I. Introduction

A. Disability management, most often recognized in workers’ compensation in the activities of nurse case managers, has been on the rise over the last few decades. The insurance executive David North characterized the emergence of case management as one of the 1990’s. He marks 1993 as a significant date. In that year, the “CCM” was established – the credentialing process established reflecting professionalization of the medical intervention process. David A. North, “Workers’ Compensation Medical Management: 1993 to 2008: Innovation, Regulatory Response, and Unfinished Business,” p.161, in WORKERS’ COMPENSATION: WHERE HAVE WE COME FROM? WHERE ARE WE GOING? (Richard A. Victor & Linda L. Carruba, eds., WCRI 2010).

B. The formal definition of disability management is “a collaborative process of assessment, planning, facilitation and advocacy for options and services to meet an individual's health needs through communication and available resources to promote quality cost-effective outcomes.” Vernon Poland, What is Medical Case Management?, https://www.linkedin.com/pulse/what-medical-case-management-vernon-poland. See also https://ccmcertification.org/policymakers/faqs-about-case-management.

It is notable that not all disability management professionals are nurses. In the 2007 article, “Disability Management Approach Focuses on Employee,” the administrators of the certification, “Certified Disability Management Specialist” (CDMS, now part of CCM), asserted that many disability managers are not nurses, but come from other fields, like human resources or benefits management. The article added, “Companies are looking at what specific programs and offerings will help bring their employees back to work.” 2007 LRP WORKERS’ COMPENSATION YEAR BOOK, p.II-28 (LRP 2007).

* Any opinions are solely those of the author, and not of the Commonwealth of Pennsylvania. Contact: DTorrey@pa.gov.
In a 2016 Pennsylvania case which held that a Heart & Lung Act recipient is not obliged to accept the involvement of a case manager, the case manager in question was from a vocational services vendor. *See City of Wilkes-Barre v. Fire Fighters Local Union No. 104*, 143 A.3d 1050 (Pa. Commw. 2016).

C. Employers and carriers in the present day are advised not to be passive in the face of workers’ compensation claims, and in cases that are, or promise to be, big-ticket items, the assignment of a case manager has become popular. Employers and carriers are unapologetic in arguing for disability management to reduce the cost of claims and to foster prompt return to work by injured workers. See the article, “Reduce work comp costs by proactively managing claims.” This 2000 advice column admonished, “Early nurse intervention and case management. Earlier intervention allows the claim to be managed and makes sure that the employee gets the care needed while looking at return-to-work at the earliest possible time.” 2001 LRP WORKERS’ COMPENSATION YEAR BOOK, p.1-1 (LRP 2001). *See The N Factor: How Nurses add Value to Workers Compensation Claims* (a study by Liberty Mutual, 2016), https://helmsmantpa.com/Documents/HMS_NFactor.pdf.


D. An Indiana-based disability manager summarizes the goals of a nurse case manager as follows:

1. Assuring an accurate and thorough diagnosis of injury
2. Coordination of the total span of an injured worker’s medical treatment
3. Assuring a timely compliance with all medical treatment to facilitate an optimal functional outcome
4. Avoiding unnecessary/unproven medical care
5. Assuring appropriate utilization of resources (concurrent utilization review)
6. Attaining medical stability/maximum medical improvement (MMI)
7. Facilitating an early return-to-work (RTW)
8. Avoiding complications and/or re-injury
9. Achieving a reduction in the overall cost of the claim

He adds, “These goals will be accomplished” when the nurse case manager undertakes the following efforts:

1. Educating the disabled worker about their injury and the rehabilitation/RTW process.
2. Guiding the disabled worker to the most appropriate provider for their injury
3. Educating the employer about their disabled worker’s injury and the rehabilitation/RTW process that lies before them
4. Educating the provider(s) about the functional demands of the disabled
worker’s pre-injury job and any transitional work activities available, facilitating the earliest possible safe RTW
5. Motivating the disabled worker in their compliance and completion of the rehabilitation/RTW process
6. Keeping everyone involved in the disabled worker’s rehabilitation/RTW process fully informed at all times regarding progress, developments, and setbacks


E. A current trend is said to be a growing desire by employers to have disability management professionals possess certification. The credentialing organization CDMS was, notably, recently purchased by CCM, the certification enterprise noted above. CCM, in April 2017, posted a policy paper (“Issue Brief”) on ethics in the field. See ETHICS IN CASE MANAGEMENT, https://ccmcertification.org/center-stage/issue-brief-ethics-case-management.

