Fighting Workers' Comp Abuse: Spotting "Red Flags" and Taking Appropriate Action

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Introduction

The world of workers' compensation is far more complex than many think. Some who have not really dealt with the process perceive it as some simply "paper pushing" of standard forms. While workers' compensation systems are often form-driven, and extremely time-sensitive, they are far from simplistic. Indeed, as workers' compensation is a statutory creature, the formal law, in terms of statutes and regulations, is generally far more complex than many areas of tort liability, such as auto torts, premises liability, and product liability.

Compounding the complexity of workers' compensation is the fact that the laws and procedures vary tremendously from state to state. There are, however, certain fundamental common underlying concepts, and best practices, which will be discussed below. Finally, the uninitiated may initially have a difficult time conversing with those immersed in the workers' compensation system, as it has its own lingo, and is replete with a lexicon of acronyms and abbreviations with which one must become familiar, in order to meaningfully participate in the claims process.

The process for adjudicating workers' compensation claims may be far more streamlined than that used for tort actions, which often involves full discovery and jury trials. In Maryland, for example, initial adjudication is in the form of an administrative hearing before the Workers' Compensation Commission, and there is virtually no discovery, other than the exchange of medical reports, required. Accordingly, such hearings can be "trial by ambush," with either side presenting documents, and testimony of witnesses of which the opposing party was completely unaware. Moreover, the Maryland administrative hearings are conducted in an abbreviated and relatively informal fashion. Nonetheless, the Commissioners' rulings are binding. Moreover, while one can take an appeal from an adverse decision, such an appeal does not "stay" an award, and one must continue paying. In fact, even if the employer/insurer is successful in having the decision reversed on appeal, reimbursement cannot be sought from the claimant.

While some have varying views and concepts as to the complexity of the workers' compensation system, and its fairness, anyone who has ever looked at risk data or a related financial statement understands the significance of it. The cost of workers' compensation insurance is staggering, and continues to rise steadily. Moreover, there are even greater amounts of costs arising out of work-related injuries, including the loss of productivity, the amount of time spent dealing with the claims and injured employees, the loss of good will in the employer/employee relationship, and so forth.

As job functions are consolidated in the interest of cost-cutting, and people typically take on more responsibility, the last thing anyone needs is more work. Nonetheless, it is important for anyone charged with responsibility for any aspect of workers' compensation claims in an organization to take the time, and make the effort, to understand the system, and have practices in place for dealing with claims. Doing so will, without question, take some additional time and effort, but failing to do so will result in far greater cost in the long run.

Phantom Claims

A. Red Flags

One of the areas to monitor for "red flags," or spotting potential abuse of the workers' compensation system, is any adverse changes in an employee's status. There is often a high correlation between such changes, and the reporting of a questionable claim. Such changes include: failure to obtain a promotion; assignment to hours and/or duties that are perceived as unfavorable; failure to get a raise; a bad performance review; disciplinary action; or pending termination or lay-off. Adverse changes may also come in the form of the employee's personal life, such as a divorce, or financial problems overall. This is not to suggest that anyone who undergoes such adverse changes will fabricate a claim, but simply to note that there is a high correlation, and the circumstances should be monitored accordingly.

There similarly are "red flags" in terms of an accident or occurrence supposedly resulting in a work-related injury. First of all, any incident that is not witnessed, or for which the employee inexplicably delayed reporting an alleged incident, may be questionable. A vague or inconsistent history of what transpired, or of the nature of the resulting physical complaints, is also suspect.

The pattern of the employee's treatment is also significant. For example, a delay in the onset of treatment, particularly when the onset coincides with first securing representation, can be telling. The choice of a treating physician can also be important. For example, while in some states, such as Maryland, an employer/insurer cannot compel an employee to seek treatment from a given facility, the employer/insurer can recommend it. An employee with no agenda other than seeking treatment will generally voluntarily comply and treat with the suggested provider. When, instead, the employee secures treatment from one of the doctors or facilities known for handling workers' compensation claims for claimants' attorneys, it is definitely a "red flag."

The nature of the diagnosis and treatment is also important. For example, if there are no objective findings, and nothing to substantiate the subjective complaints, it is suspicious. Such a suspicion is further reinforced when objective testing consistently produces negative and normal results. The pattern of complaints and treatment can also be important, such as when one claims, months after sustaining a minor soft tissue injury, the complaints have worsened, as that is generally not consistent with medical expectation. Finally, excessive treatment of questionable necessity, such as physical therapy, is also often telling.

