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WORKERS' COMPENSATION, INSURANCE, CLAIMS AND LAW FOR THE EMPLOYER

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TO CATCH A FRAUD

Every employer, at one time or another, has questioned the legitimacy of a Workers' Compensation claim. Countless employers have thought a Workers' Compensation claim was fraudulent, only to find that the claim was later accepted by the Workers' Compensation Board.

Most fraud investigations involve allegations of work activity. These investigations are rarely successful, unless the insurance carrier can identify the employee and prove that he or she is actively employed. These investigations are also costly and require more than the typical "two-day surveillances" offered. Further, it is usually by chance that the employee is "caught in the act". For that reason, insurance carriers are hesitant to conduct investigations if the request by the employer is based on a "hunch" of wrongful activity.

In contrast, most successful fraud investigations are those that obtain proof that the employee knowingly misrepresented or omitted a material fact so that he or she could secure benefits. In such cases, it is the employee's statements or omissions that doom his or her case. When these cases are litigated and won, the employee is disqualified from collecting wage replacement benefits.

Here are some examples:

- An Employee injures his left shoulder and attends the insurance carrier's IME (Independent Medical Exam). The IME asks the employee if he had any prior injuries to the left shoulder. The employee had been involved in a Motor Vehicle Accident (MVA) two years prior to the work-related accident, but he still **knowingly answers no**. In this case, the insurance carrier was able to find evidence of the prior MVA, thereby successfully producing medical evidence that proved the employee misrepresented a material fact.
- An Employee injures his back and does not return to work for two years. The employee tells the insurance carrier's IME that he cannot bend of lift objects. The employee further states he cannot walk for more than one block at a time. The insurance carrier conducts a surveillance that shows the employee walking for a mile, and later doing strenuous yard work consisting of constant bending. The surveillance rebuts the employee's stated assertion.

Since it is difficult for an employer to know if an employee is involved in fraudulent activity, the following are some tips to assist in the Workers' Compensation process:

1. Investigate any suspected claim thoroughly with the employee's supervisor and any person the employee claims witnessed the accident
2. Be aware that a prior condition does not negate the alleged claim. Providing evidence of prior conditions (if known), however, may help the insurance carrier build a defense if the employee omits this information.
3. Avoid asserting fraud based on a hunch. Make sure there is evidence from a source. One example would be a co-worker who has actual knowledge that the employee is working, or a lead from a social media source.
4. Show concern for the employee by inquiring as to his health and well-being. Most employees are inclined to avoid fraudulent activity when they know their absence is notated, and the employer appears to be concerned for his well-being.

The Workers' Compensation Board is attempting to combat fraud in every aspect of the industry. The focus is not merely on the injured worker. Companies that specialize in IME examinations are being tested. Defense counsel and IME vendors can no longer "prepare" a doctor before depositions, nor may they "cause, direct, or encourage a report to be submitted as evidence in workers' compensation claim adjudication that differs substantially from the professional opinion of the examining practitioner. Such action 'shall' be considered fraud and referred to the fraud inspector general" (WC Law Section 137). This section of the law applies to counsel for the employee, as well. Claimant's counsel may not direct treating physicians either.

At present, any possible type of fraud is under scrutiny and investigation by the Workers' Compensation Board. Most recently, there has been an exodus of IME doctors who were given an opportunity to resign (with a chance to return later) rather than face scrutiny from the Board's investigation of an IME vendor. To "catch a fraud" is no easy task, but employers can be confident that, with the current level of scrutiny, employee deception is not being ignored.

CHANGES TO WORKERS' COMPENSATION MEDICAL FEE SCHEDULE ON 4/1/19

In an effort to attract more medical providers to the New York Workers' Compensation system, the Workers' Compensation Board has adopted changes to the Medical Fee Schedule. The changes were first proposed on June 6, 2018, and adopted on October 3, 2018, following a public comment period. The revised fee schedule was implemented on April 1, 2109. Changes to the schedule include an overall fee increase for all medical providers, in addition to increases for certain specialty provider groups (such as physical therapists and podiatrists).

Some of the enhancements in the proposal include updated CPT codes (Current Procedural Technology), amended ground rules, and increased conversion factors. The conversion factors and CPT codes determine the reimbursement to physicians by region, and are also the method by which the increase is calculated. These changes were implemented to ensure prompt and quality care for injured workers by allowing for reasonable reimbursement to providers. The Board's rationale was that provider fee increases had not been implemented since 1996.

We expect this increase will have a minimal impact on experience modifications for insured employers, as well as a minimal impact on self-insured employers who incur a dollar-for-dollar cost for medical treatment. Please bear in mind that a series of previous changes made to the New York Medical Treatment Guidelines were designed to curb frequent and unnecessary treatment. To some extent, those changes may offset any additional costs associated with the increase in the Medical Fee Schedule.

NYCIRB AMENDS REPORTING REQUIREMENTS FOR CHANGES IN OWNERSHIP

The New York Compensation Insurance Rating Board (NYCIRB) recently amended its requirements for employers to report changes in ownership. This revision clarifies a 90-day reporting requirement that changes in ownership, whether by sale, purchase, transfer, merger, consolidation, dissolution, or formation of a new entity, are to be reported in writing to NYCIRB within 90 days. Since the insurance carrier is the party who reports the change of ownership of an entity with the requisite forms signed by the employer, this would require the employer to report said changes to the insurance carrier. According to the rule, the reporting requirement exists regardless of whether the employer is experience rated or not.

It is not entirely clear what the penalty for failure to report, or tardiness in reporting, would be, since the rule only indicates "Failure to report any change in ownership, regardless of whether the change is reported within 90 days of such change, may result in revision of the experience rating modification factor used to determine your premium". This does not really appear to be a "penalty". In any event, as we are workers' compensation specialists, we would encourage our employers to engage us in a discussion regarding any proposed changes in ownership, so we can provide consultation and guidance and so we may avoid "surprises" in the resulting change of ownership if and when it shall occur. Remember, only entities that are commonly owned (defined as 51% or more common ownership) may be insured under the same policy. Sometimes, after a change of ownership of an entity, a new policy must be set up to insure an entity previously on another policy. To avoid any lapses in coverage, or non-compliance issues, we again encourage our employers to engage us in discussion before any proposed change is made.