F. Dr. Christopher Brigham, in his valuable book, *Living Abled & Healthy* (2016), http://www.livingabled.com/, discusses (chiefly for the benefit of injured workers), the role of all the players in the system, including nurse case managers.

II. Legal Implications

Why do legal implications exist when discussing nurse case (and other disability) management? A principal reason is that workers’ compensation, while an insurance, medical, and rehabilitation system, is also a legal system. Rights and obligations under the workers’ compensation law, privacy laws, and tort must be considered.

A. No duty exists under the PA Act to cooperate with case management.

1. *The term, “nurse case manager,” or the like, does not appear in the Act or its regulations.* However, Section 306(f.1)(1)(iii) of the Act provides that “[n]othing in this section shall prohibit an insurer or an employer from contracting with any individual, partnership, association or corporation to provide case management and coordination of services with regard to injured employes.” 77 P.S. § 531(1)(iii).

2. *No guidelines for use of case managers exist in Pennsylvania, as in other states.* (See, e.g., rules and laws of Indiana, Michigan, and South Carolina). South Carolina, for example, has a statute which authorizes the physician to communicate with a nurse case manager
under certain conditions. SOUTH CAROLINA STATUTES, § 42-15-95(B); Rule 67-1308 (same).


3. **Analyzing potential liability.** In general, in looking at liability issues, lawyers and judges may refer to what duties are owed by the case manager once a relationship exists, and may also consider the “scope of practice” of an individual identifying him- or herself as a licensed nurse.

B. **The issue of involvement of nurse case managers is one current on a national basis.**

1. As noted above, case management is recognized universally as being motivated as a method of controlling disability and medical costs.

2. A perennial subject at bar association and similar conferences.

   a. **Accusation that the case manager is a mere extension of the adjuster, and/or that he or she is a “spy” for the carrier.** A particularly shrill criticism is found on the website of a Georgia claimants’ lawyer. See http://moelaw.com/dont-want-nurse-case-manager-assigned-case/.

   b. **Refusals of cooperation by claimant’s attorneys.** Some attorneys in Pennsylvania simply instruct their clients not to deal with nurse case managers. Others approach the issue on a case-by-case basis and consider the identity of the particular nurse involved. **Note:** In South Carolina, where cooperation is in essence required and seems to be part of the system, a typical pattern of advice is for the client to cooperate, but to be cautious about the case manager becoming an advocate for the carrier. One constructive South Carolina lawyer website states:

   Theoretically, nurse case managers work independently of the insurance company. While they do provide the insurance company with relevant information about a patient’s condition and medical treatment, they should not advocate against the patient during settlement negotiations or otherwise perform investigative activity on the insurance company’s behalf…. Some argue that nurse case managers take on the role as a second insurance adjuster. They may present facts in a light that favors the insurance company’s position. If you suspect that this is occurring, it is important that you share this information with your workers’ compensation attorney immediately.

c. **Physicians’ view that they are being manipulated.** A few years ago, a prominent Pittsburgh foot and ankle specialist, at a regular educational seminar he and his partners host for the community, presented a satirical film in which he depicted himself as the subject of attempted manipulation by both a nurse case manager and an injured employee/patient who didn’t want to go back to work. The film was remarkable in that the physician (in costume) played all the characters **himself.**

II. Pennsylvania Law

**A. In general:** available authorities mostly have to do with potential liability of a case manager and the sponsoring employer/carrier when some alleged irregularity occurs in the course of case management.

