

Workers' Compensation Fraud

Presentation to the LMAC
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How Do You Define Criminal FRAUD?

- Act has to be **INTENTIONAL**
- Actor had to **KNOW THE ACT WAS WRONG**
- Actor stands to reap some **PERSONAL GAIN** from the act

Two Methods to Pursue Workers' Compensation Fraud

- Criminal Prosecution – this is generally up to the District Attorney or the Attorney General within a state to pursue if they feel there is enough evidence
- Civil Prosecution – for WC;
 - denial of benefits to a worker for fraud or refusal of payment or action to recover overpayments made to providers for fraud can be pursued by the payer through the usual workers compensation dispute resolution function;
 - Departments of Insurance or insurers usually handle civil actions under their specific authorizing statutes

How Does the Montana WC Court Define Fraud?

- Haag v. Montana Sch. Group Ins. Auth. (1995), 906 P.2d 693, 697. **Fraud can never be presumed but must be proved by a preponderance of the evidence.** Barrett v. Holland & Hart (1993), 845 P.2d 714, 717 (citing Batten v. Watts Cycle & Marine (1989), 783 P.2d 378, 381, cert. denied, 494 U.S. 1087, 110 S.Ct. 1826, 108 L.Ed.2d 955 (1990)).
- By case law, there are **nine elements to meet in establishing fraud**: (1) a representation; (2) falsity of the representation; (3) materiality of the representation; (4) speaker's knowledge of the falsity of the representation or ignorance of its truth; (5) the speaker's intent it should be relied upon; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the representation; (8) the hearer's right to rely on the representation; and (9) the hearer's consequent and proximate injury caused by the reliance on the representation. Lee v. Armstrong (1990), 798 P.2d 84, 87; Batten, 783 P.2d at 380-81.

How Big Is the Fraud Problem?

- Over 25%?
- Over 10% but less than 25%?
- Between 5% and 10%?
- Less than 5%?

Possible Answers from 1990's:

- AIA estimates fraud losses at 10% of the cost of claims paid (about \$3 billion)
- NICB estimates fraud losses at about \$6 billion (20%)
- One Ins. Company CEO estimates \$30 billion a year
- CA Gov. Pete Wilson suggested 25% of all employer costs and 10% of all claims

Source: *Workers' Compensation Fraud: The Real Story*, Labor Research Reports, 1998

Possible Answers Currently:

- PBS *Frontline* program on *The Myth of Workers' Compensation Fraud* claimed that studies show that only 1 to 2% of claims are fraudulent
- Letters from AFL/CIO state representatives indicated that employer fraud was much greater than employee fraud

Answer Depends On When and Who You Ask, and The Type of WC Fraud

- There tends to be more employer fraud than employee fraud (varies by jurisdiction)
- Difficult claims are often thought of as injured worker fraud, but it is not fraud unless it can be proven
- Healthcare provider fraud happens more often than people think
- Claims adjuster fraud happens less often than people think
- Insurance agent and attorney fraud seems to be becoming more prevalent

Some Recent Statistics:

- **Washington** has a separate Fraud Prevention and Compliance Program within the Department of Labor and Industry

Period	Operating Costs	Costs Avoided	Recoveries	Return on Investment
FY2004	\$10.9 million	\$4 million	\$93.8 million	9 to 1
FY2005	\$13.6 million	\$7 million	\$104.9 million	8.2 to 1
FY2006	\$14.9 million	\$16.6 million	\$135.3 million	10.2 to 1
FY2007	\$14.7 million	\$4.9 million	\$139.2 million	9.8 to 1
FY2008	\$16.6 million	\$2.7 million	\$124.5 million	7.6 to 1

Source: <http://www.lni.wa.gov/ClaimsIns/FraudComp/WCFraud/About/Reports/default.asp>

Washington Results:

