

Special Report

WORKERS' COMPENSATION FRAUD: CRIME AND PUNISHMENT

Workers' compensation costs are driving business out of California, according to the California Chamber of Commerce, Insurance Commissioner John Garamendi, the California Business Roundtable, and numerous other organizations and authorities.

Workers' compensation fraud, in particular, has reached critical proportions in California. It is not only driving businesses out of the state, it's driving some of them out of business entirely, according to experts.

Nobody knows how many hundreds of millions of dollars fraud costs the \$10 billion California workers' compensation insurance industry each year, but there is near universal consensus that fraud is one of the major cost-drivers of a system that ranks second in the nation in terms of employer costs and 30th in the nation in terms of worker benefits.

In order to combat fraud and other out-of-control factors in the system, the California Chamber of Commerce and the California Workers' Compensation Institute (CWCI) conducted 11 Business Survival Seminars on "Workers' Compensation and What the Employer Can Do About It" throughout the state in October.

BNA attended one of those seminars Oct. 23 in San Francisco where it was readily apparent that fraud pervades the entire system: It's not just gold-bricking employees or unscrupulous doctors and lawyers who prey on hapless employers and insurers. Some employers and insurers are perpetrators of fraud themselves—and/or are negligent in their efforts to ferret it out and enforce the laws against it.

Perceptions v. Realities

The first problem with workers' compensation is telling the difference between fraud and California law.

"Stupidity is compensable under workers' comp, contrary to popular belief," said Frank Floyd, claims manager for the State Compensation Insurance Fund (SCIF), the largest workers' compensation insurance underwriter in the state.

Another legitimate claim that can look like fraud is the highly controversial cumulative stress claim. California is only one of six states in the country that recognizes cumulative stress as a compensable claim. Tom Parry, research director for CWCI, told the seminar participants. "It's not fraud," he said. "It's just behavior employers don't particularly appreciate."

Employers especially don't appreciate that only 10 percent of stress in a person's life has to be work-related to be compensable under current law, or that if a pre-existing back injury is aggravated on the job, it's fully compensable. Situations like this may not be fair to the employer, but they are legal—and that's why the chamber is, and has been, spearheading efforts to reform workers' compensation law.

Doctors, Lawyers Said Worst Offenders

"The main culprits are lawyers who aggressively influence workers to file phony claims and doctors who bill for unnecessary services or services not performed at all," claimed Harvey Levin, a reporter for KCBS Channel 2 in Los Angeles. In a highly publicized expose earlier this year of "workers' comp mills," Levin went undercover to show just how easy it is for doctors, lawyers and others to bilk the system.

In one scam, using street-wise "cappers" or "runners," doctors and lawyers solicited business in unemployment lines where out-of-work people were induced to file false claims, usually for stress or back injuries. Intake workers at "cookie cutter" clinics filled out claim forms for injuries that didn't exist. The doctors and lawyers, frequently in kickback deals, collected their fees, often overcharging in the process, according to Levin's reports.

The main idea here was not to obtain benefits for the "injured" worker, according to Don Clark, an SCIF attorney, rather, the intent was simply to "generate medical/legal bills at \$1,000 to \$5,000 a pop." If they were lucky, their partners in crime, the workers who filed the phony claims, got a free ride on workers' compensation disability benefits.

Employers/insurance carriers are generally required to pay for a medical/legal evaluation of a claimed injury whether or not an injury even exists — and sometimes whether or not an actual medical/legal evaluation even took place. Over half, 57 percent, of the \$1.5 billion paid out last year for total litigation costs in workers' compensation cases went for medical/legal billing, according to CWCI Research Notes *Workers' Compensation Litigation Costs, 1990*.

The California workers' compensation system is "the last blank check for medical care in this country," claimed Donald Young, an insurance industry representative, testifying before a hearing panel on workers' compensation insurance premium rates Oct. 22 (see *Workers' Compensation*, p. 43).

Of course, all this is against the law, but even after Levin documented the extent of workers' compensa-

tion fraud in Southern California, the offenders weren't prosecuted. This led the reporter to conclude: "Nobody's looking and nobody cares."

Employee Fraud Fact of Life

Filing a fraudulent workers' compensation claim might not occur to many otherwise honest employees if it weren't for aggressive print and electronic advertising by workers' comp mills. These ads, particularly widespread in Southern California, according to the chamber/CWCI seminar speakers, encourage filing of workers' compensation claims, with one clinic even offering a paid Las Vegas vacation as an inducement for patronage.

There will always be employees who take advantage of the system, but Parry of CWCI cautioned employers to distinguish between outright criminal fraud and unethical abuse of the system. It's criminal to claim and collect benefits for an injury that never occurred, or for one that occurred off the job. On the other hand, an employee can abuse the system by simply exaggerating a real claim, especially a stress or back injury. "That's not fraud in California workers' compensation," said Clark, "but it is certainly a frustration to the employer."

"The system has lent itself to abuse," SCIF's Floyd told BNA. And abusive claims increase in a recession. Workers' compensation claims traditionally rise when people are getting laid off and unemployment is running high.

Employer Fraud a Problem Too

Before employers get too self-righteous about workers' compensation fraud, they need to look at their own activities, SCIF attorney Clark warned seminar participants.

For instance, "There's the old hiding of payroll routine," said Clark. "It happens a lot. This is a million-billion dollar industry in California—hiding payroll." And it's a felony, punishable by fines and/or imprisonment.