**B. The employer- or carrier-employed case manager is generally entitled to immunity for negligence in treatment and in processing of the workers’ compensation claim.**


**C. Employer- or carrier-employed case managers enjoy such immunity with regard to negligence in the “processing of claims.”** That is, no “bad faith” tort cause of action exists. The leading case is *Kuney v. PMA Ins. Co.*, 578 A.2d 1285 (Pa. 1990). See **TORREY-GREENBERG TREATISE, § 10:26.** Thus, where the plaintiff, a workers’ compensation recipient, complained of increased injury and failure fully to recover, because of an insurer’s refusal promptly to agree to pay for back surgery (requesting, instead, a second opinion), such claim was held barred by the exclusive remedy. *Fry v. Atlantic States Ins. Co.*, 700 A.2d 974 (Pa. Super. 1997).

**D. Exception:** Acts “subsequent to and independent of injury.”

1. **Leading case: Taras v. Wausau Ins. Cos.,** 602 A.2d 882 (1992), appeal denied, 615 A.2d 1313 (1992). In this case, the employer and/or its agents were alleged to have committed negligence in the course of controlling the claimant’s medical treatment. The court held that because this activity transcended mere processing of the claim, and constituted an activity “subsequent to and independent of” the original injury, a tort suit could lie despite the case having its genesis under the Act.

In *Taras*, the employee had suffered a serious work injury. Although the injury was orthopedic in nature, he later developed psychiatric complications. His employer’s insurance carrier assigned the case to a management enterprise, assigning a registered nurse to direct and recommend treatment. The nurse told the claimant that, in order to continue his eligibility for benefits, he was to undergo such treatment as determined necessary by the carrier. One of the treatments was electrical shock therapy, a procedure which went poorly. Thereafter, a different physician told the claimant that his psychological problem was not, in fact, work-related, but instead was Post Traumatic Stress Disorder caused by his wartime experiences in Vietnam. The claimant thereafter sued the insurance carrier, the nurse, and the psychiatrist who had
administered the shock therapy. The precise claim was that they were negligent in directing and coordinating his medical care, which they had indicated was necessary for the claimant to continue receiving compensation benefits.

This claim was allowed by the Pennsylvania Superior Court. The lawsuit was not considered to reflect merely “bad faith” in the claims handling.


In that case, claimant suffered injuries with complete incontinence of bowel and bladder. He was paid benefits on a continuing basis. The employer, a school district, thereafter retained, through its TPA, a vocational rehabilitation service provider to “provide vocational rehabilitation services… including securing job interviews ….” According to the complaint, the counselor (Chattin) when setting up interviews, “failed to take into consideration and inform potential employers of plaintiff’s limitations regarding bowel and bladder control.” Claimant attended interviews and, as a result on the counselor’s omissions, became embarrassed at those meetings – at which he was obliged to reveal his condition. As a result, he filed a civil complaint alleging vocational malpractice, breach of contract, and intentional infliction of emotional distress (IIED).

With regard to the first count, the claimant maintained that the “defendants breached the duty of care owed to him, causing damages and constituting vocational malpractice.” With regard to the breach of contract theory, “the alleged contractual breach is based upon the assertion that the plaintiff is a third party beneficiary of defendant Wood’s contract” with the TPA. According to the plaintiff, the rehabilitation vendor’s and Ms. Chattin’s “failure to pay proper attention to his physical limitations constitutes breach of contract.” With regard to the IIED claim, the plaintiff complained that the defendants had committed this tort “because their failure to inform potential employers of claimant’s limitations led to the plaintiff’s embarrassment, humiliation, and emotional distress when he attended job interviews and had to discuss his limitations…."

