

BELOW THE RED LINE

HEYL ROYSTER

WORKERS' COMPENSATION NEWSLETTER

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A Newsletter for Employers and Claims Professionals

July 2011



A WORD FROM THE PRACTICE GROUP CHAIR

We hope you are enjoying the summer as it looks like it will be an interesting fall with the passage of workers' compensation legislative reform and other changes on the horizon. We will continue to be your source for significant changes and news that affects your company's workers' compensation destiny.

This month's author is attorney Brad Antonacci, who practices workers' compensation law out of our Rockford and Chicago offices. Brad has had a busy year arbitrating claims for employers, and recently he was contacted by a fraud investigator regarding a workers' compensation claim that we are currently defending. We thought our experience in dealing with the fraud investigator on behalf of the employer would be of interest to you. My personal observation is fraud investigations may be more prevalent in the future.

As you know, Governor Quinn signed the new workers' compensation legislation on June 28, 2011. While many new provisions apply to accidents occurring on or after September 1, 2011, some new provisions are currently in effect. For example, amended Section 8.1a allows employers to establish a Preferred Provider Program ("PPP"), which may provide the employer with the ability to control medical costs. Pursuant to this Section, an employer will need to register the PPP with the Illinois Department of Insurance if they contract directly with providers or use multiple networks to establish their own PPP. The Department of Insurance will then approve the PPP if certain conditions are met. As of this writing we are told no PPPs have been registered by the Department of Insurance. The Department of Insurance is currently working on the implementation of this new section. We strongly suggest efforts be made by your company to take advantage of this new section if possible.

Finally, should your company desire a presentation by us regarding the new workers' compensation legislation, please do not hesitate to contact: kluther@heyloyroyster.com,

bbonds@heyloyroyster.com, or cyoung@heyloyroyster.com. Stay cool and enjoy the summer.

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THIS MONTH'S AUTHOR:



A native of Hampshire, Illinois, **Brad Antonacci** served as an editor of the Bar Review at Northern Illinois University College of Law. After graduating from law school in 2002, Brad joined Heyl Royster as an associate in the Rockford office.

Brad concentrates his practice in the area of workers' compensation and civil litigation. He has arbitrated numerous workers' compensation claims.

WORKERS' COMPENSATION FRAUD

By Brad Antonacci

We have recently been contacted by an investigator from the Illinois Workers' Compensation Fraud Unit as part of its investigation of potentially fraudulent claims brought by a claimant in one of our files. In this article, we discuss the recent amendments to the fraud section of the Workers' Compensation Act and provide you with a helpful checklist if you wish to forward a report of a potentially fraudulent matter to the Workers' Compensation Fraud Unit. We also discuss an employer's right to terminate a claimant for filing a fraudulent claim, and what to expect during a fraud investigation by the Workers' Compensation Fraud Unit. Finally, we provide you with several tips for investigating and exposing possible fraud in your workers' compensation claims.

Amendments To The Fraud Section Of The Act

Our October 2010 issue of *Below The Red Line* discussed the various fraud provisions of the Workers' Compensation Act. The recent 2011 amendments to the Act, now signed into law by the governor and effective as of July 1, 2011, amend many of those fraud provisions of the Act.

According to the amended Section 25.5 of the Act, it is now unlawful for any person, company, corporation, insurance carrier, healthcare provider, or other entity to intentionally present a bill or statement for the payment of medical services that were not provided. 820 ILCS 305/25.5. Sentences for violating this Section are as follows: If the value of the property is \$300 or less, it is a Class A misdemeanor; if the value of the property is more than \$300 but not more than \$10,000, it is a Class 3 felony; if the value of the property is more than \$10,000 but not more than \$100,000, it is a Class 2 felony; if the violation is more than \$100,000, it is a Class 1 felony. A person convicted under this Section shall also be ordered to pay monetary restitution to the insurance company or self-insured entity or any other person for any financial loss sustained as a result of the violation of the Section, including court costs and attorney fees. 820 ILCS 305/25.5. An insurance company, self-insured entity, or any other person suffering financial loss sustained as a result of a violation may seek restitution, including court costs and attorney fees in a civil action in a court of competent jurisdiction. 820 ILCS 305/25.5.

The fraud insurance non-compliance unit shall report violations to the "Special Prosecutions Bureau of the Criminal Division of the Office of the Attorney General" or to the

state's attorney of the county in which the offense allegedly occurred, either of whom has authority to prosecute violations under this section. 820 ILCS 305/25.5. The primary insurance shall have authority to issue a subpoena to a medical provider. The fraud and insurance non-compliance unit shall implement a system utilizing advance analytics inclusive of predictive modeling, data mining, social network analysis, and scoring algorithms for the detection and prevention of fraud, waste, and abuse on or before January 1, 2012.

The fraud and insurance non-compliance unit shall also provide a report to the President of the Senate, Speaker of the House of Representatives, Minority Leader of the House of Representatives, Minority Leader of the Senate, Governor, Chairman of the Commission, and Director of Insurance on or before July 1, 2012, and annually thereafter. 820 ILCS 305/25.5. The fraud and insurance non-compliance unit shall submit a written report on an annual basis identifying information regarding all proceedings under this section.

