

BELOW THE RED LINE

HEYL ROYSTER

WORKERS' COMPENSATION NEWSLETTER

A Newsletter for Employers and Claims Professionals

October 2010



A WORD FROM THE PRACTICE GROUP CHAIR

Many of you may remember that our most recent former governor heralded “workers’ compensation reform” as one of his political objectives. The result of his and the General Assembly’s efforts was the 2005 statutory amendments, which included procedures to combat workers’ compensation fraud. So, after four years, how far have we progressed in combating workers’ compensation fraud?

The answers to that question are provided in this month’s feature article authored by John Flodstrom, a partner in our Urbana office. John has provided an excellent update on workers’ compensation fraud in Illinois. If you need assistance in initiating fraud investigation procedures, please do not hesitate to contact John or one of our other workers’ compensation attorneys for assistance.

In addition, following John’s feature article, Brad Peterson has authored a summary of a potentially significant decision from the Eleventh Circuit on the issue of Medicare liens. In this decision, the Court of Appeals for the Eleventh Circuit found Medicare’s insistence on full payment of its lien to be unreasonable in view of the facts of that case and the amount of the proffered potential settlement. As the law concerning Medicare Set-Aside trusts and Medicare liens continues to evolve, our firm is identifying tactics and strategies to limit your MSA liability. Please do not hesitate to contact us should you have questions on MSA issues.

With leaves flying and pumpkins grinning, we know that Fall is here—please enjoy it before the snow starts flying!

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A REVIEW OF WORKERS' COMPENSATION FRAUD CONVICTIONS SINCE 2005

Illinois is approaching the 100th anniversary of the adoption of comprehensive workers’ compensation laws. As enacted in 1911, the workers’ compensation statutes did not contain any provisions prohibiting fraud. Under the prior versions of the Act, if an individual committed fraud to obtain or deny someone workers’ compensation benefits, any prosecution for that fraud was carried out pursuant to the general criminal statutes of Illinois. The Workers’ Compensation Act was amended in 2005 in an attempt to specifically criminalize workers’ compensation fraud. 820 ILCS 305/25.5. This newsletter discusses that amendment and what has transpired since it became effective.

THIS MONTH'S FEATURE AUTHOR:



John Flodstrom joined the Urbana office of Heyl Royster in 1986 following his graduation from Northern Illinois University Law School. He became a partner in 1996. John devotes a significant portion of his practice to the defense of employers in Illinois workers’ compensation cases. He has covered the Mattoon docket since 1988 and also appears regularly at the Whittington/Herrin docket in Southern Illinois. John has tried well in excess of 100 cases before various Workers’ Compensation Commission arbitrators. John is also involved in civil litigation, where much of his work entails defending employers in third party cases. In addition to being a frequent lecturer on workers’ compensation issues, John has written several articles on various aspects of workers’ compensation and has also provided in-house training to firm clients.

2005 Amendments to the Workers' Compensation Act

The fraud provisions were codified in Section 25.5 of the Workers' Compensation Act. Paragraph (a) sets forth the acts deemed to be unlawful, and states as follows:

(a) It is unlawful for any person, company, corporation, insurance carrier, healthcare provider, or other entity to:

(1) Intentionally present or cause to be presented any false or fraudulent claim for the payment of any workers' compensation benefit.

(2) Intentionally make or cause to be made any false or fraudulent material statement or material representation for the purpose of obtaining or denying any workers' compensation benefit.

(3) Intentionally make or cause to be made any false or fraudulent statements with regard to entitlement to workers' compensation benefits with the intent to prevent an injured worker from making a legitimate claim for any workers' compensation benefits.

(4) Intentionally prepare or provide an invalid, false, or counterfeit certificate of insurance as proof of workers' compensation insurance.

(5) Intentionally make or cause to be made any false or fraudulent material statement or material representation for the purpose of obtaining workers' compensation insurance at less than the proper rate for that insurance.

(6) Intentionally make or cause to be made any false or fraudulent material statement or material representation on an initial or renewal self-insurance application or accompanying financial statement for the purpose of obtaining self-insurance status or reducing the amount of security that may be required to be furnished pursuant to Section 4 of this Act.

(7) Intentionally make or cause to be made any false or fraudulent material statement to the Division of Insurance's fraud and insurance non-compliance unit in the course of an investigation of fraud or insurance non-compliance.

(8) Intentionally assist, abet, solicit, or conspire with any person, company, or other entity to commit any of the acts in paragraph (1), (2), (3), (4), (5), (6), or (7) of this subsection (a).