Floyd explained a routine form of payroll fraud is misclassifying workers in order to obtain lower workers' compensation insurance premiums. Premiums are based on the risk/loss experience of an occupation.

Consequently, a general contractor might report his carpenters as cement workers, said Floyd, because workers' compensation insurance for a cement worker is about a third of the rate for a carpenter.

Insurer Fraud and Negligence

Fraud by insurance companies is the least documented of the various kinds of workers' compensation fraud, said Clark, but it's out there too.

Although there are various forms of insurer fraud, as far as employers are concerned, "There's a feeling that the insurer is not providing adequate investigation and that employers are paying for claims that really they should not pay for," said CWCI's Parry.

Basically, employers want more say in how claims are settled.

At the Oct. 22 rate insurance hearing in San Francisco, Young—a member of the governing board of the Workers' Compensation Insurance Rating Bureau, the agency that recommends workers' compensation insurance rates to the state insurance commissioner—admitted under questioning that some carriers have "taken the easy way out" and settled potentially fraudulent claims.

While this tactic may save the insurer money, it frequently drives up the cost of the employer's workers' compensation premiums.

Putting Teeth in Reform Law

"It's questionable whether we achieved anything under [1989] reform," Floyd told BNA. While worker benefits have improved somewhat under the Workers' Compensation Reform Act of 1989, other reforms, such as reduced litigation, have failed to materialize.

In fact, according to the CWCI study on litigation, "... the incidence of litigation in the California system increased 17 percent between 1989 and 1991, with an even more dramatic 27 percent upturn recorded in Southern California."

This litigation, much of it suspected of being fraud-based, provided impetus for SB 1218, workers' compensation fraud legislation authored by Sen. Robert Presley (D-Riverside). Signed this summer by Gov. Pete Wilson (R), it will take effect Jan. 1, 1992.

Under SB 1218, a doctor, attorney, health care professional, or insurer who engages in workers' compensation fraud can have his or her license suspended or revoked. Furthermore, anyone found guilty of fraudulently obtaining workers' compensation benefits or payment for services can be incarcerated in state prison for up to five years and/or fined up to \$50,000 or double the amount of the fraud, whichever is greater. The penalties are even stiffer for repeat offenders.

Running or capping for an attorney, doctor or insurer is a misdemeanor punishable by up to a year in county jail and a \$1,000 fine. Repeat offenders can face a three-year prison term and a \$10,000 fine.

Making false or misleading advertisements of workers' compensation services or benefits can put the perpetrator in county jail for a year and cost him or her up to \$10,000.

Taking a Bite out of Crime

Of course, SB 1218 and other laws will be effective only if they are enforced—something that hasn't happened much in the past.

Therefore, SB 1218 created the Bureau of Fraudulent Claims to investigate and assist in enforcement of the law. It also created the Fraud Assessment Commission to levy surcharges on insurance carriers and self-insured companies to fund increased fraud enforcement.

Those assessments, along with fines collected under the new law, will be used "only for enhanced workers' compensation fraud investigation and prosecution."

Half will go to the Bureau of Fraudulent Claims, and half will go to local district attorneys who prove they will use the money to prosecute fraud cases. The law calls for a minimum of \$3 million a year for the next two years.

Finally, SB 1218 creates the Workers' Compensation Insurance Fraud Reporting Act, which requires insurers, self-insured companies, and authorized government agencies to report, confidentially, to each other suspected fraudulent activities.

What to Do Until Help Arrives

Nobody expects SB 1218 to be a quick-fix, much less a cure-all, law. Indeed, more reform of workers' compensation is already being drafted for the 1992 legislative session.

Meanwhile, what can employers do to reduce fraud?

All the speakers at the Chamber/CWCI seminar emphasized treating employees well is the best defense against fraud. Happy employees are much less likely to file a fraudulent workers' compensation claim than the traditional disgruntled employee, who files a "retaliation claim," they said.

Well-informed employees are also a good defense against fraud, the experts agreed. Many employers are afraid if employees know too much about workers' compensation, they are more likely to abuse it. Not necessarily. The more they know, the less likely they are to retain an attorney, the speakers argued.

Several videos and booklets are available through SCIF, CWCI, insurance carriers, and the chamber that

explain workers' compensation to employees. Two videos from CWCI feature former professional football player and coach Joe Kapp, who explains, in English or Spanish, employees' rights and responsibilities under the law in terms designed to reassure workers that the law is there to protect them—and they don't need an attorney.

To obtain free copies of the booklets or to purchase the videos at cost, contact California Workers' Compensation Institute, 120 Montgomery St., Suite 1300, San Francisco 94104, (415) 981-2107; State Compensation Insurance Fund, 1275 Market St., San Francisco 94103, (415) 565-1344, or Priscilla Ross, manager of business education, at the California Chamber of Commerce, P.O. Box 1736, Sacramento 95812-1736; (916) 444-6670. The chamber also publishes an Employer's Survival Guide to Workers' Compensation for \$35 plus tax and shipping. Workers' compensation insurance carriers will have many of these materials as well.

Meanwhile, the reality is that both employers and employees commit workers' compensation fraud—and so do their lawyers and doctors and insurers.

If an employer suspects employee fraud, the seminar speakers stressed it is imperative to work closely with the insurance carrier to evaluate and investigate the claim—without violating the employee's rights in the process. If the case warrants, it is appropriate to deny benefits, litigate, and file a complaint with the proper policing authority.

In fact, starting Jan. 1, it's the law.