

## PENNSYLVANIA WORKERS' COMPENSATION

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Anthony Natale III

### PEOs: A New Potential for Workers' Comp Fraud? A Close Look at Professional Employer Organizations.

Workers' Compensation fraud has reached epidemic proportions within the United States, costing legitimate employers, employees and healthcare providers millions of dollars per year. The landscape of this fraud is ever-changing; no longer is it limited to employees exaggerating workplace injuries or working for cash while collecting workers' compensation benefits. More recent schemes involve employers under-reporting payrolls to receive lower workers' compensation premiums, or incorrectly classifying employees to save insurance costs. Throw in unscrupulous medical providers billing for services they never performed, and it's no wonder that healthcare and medical care costs are so egregious.

The result of these and other fraudulent activities is that businesses and much-needed jobs are often forced out of regions that operate under high workers' compensation costs. In some cases, in an effort to offset these costs, businesses may be forced to increase the price of goods and services, thus impacting local economies. These activities also serve to create an environment that results in unnecessary delays in the processing of legitimate claims that can affect an injured worker's ability to obtain crucial medical treatment for true workplace injuries.

To effectively compete in this new business world, employers are attempting to shift the burden of workers' compensation costs to entities known as Professional Employer Organizations (PEOs). According to the National Association of Professional Employer Organizations (NAPEO) there are an estimated 700 PEOs in operation throughout the 50 states. While PEOs undoubtedly have rescued employers from the high costs associated with the administration of workers' compensation programs, their very existence has also set the stage for the emergence of PEO-related workers' compensation fraud. With acknowledgement to the fact that the overwhelming majority of PEOs are legitimate, law abiding companies, the emergence of fraud in this arena should put employers on alert when contemplating entering into the PEO arrangement.

### WHAT IS A PEO?

A PEO is an entity that contractually assumes various employer rights and human resources responsibilities through the undertaking of an "employer relationship" with workers either assigned to or hired by its clients (employers). In short, the PEO and the employer/client share an employment relationship that allows the PEO to handle and manage employee-related matters such as payroll, benefits, tax matters and, in many cases, workers' compensation programs, thus allowing the employer to concentrate on the operation and revenue producing aspects of its business. This relationship has become so commonplace that various states actually recognize PEOs and their clients as "co-employers."

This co-employment relationship has been summarized by NAPEO, in part, as a contractual relationship whereby the PEO:

- Co-employs workers at the client locations and assumes responsibility as an employer for specified purposes;
- Reserves a right to direct and control these employees;
- Pays wages and employment taxes of the employee out of its own accounts;
- Reports, collects and deposits employment taxes with the state and federal authorities;
- Establishes and maintains an employment relationship with its employees that is intended to be long-term and not temporary; and
- Retains the right to hire, re-assign and fire the employees.

Recognizing the potential for fraud that could arise from the co-employer shared relationship, some states have enacted legislation that further defines a PEO relationship and undertakes management protocols for these entities. The majority of states, however, have failed to enact or enforce legislation that would protect employers from PEO fraud or misrepresentation.

### POTENTIAL FRAUD ISSUES

When an employer outsources its workers' compensation coverage responsibility to a PEO, it is entrusting that all insurance requirements will be fulfilled by the PEO. This means that the PEO will be responsible for classifying employees, communicating payroll to insurers, selecting appropriate coverage and paying premiums. This also

presupposes that the PEO is familiar with the local workers' compensation statutes and regulations. Unknowingly, some employers may willingly shift this burden to the PEO without securing contractual evidence of the PEO's rights and duties. What's worse, these same employers may rely on an ambiguous contract drafted by the PEO which does nothing to protect the employer's interests. Unfortunately, the lack of a clearly defined, written contract between the PEO and employer can not only lead to fraud or misrepresentation by the PEO, but also negate the existence of a valid PEO relationship in states that require a written PEO contract.

When an employer is contracted with a PEO and a workers' compensation claim is filed, questions often arise as to whether appropriate insurance has been maintained, if there is documentary evidence available to support the PEO's responsibility to defend the workers' compensation claim and even, sometimes, whether the PEO is fiscally solvent. There have been cases where a "fly by night" PEO is saddled with liability by a workers' compensation judge and simply fails to pay benefits. Under such circumstances the employer would likely be liable for the injury and could be put into a situation where no insurance exists, thus exposing employers to criminal liability in certain states.