For the purposes of paragraphs (2), (3), (5), (6), and (7), the term "statement" includes any writing, notice, proof of injury, bill for services, hospital or doctor records and reports, or X-ray and test results.

(b) any person violating subsection (a) is guilty of a Class 4 felony. Any person or entity convicted of any violation of this Section shall be ordered to pay complete restitution to any person or entity so defrauded in addition to any fine or sentence imposed as a result of the conviction.

820 ILCS 305/25.5(a).

In addition to the criminal penalties, anyone convicted of committing workers' compensation fraud and "who knowingly obtains, attempts to obtain, or causes to be obtained any benefits under th[e] Act by the making of a false claim" or misrepresentation, is civilly liable to the payor of the benefits in an amount equal to three times the value of the benefits obtained plus reasonable attorney's fees and expenses. 820 ILCS 305/25.5(g). If the benefits are fraudulently sought, but not actually obtained, the penalty is twice the value of the benefits so sought.

Procedures For Investigating And Prosecuting Workers' Compensation Fraud Violations

The Workers' Compensation Act empowered the Illinois Department of Insurance to create a special investigative unit to investigate reports of workers' compensation fraud or insurance non-compliance. In the exercise of that power, the Department of Insurance created the Workers' Compensation Fraud Unit (WCFU) to investigate claims of workers' compensation fraud or insurance non-compliance. The WCFU is responsible for investigating reports of fraud and making referrals for prosecution to the Illinois Attorney General or the appropriate county State's Attorney. 820 ILCS 305/25.5(c).

Review of Workers' Compensation Fraud Convictions Since 2005

According to the WCFU's annual reports to the Illinois Workers' Compensation Advisory Board, there were no re-

ported convictions in 2006 or 2007. However, in 2008, there were a total of seven convictions, each involving employees who committed fraud to illegally obtain workers' compensation benefits. In four of these cases, the employee was either working an alternate job while receiving TTD benefits, or observed doing activities that violated the medical restrictions. None of the employee-defendants in these four cases were sentenced to any jail or prison time but were placed on probation and ordered to pay restitution and/or perform public service. *See e.g., People v. Erica Miller*, 07 CF 1804 (Champaign County, July 11, 2008); *People v. Christopher Vaultenburg*, 07 CF 1056 (Peoria County, July 17, 2008); *People v. Maria Garcia*, 07 CF 403 (Lake County, August 26, 2008); *People v. Ghodrati Karami*, 07 CF 001547-0002 (DuPage County, October 8, 2008).

In two of the cases, an employee reported a workplace injury that was contradicted by the medical records or other evidence. These cases resulted in sentences of probation and fines. *People v. Eugene Foster*, 07 CR 25480 (Cook County, May 13, 2008); *People v. Robert Lee Walker*, 07 CF 1023 (Peoria County, December 15, 2008).

The final 2008 case involved an employee who altered his medical records in an attempt to obtain workers' compensation benefits. This employee was sentenced to two years in prison. *People v. Jeffrey Lotesto*, (Cook County, January 16, 2008).

There were five reported convictions in 2009. One case involved an insurance agent who embezzled premiums intended for workers' compensation insurance. The insurance agent was sentenced to two months of periodic imprisonment, probation, and fines and restitution. In another matter, the employee admitted to working at another job while collecting TTD benefits. She was sentenced to court supervision and assessed a fine.

An employee was prosecuted for forgery, a Class 3 felony, for providing false information on an Application for Adjustment of Claim. *People v. Araceli Torres*, 08 CF 189 (Kankakee County, August 25, 2009). This employee was sentenced to 18 months of conditional discharge plus court costs.

An employer in a workers' compensation claim pled guilty to a lesser offense relating to making a fraudulent representation to obtain workers' compensation insurance at less than the proper rate for the insurance. *People v. James Boomgard*, 09 CF 5 (Ford County, May 15, 2009). The defendant was ordered to pay court costs and a Crimestoppers fee.

Finally, in a case where the defendant attempted to furnish fraudulent certificates of insurance to a general contractor

as proof of having workers' compensation insurance, the defendant was sentenced to one year conditional discharge, assessed a fine, and ordered to pay restitution. *People v. Zbigniew Szeliga*, 07 CR 25479 (Cook County, December 4, 2009).

