top with a sprig of mint and enjoy!

As Ron was left speechless and Frank was beaming, I waived to Kim to bring us another round. My work was done.

DISCLAIMER: All characters at the Lobby Bar are fictional, and the storyline is simply a product of my animated imagination.

We are still bound by the four corners of the Guides unless a doctor can provide sound reasoning to justify their determination as to otherwise with an *Almaraz-Guzman* analysis. While *Jayasuriya* lacks the designation "significant panel decision," Joe Truce always liked to remind me of one of his favorite portions of the Labor Code, subtitled "Specific Additional Evidence Allowed," §5703(g), which states in relevant part as follows:

> The appeals board may receive as **evidence either at or subsequent to a hearing**, and use as proof of any fact in dispute, the following matters, in addition to sworn testimony presented in open hearing: ... (g) Excerpts from expert testimony received by the appeals board upon similar issues of scientific fact in other cases and the prior decisions of the appeals board upon similar issues. (emphasis added)

He would also draw our attention to California Evidence Code §452(d), which provides that judicial notice may be taken of "Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States."

Outside of this brief respite to the friendly confines of the Lobby Bar, we continue to make our own doubles and vigorously wash our hands. Bottoms up, friends.

[1] For those new patrons to the Lobby Bar, George the Bartender's workers' compensation case involves an injury to his elbow, epicondylitis (tennis elbow), sustained from the repetitive serving of martinis to Joe Truce. If there ever was an admitted industrial injury, this is it!

[2] First conceived as a medicinal aid to ease gastrointestinal distress, the julep transitioned into a cocktail in the late 1700s in the American South, predominantly enjoyed by the upper-crust of society as access to ice and the silver or pewter cup in which the drink is served was limited.

[3] Much like Mary Poppins's seemingly bottomless carpetbag (of Disney fame) and Hermione Granger's bottomless handbag (of Harry Potter fame), Joe's briefcase possesses magical powers, granting him the ability to pull out any decision at a moment's notice.

[4] A copy of *Jayasuriya* can be obtained via email request.

[5] Several discussions were had on *Almaraz-Guzman* in the Lobby Bar back in the day during 2009-2010. *Milpitas* in particular was discussed in the fall of 2010 in the edition titled Re: George The Bartender, The "List" And The Court Of Appeals Decision In Guzman Or Will You Be Left Standing When The Music Stops? A copy of *Milpitas* can be obtained via email request.

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EXECUTIVE SUMMARY

American workers' compensation –a study in disparities and the expanded use of presumption

BY DAVID LANGHAM, DEPUTY CHIEF JUDGE, FLORIDA OFFICE OF WORKER'S COMPENSATION CLAIMS AND VISITING FELLOW, SEDGWICK INSTITUTE AND CHRIS MANDEL, RIMS-CRMP, SVP, STRATEGIC SOLUTIONS AND DIRECTOR, SEDGWICK INSTITUTE

COVID-19 has presented American workers and employers with a variety of impacts. From its roots as an injury compensation system, American workers' compensation has evolved on a state-by-state basis. Despite some outliers, disease has not been compensable in these systems absent specific evidentiary demonstrations or legislative definitions. The nature of COVID-19 and its challenges have led various states to react legislatively or regulatorily to retroactively amend the social contract that is workers' compensation, and to shift virus costs to employers and insurance carriers retroactively. There remains a specific COVID-19 focus in much of that, but a suggestion of potential generalized expansion of workers' compensation in the long-term.

This paper provides a brief outline of the history and original purposes of state-based workers' compensation systems and offers a deeper look at the evolution of the view and coverage of "occupational" disease within these systems. It includes an in-depth examination of the legal issue of "presumption of compensability" and its implications for a no-fault based system whose design under-girded by the "grand bargain," offered an ostensible equivalent trade-off between an injured employee's right to sue their employer and the employer's right to deny responsibility for injuries that occurred on the job.

The COVID-19 virus event has both expanded the use of presumption, state by state, and raised significant questions and concerns about how or if this expansion will undermine the grand bargain and the core principles that have consistently defined the guard rails of state systems for over 100 years. The paper considers both the micro- and macro-economic impacts of COVID-19 as legislators, politicians, and regulators take actions that extend workers' compensation benefits to typically selected groups of affected workers, some more narrowly and some more broadly. Those impacts include potentially significant implications for interstate competition among states, each of which provides workers' compensation benefits in accordance with the statute within each state.

