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**IMPORTANT ISSUE OF CONCERN FOR YOUR BUSINESS**

# "How to Deal with Fraudulent Workers' Compensation Claims When Your Insurance Carrier Will Not Help or Listen To You"

## "How to Deal with Fraudulent Workers' Compensation Claims When Your Insurance Carrier Will Not Help or Listen to You"

Over the last decade, there has been a sharp increase in the number of fraudulently filed workers' compensation cases in California. The rise in fraudulent claims that were settled by profit driven carriers – instead of investigated and challenged – has led to skyrocketing employer costs associated with purchasing workers' compensation insurance. In addition, due to these fraudulent claims many employers have had to look elsewhere for coverage based on unreasonably high modification rates imposed during periods of policy renewals. Moreover, the claims handling process has prevented employers from contesting the severity or even the existence of an employee's alleged injury. As a direct result, employer concerns and frustrations have been met with resistance, if not outright rejection, by insurance carriers more interested in trying to settle fraudulent claims then in investigating and contesting the claims' merits.

While it seems that common sense no longer applies in today's world, there are still many lawful tools that are readily available to employers. However, there are also various pitfalls that will occur if employers attempt to take short-cuts. Purchasing insurance from an unknown or out-of-state broker/carrier or hiring employees from a PEO but still retaining control over these "temporary employees" will likely, in the end, cost you more than had you simply purchased new workers' compensation insurance from a valid insurer. *In the article below, I will address, based on my experience, how employers in California who purchase valid workers' compensation insurance from a recognized carrier can effectively address fraudulent claims when their insurance carrier will not help or refuses to listen to their concerns.*

### A. What is Workers' Compensation Fraud?

Workers' compensation fraud is a major problem in California both to employers and to the State. According to recent statistics by the California Department of Insurance: "Based on estimates by the National Insurance Crime Bureau (NICB), workers' compensation fraud is a $30 billion problem annually in the United States. In California, it is estimated that workers' compensation

fraud costs the state between $1 billion to $3 billion per year." http://www.insurance.ca.gov/0300-fraud/0100-fraud-division-overview/25-wc-conv/ This estimate does not include the direct costs and expenses to employers that result from fraudulent claims.

In California, it is unlawful pursuant to Labor Code Section 3820(b) to engage in any of the following acts, omissions, and/or misconduct that may constitute workers' compensation fraud:

(1) Willfully misrepresent any fact in order to obtain workers' compensation insurance at less than the proper rate.

(2) Present or cause to be presented any knowingly false or fraudulent written or oral material statement in support of, or in opposition to, any claim for compensation for the purpose of obtaining or denying any compensation, as defined in Section 3207.

(3) Knowingly solicit, receive, offer, pay, or accept any rebate, refund, commission, preference, patronage, dividend, discount, or other consideration, whether in the form of money or otherwise, as compensation or inducement for soliciting or referring clients or patients to obtain services or benefits pursuant to Division 4 (commencing with Section 3200) unless the payment or receipt of consideration for services other than the referral of clients or patients is lawful pursuant to Section 650 of the Business and Professions Code or expressly permitted by the Rules of Professional Conduct of the State Bar.

(4) Knowingly operate or participate in a service that, for profit, refers or recommends clients or patients to obtain medical or medical-legal services or benefits pursuant to Division 4 (commencing with Section 3200).

(5) Knowingly assist, abet, solicit, or conspire with any person who engages in an unlawful act under this section.

In addition, workers' compensation fraud is also unlawful under California Insurance Code Section 1871.1 and 1871.4, as well as California Penal Code Section 549. With this background regarding the law in California,

we now turn to what actions you may decide to take on your own and what actions will require the assistance of "Audit Counsel."

## B. Initial Actions To Be Taken By Employer:

When you first receive a report from an employee that he/she has allegedly been injured on the job, you should as soon as possible have the employee complete the employee portion of the Workers' Compensation Claim Form (DWC-1). By doing so you help to ensure that the employee is not able to later amend or change his/her claim without drawing scrutiny from the insurance carrier and possibly triggering a fraud investigation. Once this is done and you have completed the employer portion of the DWC-1, the claim form should be immediately tendered to both your insurance broker and workers' compensation carrier. It is important to have proof of delivery in case there is ever a claim by the insurer that due to non-receipt of DWC-1, the claim is being denied for failure to timely tender for coverage and defense.

After tendering the matter for coverage and defense to your insurance carrier, if you believe that the employee is faking or exaggerating their alleged injury, you should conduct a workplace investigation regarding the incident. ***First,*** contact the employee's direct supervisor and interview him/her regarding their knowledge of this employee and his/her injury. ***Second,*** interview all employees who were in the alleged vicinity or location where the injury occurred. For example, if the employee was allegedly injured on the night shift, you should have the employee's direct supervisor(s) identify all employees assigned on the particular shift who may have been in a position to view the events before, during, and after the employee's alleged injury. ***Third,*** interview these employees and take notes of each witness's statement that should be maintained in a separate investigative file in your Human Resources office.

