

# Claimant Fraud: Problems with Developing Prosecutable Claims

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## I. Introduction

"The real question is not why there is so much claimant fraud, but why is there so little." This question was recently raised in an article in the March 1999 issue of *Trial* magazine entitled "Workers' Comp Fraud: the real story." The article cites numerous studies that have been completed of different states' efforts in prosecuting claimant fraud. These studies show a consistent pattern in that the ratio between reports of suspected fraud and actual criminal convictions continues to be extremely low. For example in 1996, 18 cases of 4077 claimant fraud cases investigated in the state of Texas were referred for criminal prosecution. Also in 1996, only 11 cases of 152 complaints of claimant fraud in the State of Wisconsin, were referred for criminal prosecution. According to the article, a 1997 study by the Wisconsin Division of Workers' Compensation Fraud concluded that "there is no...evidence that criminally prosecutable fraud is more than 1 percent of all reported claims in Wisconsin—a far cry from the 20-30 percent estimates thrown about elsewhere." At an anti-fraud conference in San Francisco in November of 1998, and much to the chagrin of insurance company representatives, Mayor Willie Brown announced that anti-fraud efforts in the State of California had successfully led to the end of claimant fraud and it was now time to emphasize prosecution of employer fraud. The article from *Trial* magazine echoes Brown's statements by concluding that greater efforts need to be directed at investigating employer and provider fraud.

Our own experience in North Carolina is consistent with other states in that the ratio between reports of suspected fraud and actual criminal convictions remains low.

The North Carolina Industrial Commission's Fraud Investigations Unit received 87 complaints in 1996, 303 complaints in 1997 and 315 complaints in 1998. Of these 705 cases, four cases have resulted in criminal convictions of claimant fraud, two cases have resulted in admissions of guilt and prayer for judgment continued in claimant fraud cases, and one claimant fraud case resulted in a dismissal in exchange for payment of restitution.

Low conviction rates should not be interpreted as evidence that there is not a serious problem with claimant fraud. Even if only 1 percent of all work related claims involve claimant fraud then there would have been over 2360 cases in North Carolina during the time period that the Fraud Investigations Unit has been in existence. (There were 86,333 claims made in fiscal year 1996-1997, 74,476 claims in fiscal year 1997-1998, and 75,026 claims projected in fiscal year 1998-1999.) This paper seeks to address the problems with developing prosecutable claimant fraud cases in North Carolina.

## II. Problems Prosecuting Claimant Fraud Involving the Receipt of Benefits While Working

### A. Proof of Earnings

The most commonly prosecuted type of claimant fraud across the country involves the receipt of benefits while working. A straightforward development of this type of fraud case would include both a written statement by the claimant that he or she is not earning wages during a specified time period and wage records showing that the claimant received earnings during that time period. In three years of operation, we have not received or been able to develop a single case with this type of evidence!

One reason that there are so few prosecutable cases of claimant fraud is that the claimant will perform work in the underground economy where no records are maintained. Most of the fraud cases that we receive from employers and carriers involving working and receiving benefits will be developed to the extent that a videotape is available that shows the claimant engaging in work activities. There are usually no wage records or employment security records that can establish that the work on the videotape is being performed for compensation. In order to prove

that earnings are being received for these work activities, a witness must exist who can testify that the work was done for compensation. A person who is paying a claimant under the table is probably in violation of both federal and state tax laws and has a vested interest along with the claimant to conceal the employer-employee relationship. Sometimes these employers will admit that they have made illegal payments to our investigators in order to avoid being the subject of a criminal investigation for tax fraud or being charged as an accomplice in assisting the claimant in the commission of workers' compensation fraud. Such cooperation is less likely for a private investigator employed by a private carrier who does not have the ability to charge anyone with a criminal violation. (Our investigators can not charge anyone with a crime, but they do have a state position and a state badge that can sometimes be used to induce cooperation from a reluctant witness.) Other witnesses that can potentially testify whether a person was working for wages are co-workers. Disgruntled ex-spouses and lovers may also be able to testify about what wages, if any, an injured worker has received in the underground economy.