As we share in our conclusions, the stage is set for workers' compensation in some jurisdictions to face potentially significant cost increases associated with COVID-19 as the presumption is used by some states to provide benefits to cover it under workers' compensation statutes. As states expand their coverage, they will need to raise premiums.

There may be those who characterize this expansion, contrary to recent system criticisms, as a "race to the top." Critics may allege that merely describes the workers' compensation cost of doing business. As COVID-19 plays out over time, the extent and frequency of using the presumption will influence how it and similar presumptions are used for distribution of risk in the future. Stakeholders in the workers' compensation systems would be wise to carefully consider the full ramifications of the continued expansion of the presumption tool before capitulating to its use without a clear, supportable basis for doing so. Overuse of the presumption risks tipping the grand bargain balance away from its creator's original intent and increasingly toward inequity between stakeholders.

Click here to read the complete white paper.

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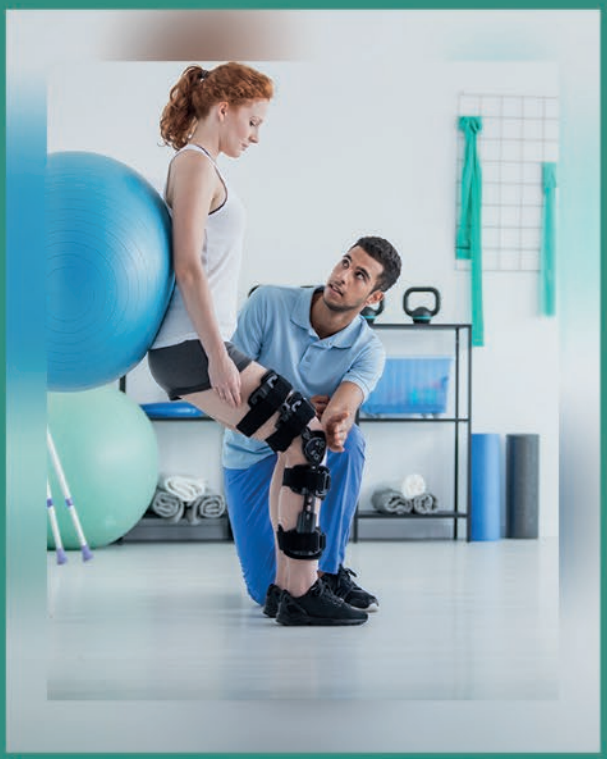

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AB5 Bares Its Teeth

BY CURTIS WHEATON, ASSOCIATE ATTORNEY AT HANNA BROPHY OAKLAND

Furious advocacy from both supporters and opponents of AB5 throughout its legislative pendency underscored the significant stakes of the legislation. However, it is vital to remember that the bill codified a new legal test. It did not define specific results. Those classified as independent contractors did not receive an embossed state certificate entitling them to the rights and benefits of employees. Instead, they won the intangible legal right to hold their employers to the "ABC test" and the considerably more challenging standard it prescribes.

To that end, AB5 was also endowed with an expanded scope of agencies authorized to enforce its provisions, vesting the Attorney General and city attorneys statewide with the authority to bring actions for injunctive relief to correct alleged misclassification. The California Labor Commissioner (authorized to enforce all provisions of the Labor Code) and workers themselves (those claiming harm by alleged misclassification) also remain entitled to bring actions of their own.

Seven months following AB5's implementation, its expanded enforcement mechanism is already apparent. On May 5, Attorney General Becerra (joined by the city attorneys of Los Angeles, San Francisco and San Diego) filed a complaint seeking injunctive relief, damages and penalties for misclassification against Lyft and Uber. On July 16, San Francisco District Attorney Boudin filed a complaint on the same basis against DoorDash. Most recently, the California Labor Commissioner targeted "Mobile Wash Inc.," a gig-based car washing company, with a complaint for allegedly making a "business decision" to misclassify car washers as independent contractors.

OVERALL, THE TAKEAWAY FROM THIS SURGE IN PROSECUTION IS THAT VARIOUS STATE AGENCIES ARE WATCHING. WHETHER THERE WILL BE ENOUGH RESULTS FROM THE INITIALLY SACRIFICED LAMBS TO PREVENT THE SLAUGHTER OF THE ENTIRE HERD IS YET TO BE SEEN.

