

Best's Insurance Law Podcast

■ Insurance Defense Attorneys Combat Workers' Compensation Fraud - Episode #194

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Hosted by: John Czuba, Managing Editor **Guest Attorney:** Anthony Natale, III from Marshall Dennehey

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John Czuba: Welcome to "Best's Insurance Law Podcast," the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor of Best's Insurance Professional Resources.

We're pleased to have with us today, Anthony Natale III, a shareholder and co-chair of the Medicare Set Aside Practice Group, and supervisor of the Workers' Compensation department in the Philadelphia office of Marshall Dennehey.

Tony has 31 years of experience defending employers, self-insureds, and insurance carriers in workers' compensation litigation. He focuses on high-exposure complex litigation, including repetitive trauma claims, occupational disease, and hearing loss claims, as well as chemical sensitivity claims. Tony is frequently called upon to speak to insurance companies and self-insured employers in the area of Workers' Compensation and Employment Law.

Tony, we're very pleased to have you with us today.

Anthony Natale: Thank you, John. Great to be here.

John: Thanks, Tony. Today's discussion will center on workers' compensation fraud. Tony, for our first question, what is workers' compensation fraud, and how pervasive is it within the United States?



Anthony: When we talk about workers' compensation fraud, acts of fraud are going to be different depending on the party involved, and I'm talking about the claimant, the employer, the insurance company, or a provider. A definition of fraud boiled down to its simplest form is this.

A person, and when I say a person, I mean the claimant, the employer, the insurer, the healthcare provider, or somebody within the workers' compensation system, who knowingly and with intent to defraud engages in the use of false or misleading information or the omission of information concerning any factor or thing material to a workers' compensation claim.

Now, that is a standard definition. It contains some legal mumbo jumbo, but let's give you some examples so you understand what I'm talking about.

From the claimant point of view, if an individual claimant is collecting total disability benefits and they testify that they're not working anywhere else and they're totally disabled, and then we find out through evidence that the claimant is actually clandestinely working and receiving wages, we have a situation now where a claimant has testified that they're not working.

They're really working and receiving wages. They're also receiving temporary total disability benefits. They are now committing fraud.

From the employer standpoint, we have employers who sometimes will misrepresent employee classifications to lower their workers' compensation premiums.

I was involved in a case where an employer indicated that they had 16 secretaries and two truck drivers when in reality they had 16 truck drivers and two secretaries. You can imagine the difference in the premium there, the so-called premium fraud that sometimes employers engage in

From a healthcare provider standpoint, we have had orthopedic surgeons who billed for services that they never performed. I remember having a doctor who examined 20 patients at the same time in a large room. Really didn't examine them, but gave out 20 different reports, 20 diagnoses, and 20 bills.

Insurance companies can commit workers' compensation fraud. We have had cases where specific insurance adjusters will lead a claimant to believe that their claim is accepted when it's really not accepted, and then tried to dismiss the claim based on the passing of a statute of limitations. There are many actors in the system and all have the propensity for fraud.

As to pervasiveness in the United States, the National Insurance Crime Bureau estimates that it is a \$30 billion, with a "B," dollar problem every year. It strikes every state or Commonwealth or region in the United States.

From the inception of my practice, I always equated workers' compensation fraud with the great white shark. It's always been there, it never had to evolve, and it will continue to feed unless we stop it.

John: Tony, why is the workers' compensation system such a fertile ground for fraudulent claims?



Anthony: Let's talk about the grand bargain between employers and claimants. Many decades ago, the workers' compensation system developed in most states and Commonwealths. There was a two-pronged reason why workers' compensation, the system itself, developed.

First, it was designed to help claimants by eliminating long delays for the workers in the jury trial process. Anyone who practices in workers' compensation and also does civil jury trials understands that we can litigate a workers' compensation case in a shorter amount of time than it takes to just complete discovery in a civil matter involving a jury.

The second prong or reason why we have a workers' compensation system in this grand bargain scheme is that it helped employers by eliminating pain and suffering awards. Remember, in workers' compensation, there are no awards for pain and suffering.

There are awards for lost time, there are awards for medical, there are awards in some states for specific losses or permanency, but there is no pain and suffering. We've eliminated these possible million-dollar jury verdicts that could come down against employers.

Now, as a result of the grand bargain, there have been some unintended consequences. The first being what I call an entitlement complex among the claimant and claimant bar. Based on the grand bargain, most claimants and claimant attorneys feel that the workers' compensation system should be academic in nature, and most, if not all claims should be granted.