- In 2008:
 - Collected \$125.5 million in delinquent employer premiums, audit assessments, overpayments to workers, health-care and vocational providers, and fraud recovery orders;
 - Increased the percentage of audits where monies are owed to L&I – to 66% compared to 50% in FY 2007
 - Assessed \$6.5 million against unregistered employers (companies that hired workers but did not purchase WC insurance)
 - Referred 25 cases for criminal prosecution
 - Pursued premiums from 215 companies that closed and then reopened under a new name

Source: *Targeting Fraud and Abuse In Washington State's Workers' Compensation System*, 2008 Annual Fraud Report to the Legislature, Washington State Department of Labor and Industries

Washington Results:

- Washington receives support from a full-time assistant attorney general that develops fraud cases for criminal prosecution. This position was created in 2006.

Type of Fraud	Number Referred for Prosecution in 2008
Employer	3
Provider	4
Worker	18
Total	25

Source: *Targeting Fraud and Abuse In Washington State's Workers' Compensation System*, 2008 Annual Fraud Report to the Legislature, Washington State Department of Labor and Industries

Reporting, Investigating and Prosecuting Process in Most Jurisdictions is Bifurcated

- In most states:
 - Department of Insurance, individual insurers or the monopolistic state fund is the entity to investigate employer fraud;
 - Workers' compensation agencies often take complaints about injured worker fraud, but the individual insurers, self insurers or monopolistic state fund must pursue prosecution and restitution in civil suits;
 - District attorney or attorneys general in each state must agree to pursue a criminal case.

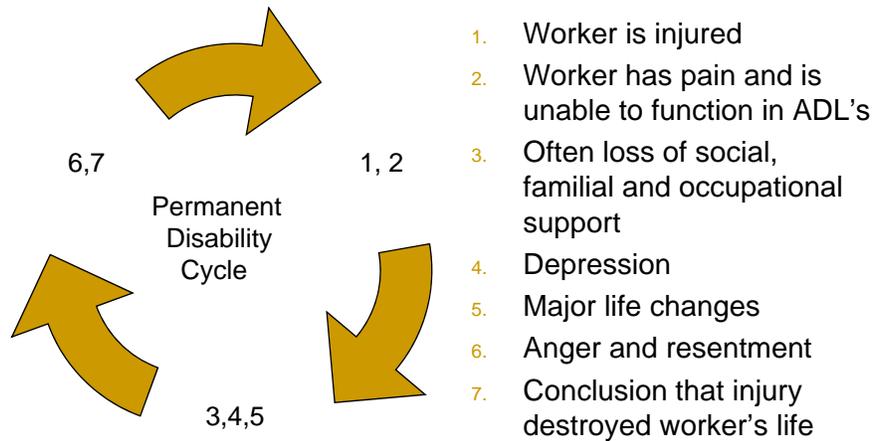
Examples of Injured Worker Fraud

- Claiming WC benefits when injured elsewhere
- Receiving WC benefits and working fulltime
- Claiming reimbursement for drugs prescribed for another (non work related) condition

Difficult Claims Are Often Thought Of As Fraudulent Claims

- Malingering, compensation neurosis, and depression are often seen as fraud
 - The solution to these is not prosecution, but recognition of the psycho social aspects of disability and an aggressive return to work policy

Long Term WC Disability Cycle



Examples of Employer Fraud

- Not purchasing a WC policy to reduce business costs
- Not reporting injuries and paying for the medical bills directly
- Not reporting payroll and/or paying wages in cash and not keeping a record
- Understating payroll
- Misclassifying payroll
- Other

Examples of Insurer Fraud

- Falsely denying claims
- Misrepresenting the facts of a case to justify a defense
- Intentionally over-reserving
- Intentionally under-reserving
- Other

Examples of Healthcare Provider Fraud

- Billing for services not provided
- Intentionally “up coding”
- Intentionally “unbundling”
- Billing and collecting payment from multiple payers at the same time for the same service
- Billing WC carrier for services unrelated to the injury
- Other