Another indicator of the priority being given to enforcement of AB5 is the 2020-21 State budget. Despite being created subject to unprecedented fiscal challenges resultant from the COVID-19 pandemic, over $20 million is allocated specifically for the enforcement of AB5 by the Department of Justice and State agencies. California voters will also play a pivotal role. The consortium of Uber, Lyft, DoorDash, Instacart, and Postmates (recently acquired by Uber) raised the requisite signatures for the "Protect App-Based Drivers and Services Act" to appear on the November 2020 ballot as "Proposition 22," a measure that would exempt ride-share and delivery companies from AB5 entirely.

Overall, the takeaway from this surge in prosecution is that various state agencies are watching. Whether there will be enough results from the initially sacrificed lambs to prevent the slaughter of the entire herd is yet to be seen. Business operators and owners who could be deemed "employers" should carefully review their procedures and consult with appropriate employment counsel as to proper classification. If those workers are deemed employees, they are eligible for workers' compensation benefits as well. Coverage is required in the state of California for workers' compensation for any business with even just a single employee. Failure to appropriately misclassify an entire rank of workers could lead to significant exposure for an otherwise uninsured employer.

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[1] To satisfy the ABC test, a hiring entity must demonstrate that: (1) the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (2) the worker performs work that is outside the usual course of the hiring entity's business; and (3) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

[2] https://oag.ca.gov/system/files/attachments/press-docs/2020-05-05%20-%20Filed%20Complaint.pdf

[3] https://sfdistrictattorney.org/sites/default/files/Document/DoorDash%20complaint.pdf

[4] https://www.dir.ca.gov/DIRNews/2020/2020-61.html

[5] http://www.ebudget.ca.gov/budget/2020-21EN/#/BudgetSummary

[6] https://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures/

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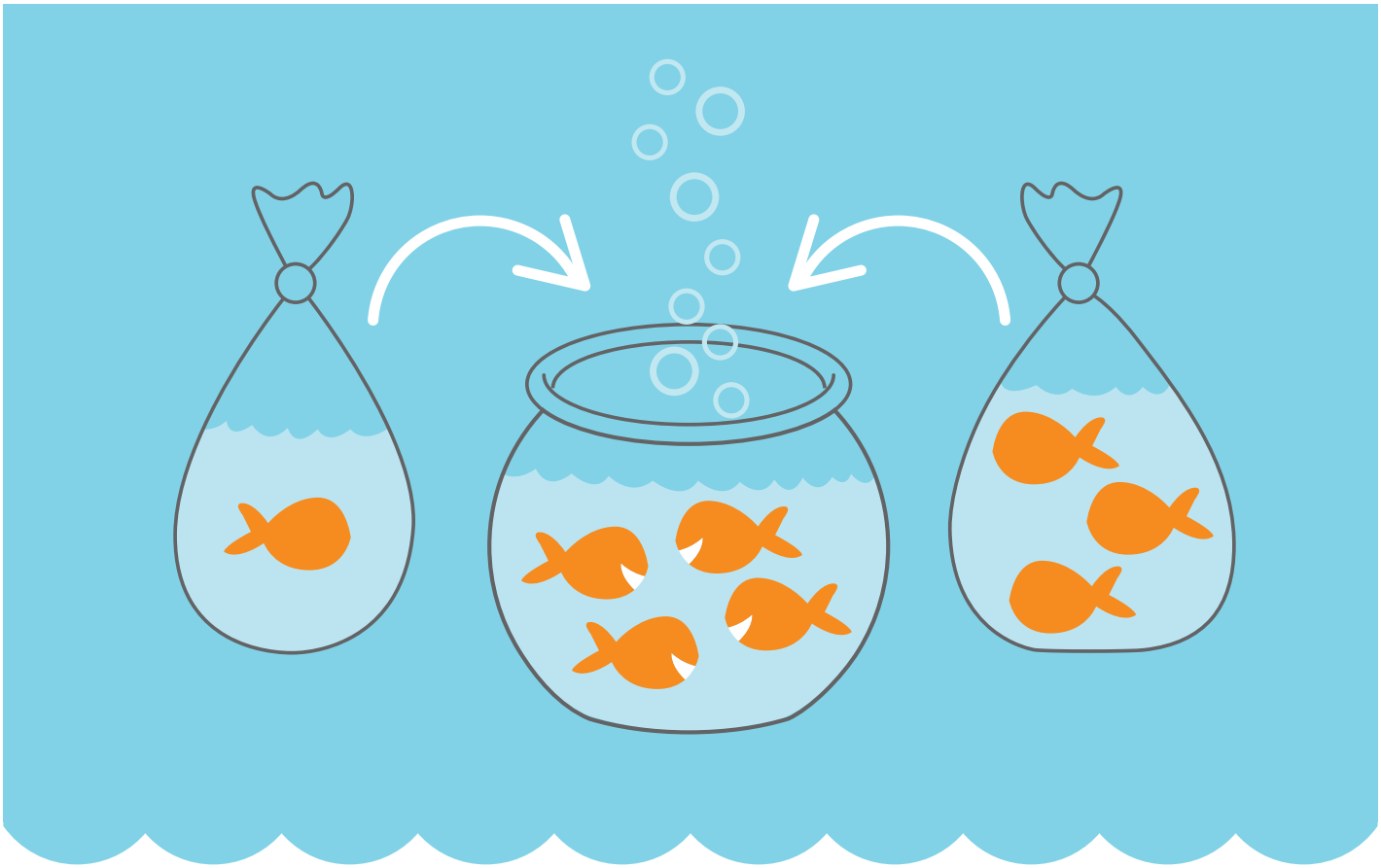