The trial court granted summary judgment to the defendants but Superior Court reversed. In this regard, the Taras case, noted above, applied. In the present case, as in Taras, neither the compensation carrier nor its agent would be “immune from suit… because the injuries stemmed from a separate, non-work-related injury”; in Taras, the claimant (see above) had sustained an aggravation to his underlying work-related injury as a result of the required electro-convulsive therapy. The present case was analogous:

Appellant seeks damages for vocational malpractice and intentional infliction of emotional distress arising out of conduct by a third party, a rehabilitation company…. These damages for the alleged emotional distress occurred over four and a half years after the occurrence of appellant’s work-related injury and relate to an entirely different injury than the one for which appellant originally received workers’ compensation under the Act…. 
3. **Subsequent case:** Charlton v. PMA Ins. Group, 2015 WL 6870724 (Pa. Super. 2015). In Charlton, the Superior Court allowed a workers’ compensation claimant’s Intentional Infliction of Emotional Distress (IIED) claim against the carrier and its adjuster.

There, the adjuster (Zimmerman), in an apparent attempt to leverage the claimant (Charlton) into a compromise settlement, harassed him by bringing up an episode of child abuse she had detected in his psychologist’s records. The claimant sued the adjuster and the carrier in tort, alleging IIED. The trial court dismissed the case, but Superior Court reversed and remanded for trial. The record recognized that carriers and their employees are immune when a default occurs in the claims handling. However, “a claim that an insurer’s conduct in handling a claim exacerbated a non-work-related injury is not subject to the exclusive remedy.” In the present case, the worker had alleged that the adjuster had “intentionally caused him an injury by referencing a non-work-related psychological injury … [W]e conclude that Charlton’s claim is not based upon a work-related injury, and that Charlton is not seeking the type of damages that would flow from such a claim …”

4. **Note:** A case on insurance coverage in this area. Atlantic Mutual Insurance Co. v WCAB (Gula), 926 A.2d 449 (Pa. Super. 2007).

In a 2007 case, the Superior Court held that a managed care/risk management entity’s comprehensive general liability (CGL) carrier did not have the duty to defend or indemnify against such allegations of negligence in the carrier’s administration of medical care. In this regard, the type of omission complained of (bodily injury) did not constitute an “occurrence” under the CGL policy. Further, the CGL policy in question included a valid exclusion for “failing to render proper professional services.”

**III. Hypotheticals Based on Actual Cases**

The following cases gave rise to questions concerning the effectiveness, ethics, and potential liabilities of the nurse case manager (NCM).

**A.** NCM working with catastrophically injured worker conveys to the adjuster claimant’s statement that he believes that he may be charged criminally in the motor vehicle accident that caused the injury. The NCM in turn calls the adjuster, who sets in motion an attempt to set aside its liability. (2016 Pittsburgh claim of WCJ Torrey).

**B.** NCM working with injured worker accepts her invitation to attend her child’s first communion and family social gathering thereafter. Litigation commences, causing distress on the part of the claimant, who felt betrayed, and permanent estrangement. (1988 Pittsburgh claim of Torrey as a lawyer – employer’s agent was a job placement professional, not a NCM).

**C.** NCM, formally employed by Liberty Mutual, who “took an active role in managing the treatment of the claimant, utilizing her nursing skills, taking an active role in the managing of the treatment,” alleged to have been negligent in not informing him of his true diagnosis, thereby exacerbating his condition. Altstaetter v. Liberty Mutual Corp., 2007 S.C. Unpub. LEXIS 356 (S.C. Ct. App. 2007) (case was dismissed based on exclusive remedy).
D. NCM, employee of “Amerisys,” who was assigned to an injured worker, off on TTD, and who was “frustrated with the handling of his claims,” indicated to her that he “might be destructive,” explaining, “I know how to make bombs and silencers,” alleged, along with carrier, to have defamed and libeled him; and to have falsely accused him of a crime, and to have committed intentional infliction of emotional distress. *Marshall v. Amerisys, Inc.*, 943 So.2d 276 (Fl. Ct. App. 2006) (case was dismissed under exclusive remedy; no intentional tort made out).

