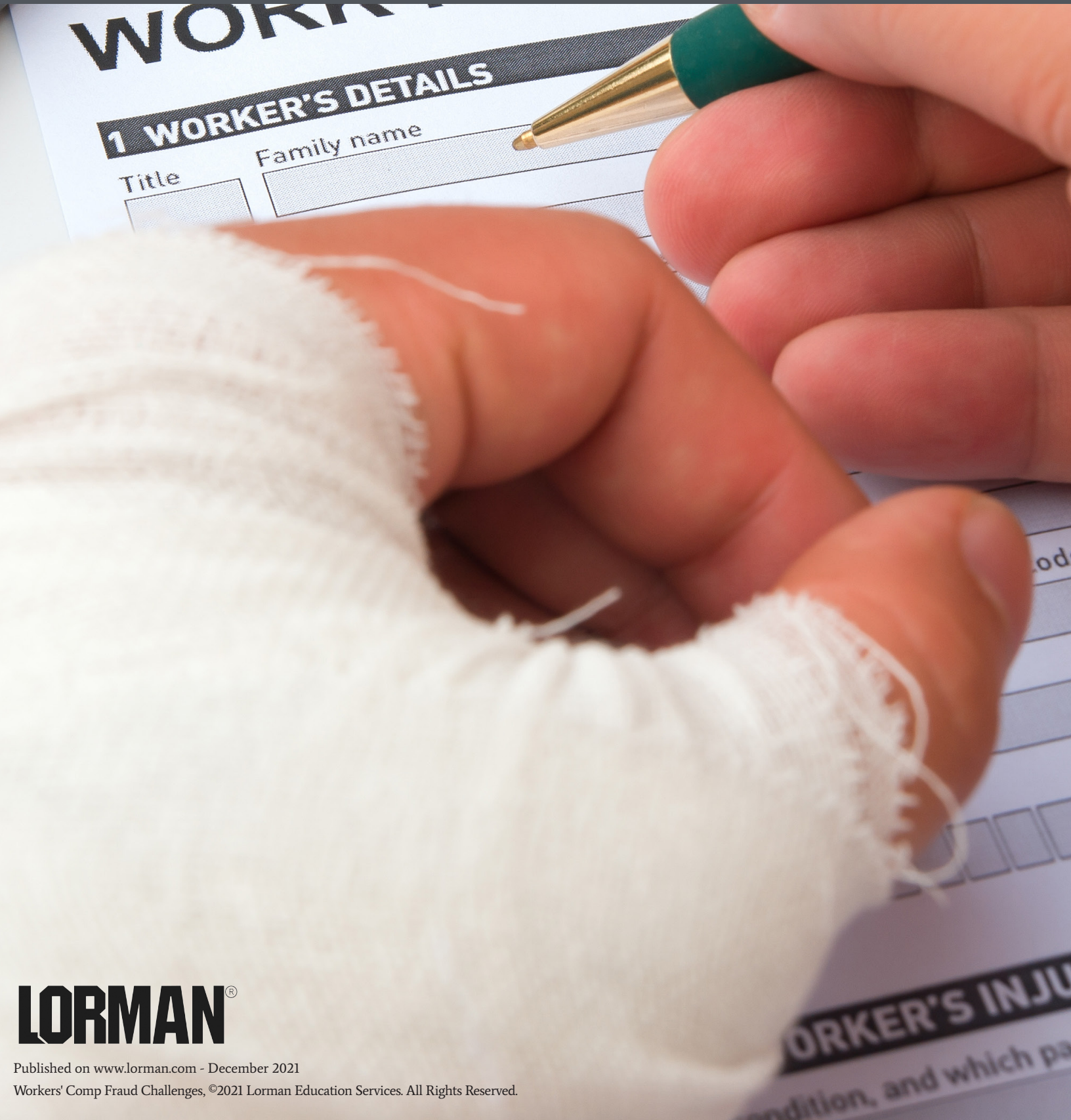


Workers' Comp Fraud Challenges

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Pursuant to the Workers' Compensation Act, an injured employee's exclusive remedies against the employer are generally limited to such benefits as temporary total disability payments and reasonable and necessary medical expenses. The underlying legal theory is that while claimants forgo an extensive range of tort damages available to them in other personal injury actions, they receive speedy and certain medical and lost-time payments and are not required to prove fault.

Fraud, however, has been a growing concern in the workers' comp arena. Employees who elect to abuse the system do so at the risk of hefty criminal and civil penalties. Nonetheless, claim managers and adjusters who suspect fraud also should be cognizant of the relationship between fraud, slander, and libel actions, and the anti-retaliation and whistle-blower laws that operate to protect the rights of injured workers.