In addition, you should be in constant communication with your broker and insurance carrier to ensure that any information which may cast doubt on the severity and/or even the existence of an employee's alleged injury is sent and received in a timely manner. It does not help you to investigate the circumstances of the employee's alleged injury only to withhold and/or fail to provide this information directly to the broker and insurance carrier for further

action.

Finally, if based on the evidence you collected during your investigation, you have a good faith basis to allege that the employee has filed a fraudulent workers' compensation claim you should immediately notify your insurance carrier and demand that they deny the claim as fraudulent and/or alternatively assign a fraud investigator to the claim. Your broker may be able to assist you in this process and may be able to press your case for denial of the claim and/or alternatively assignment of a fraud investigator to the claim.

After you have taken these initial steps, depending upon your carrier's response as discussed in Section C below, it may be time to retain "Audit Counsel" as discussed further below in Section D.

## C. <u>The Claims Handling Process and Typical Carrier Responses to Fraud Claims</u>:

Once you have tendered the claim to your carrier, an adjuster will be assigned to open a "Claim's Account File." The adjuster will review the claim and then make an initial determination as to what reserve to place on the claim. The reserve amount may be based on the adjuster's viewpoint of the "merits of the claim" and potential litigation costs, as well as costs of medical / psychological care, treatment, diagnosis, and if applicable, costs for defense and settlement.

During this period of time, it is important that you provide all of the information you have obtained during the course of your investigation to the insurance adjuster assigned to the claim. After sending the adjuster this information, you should follow-up with a phone call and e-mail to ensure receipt by the adjuster of the materials and to request that based on the information, the carrier deny the employee's claim based on fraud and/or alternatively assign a fraud investigator to the claim.

The response you will likely receive from the insurance adjuster will consist of one of the following based on complaints that I have heard from our clients over the years:

**(1) "Thank you very much for the information. I can't deny the claim and I don't think there is enough information to warrant assigning a fraud investigator, but we'll keep a copy of your concerns in our file."**

**(2) "Yes, I received the information and have forwarded it to our attorneys to review, but at this time, we are going to approve the claim. If anything changes, I'll let you know."**

**(3) "After reviewing what you provided, I still don't feel there is any evidence of fraud. However, if you discover any new or different facts, please feel free to let us know."**

For some of you who have already been on the receiving end of these types of comments, the above responses from insurance adjusters are only too real and evoke frustrating memories of being unable to stop employees from profiting off their fraudulent WCAB claims. In the next section below, I will tell you what the legal strategy is when you reach a dead end and your concerns are ignored by the carrier.

### D. <u>When you get nowhere it is time to retain Audit Counsel to fight for your interests, NOT the interests of the carrier</u>:

Many years ago, after hearing complaints from clients regarding their experiences with insurance companies and adjusters who were unwilling to listen and failed to act on their concerns regarding fraud claims, I began serving as private "Audit Counsel" <u>on behalf of my clients' interests, and not on behalf of the interests of the insurer.</u> While employers are interested in ensuring that fraudulent claims are denied and hence their modification rates are not unnecessarily increased, insurance carriers really do not care if a claim is fraudulent or not. The carrier's primary interest is often in seeking to settle WCAB cases early and for the least amount of money as possible before the costs of medical and psychological bills for diagnosis, care, and treatment become disproportionate to the adjusters' "Claim Account Reserve."

However, the addition of "Audit Counsel" to challenge a claim as fraudulent is a **"game changer."** The primary function of having private counsel separately retained to serve as Audit Counsel is to work on your behalf

to convince the insurance carriers and adjusters to investigate, defend, and deny claims when they will not listen to you, without jeopardizing insurance coverage.

Audit counsel is permitted upon filing a Notice of Appearance before the WCAB on your behalf to attend all necessary WCAB hearings, conferences, depositions, and other important events during the life of the case to ensure that your interests are adequately represented. Retaining Audit Counsel is not intended, and does not infringe on the professional and legal rights, responsibilities, and privileges of the carriers and insurance appointed defense to represent your interests before the WCAB. Instead, Audit Counsel serves the limited and important role of placing legal pressure on insurance carriers, adjusters, and appointed defense counsel who have previously failed to pursue all legal options in addressing your fraud concerns.

Finally, in order to ensure that the cost of retaining the firm as Audit Counsel is affordable for all of our clients, we charge a flat rate for our legal services, instead of billing for this service under an hourly rate agreement. If you are interested in learning more or retaining the firm as Audit Counsel please contact us.

Whatever you decide, always check with legal counsel first and have a plan of action.

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