Our Recent Experience Involving Alleged Fraud By A Claimant

In one of our firm's claim files, the employer forwarded materials to the Workers' Compensation Fraud Unit (WCFU) to investigate potential fraud by the claimant involving two workers' compensation claims against the employer. In the claimant's first claim, the employer investigated the alleged accident and determined that it was physically impossible for the claimant's injury to have occurred as described by the claimant. In the claimant's second claim, surveillance cameras at the employer's place of business confirmed that no accident took place as alleged by the claimant. The employer forwarded to the WCFU statements by employees who were working with the claimant on the dates of the alleged accidents as well as the surveillance video from the alleged second accident. The employer also forwarded his notes with respect to his investigations of the alleged accidents.

The employer was then contacted by an investigator from the WCFU who expressed great interest in prosecuting the claimant for fraud for her workers' compensation claims. The investigator met with the employer at the employer's place of business and one of our firm's attorneys attended that meeting. During that meeting, the investigator interviewed a witness and photographed the alleged accident sites. The investigator appeared very "gung ho" about

Past issues of
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are available under the
"Resources" section of our website
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prosecuting the claimant, especially given the surveillance from the date of the alleged second accident which showed no accident taking place. The investigator was even more interested when we advised her that our investigation turned up sixteen prior workers' compensation claims by the claimant.

One issue that did arise during the investigation was the disclosure of the claimant's medical records, which we obtained as part of our investigation of claimant's claims. We were provided with a subpoena from the Department of Insurance (as part of the fraud investigation) requesting that we provide any and all records with respect to the claimant, including medical records. There was concern with disclosing the claimant's medical records, which presents issues given the Health Information Portability and Accountability Act (HIPAA). HIPAA specifically notes that it does not apply to workers' compensation claims, but given that this is a fraud investigation, it is not clear as to whether that section of HIPAA applies. However, HIPAA does require responses to requests for information and documentation from law enforcement. Therefore, we believe we are obligated to respond to subpoena requests from the WCFU for a claimant's medical records and did so in this case.

If you receive a subpoena or request for documentation from the WCFU, one option would be to advise the claimant's counsel that you have received a subpoena regarding a fraud investigation and will be responding to it. The claimant's counsel should then advise if he has an objection and should file a motion to quash the subpoena if he or she has an issue with the subpoena. This puts the claimant on notice that if there is an issue with disclosing the information, it is their responsibility to act, and absent that, the subpoena will be responded to. You should be careful not to disclose protected information. If you are unsure of what documents need to be disclosed and what documents should be withheld from disclosure, please contact our offices and we can discuss these issues with you.

Once the WCFU has the necessary documentation, they will contact the claimant and schedule an interview. We were advised during our meeting that many times during this interview claimants break down and admit to the fraud. Even if the claimants do not admit to the fraud, we were advised that they usually end up lying during the interview. If a claimant lies during the interview, they are charged for

that as well. The fraud investigator advised that in our case, the claimant's counsel was notified of the pending fraud investigation. The interview has not yet been scheduled.

Following the WCFU's investigation, all documentation is forwarded by the WCFU to the local State's Attorney in the county where the fraud allegedly took place. It is then up to the State's Attorney to determine if charges will be brought against the claimant. In the case discussed here, the documentation is in the hands of the WCFU for their review.

CAUTION

It is imperative that a claim being investigated by the WCFU *not* be settled. If one of these claims is settled, the WCFU is no longer able to prosecute the fraud claims.

Complaint Checklist

The WCFU has provided a complaint checklist, for matters that may involve fraud perpetrated by a claimant. The report should include the following information:

1. Identity of the claimant;
2. Date of injury, if known;
3. Type of injury;
4. Activity level with a vivid description of activity;
5. Employer, if known;
6. Insurance company, if known;
7. Secondary employer, if known, or if claimant is self-employed;
8. Additional witness; and
9. The complainant must submit in writing, identify themselves, and be willing to testify.

Further information can also be obtained in writing from the Illinois Department of Insurance, Workers' Compensation Fraud Unit, William Blumthal, Supervisor, 320 W. Washington, Springfield, IL 62786, email: DOI.WorkCompFraud@illinois.gov; phone number: 877-923-8648.

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An Employer Can Terminate A Claimant For Filing A Fraudulent Claim

An employee who files a fraudulent claim can be discharged. See *Gonzalez v. Prestress Engineering Corp.*, 194 Ill. App. 3d 819, 551 N.E.2D 793 (4th Dist. 1990). In such a case, the discharge is related to employee dishonesty, as opposed to his exercising his rights under the Workers' Compensation Act. It is important to distinguish a fraudulent claim from one in which the employee is merely unsuccessful; therefore, these cases should be handled carefully.

Conclusion

As we noted in our October 2010 newsletter, there have only been a handful of convictions in each of the past few years for violations of the Illinois Workers' Compensation fraud statute. We again note several tips for investigating and exposing possible fraud in workers' compensation claims:

1. 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.
2. 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.
3. Use video surveillance in cases of suspected fraud to develop evidence of any activities that are inconsistent with medical histories or work restrictions.
4. Use a private investigator or other sources of investigation in cases where there is 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.
5. Be careful to preserve all evidence of potential fraud, including tape recordings, video or photographic evidence, and original documents.
6. Report 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.

If you have any questions concerning potential fraud claims or any other matter involving Illinois workers' compensation law, please feel free to contact any of our workers' compensation lawyers throughout the State.

HRVA Makes House Calls!

If you or your organization is interested in a presentation on the recent Amendments to the Workers' Compensation Act and how they will affect your claims handling, Heyl Royster would be happy to visit. To schedule your "house call" please contact:

Kevin Luther
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We look forward to stopping by!

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