B. Preventative Action

One should monitor and document activity and circumstances that raise "red flags," as noted above. Moreover, it is imperative that the employer/insurer continue to follow-up and monitor an employee's activities following a return to work from a work-related injury. For example, if light duty is to be performed, at least on a temporary basis, a supervisor should carefully monitor what type of duties are assigned, and how the employee handles them, as it is quite common for employees to discontinue light duty and thereafter claim that they were assigned work beyond their physical capabilities.

The employer should track, and retain records of, an employee's ongoing hours, wages, and duties, subsequent to the return to work. Even in a legitimate claim, that information, and documentation, is often significant when the permanency aspect of a claim is being evaluated or ruled upon. If there is an adverse change in the employment subsequent to the return to work, such as a change in duties or reduction in wages, the reason for the same should be carefully documented, as it may well have nothing to do with the subject injury. Finally, any ongoing complaints, or requests for accommodation in duties, should be documented, or a supervisor should be prepared to testify to the absence thereof.

C. Contesting "Didn't Happen" Claims

A typical scenario involving suspicious claims is what is sometimes referred to as the "didn't happen" defense. In other words, the employer/insurer simply do not believe that an accident like that complained of ever took place. While it is the employee's burden of proof to establish that a compensable event took place, as a practical matter, he or she often needs only to testify to it occurring. The employer/insurer then, as a practical matter, has the burden of "proving a negative."

1. Pin Down Allegations

One should seek detailed information from the employee as to the incident and surrounding circumstances. While it is expected, and recommended, that a supervisor fill out certain related paperwork, it is a good practice to also have an accident report for the employee to fill out in his or her own handwriting, contemporaneous with the reporting of the event. In that fashion, the information will be memorialized shortly after the alleged accident and before the employee has been coached by an attorney. Moreover, the employee will not be able to later claim (as they often do) that the supervisor distorted his or her words, whether in terms of the history of the occurrence, or the nature of the complaints, and so forth.

One should also carefully pin down any related evidence, such as the identity of any alleged eyewitnesses, the individual to whom the employee first reported the incident (and precisely what was reported), and so forth. The physical complaints should also be verified, including the areas of the body, timing, and severity. Finally, the employer should also document that initial treatment was offered, and the employee's response to the same, such as signing a form acknowledging when treatment is declined.

2. Initial Investigation

The supervisor should promptly, once the original history is obtained and the employee is referred for treatment, follow up to conduct an investigation of the alleged accident. That includes physically viewing the scene. For example, if the employee claims that boxes fell on him from a shelf, the supervisor should go to the precise spot alleged, and determine whether there is any such evidence. The supervisor should also follow up with potential witnesses, both in terms of eyewitnesses, and those who may have heard the event complained of taking place, if in fact there was such an event. If appropriate, the supervisor should take photographs, and/or written statements from co-employees, which can later be used to document the results of the investigation.

3. Build a Chronology

In order to contest a phantom claim, it is imperative to establish a chronology of events surrounding the alleged incident. This can be done through timecards, orders, and so on. For example, if one claims to have injured his arm at 10:00 a.m. on a Thursday morning, but thereafter continued to perform his or her regular duties, for full hours for the remainder of Thursday, and all day Friday, it would certainly bolster the employer/insurer's defense. That

defense would further be bolstered if there is a supervisor who worked, and spoke, with the employee during the balance of Thursday, and at some time on Friday, and confirms that the employee never reported any injury throughout the time, nor complained of any physical problems. Similarly, the lack of treatment initially following an alleged injury can also be significant.

4. Seek Information

The formal ability to secure information from an adverse party in a workers' compensation claim varies greatly from state to state. In some states, formal "discovery" is permitted at the initial adjudicated level, just as it is in an auto accident or some other tort claim. In others, however, such as Maryland, there is virtually no provision for formal discovery.

Even without the aid of formal discovery, one may obtain certain information. First of all, anecdotal information from co-employees may be significant. Even if it is not admissible, such information may lead to admissible evidence. For example, information indicating that the allegedly disabled employee is performing some strenuous physical activity (such as playing softball) could facilitate the performance of very effective surveillance. Surveillance is, overall, another way to obtain valuable information and evidence in a claim.

One should also seek information and documentation concerning the employee from other sources. For example, it is generally possible to obtain records from prior workers' compensation claims filed by the employee. The employee's personnel file may also have important information. For example, if the documentation indicates that the employee has a history of diabetes and obesity, that could be significant in a claim of carpal tunnel syndrome, as such factors often highly correlate with the onset of such complaints, even in the absence of a work-related injury or exposure.