#### B. Proof of Working: The "It Depends on the Meaning of 'Is' Is Defense"

The Industrial Commission has investigated and referred cases for prosecution where the claimant has made oral representations to either a physician, employer, and/or the carrier that he or she was not working at a time when there is videotaped evidence of the claimant working but there is no evidence of earnings. During the summer of 1998, a workers' compensation fraud case was tried before a Wake County jury that deadlocked seven to five in favor of guilt. An interview with one of the jurors after the trial revealed that some of the jurors did not think that the claimant intentionally made a false statement when he said he could not work at or near a time when he was videotaped operating a bulldozer. The claimant was a self-employed owner of a construction business. The juror explained that some jurors felt that when the claimant made statements about his ability to work that he did not mean that he could not "piddle around" in his own company. Some jurors felt that the claimant meant that he could not return to performing his regular job duties prior to his injury. The claimant had reported to an SBI investigator that he was engaged in trial returns to work during the times that he was videotaped.

In order to successfully prosecute a claimant for a false statement denying having returned to work, a jury will have to be convinced that the claimant's use of words like "work" or "working" include those work activities that the claimant has performed while receiving compensation payments. Examples of the defense known as the "it depends on the definition of what work is" are as follows in cases that we have referred for prosecution:

- a. claimant who attempted to recruit a private investigator for the carrier into Amway puts on a defense that she lost money while engaged in Amway activities
- b. claimant who sold Avon products at a flea market says that was she making these sales on behalf of her daughter and did not receive income.
- c. claimant who provided childcare in her home says that she was doing it for free.
- d. claimant in self-employed business says money earned as a result of his work activities were reinvested in his business.
- e. claimant doing logging work says he was doing it for a friend for free.
- f. claimant who had performed roofing job put on a defense in his workers' compensation claim that he had not been paid yet at the time that he reported he was not working.

#### C. Proof of a Statement or Representation About Working

A specific reason that the number of prosecutable claimant fraud cases remain low in North Carolina is that there are no statutes or Industrial Commission Rules that place a duty on a claimant to report earnings received for work performed while receiving workers' compensation.

Proof of working for wages and receiving worker's compensation benefits is not sufficient to prove workers' compensation fraud. Even if the hurdle of proving that wages have been received by the claimant, there must be evidence of a false statement or representation of a material fact concerning the earning of those wages. The Investigations Unit commonly receives reports of injured employees working and receiving compensation benefits. Most of these cases have to be closed because there is no evidence of any false statements or false representations in relation to what appears to be "double dipping." Furthermore, our fraud statute does not include language that makes it a crime "by failing to disclose material facts" in order to obtain workers' compensation

benefits. (See attachment 1) Both the welfare and unemployment fraud statutes in North Carolina do contain such language:

N.C. Gen. Stat. §108A-53(a)(19xx)

Any person whether provider or recipient or person representing himself as such, who knowingly obtains by means of making a willfully false statement or representation or by impersonation or *by failing to disclose material facts* or in any manner not authorized by This Part or the regulations issued pursuant thereto, transfers with intent to defraud any food stamps or authorization cards to which that person is not entitled to an amount of four hundred dollars \$400.00 or less shall be guilty of a Class I felony... .

N.C. Gen. Stat. §96-18(a)(19xx)

Any person who makes a false statement or representation knowing it to be false or *knowingly fails to disclose a material fact* to obtain or increase any benefit under this Chapter or under an employment security law of any other state, the federal government, or of a foreign government, either for himself or any other person, shall be guilty of a Class 1 misdemeanor... .

Some states have such language expressly in their workers' compensation fraud statutes. For example the Arkansas workers' compensation statute reads as follows:

Ark. Code Ann. §11-9-106(a)(1)(Michie 19xx)

Any person or entity who willfully and knowingly makes any material false statement or representation, or who willfully and *knowingly omits or conceals any material information*, or who willfully and knowingly employs any device, scheme or artifice, for the purpose of obtaining any benefit or payment, or for the purpose of defeating or wrongfully increasing or wrongfully decreasing any claim for benefit or payment or obtaining or avoiding workers' compensation coverage or avoiding payment of the proper insurance premium, or who aids and abets for any of said purposes, under this chapter shall be guilty of a Class D felony...

The Full Commission is considering whether to adopt rules establishing a uniform system for a claimant to report earnings so that a carrier or employer may determine what credits, if any, they are entitled or whether benefits can be terminated because the plaintiff has retained wage earning capacity. If an injured employee fails to report earnings on such an earnings report and it is determined that the injured employee did receive wages during the time period covered by the report, then the earnings report would be evidence of a false statement made in order to obtain or deny a benefit.

Some carriers have on their own initiative put a report of earnings statement on the back of their compensation checks above the area designated for the injured worker to endorse the check by signature. Federated Mutual Insurance Company has placed the following language on the backs of their checks:

By endorsing this check, I certify that I have made no false claims or statements or concealed any material facts, and I have not earned or received unreported income from any employment including self-employment, during the time benefits are being claimed. Failure to report employment or income to Federated Insurance may result in civil and/or criminal penalties.