Caution should be exercised in the investigation of suspected fraud. Claim professionals should not make unsupported statements or premature decisions based on a mere hunch that fraud is present. Overly zealous fraud investigations could lead to defamation or other civil lawsuits. Accordingly, claim professionals should avoid actions that create unnecessary and costly legal exposures.

Fraud

An "occupational" illness/injury is generally present where: (1) there is some causal connection between the loss and employment; (2) it had its origin in a risk incidental to, or connected with, employment; (3) it flowed from as a natural consequence of employment; or (4) it occurred within the period of employment at a place where the employee may reasonably be and while reasonably fulfilling the duties of employment or engaged in doing something incidental to employment. Conversely, claims that do not meet the criteria of being work-related are fraudulent.

Everyone pays the price of bogus claims. Fraud results in higher premiums and greater company expenditures. This translates into higher cost margins, which get passed on to consumers. Claim professionals, therefore, should be on the lookout for fraud while adjusting workers' comp losses.

Legal Definition of Fraud

Like other categories of fraud, insurance fraud is a crime. The statutes of the jurisdiction in question should be reviewed to determine how fraud is defined. A claim, however, is likely

fraudulent when someone knowingly and with the intent to defraud the carrier presents a statement that is materially false and misleading in order to obtain a benefit.

Fraud comes in a variety of forms. Employers may misrepresent material facts on applications or misclassify workers to attain an artificially lower rate. Medical professionals may inflate claims when billing for services. Employees may embellish details regarding losses or even allege job-related injuries that never occurred. A fraudulent claim may even involve a staged accident. According to a study conducted by the National Insurance Crime Bureau, the cities with the highest incidents of staged car crashes are Miami, Los Angeles, Houston, Chicago, and Philadelphia. With Tampa and Orlando ranking at numbers six and eight respectively, Florida holds the distinction of having three cities in the top 10.

States and municipalities have gotten tough on fraud by instituting a broad spectrum of initiatives to address it. Many have established workers' comp insurance fraud bureaus. Louisiana offers an online form wherein suspected fraud may be reported anonymously, as well as a toll-free fraud hotline, as does New York, Texas, and Oregon, among several other jurisdictions. The Los Angeles County District Attorney Workers' Compensation Fraud Division investigates and prosecutes fraud, and has targeted organized "claim mills," which is viewed as a growing problem in Southern California. Claim mills include individuals who are recruited to file fraudulent claims and are referred to a doctor or lawyer who is in on the scam.

As part of its anti-fraud reward program, Florida offers up to \$25,000 to individuals providing information leading to the arrest and conviction of persons committing fraud. In October 2006, Florida's Department of Financial Services announced the arrests of three individuals on workers' comp fraud charges.

Red Flags of Fraud

While there are no sure-fire indications of fraud, warning signs do exist. Disgruntled workers may try to even the score with employers by filing false claims. An employee in line for early retirement may seek to bridge the gap by fraudulently seeking benefits. Likewise, a claimant who is impossible to reach during working hours may be earning extra money "moonlighting" while on no-work status.

Other red flags include:

- Untimely report of claim
- Multiple prior accidents
- Injury inconsistent with the nature of the insured's business
- Date, time, and place of accident is unknown
- Refusal to communicate with adjuster
- No witnesses to the accident
- Co-workers suspect fraud
- Varying accounts of the claim by the employee, witnesses, and medical professionals

Because a reasonable explanation may exist even if several of these warning signs are present, the claim professional should never jump to conclusions. The better course of action is to keep an open mind and prudently investigate if fraud is suspected.

Defamation

While fraud is properly on the claim professional's radar screen, defamation is a potential danger zone for those who investigate this activity. A mishandled fraud investigation could result in an expensive defamation lawsuit.

An employer puts himself at risk of such litigation by giving false and mean-spirited accounts of the claimant's workers' comp claim to third parties such as prospective new employers. An adjuster also could create a legal exposure by making improper statements regarding a claimant, employer, or health-care provider.

Defamation of character includes slander and libel. In general, slander occurs when false statements that are injurious to the reputation or good name of another are made with knowledge of its falsity. Conversely, libel is defamation in its written form, and can appear in a letter, e-mail, or report concerning the loss. In both instances, the defamation must be published.

Whether or not the statement rises to the level of legal defamation depends on the circumstances. For a plaintiff to prevail in a defamation action, he must show that a false and defamatory statement was made by the defendant to someone else. In other words, even the most scandalous false statements that are shouted in a desolate and uninhabitable area where no one can hear them are not actionable.