There have been two convictions thus far in 2010. In the first, the defendant was an insurance agent who collected money from clients for a non-existent workers' compensation insurance policy. He was prosecuted for theft, a Class 3 felony, and was sentenced to 24 months of probation, assessed probation and genetic marker fees, and ordered to pay restitution of \$52,732. *People v. David McElwee*, 09 CF 737 (Macon County, June 16, 2010). In the other case, the defendant was convicted of income tax evasion for committing affirmative acts of evasion including collecting workers' compensation premiums for personal use and not reporting it as income. He was sentenced to 33 months in prison, two years of supervised release and fined. *USA v. Quilici*, 09 CR 436-1 (N.D. Ill., July 6, 2010).

Conclusions

An analysis of the WCFU's records shows that the new anti-fraud provisions enacted in 2005 have led to very few convictions for workers' compensation fraud. The WCFU records document 14 convictions from the date the provisions were enacted through September, 2010. When one considers that approximately 55,000 new claims are filed with the Illinois Workers' Compensation Commission each year, the reported cases are miniscule. However, it is worth mentioning that the WCFU was not actually established until 2006, and that it has taken some time for the fraud investigators to complete their investigations and have their referrals make their way through the criminal justice system. It is encouraging to see many of the convictions have involved fraudulent activity that is thought to be fairly common to workers' compensation claims, such as collecting TTD while working at an alternate job, performing activities inconsistent with medical restrictions, and providing false information to medical providers. Hopefully these recent convictions will lay the groundwork for further prosecutions (when warranted) and we will see more results in the years to come.

PRACTICE POINTERS

The enactment of the workers' compensation fraud provisions and the creation of the WCFU provide employers, insurers, and third-party administrators with an effective tool to combat workers' compensation fraud. If you suspect fraud in any workers' compensation case, you must submit

a written complaint to Francis (Buzz) Walsh at the *Workers' Compensation Fraud Unit, Illinois Department of Insurance*, francis.walsh@illinois.gov; 320 W. Washington, Springfield, Illinois 62786.

Here are several tips for investigating and exposing possible fraud in workers' compensation claims:

- Verify that medical records, reports, and off-work slips provided by claimants are complete and unaltered. Request medical records directly from medical providers to ensure the documents are accurate.
- Take recorded or written statements from claimants, co-workers, and supervisors. This should be done as soon as possible to document any accidents or claimed injuries, and to make the claimant commit to a specific version of the incident.
- Use video surveillance in cases of suspected fraud to develop evidence of any activities that are inconsistent with medical histories or work restrictions.
- Use a private investigator or other sources of investigation in cases where there is a suspicion that an employee might be earning income while collecting TTD benefits. If the claimant has filed an Application for Adjustment of Claim with the Workers' Compensation Commission, record subpoenas can be issued by defense counsel to obtain employment records from other employers.
- Be careful to preserve all evidence of potential fraud, including tape recordings, video or photographic evidence, and original documents.
- Reports of fraudulent activity should be submitted to the WCFU as soon as possible. There is a three-year statute of limitations for prosecutions of workers' compensation fraud. The statute begins to run on the date the fraud is committed.

Should you have any questions or concerns involving workers' compensation fraud, please feel to contact any of our workers' compensation attorneys across the state.

RECENT CASE OF INTEREST

The Appellate Court Rules A Chicago Police Department Trainee Is Eligible For Workers' Compensation Benefits

On August 3, 2010, the Appellate Court, Workers' Compensation Commission Division, issued its decision in *Dodaro v. Illinois Workers' Compensation Comm'n*, No. 1-09-0447WC, 2010 WL 3035744 (1st Dist. Aug. 3, 2010). In that case, the claimant alleged that she had been injured while performing a training exercise as a trainee with the Chicago Police Department. The respondent denied the claim, taking the position the claimant was not an employee entitled to workers' compensation benefits under 820 ILCS 305/1(b)1. Section 1(b)1 excludes workers' compensation coverage for "any duly appointed member of a police department in any city whose population exceeds 200,000 according to the last Federal or State Census" A member of a police department of a city with a population in excess of 200,000 qualifies for disability benefits under the Illinois Pension Code instead of the Workers' Compensation Act.

According to the opinion, there was testimony in the record indicating the claimant was referred to as a "recruit" or "probationary police officer" while she was attending the police academy and training to become a police officer. Trainees did not wear any badges or other insignia identifying them as Chicago police officers. The recruits did not have the authority to carry weapons outside of the academy or to make arrests. Funds were deducted from the trainee's earnings to contribute toward the Police Pension Fund.