5. Procedure Regarding Claims

It is imperative for the employer and insurer to cooperate in terms of how claims will be handled. Each plays an important, yet distinct, role. The respective roles and responsibilities should be discussed and confirmed in advance, so that efforts are not duplicated, or, worse yet, contradictory. Representatives from employers are also strongly encouraged to attend hearings, even if they are not to testify, as observing the proceedings can provide a great deal of insight for future reference.

Exaggeration/Fabrication Regarding Condition

A. Red Flags

As noted above, the choice of medical provider, and the timing of treatment, can be very telling. An employee with a legitimate injury, particularly one who is unfamiliar with the system, will often accept offered treatment from a clinic or physician referred by the employer/insurer. One with more claims' experience, and/or an agenda to abuse the system, will generally decline such treatment, and instead seek it from doctors referred by the employee's attorney. Indeed, every locale has its notorious "litigation mill" medical facilities, and hearing that treatment is being received from one of those facilities immediately raises a red flag to one experienced with the system.

The reaction to an offer of light duty can also be telling. Legitimate employees are generally eager to resume their ordinary work routine. Even if they temporarily must perform light duty, such employees will often cooperate. Those who balk at light duty, or only make a minimal effort to perform it before claiming that they cannot do so, are far more suspect.

As also noted above, in conjunction with phantom claims, the pattern of treatment and complaints can be telling in a claim, which is accepted as legitimate in terms of the initial occurrence, but which is later exaggerated. For example, the subjective complaints should correlate with the objective findings. One with a documented herniated disk will obviously be expected to have more severe complaints, and a longer period of treatment, than one with a simple soft tissue strain, for whom all objective tests have been negative. Again, the pattern of complaints is important. In a soft tissue injury, the body generally heals over time, and it is suspicious when, for example, the subjective complaints later become more severe, erratically ebb and flow, or inexplicably "migrate" to other areas of the body.

B. Preventative Action

In a claim where one accepts that an injury initially occurred, it is also important to monitor the treatment received, and any restrictions. For example, when a doctor places restrictions on a claimant, he or she should be pressed for specification of what physical activities in which the employee can or cannot engage, rather than simply providing an "off duty slip." The employer/insurer will also be well served to implement an aggressive light duty program, when the employer/insurer is satisfied that it is warranted. Also, independent medical examinations can be a valuable source of medical information and evidence.

C. Contesting Protracted Lost Time Claims

One should obtain, whether by authorization orsubpoena, all available medical records. The results of objective tests performed, such as x-rays, MRIs, CT scans, and so on, may be extremely important.

One should also carefully document the activity related to light duty. The timing of the offer, along with specification of the duties to be performed, should be documented, as should the employee's response. Finally, if the employee does return to work on a light-duty basis, the employer should carefully monitor the work performed, and any complaints voiced.

As with other types of claims noted above, surveillance can be important in a claim for exaggerated or ongoing lost time from work. Blindly performing random surveillance is, however, generally not successful. It is important to "do one's homework" first, in order to obtain any available information that may facilitate a greater likelihood of success for the surveillance, such as information about work the employee may be performing, sports or other strenuous personal activities in which the employee may be engaged, and so forth.

One should also investigate ancillary claims. For example, the employee may have submitted some bills for treatment, which are now allegedly attributable to the work-related claim, through his or her group health insurer. The application for such benefits will generally contain a place for the employee to declare whether he or she is alleging the condition to be work related. One should also seek information regarding a claim for unemployment benefits subsequent to a compensable injury. At times, employees claim lost time benefits (thereby testifying that they were completely unable to work during a given period of time), when they in fact claimed unemployment benefits (thereby certifying that they were ready, willing, and able to work, and actively seeking full time employment) during all or part of the same period of time. Such a contradiction can be powerful evidence, and may serve to undermine the employee's credibility in the claim overall.

Any change in the employment status post-injury should also be documented. Any time the employee has left employment with the employer subsequent to a work-related injury, there is the potential for the employee to raise an inference that such a change in work status was due to the

injury, either in terms of ongoing physical complaints, or some retaliation on the part of the employer. The change in employment status may, of course, have absolutely nothing to do with the work-related injury (e.g., a positive drug test), and the reasons for the change in employment status should, accordingly be carefully documented.