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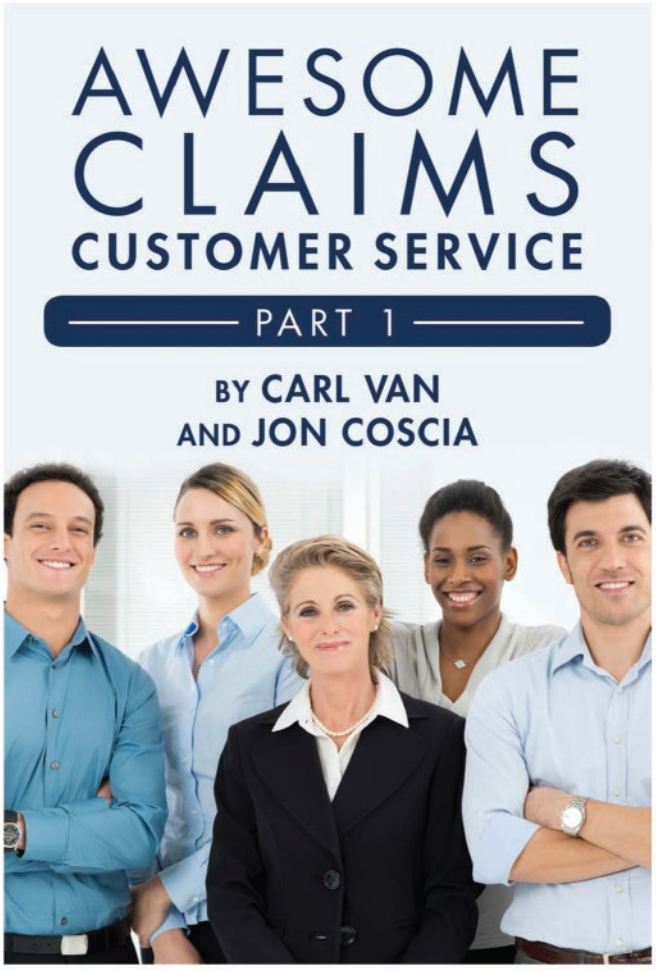
Listen to Customers: You Might Learn Something

PART 1 OF A 2-PART SERIES

BY CARL VAN, ITP AND JON COSCIA



Most of us believe our jobs would be easier if customers would just listen. In our new book *Awesome Claims Customer Service*, we talk about a way to make that happen. Do you know what would also make our jobs easier? If we listened a little better ourselves. Nowhere is this truth more evident than when Carl monitors claims examiners' phone calls. Customers tell us precisely what they want; we just fail to listen. By applying active listening skills, we can make our jobs easier and improve customer service along the way.