Examples of Rehab. Provider Fraud

- Billing for services not provided
- Billing multiple clients for the same time or same services
- Misrepresenting facts in reports to continue services
- Other

Examples of Attorney Fraud

- Billing for services not provided
- Billing multiple clients for the same time
- Advising a client to lie, withhold material information or misrepresent the facts to improve their case
- Other

Other Types of Fraud

- Pharmacists billing for brand name drugs and providing generic to the patient
- Pharmacists billing for more medication than they provided to the patient
- Agents collecting premium and not sending it into the insurer
- Other

Criminal Fraud is Hard to Prove

- Must prove it was “intentional”
 - Ignorance **IS** a defense
- Must prove they “**knew it was wrong**”
 - Once or twice could be a mistake
- Must prove they “**benefited from the act**”
 - Often no records kept

Criminal Fraud is Hard to Prosecute

- Prior to ten years ago, was given a low priority by the state AG's and DA's
- Due to lack of resources and priority, workers' compensation systems in a number of states now fund all or part of an assistant attorney general to ensure workers' compensation fraud cases get the needed attention and publicity to deter future fraudulent actions

Solutions:

- Legislative actions to create WC fraud programs:
 - States establish and fund WC Fraud Programs
 - WC agencies begin funding at least one AG or DA position to pursue criminal WC fraud cases
 - States make fraud a felony
 - NCIB formed by the insurance industry
 - Public/Private task forces formed and produce high visibility news on prosecutions

The Results

- Fraud bureaus now exist in at least 34 U.S. jurisdictions
- Over 1000 insurers now are members of the NICB
- States have more arrests and successful prosecutions than ever before
- Results are reported and convictions made public as a deterrent

Example Results:

- CA – (FY 2007/2008)
 - 583 arrests; 1063 prosecutions with 1,066 suspects; resulting in 527 convictions
 - \$23,611,264 in restitution was ordered and \$10,348,834 was collected during the year
 - Total chargeable fraud was \$270,465,234

Source: www.insurance.ca.gov

Example Results:

- FL – (FY 2005-2006)
 - 1982 cases were referred to the BWCF as possible fraud cases
 - 221 of those were presented to the DA with a total restitution amount of \$8,725,191 (42% of that year restitution amt. for all types of fraud)
 - 184 total convictions (26% claimant fraud and 74% appears as employer fraud)
 - 2693 stop work orders issued and \$58,783,652 assessed in penalties

Source: *Florida Joint Report, DWC and DIF, January 2007*

Preliminary Results From Comparator States:

- See Excel Spreadsheet Attached

Preliminary Summary of Fraud Information From Comparator States

- Significant variation in penalties:
 - Criminal penalties range from petty misdemeanor to different classes of felonies
 - Civil penalties range from minor fines to not more than 20 years in jail and fines up to \$100,000; injured worker can lose all entitlement to benefits and employer may have to pay fines and up to 3 times the premium they evaded

Preliminary Summary of Fraud Information From Comparator States

- Civil prosecution may be pursued by the state agency or by the employer/insurer themselves; may go through the general court system or (like Montana, can be pursued through the WC Court)
- Criminal prosecution must usually be pursued by the state attorney general, county prosecutor, a district attorney, or special prosecutor and goes through the courts of general jurisdiction

Preliminary Summary of Fraud Information From Comparator States

- Some states seem to be much more active in fraud pursuit as evidenced by their staffing and budget (see Washington results)
- Even with significant resources, criminal prosecution and conviction is not simple
- Many workers' compensation state agencies do not seem to know the prosecution and conviction rates for their states

Preliminary Summary of Fraud Information From Comparator States

- Most common process and tools in use by states answering the survey are:
 - Toll free hot line for fraud reporting
 - Fraud notices on websites, publications and forms
 - Publication of convictions
- Other less common practices include:
 - Use of database matching with other agencies
 - Insurers mandated to report
 - State fraud task forces
 - Education and public awareness

Questions?

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