E. NCM who allegedly told claimant that “I work with a lot of your company’s people and if you don’t get back to work in the next few weeks you could be fired …. [also] It doesn’t matter how many times you ask for chiropractic care, you are not going to get it. That is just the way the system is and you need to get back to work, and if you don’t, you will get fired,” sued for intentional infliction of emotional distress after claimant was, in fact, fired. *Meadows v. Farrell*, 2010 Cal. App. Unpub. LEXIS 9275 (Cal. Ct. App. 2010) (NCM’s motion to strike complaint, based upon anti-SLAPP law, dismissed).

**APPENDIX**

I. Indiana Guidelines

“The Indiana Worker’s Compensation Board has issued guidelines for the use of Nurse Case Managers (“NCM”) in the administration of compensation claims. [They are as follows.] 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.”

II. Michigan Guidelines

(MEDICAL CASE MANAGEMENT DO’S AND DON’TS)

**DO:**
- Be inclusive of all parties involved in the medical recovery process, especially the injured employee and their family.
- Include goals and timeframes when creating the care plan, and allow for updates as needed.
- Determine if treatment is appropriate.
- Determine if funding for case management services is secured before proceeding.
- Determine what is needed for successful return to work, especially from employer’s perspective.
- Provide client advocacy and support at all times, and provide input and guidance on treatment services…BE A LIAISON BETWEEN PARTIES.
- Use valid disability duration guidelines, and use them as GUIDELINES.
- Educate all parties, especially employer, whenever possible on the positive and cost-effective aspects of return to work programs and processes.
- Always obtain and maintain appropriate releases of information prior to beginning case management services.
• Understand that there are many players in the case management process, but that your main client should always be the injured employee.
• Always identify clearly your role as a case manager to the employee at the start of the relationship.

**DO NOT:**
• Give legal advice at any time.
• Schedule IME appointments.
• Change employee’s doctor appointments just to fit YOUR schedule.
• Withhold information crucial to RTW success.
• Perpetuate disability by failing to address doctor recommendations, health concerns, or return-to-work issues in a timely fashion.
• Become personally and/or emotionally attached to the client.
• Assume that you have an absolute right to attend all doctors’ appointments despite client wishes against it.
• Interfere with due process between employee and employer.
• Initiate cost services prior to obtaining carrier authorization.
• Provide legal direction to the claims adjuster, or engage in claims investigative or adversarial activities.

http://www.michigan.gov/wca/0,4682,7-191-26929-101122--,00.html.

III. South Carolina Statute

Title 42. Workers’ Compensation
Chapter 15. … Medical Attention and Examination

[Excerpt]


(A) ….

(B) A health care provider who provides examination or treatment for any injury, disease, or condition for which compensation is sought under the provisions of this title may discuss or communicate an employee’s medical history, diagnosis, causation, course of treatment, prognosis, work restrictions, and impairments with the insurance carrier, employer, their respective attorneys or certified rehabilitation professionals, or the commission without the employee’s consent. The employee must be:

(1) notified by the employer, carrier, or its representative requesting the discussion or communication with the health care provider in a timely fashion, in writing or orally, of the discussion or communication and may attend and participate. This notification must occur prior to the actual discussion or communication if the health care provider knows the discussion or communication will occur in the near future;
(2) advised by the employer, carrier, or its representative requesting the discussion or communication with the health care provider of the nature of the discussion or communication prior to the discussion or communication; and

(3) provided with a copy of the written questions at the same time the questions are submitted to the health care provider. The employee also must be provided with a copy of the response by the health care provider.

Any discussion or communication must not conflict with or interfere with the employee’s examination or treatment.

Any discussions, communications, medical reports, or opinions obtained in accordance with this section will not constitute a breach of the physician’s duty of confidentiality.

(C) Any discussions, communications, medical reports, or opinions obtained in violation of this section must be excluded from any proceedings under the provisions of this title.