In claims discussions, customers do three basic things. First, they ask questions. Next, they offer objections. And third, they make statements. If you're not using active listening skills, you might get confused about which of these is happening. We're pretty good at knowing when someone asks a question. But sometimes, if someone makes a snide comment when they're asking a question, like, "Oh, thanks for calling *finally*. Is that the best you can do?," they may not actually be asking a question. Carl heard one call recently where a customer said to a claims person, "What are you guys there, a bunch of morons?," and the claims person *actually answered*: "Well, no, we're not morons; we've all graduated from college and…" blah blah blah. We don't think the customer was really asking that question. But generally, we're pretty good at knowing when someone asks us a question. It's in instances when people make statements and offer objections that sometimes we get confused, and that can be dangerous for the claims professional.

When a claims person becomes confused between a customer's statement and a customer's objection, it's usually because they don't understand the difference between making a statement and offering an objection from the customer's point of view. If a customer were to tell you, "You know what, I didn't get payment nearly as soon as I thought I should have," this person isn't really offering an objection. And by the way, when someone offers an objection, you need to get involved. If they're just making a statement, they're looking for a reaction, like a snide comment. So when the customer says, "I didn't get payment as soon as I thought I should have," our response should be a simple reaction to the statement: "You know what, if you didn't get it as soon as you thought you were going to, I do apologize. We understand that paying promptly

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ACTIVE LISTENING ALSO MEANS KNOWING THE DIFFERENCE BETWEEN WHAT PEOPLE WANT TO HEAR AND WHAT THEY EXPECT TO HEAR. AS A CLAIMS PROFESSIONAL, MANY TIMES, CUSTOMERS ONLY HEAR WHAT THEY WANT TO HEAR. WE KNOW THAT. WE HEAR THAT ALL THE TIME FROM CLAIMS PEOPLE. CUSTOMERS JUST HEAR WHAT THEY WANT TO HEAR. IT MIGHT BE TRUE IN MANY CASES. BUT IT'S ALSO TRUE THAT PEOPLE HEAR WHAT THEY EXPECT TO HEAR.

is important, and I am sorry it didn't happen." But if this person says, "Well, I didn't get my payment as soon as I thought I should have, and I want to talk to a manager," that's an objection, and that's something you need to get involved in. But how can you tell the difference? It's simple.

If a customer implies that they are going to take some future action, i.e., they are going to do something because of a perceived issue, then you need to get involved and help solve the problem. Short of that, your best response is simply to apologize for the situation and move on. That's the difference between an objection that requires your involvement and a statement that simply requires your acknowledgment. If the customer says, "You didn't respond to my claim as soon as you should have," they're just making a statement. Apologize: "If we didn't respond as soon as you thought we should have, I apologize. We understand that this is important." If they say something like, "Well, you didn't respond as soon as I thought you should have, and I think I should speak to a supervisor," that's an objection. How do you tell the difference? In the second instance, the customer implied that they were going to take some action. If they don't say something like, "Maybe I should speak to a manager," i.e., they don't suggest an action they think they should take, then they are probably just making a statement. Not understanding the difference can lead to an argument.

When a person says something like, "You didn't call me as soon as you should have," and you reply with, "When were you told I was going to call?," notice what is happening. You're getting involved in the issue when the customer is looking for a reaction. Guess what? No matter what you say and how this goes back and forth, this conversation won't end well because you're drawing out the fact that the customer is disappointed. You don't need to try to solve the problem. What's the best reaction? "If I didn't call when you thought I should have (or whatever the issue is), I'm sorry about that. We understand that this is important. I apologize that it didn't happen." This is the response that the person is looking for. You can make your job much easier and improve customer service by giving the claimant what they want: a reaction.

Active listening also means knowing the difference between what people want to hear and what they expect to hear. As a claims professional, many times, customers only hear what they want to hear. We know that. We hear that all the time from claims people. Customers just hear what they want to hear. It might be true in many cases. But it's also true that people hear what they *expect* to hear. In fact, it is a theory called the *law of expectations*. The law of expectations says that you will hear what you expect to hear, and you will see what you expect to see, and that truth is so strong, it can override what you hear versus what the person really said and what you see versus what's actually in front of you. We know that's hard to believe, so in the next part of our series, we are going to give you an exercise to illustrate that point.

To be continued in EWC Newsletter, September 1, "Listen to Customers: You Might Learn Something - Part 2."