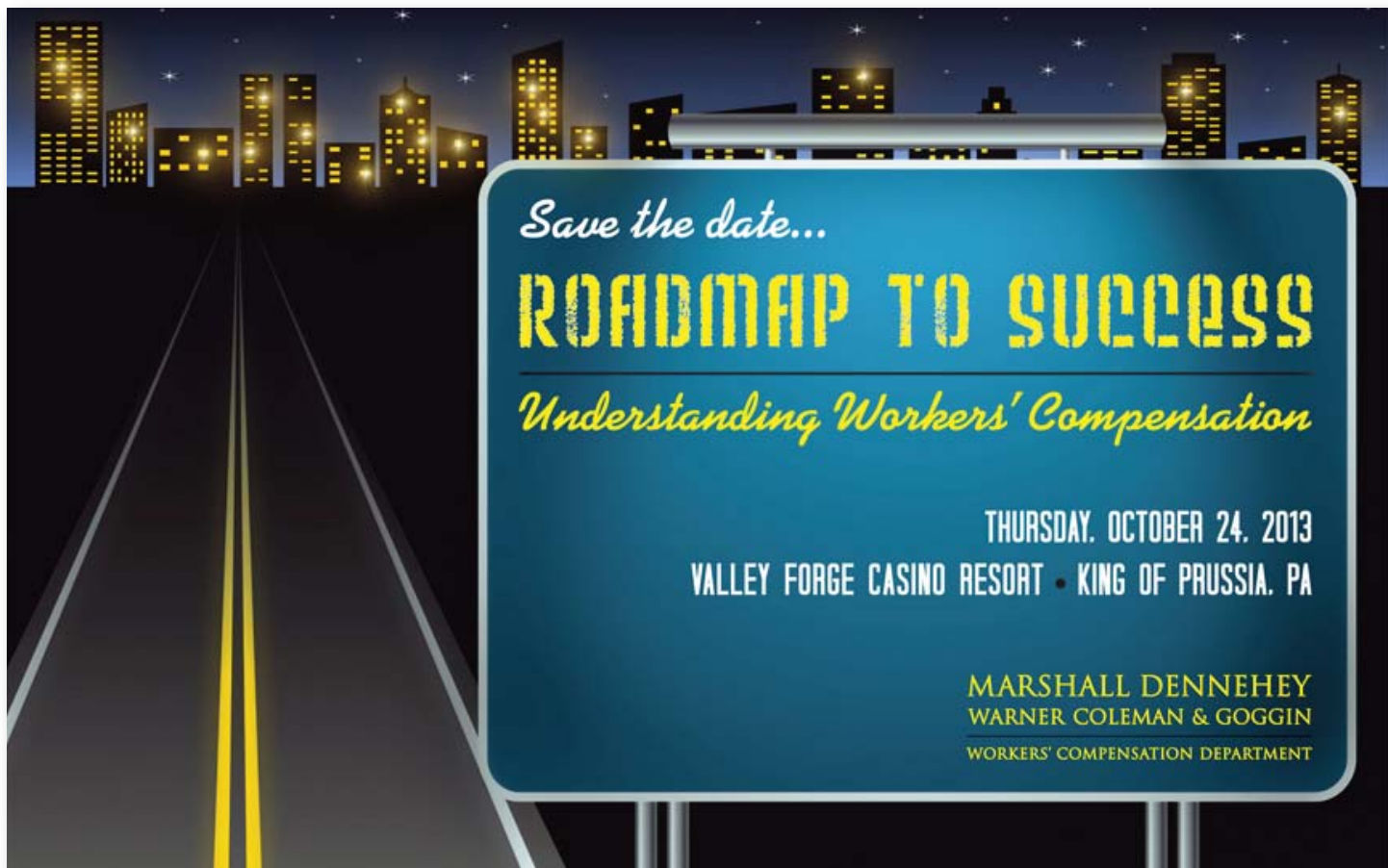
The fact that the PEO and its employer-client are viewed as co-employers in the workers' compensation system has a perceived advantage. From a theoretical standpoint, an employer can farm out its workers' compensation coverage while keeping the protection of tort immunity. It follows that in the PEO relationship, where the PEO and the employer both share the right to control the employee, both technically possess the right to assert tort immunity. However, this has not stopped a number of lawsuits naming the employer as a third party tortfeasor after a workers' compensation injury, which has led some states to

create specific statutes related to workers' compensation that govern PEO contracts and tort immunity. If an employer is unaware of these statutes and if the PEO does not strictly adhere to the provisions of the statute, the alleged "PEO relationship" may not be binding and the employer could face expensive litigation to prove that tort immunity applies or that a PEO co-employer relationship even exists.

