

WORKERS COMPENSATION



GETTING ANSWERS ON QUESTIONABLE CLAIMS

An Employer's Guide for Minimizing Workers Compensation Abuse

By Ronni Bright and Marc Sirotkin

When investigating a workers compensation claim, the employer and insurer/servicing agent are given limited time to make a tough decision: accept or deny the claim. As such, it is imperative for the employer to have strategic measures in place to identify and properly handle questionable claims. Here are five resources employers should use to potentially mitigate exposure for abuse of the system.

PRE-EMPLOYMENT, POST-HIRE STRATEGIES

An ounce of prevention is worth a pound of cure. Employers are wise to use pre-employment physicals and post-hire medical questionnaires. As a general matter, though, employers cannot ask prospective employees questions about their medical histories or prior accidents when interviewing candidates. However, employers can have employees undergo pre-employment physicals and complete post-hire medical questionnaires. In doing so, the employer may establish what exactly is the employee's baseline level of

functionality and current medical condition.

It should be noted that an employee's misrepresentation of a pre-existing condition is not uncommon in today's competitive workforce. Given that reality, how helpful can a pre-employment physical and post-hire medical questionnaire truly be? The answer is "very helpful." Pre-employment physicals and post-hire medical questionnaires are of great value to employers when it is discovered that an employee who alleges a work injury is found to have previously misrepresented the existence of a pre-existing medical condition. Under these circumstances, the employer may deny liability for the work injury by asserting what is commonly known as the *Rycroft* defense.

The Georgia Supreme Court articulated the defense as being applicable where the employee knowingly and willfully made a false representation as to her physical condition; the employer relied upon the false representation and the reliance was a substantial factor in hiring; and, as decided in *Georgia Elec. Co v. Rycroft*, there must have been a causal connection between the false representation and the injury.

It is the employer's burden of proof to establish the three prongs of the *Rycroft* defense. As we learned in *Saunders v. Bailey*, the employee's misrepresentation can be either written or verbal. Again, as in the *Rycroft* case, the employer's substantial reliance upon the employee's misrepresentation can be demonstrated by the employer's testimony.

However, when asserting the *Rycroft* defense, the employer should be ready to demonstrate due diligence to investigate an employee's pre-existing injuries where the suspicion of one was raised. Otherwise, according to *Gordon County Farms v. Edwards*, a court may find the employer cannot be said to have substantially relied



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upon the misrepresentation when hiring the employee.

Keep in mind that it is not necessary for the employer to prove that the employee's pre-existing condition caused the work injury. Rather, the causal link between the on-the-job injury and pre-existing condition can be established where medical evidence shows the work injury was considerably worse than what it would have been if the employee did not have the pre-existing injury, or that the pre-existing condition made the employee susceptible to the work injury, such that the injury would not have occurred but for the pre-existing condition.

DRUG-FREE WORKPLACE PROGRAMS

A drug-free workplace policy, whether certified by a state board or not, may help the employer reduce exposure for work injuries. If an employee tests positive for drugs after a work injury or refuses to take a drug screen following a work injury, then this may provide the employer with grounds to deny the claim.

Pursuant to O.C.G.A. § 34-9-17 (b) of the Workers' Compensation Act, "No compensation shall be allowed for an injury or death due to intoxication by alcohol or being under the influence of marijuana or a controlled substance, except as may have been prescribed by a physician for such employee and taken in accordance with such prescription."

And while the statute generally places the burden of proof upon the employer, there is an exception when the employee tests positive for the presence of alcohol or drugs in his blood. Specifically, O.C.G.A. § 34-9-17 provides that, where an employee tests positive for at least 0.08 grams of alcohol in his blood within three hours of the time of the alleged accident, or where an employee has any amount of marijuana or controlled substance in his blood within eight hours of the alleged accident, there will be a rebuttable presumption that the accident and injury or death were caused by the consumption of alcohol or by the ingestion of marijuana or the controlled substance.

when an employee unjustifiably refuses to take a drug or alcohol test. In a situation where an employee tests positive for drugs or alcohol following a work injury, the employer should immediately get in touch with defense counsel to determine the likelihood of a successful claim denial. When contacting an attorney, the employer should have available the results of the drug and alcohol screen as well as any other factual information available related to the work accident and employee's intoxication.

ACCIDENT/INCIDENT REPORTS

Once you have assessed whether the injured worker requires immediate medical attention, and presuming there is adequate time, it is essential to have the injured worker complete an accident/incident report. The accident/incident report should be a pre-approved form that allows the injured worker to document biographical details, the date/time of the accident, witnesses to the accident, the location of the accident, and a description of injuries, with space available to provide details about what happened.

In the statement, the employee should also confirm medical history, prior accidents, and co-employment. Remember, the employer is better off utilizing direct questions that prompt injured workers to respond rather than simply having them "write what happened." It is also advisable to have supervisor incident report and witness incident report forms available for completion. Remember to have each person, including the injured worker, date and sign the reports.

The benefits of these statements are that they can be used later for impeachment purposes or to share with authorized medical providers or experts to confirm or disprove that the reported mechanism of injury is a competent cause of the employee complaints. Also, statements may be used to impeach injured worker credibility should an investigation lead to information showing that the injured worker's medical history and/or co-employment is inconsistent

ISO CLAIMSEARCH

One of the best tools to help us identify an injured worker's claim history is the ISO ClaimSearch. Knowing whether an injured worker was involved in a prior personal injury, motor vehicle, or workers compensation claim allows us to investigate with the insurer and/or medical providers to learn more about the extent of the prior accident and injury. This is very important when it comes to handling aggravation injury claims and working to restore someone to baseline. It is also important to know if we have an intervening accident that breaks the causal chain to the compensable claim. In general, it is a good idea to check your ISO search often throughout the claim for new information.

MEDICAL/HOSPITAL/ PHARMACY CANVAS

When investigating a claim or working to mitigate exposure, it is essential to perform a medical, hospital, and/or pharmacy canvas search to confirm if an injured worker has been treating for a condition or injury prior to the subject accident date. This will help determine whether the claimant sought prior medical treatment at a facility and could assist in determining if a claim is truly the result of an idiopathic condition, if the injury was caused by a truly non-work-related condition, and whether a baseline condition for a compensable injury can be established.

Once the claim moves into litigation, the defense counsel will already have the names of all providers in order to request the medical records, and will have a head start on the claim. This tool can certainly help discover patterns of treatment and potential claim abuse.

These five tools are inexpensive means to flag questionable claims and may potentially mitigate claims exposure; some of the measures may also help reduce workers compensation insurance premiums. The employer's and the insurer's/servicing agent's proactive exercise of due diligence will certainly aid defense counsel in making a determination

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with information given by the injured worker at the time of the statement.

of the likelihood of successfully denying liability for the injury. ■