The plaintiff also needs to prove that he suffered damages as a result of the slander or libel. Although damages in the defamation context typically involve injuries to one's reputation, depending on the jurisdiction, it may be sufficient to show that the plaintiff suffered mental anguish. Additionally, truth is a defense to defamation. Consequently, irrespective of how damaging or inappropriate the statement is, the plaintiff has no claim if it is true.

Nevertheless, from a practical perspective, the claim professional who wishes to minimize the potential of being named in a defamation lawsuit should guard against uttering damaging statements to a claimant's supervisor based on a mere gut feeling of fraud, of sending an e-mail to the claimant's co-worker that discusses a perceived staged workplace accident, or of publishing a report that warns other claim professionals that a particular doctor, therapist, or attorney is involved in a claim mill. As these types of actions could give rise to litigation, claim professionals should exercise extreme discretion regarding what they say or write about anyone — even if fraud is strongly suspected.

Workers' Comp Retaliation Laws

Consideration also should be given to the statutes that protect the rights of claimants who lawfully pursue remedies afforded them under the Workers' Compensation Act.

Many states have laws barring workers' comp retaliation. Although there is some variation in the construction of these statutes, they generally bar employers from retaliating against employees who assert their rights to workers' comp benefits. The public policy prohibiting the retaliation of claimants is self-evident. After all, employees would be reluctant to

file legitimate workers' comp claims if they feared that their current or future jobs could be on the line for doing so.

Thus, an inappropriate or premature fraud allegation could blow up into a retaliation claim. An employee with a legitimate claim could take the position that the fraud investigation is retaliatory in nature and was initiated with the express purpose of intimidating him. Consequently, the claim professional should be vigilant of conduct that could put the insured at risk of a retaliation lawsuit.

Florida is one state among many that expressly prohibits workers' comp retaliation. In 1979, the Florida legislature enacted Fla. Statute § 440.205, which states, "No employer shall discharge, threaten to discharge, intimidate, or coerce any employee by reason of such employee's valid claim for compensation or attempt to claim compensation, under the Workers' Compensation Law."

But the employer who is on the hook for the occupational loss is not the only party who could face a retaliation lawsuit. A Florida claimant who sustained a compensable workers' compensation injury with one company subsequently took a job with another company where he was identified as being a "W/C risk." Shortly thereafter, he was discharged. The employee instituted a lawsuit against the second employer alleging wrongful discharge based upon his prior workers' comp claim. After the defendant was granted summary judgment by the trial court, Florida's First District Court of Appeals reversed. The court held that to interpret Section 440.205 as the trial court did would result in a chilling effect on an employee's decision to file a legitimate claim for fear of retribution by subsequent employers.

To prevail in a retaliation lawsuit, the plaintiff typically needs to prove that he: (1) was an employee entitled to receive benefits under the workers' compensation program; (2) engaged in some protected activity, such as filing a workers' comp claim; (3) suffered an adverse employment action, such as involuntary separation or other change in the terms or conditions of employment; and (4) that there existed a causal connection between the employer's actions and the protected activity.

Whistle-Blower Acts

Uncorrected safety concerns or practices that could lead to occupational injuries/illnesses might induce the claimant to blow the whistle on unsafe working conditions. The Occupational Safety and Health Act (OSHA) is one law that protects claimants who speak out against unsafe or unhealthful conditions in the workplace and for engaging in other related protected activities. Section 11(c) of the OSH Act prohibits any person from discharging, or from discriminating against, any employee in any manner because that employee has exercised rights under the Act, including complaining to the Occupational Safety and Health Administration or participating in an OSHA inspection. Discrimination can include such actions as firing, laying off, demoting, failing to promote, disciplining, or intimidating the worker.

Additionally, several states have enacted their own whistle-blower statutes. For instance, on Jan. 1, 2004, California extended its Whistle-Blower Protection Act to employees. The statute established a hotline within the California Office of the Attorney General for workers who wish

to report violations of the law and requires the attorney general to refer these calls to the proper authority.

Like the anti-retaliation laws, whistle-blower statutes typically allow claimants to bring civil actions in situations where they have suffered some harm as a direct result of engaging in protected activities. Thus, an injured worker who was fired after filing an OSHA complaint might bring a private whistle-blower and retaliation action against the employer seeking damages.

Although these civil lawsuits are brought against the employer and generally do not involve the workers' compensation carrier directly, chances are strong that the claim adjuster will be on the plaintiff's witness list and, therefore, be subpoenaed for deposition and possibly trial. Likewise, there exists a good possibility that plaintiff's counsel will seek to obtain the claim file during the discovery process. Depending on the outcome, matters could come full circle and lead to a bad faith claim — against the insurer. Thus, the recommended strategy for the claim professional who adjusts workers' comp losses involving suspected fraud is to combine diligence with equal amounts of discretion and caution.

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