IF YOU SEE SOMETHING, SAY SOMETHING

The Importance of Identifying and Reporting Workers Compensation Fraud

By Anthony Natale III

To many, workers compensation fraud is a topic for television commercials and billboard clichés. In the courtroom, however, fraud remains an unfortunate reality in many cases regardless of geographical location, differences in statutory interpretations, and job categories.

The workers compensation system has evolved to eliminate long delays for injured workers in the trial process while also insulating employers from high jury verdicts. In doing so, however, the system has become a veritable claimant dumping ground for any and every malady that can be argued—through a tortuous reading of "expert" testimony—to be work-related.

While no system of law is perfect, the workers compensation system seems to breed fraud by its very existence. It is not by coincidence that the definition of workplace injury contained in various state statutes ("injury" versus "accident" versus "aggravation") seems to adapt to the facts of the case rather than to the truth. For instance, in a state where aggravating a pre-existing condition can be deemed a work injury, a claimant will allege that his previously diagnosed carpal tunnel syndrome was made worse by his work duties. Conversely, in a state where there must be an accident to support an injury, that same claimant will allege that a bump, twist, or jerk at work caused his carpal tunnel injury.

It can be credibly argued that this type of fraud proliferates within the system since it has no natural predators. Those who commit fraud usually do so based on the fact that it is very hard to prove it, and it is, therefore, hard to get caught. By no means is this an indictment of our hard-working state and federal prosecutors whose dockets are full of insurance fraud and other cases. At the same time, however, the insurance industry seems to forget about fraud when dealing with workers compensation cases.

Let's face it, the practice of workers compensation law has drastically changed over the last few decades. Law firms are competing for business in limited markets and carriers are changing their methods of dealing with bulk claims. Alternative fee arrangements seem to be in vogue, along with cost/benefit settlements, where applicable. The main push right now is to get in and get out while reducing exposure for the insured and eliminating unnecessary legal fees.

As a result, we in the insurance industry litigate these cases with blinders on—looking straight ahead to the goal of closing the file. While this is not necessarily a bad thing, we have created a new paradigm in which fraud by the claimant or the claimant's treating doctor becomes background noise and is ignored in the process. It is no wonder that an opioid epidemic now plagues this system on a national scale.

It is time to once again step up and identify and control the common abuses in the system. The insurance industry

Anthony Natale III is a shareholder in the workers compensation department at Marshall Dennehey Warner Coleman & Goggin. He can be reached at apnatale@mdwcg.com.

needs to be more proactive in spotting and reporting fraud to reestablish a deterrent effect that has long been missing.

IDENTIFYING THE PROBLEM

Many workers compensation statutes have now been amended to define the concept of fraud. The key is to not get caught up in broad definitions, since fraud should be identified in its simplest form without confusing statutory mumbo jumbo at the inception point. Unfortunately, the oft-cited "red flags" of workers compensation fraud, while still relevant, are not the only points of consternation.

Yes, an injury reported early Monday morning may signify the claimant was injured over the weekend outside of work, but claimants have become more sophisticated. By the time the Monday morning alleged injury reaches the courtroom, the story will have been changed a dozen times. These days, claimants call attorneys before they report injuries, and certainly before they get treated by doctors for alleged workplace accidents.

In order to detect fraud, it is best to also adjudge it through areas in the statute that provide an employer a defense to the claim. Each state's statute is quite different when it comes to workers compensation benefits, but many of the defenses to claims are universal.

Type of Injury—Post-concussion syndrome is on the rise in the workers compensation system. The diagnosis is primarily based on subjective complaints of headaches, dizziness, and light sensitivity—none of which can really be disproven by a diagnostic test. In some cases, surveillance shows that the subjective complaints that form the basis of the diagnosis are not only false, but also outright knowing misrepresentations with intent to defraud. Claims based on subjective complaints must be reviewed with great care.

Course and Scope—Most, if not all, states require the claimant to be furthering an employer interest at the time of a compensable injury. Some states carve out additional exceptions when a claimant may not be furthering the affairs of the employer but is nonetheless injured on the employer's premises while at work. There is a tendency for fabrication and misrepresentation to keep the case alive when a claimant is not in the course of employment at the time of injury. Cross-examination is a key factor here.

Jurisdiction—While jurisdiction seems to be innocuous (if an injury occurs within the state or commonwealth, jurisdiction is typically a non-issue), many states have extra-territorial jurisdiction requirements for employees whose jobs may take them out of the state within which they have filed a claim. When these provisions require proof of where the contract of hire was made and where the injury occurred, intent to defraud the carrier rears its ugly head.

Double Dipping—Earning wages from any source while collecting workers compensation benefits can be indicative of fraud. While some states will offer an offset for a claimant's receipt of unemployment compensation or even Social Security Disability, a claimant clandestinely working and receiving wages while collecting benefits is tantamount to fraud.

Reporting the Problem—When an attorney is fortunate enough to expose fraud, the expositive evidence typically is used to shut down ongoing litigation. The case may "go away" if the claimant is caught red-handed, or a decision on the merits may be undertaken even in a notoriously claimant-oriented jurisdiction. What has become less prevalent is the case being referred to the district attorney for investigation and possible prosecution. Acts of fraud are unfortunately viewed as the cost of doing business. Time is a valuable commodity, and once a case can be closed, any additional time spent mulling over spilled milk may not be something we feel is worthwhile.

Consider, however, the deterrent effect that comes from an employee who is investigated for fraud. A clear zero-tolerance message is sent to all employees in similar circumstances. Most states have policies whereby workers compensation fraud allegations can be submitted quickly and easily via a website. The ultimate effect is far greater than a response to a billboard or television commercial. The insurance industry has the ability to act, and, therefore, the responsibility to create change. If you see something, say something. ■