It's dangerous when a party has an entitlement complex because then a party feels justified in saying or doing whatever they can to get benefits because they're entitled to those benefits. The second unintended consequence is that the venue of workers' compensation has now become a dumping ground for any possible claim that could have any relationship to employment.

I'm getting claims where a claimant will indicate that they have to stand at their job, and therefore, they're entitled to total knee replacements. I have had claimants who testified that the union-sponsored medical plan will not pay for any type of medical condition unless the claimant first tries to argue that it's work-related.

We see this entitlement complex and this dumping ground making the workers' compensation system a fertile ground for fraud. It goes further than that. If you look at the Workers' Compensation Act in your state, it is a blueprint for fraud. It's not a coincidence that the type of injury being alleged follows the definition of injury in that particular state or Commonwealth as opposed to the actual truth.

For instance, in Pennsylvania, it's an aggravation state. If you aggravate a pre-existing condition, it can be looked at as a new injury. If you go over the bridge in one of the states bordering Pennsylvania, they may not be an aggravation state. A claimant may argue a traumatic injury, even if it was an aggravation, to fit within the definition of the state that they're filing the claim in.

What I see is injuries following the definition of injury in the Act and the allegations not following the actual truth. Now, a lot of claimant attorneys will tell me that this can put the claimant in a position where they could be prosecuted for fraud.



The response to that is, then why do so many claimants continue to lie under oath or blatantly commit fraud in the workers' compensation system? The answer is, as we'll get into later, they can, so they do it. Unless we stop it, they are going to continue to do it.

John: Tony, are there certain industries that are more susceptible to fraudulent workers' compensation claims?

Anthony: In my experience over 31 years, the answer to that question is no, and this is going to seem counterintuitive to an outsider to workers' compensation. When I started in the business, I represented a lot of steel mills. My gut reaction was fraud is going to show up in claims where individuals have heavy jobs.

If you're lifting a 400-pound ingot mold, who am I to tell you that you did not herniate a disc in your back or you don't feel back pain? Throughout my career, I've handled legal offices and insurance offices. I've handled foundries, hospitals, mushroom farms, and professional sports teams.

I've even handled foundry steel mills and business offices. Fraud is apparent in every setting.

There is not one industry that we can say, "Hey, here's where all the fraud is coming from." When I'm referred a file, the type of industry where the claimant works doesn't concern me as much as the background of the claimant themselves. Fraud follows the individual. It doesn't follow the industry.

John: Tony, are there certain types of injury claims that lend themselves to workers' compensation fraud?

Anthony: Over the course of my career, I've learned that injuries that have a high subjective basis tend to be the feeding ground for fraud. For instance, there's a big push over the last 15 years for head injuries. Not only where I practice in Pennsylvania, but in all states. It seems now that anyone who alleges a head injury also alleges post-concussive syndrome.

That has invaded the Workers' Compensation Act. Why? The diagnosis for this condition is primarily based on subjective complaints. I have headaches. I have dizziness. I have light sensitivity. None of these can be disproven. None of these symptoms can be disproven by diagnostic testing.

I go head-to-head with the preeminent claimant neurologist who testifies up and down the East Coast in workers' compensation post-concussive syndrome claims. I actually had a colloquy with him on the record on cross-examination, where at one point I think I made him a little bit mad.

He indicated to me, "You can't prove the claimant doesn't have these symptoms, so I'm going to continue to diagnose and treat him. I'm going to disable him from employment and continue to bill your client, the insurance company."



Now, I ultimately won that case (and we'll get into it a little later about how you do that), but this is the mindset of individuals who are alleging injuries that have a subjective basis to them. Nobody can disprove that I am experiencing these symptoms, so this is a perfect area in which I can commit fraud.

Mental injuries have the same impact. Depending on the state that you practice in, mental injuries can be compensable under the Workers' Compensation Act. If they are in your state, look out, because again, these are subjective bases.

Claimants can argue I have a back injury and now I'm depressed because of my back pain. Who are you to tell me that I'm not depressed? It's a subjective quality. Again, there's ways to beat these claimants and these doctors, but you can see the mindset. That's the area that I concentrate on for fraud analysis.

John: Tony, why is it important to identify and report workers' compensation fraud?

Anthony: At the outset of this podcast, I told you that fraud is a \$30 billion per year industry in the U.S. What does that mean to us? I'm not talking about law firms or insurance companies. I'm just talking about everyday citizens. What does it mean? A spike in fraud cases causes an increase in insurance costs for individuals, employers, medical providers, for everyone.