D. Contesting Exaggerated Permanency Claims

In the real world, the human body heals, and there are often no residual complaints after some period of time, particularly in conjunction with a soft-tissue sprain or strain. In the world of workers' compensation claims, however, nearly every injury results in some alleged residual permanent impairment. Indeed, in some venues, such as Maryland, permanency benefits are awarded in nearly every claim, even when they involve no objective findings, no lost time from work, and little or no objective evidence of any injury. The standards for evaluating permanency often include some evaluation of the "industrial loss of use." Accordingly, it is imperative to monitor, and document, the employee's hours, wages, and duties subsequent to his or her return to work following the subject injury. If there was some change in any of those factors, in comparison to those pre-injury, then the reason for the same should also be documented. One may also claim apportionment, again depending upon the individual state's law, based upon a percentage of any permanency being attributable to conditions which pre-existed the subject occurrence.

E. Interplay With Labor Laws

One should not view workers' compensation claims in a vacuum. Workers' compensation matters, and those pertaining to labor and employment laws, are often inextricably intertwined. One should consider the ultimate goal with the employee in terms of making individual decisions, as the same decision may have a positive impact upon one potential claim, yet an adverse one on the other. For example, if an employee obtains a report from his or her doctor stating that he or she can no longer perform the pre-injury duties, it may increase benefits in the workers' compensation claim. That same evidence, however, may serve to defeat, or at least undermine, a claim by the same employee under the Americans with Disabilities Act, which requires that the employee be capable of performing essential functions of the job with or without accommodation.

Law Regarding Fraud

The law pertaining to fraud in the workers' compensation setting also varies greatly from state to state. In Maryland, for example, the statute provides in part: "A person may not knowingly affect or knowingly attempt to affect the payment of compensation, fees, or expenses under this title by means of a fraudulent representation" (Ann. Code of Md., Lab. & Emp. § 9-1106). Note that the quoted provision refers to any "person," and not just the employee. Accordingly, any doctor, therapist, or attorney, who attempts to affect payment of benefits by means of a fraudulent representation, also violates the provision.

The penalties for a violation of the quoted provision are set forth in Ann. Code of Md., Lab. & Emp. § 9-1106(b), which provides: "A person who violates this section, on conviction: (1) is subject to the penalties of [the theft statute]; and (2) may not receive compensation, fees or expenses under this title." Of course, there may be a stark discrepancy between the letter of the law and its application. While the law pertaining to fraud may appear strong on its face, it may seldom be applied or aggressively pursued by authorities.

Moreover, maneuvering the fraud positions can be the subject of gamesmanship, just as it is in other criminal proceedings. For example, in the case, *Kelly v. Consol. Delivery Co.,* 166 Md. App. 178, 887 A.2d 682 (2005), the employee was charged with criminal theft, and also a

violation of the "anti-fraud" provision in the Workers' Compensation Act. The employee ultimately pled guilty to a theft charge in conjunction with the fraudulent representation in the workers' compensation claim, and the count against him, premised upon the Workers' Compensation Act, was dropped. The employee thereafter sought further benefits in his workers' compensation claim, and the employer/insurer noted that the employee had already pled guilty to theft in conjunction with the initial benefits fraudulently obtained. The court, however, held that the employee was nonetheless not barred from seeking permanency benefits, because he was never convicted under the specific provision in the Workers' Compensation Act, and the penalties, such as the inability to obtain further compensation, were premised upon one who "violates this section." That result not only shows the absurd gamesmanship whereby courts avoid applying the clear intent of the law, it also demonstrates that, while authorities often claim to be diligent in seeking out fraud, the reality of their actions is often far different.

Conclusion

As noted at the outset of this discussion, and as has been reflected in some of the points noted above, the world of workers' compensation is indeed a complex one. Those involved in the process should learn the ropes, both in terms of the standards in their jurisdiction for compensability and obtaining various types of benefits, as well as the procedural mechanism for the adjudication of claims. One should also marshal resources, such as related texts or treatises, as well as identification of experts (such as local defense counsel) who can serve as a sounding board and provide information and feedback in conjunction with a specific claim or scenario.

By learning how to spot potential red flags, and what to do when they are spotted, one may become far more skilled in investigating potentially fraudulent, or exaggerated, claims. The results of such investigations may be significant in terms of thwarting efforts to abuse the system. By proceeding in this fashion, an employer/insurer can work more effectively toward the goal of seeing that benefits are properly and timely provided to those who are genuinely in need of them, but not to those who are abusing the system. Acting in this fashion can serve to dramatically reduce the costs related to workers' compensation, which can have a significant positive impact for all of the entity's employees and the business itself.