**PROACTIVE RISK MANAGEMENT**

The emergence of incidents of PEO fraud in relation to workers' compensation matters provides a cautionary tale for employers considering entering into the PEO arrangement. Employers should be aware of statutes in certain states that require a PEO to define its contractual obligations and the protocols by which the PEO is to be managed through a "Professional Employer Agreement." For employers operating in states without such legislation, it is important to insist on a written contractual agreement with the PEO, drafted in unambiguous language that is understood and agreed upon by both parties at the start of the co-employment relationship. Within this contract, a provision as to the allocation of workers' compensation coverage must be included. Further, the employer must have the contractual ability to request and secure proof of workers' compensation coverage from the PEO. The contract should also provide employers with access to the loss history and total wages paid for covered employees. Operating in this fashion will ensure that the employer is engaging in an environment that is free from potential PEO fraud. ||

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## NEW JERSEY WORKERS' COMPENSATION

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Dario J. Badalamenti

### Petitioner's claim dismissed based on an adverse inference drawn from petitioner's failure to produce either the testimony or records of his treating cardiologist.

*Donato v. Jersey City Municipal Utilities Authority*, Docket No. A-5984-11T4, 2013 N.J. Super. Unpub. LEXIS 2074 (App. Div., decided 8/21/13)

The petitioner was employed by the respondent from 1961 through 1974 and again from 1986 through his retirement in 1999. The majority of the petitioner's career with the respondent was spent as a vehicle maintenance foreman, where he supervised the maintenance of cars, trucks and heavy equipment vehicles and was exposed to dust, chemicals and diesel fumes.

In 2004, the petitioner was diagnosed with probable chronic obstructive pulmonary disease by Dr. H. Although the petitioner had received no pulmonary care, nor a diagnosis of pulmonary disability, prior to this evaluation, he filed a claim with the Division of Workers' Compensation alleging that his pulmonary disease arose out of and in the course of his employment with the respondent. The respondent denied the petitioner's claim.

At trial, testimony was taken from the petitioner, the respondent's executive director, and the petitioner's and the respondent's medical experts, Dr. H and Dr. K. Dr. H opined that the petitioner's condition was causally related to and/or aggravated by his workplace exposures. However, Dr. H did indicate that he could not distinguish whether the petitioner's breathing problems were related to his lung disease or his significant heart disease, for which he had been treating for over 23 years. Dr. K opined that the petitioner's symptoms were the result of his long-standing cardiac disease, based largely on the fact that the petitioner had never been referred for pulmonary treatment despite his many years of cardiac care.

In her written opinion, the Judge of Compensation found Dr. K's testimony to be more credible than that of Dr. H. In noting that Dr. H readily admitted that there was a relationship between the heart and lungs, the judge drew an adverse inference from the fact that the petitioner never produced a certified copy of the records from his treating cardiologist, nor did he have Dr. H review these records as part of his evaluation. As the judge found:

Certainly petitioner's treating cardiologist of 23 years was in the best position to opine as to whether petitioner's symptoms were due to his severe heart condition or due to a pulmonary condition. That petitioner's cardiologist never referred petitioner for pulmonary treatment or prescribed pulmonary medicine leads the Court to conclude that petitioner's complaints are not "due in a material degree" to his occupational exposure.

The judge dismissed the petitioner's claim. The petitioner subsequently filed this appeal based on his assertion that the judge committed reversible error by drawing an adverse inference against the petitioner for failing to produce evidence from his cardiologist.

In affirming the judge's dismissal, the Appellate Division commented that the petitioner's own medical expert, Dr. H, in his testimony, did not rule out that the petitioner's shortness of breath and poor performance on pulmonary function tests could be due to the petitioner's heart disease. As the Appellate Division reasoned:

Given petitioner's more than two-decade history of heart disease, those records and the opinions of the treating cardiologist in relation to petitioner's claim that his pulmonary condition was causally related to the workplace, rather than his heart disease, were highly relevant and probative.

Accordingly, the Appellate Division found that it was not unreasonable for the judge to draw the adverse inference that evidence from the petitioner's cardiologist was not produced because it was unfavorable to the petitioner's claim. ■

### SIDE BAR

"Adverse inference" refers to a circumstance wherein the finder of fact concludes that evidence was not produced because it would be unfavorable to the non-producing party. Here, it's significant to note that the petitioner's treating cardiologist, as a witness, or his cardiologist's treatment records were equally available to both the petitioner and the respondent. Although both parties failed to produce the petitioner's cardiologist, the inference drawn by the judge was adverse to the petitioner only. The Appellate Division did provide explanation:

It was petitioner who bore the burden of presenting the requisite proofs to establish his claim. Thus, the fact that petitioner's treating cardiologist, as a witness, or his cardiologist's treatment records may have been equally available to both parties did not preclude the Judge of Compensation from making a negative inference from the fact that petitioner never produced a certified copy of the records from his treating cardiologist or had Dr. H review these records as part of his evaluation.

## NEWS FROM MARSHALL DENNEHEY

On November 21, 2013, **James Pocius** (Scranton, PA) will present "Medicare Secondary Payer Issues: Ask the Expert" at The National Workers' Compensation and Disability Conference® & Expo in Las Vegas. For more information, visit [www.wccconference.com](http://www.wccconference.com).