If costs are going to increase because of fraud, then the cost of doing business wherever you live is going to increase. This is an important issue. There is hesitance in reporting fraud, because people think, "It's not hurting me." In reality, it is hurting you. Your medical plan premiums are going to go up, your workers' compensation premiums are going to go up, and who is that ultimately going to hit?

It's going to hit the little guy at the bottom of the food chain. It's very important to identify and to report workers' compensation fraud.

Now, part of this fraud epidemic in the insurance industry falls, unfortunately, on the defense side in workers' compensation cases. If you're an attorney and you're fortunate enough, like I have been, to expose fraud in a lot of cases that you defend, what normally happens next?

We really see the insurance industry and the insurance companies trying to shut down litigation. Make the case go away. Your goal is to shut down this case. If I produce evidence supportive of fraud and I share it with a claimant's attorney, the next thing you know, the claim is withdrawn. End of story. The insurance company says shut down your file.

I know there is a law firm in Philadelphia that advertises consistently stating that the only good file is a closed file. That's only partly correct. We can't keep litigating workers' compensation cases with blinders on, exposing fraud, allowing the fraud to shut down the workers' compensation claim, and then simply closing our file.

What we need to do at the end is report the fraud to the authorities or hold the party civilly responsible for the fraud. Reporting to the criminal authorities is an easy process. You contact the DA or the Attorney General. Civil fraud cases are a little bit more difficult. In the end, consider the massive deterrent effect that you would have by reporting workers' compensation fraud.



I had a case where a hospital worker alleged that she was totally disabled and we found out she was working elsewhere. She withdrew her workers' compensation claim after we presented her with evidence that we knew she was working. Then we reported her to the district attorney's office, who sent an investigator out to actually interview the claimant.

She then called all of her co-employees to indicate how she was being investigated for fraud. You know what? A year later, I got a telephone call from that hospital and they said they haven't had a workers' compensation claim since that incident for an entire year. You can see the deterrent effect of reporting and investigating workers' compensation fraud.

John: Tony, one final question today. How can employers combat and prosecute workers' compensation fraud?

Anthony: I'll start with combating fraud. I'm going to go back to our friend, the neurologist, who is the top guy on the East Coast. I never beat up a medical expert on cross-examination by challenging them on medicine. They went to medical school. I did not. I beat them up by challenging them on facts.

Our famous neurologist told me that nobody could prove the claimant is falsifying his symptoms of post-concussive syndrome. He couldn't drive because he had headaches. He couldn't go out in the daylight because he had light sensitivity. In fact, we had to do the deposition in the dark in the claimant attorney's law office because the claimant was that averse to light.

What happened after that? Thirty-eight hours of surveillance videotape showing the claimant driving, walking around in the daylight, in office buildings in light without covering his eyes, and performing all activities of daily living without a problem.

We won that case because the judge saw the surveillance and found that the claimant's symptoms were falsified, and we reported that case to the Attorney General's office and to the DA's office. You can see how you can combat a claim. Surveillance is a big, big friend of ours on the defense side. If you have a good surveillance investigator, continue to use that investigator because they can help.

Cross-examination is a big help with regard to fraud because while claimants tend to lie and falsify their symptoms, you have medical records and you have documentary evidence, where you can impeach the client's credibility in front of the judge and prove that they are falsifying their symptoms.

A final point is the importance of teaching management-level employees and employees beneath the managers about the impact of fraud and how to combat it. I find when I speak at various employers in the Commonwealth of Pennsylvania, they don't understand the impact of fraud and what it's doing, not only to their company, but to the act of doing business in the Commonwealth of Pennsylvania.

I have had employers tell me they're leaving the Commonwealth of Pennsylvania to go to a sister state because the workers' compensation system is better or there's less fraud there. We need to educate the employers and the managers, and the managers need to educate those whom they are supervising so that everyone is aware of fraud and we make it a team effort to eliminate it.



Finally, with regard to prosecuting fraud, and I touched on this before, it's a very simple process to criminally prosecute fraud. We're not doing the work. The DA or the AG is doing the work. All you have to do is submit it, and I submit to these entities all the time. I present my evidence. I wrap it up in a bow. I send it to the Attorney General, who will then investigate it. Very simple process.

Our firm has created a fraud department where we also civilly prosecute doctors and claimants who commit fraud. That is a little bit more of an extended process, but in the end, it gets your money back that you were defrauded out of.

John: Tony, thanks so much for joining us today. Very informative podcast.

Anthony: Thank you for having me.

John: You've just listened to Anthony Natale III, shareholder with Marshall Dennehey, and special thanks to today's producer, Frank Vowinkel.

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I'm John Czuba, and now this message.

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