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Workers' Compensation Fraud Not Limited to Employees

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The "F" word. To many, it means a certain four-letter word that is not spoken in sophisticated company. To workers' compensation attorneys, and others involved in the workers' compensation system, it means a certain five-letter word that is often bandied about almost indiscriminately. To these people, the "F" word is "fraud." In a recent column, two workers' compensation attorneys began by discussing fraud generally, but never tied it to workers' compensation. For good reason.

In the context of workers' compensation, fraud is commonly thought of as allegedly injured workers who either are working while receiving benefits, or who are receiving benefits although not really injured. And that is one part of the definition—the part of the definition most people think of when they hear the word.

To the public, fraud in workers' compensation appears to be common, yet most people involved in the system know that fraud involves only a very small percentage of all claims—and fraud can include actions by employees, employers and insurers.

Admittedly, there are individuals who are collecting benefits while working, and there are persons who prefer to stay at home even though they really can work. What percentage of all injured workers are these people? No one knows, although it appears they are a very small percentage of the total.

Most cases that involve fraud really are not fraud cases at all. Those are the situations in which one doctor examines a worker and concludes that he or she is fully recovered from whatever injuries he or she sustained, while another doctor—usually a treating physician—says that the worker remains symptomatic and is still not able to go back and perform the job he or she had when the injury occurred.

There is another side to fraud. That component deals with employers and insurance companies. For the most part, the public doesn't even think about this aspect of insurance fraud. Again, this type of fraud occurs only a very small percentage of the time, yet it is just as real as worker fraud, and it probably costs the system as much.

For this reason, it is pleasing to see that prosecutors in Pennsylvania have targeted employers as well as employees who violate the Workers' Compensation Act.

In one case I handled, the employer claimed that his workers were independent contractors and that he had no obligation to purchase workers' compensation insurance. Meanwhile, when the employer applied for motor vehicle insurance, he listed those same "independent contractors" as employees.

The tragic part is that my client suffered catastrophic injuries and was forced to obtain benefits from the Uninsured Employers Guaranty Fund. The UEGF, which was created by the legislature to provide coverage for injured workers whose employers have evaded the law by failing to purchase the mandatory workers' compensation insurance, paid nearly \$290,000 in benefits as of June 2015.

Fortunately, the Montgomery County district attorney prosecuted the employer, who pleaded guilty to the crime of failing to procure workers' compensation insurance. The employer was also ordered to repay the UEGF and while it is unlikely the UEGF will ever be fully reimbursed, this prosecution does send a message to other employers that they should think twice before deciding to misclassify workers to save money on workers' compensation insurance.

What appears to be happening is that both the Bureau of Workers' Compensation and prosecutors throughout the state are learning that fraud needs to be addressed, no matter who is the perpetrator. Publications from the Bureau of Workers' Compensation highlight the efforts of the compliance section, whose primary responsibility is to prosecute employers in criminal courts who fail to carry workers' compensation insurance in violation of Section 305 of the act. The summer 2015 edition of the Workers' Compensation Bureau's News and Notes, for example, cites the successful prosecution of Jomarie Fennell, who pleaded guilty to 12 third-degree felony counts and was sentenced to five years of probation and ordered to reimburse the UEGF in the amount of \$30,369.60.

But it is hard to change the public perception, created by the insurance industry and others, that fraud is essentially only an employee issue. A recent blog post on an insurance defense law firm website lamented, "What can an insurer do to expose fraud and exploit it?" after saying that, "It is not unheard of for a claimant to testify in front of a judge that he is completely disabled and unable to perform simple tasks of daily living, much less work" when there are medical evidence and social media postings that prove the claimant is leading an active social life and/or working. The blog post never even suggests that employers or insurance carriers may also commit fraud.

The difficult part of the fraud issue is separating hype from reality. In Pennsylvania, injured workers receive, on average, benefits that are equivalent to two-thirds of their pre-injury wages. There are no cost of living increases, and workers injured in 2016 will receive the same weekly check for as long as they are out of work. Injured workers at the upper end of the pay scale have their benefits capped. Thus, any worker injured in 2015 who earned \$923.07 per week (\$48,000 per year) will receive \$615.38 in weekly benefits. Although that amount may be reduced by counsel fees if an insurance company challenges the worker's right to benefits, it will never increase, no matter how long the worker receives benefits.

Abuse is a problem in any system, including workers' compensation. In another case in which I was involved, the adjuster admitted during testimony that he unilaterally stopped a claimant's benefits and prepared a termination petition for a filing that alleged that "all of the claimant's disability had ceased," when he did not have any such information. He also admitted that he signed the petition and filed it knowing that various statements in it were inaccurate, and he took no action to correct the form before signing and mailing the petition to the bureau.

Although the transcript of this testimony was submitted to law enforcement officials, no prosecution ever occurred. A workers' compensation judge did eventually reinstate the worker's benefits and assessed penalties and counsel fees against the carrier, but was powerless to address the admitted fraud.

Fortunately, the "F" word is more a problem of perception than reality. Most people involved in the workers' compensation system—be they workers, employers or insurance adjusters—are honest. Their disputes are usually factual, not criminal. And that is the way it should be. •

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