The arbitrator found that the claimant was a member of the Chicago Police Department and denied all workers' compensation benefits. The Commission reversed the arbitrator, finding the claim compensable; however, the Cook County Circuit Court reversed the Commission and found that both trainees and sworn police officers are considered members of a police department.

The Appellate Court was asked to decide whether a trainee is a "duly appointed member of a police department ..." as defined by 820 ILCS 305/1(b)1. The Appellate Court, relying on Webster's Dictionary, noted a "member" is de-

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fined, in relevant part, as 'a person who has been admitted [usually] formally to the responsibilities and privileges of some association or joint enterprise.' In applying the definition to the facts of the underlying case, the Appellate Court found that the claimant was not a sworn police officer and did not have the responsibilities, duties, and privileges of a Chicago police officer. She was a member of the police academy and not the Chicago Police Department, and therefore was eligible for workers' compensation benefits related to her claimed work accident.

RECENT DEVELOPMENTS WITH MEDICARE/CMS

by Brad Peterson

A potentially important decision concerning Medicare conditional payments (liens) was handed down on September 29, 2010 by the United States Court of Appeals for the Eleventh Circuit (California). Medicare (CMS) frequently takes the position that it will not compromise its conditional payments -- even if the settlement would result in Medicare taking all of the settlement (minus attorney's fees). In *Bradley v. Sebelius*, 2010 WL 3769132 (11th Cir. 2010), CMS took just such a position. The Court of Appeals, however, took exception to CMS's position, and affirmed a substantial reduction in the conditional payments lien.

In *Bradley*, the Probate Court was asked to apportion the settlement amount between Medicare and non-Medicare beneficiaries. The settlement amount was substantially less than the potential full value of the claim. The Probate Court effectively reduced the Medicare lien from \$38,875.08 to \$787.50. Medicare refused to accept the Probate Court's ruling. After the estate exhausted administrative remedies, the decision was appealed to the federal district court. The district court reversed, relying, in part, upon arguments by Medicare that pursuant to the Medicare Field Manual, its conditional payment lien was not subject to compromise based on allocation of fault.

On appeal, the Eleventh Circuit reversed the district court, noting "[h]istorically there is a strong public interest in the expeditious resolution of lawsuits through settlement." *Bradley*, 2010 WL 3769132, at *5. The Court stated:

The Secretary's position would have a chilling effect on settlement. The Secretary's position compels plaintiffs to force their tort claims to trial, burdening the court system. It is a financial disincentive to ac-

cept otherwise reasonable settlement offers. It would allow tortfeasors to escape responsibility.

Bradley, 2010 WL 3769132, at *5.

The court further found that Medicare's reliance on its field manual was unpersuasive, pointing out that Medicare policies and manuals are not "law" and would not be given deference under the Chevron Doctrine.

The *Bradley* case is particularly noteworthy because the Eleventh Circuit held that Medicare cannot take an unreasonable position with regard to their liens that would thwart the public policy in favor of settlements. This case will likely be widely cited in future efforts seeking compromise of Medicare conditional payments.

The public policy analysis used by the Court in *Bradley* could also be extended to civil cases where the parties choose to use a Medicare Set-Aside for future medical care. If a defendant wants to use a Medicare Set-Aside to protect itself from further claims by Medicare under the Medicare Secondary Payer Act, this case could provide a basis upon which to formulate a compromise value of the MSA. If, for example, the plaintiff reasonably appears to be 30 percent at fault and the case is settled for 70 cents on the dollar with a MSA for future medical expense, the MSA could reasonably be reduced by 30 percent under the analysis employed in *Bradley*. Under that scenario, a good faith hearing should be held requesting the court to enter an order apportioning/compromising the MSA to a reasonable amount given the facts and circumstances of the case.

While we are in uncharted territory with regard to the use of Medicare Set-Aside accounts in civil cases, the *Bradley* decision suggests that the judiciary will not hesitate to impose practical solutions to facilitate equitable settlements. In other words, this holding is a very positive development since it may result in more prompt resolution of difficult claims.



Brad Peterson concentrates his practice in the defense of workers' compensation, construction and transportation liability, and insurance coverage matters. In addition, Brad has become a leader in the field on issues of Medicare Set-Aside trusts and liens. In addition to speaking frequently on these issues, Brad was one of the first attorneys in the State of Illinois to publish an article regarding the application of the Medicare Secondary Payer Act to workers' compensation claims: "Medicare, Workers' Compensation and Set-Aside Trusts," *Southern Illinois Law Journal* (2002).

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