Two of the claimant fraud cases that have been successfully prosecuted involved sworn answers to interrogatory questions submitted to the claimant during the discovery process of the workers' compensation claim. In the case *State v. Greely White*, (98-CR-7127, Rockingham County District Court), video surveillance disclosed that the claimant went to a used car dealership after he left work where he appeared to regularly do maintenance work on vehicles. The owners of the car dealership denied that the claimant had received any compensation for his labor.

The claimant was asked the following question:

**Are you currently able to work more than four hours per day at Mayo Yarns Inc.? If not, please state in your own words why you are unable to work more than 4 hours per day at Mayo Yarns, Inc.?**

The claimant answered as follows:

*No, I am working light duty but I still have to be on the move a lot doing that job. I have to sit, stand and lay down often because of the pain. After working the four hours I have to go home and lay down because of the pain.*

In the case *State v. Jeffrey Blanton*, (98-CR-5485), videotaped surveillance revealed that the claimant had been roofing a house during the week that he provided the sworn interrogatory answer. The claimant was asked the following:

**Have you been an employee of any person or company since January 1, 1996? If so, list the name and address of each and every such employer and include the name of your supervisor, your job duties, your hourly wage and the time period you were so employed?**

The claimant answered as follows:

*No, other than as a subcontractor for the Employer-Defendant, Shar-Dan, Inc.*

The Rhode Island Division of Workers' Compensation in Rhode Island has developed a report of earnings statement that attempts to cover work activities where there is no proof of exchange of consideration. This notice statement is as follows: The claimant must "report any work in any business, even if the business lost money or if profits or income were reinvested or paid to others. If you performed any duties in any business for which you were not paid, you must show a rate of pay of what it would have cost the employer to hire someone to perform the work you did, even if your work was for yourself, a relative, or friend." Under this notice, the employee is asked to complete this section by answering the following question: "Did you perform non-paid work activities during the above period? State "Yes or No." Defense counsel should consider serving similar interrogatories during discovery in the workers' compensation claim before the Industrial Commission.

#### D. Use of Evidence of Working and Receiving Benefits in the Civil Defense of a Workers' Compensation Claim.

Even if a case can not be presented for criminal prosecution due to an inability to prove a false statement, a carrier and or employer can successfully use evidence of working in order to end or reduce their obligation to make compensation payments. If an injured employee returns to work in the underground economy, the employer and/or carrier may not be able to obtain evidence of actual compensation received. Under such circumstances, a vocational rehabilitation expert should be employed to establish the market value of such labor and whether such labor is available in the competitive marketplace.

### **III. Problems in Prosecuting Fraud Related to Misrepresentations About Physical Condition**

A second broad category of claimant fraud cases that are referred to our Investigations Unit involve fraud related to misrepresentations about one's physical condition. These cases are extremely difficult to prosecute because treating physicians are reluctant to render a medical opinion that one of their patients has misrepresented his physical condition. A physician's testimony is crucial in determining whether statements or representations about one's physical condition are false. The cases are usually referred to the Unit because there is evidence that the claimant has violated medical restrictions imposed by the treating physician. In order to seriously consider prosecuting a case involving a violation of medical restrictions, there must be expert medical testimony from a physician that a claimant has misrepresented his or her physical condition. A number of states such as Massachusetts, Rhode Island, Arkansas, and Nevada provide newsletters that contain factual summaries of the cases that are actually prosecuted. These newsletters rarely include cases that involve this type of fraud alone. This type of fraud appears to be usually handled in the civil context where the standard of proof is not as high as is the case with a criminal prosecution. These cases can sometimes be prosecuted, but they are largely left to the civil context for a determination as to whether the claimant should continue to receive workers' compensation.

## A. Physician's Opinions and Surveillance Videotapes

Carriers and/or employers frequently attempt to establish that violations of medical restrictions have taken place through the use of surveillance videotapes. The Investigations Unit is dependent on the carriers and employers to produce such videotapes because the legislature has not allocated resources to pay for undercover surveillance by the Industrial Commission. In the civil context, such evidence is utilized by defense counsel in order to show wage earning capacity and/or for impeachment purposes. Physicians impose restrictions based upon the limitations claimed by the injured employee as well as their own medical expertise. Surveillance videotapes may be presented to a physician for consideration as to whether the restrictions imposed should continue, but more often the videotapes are used to contradict "in court" testimony by the claimant. There are approximately thirty-four cases that have been considered by the Full Commission during the past four years involving the use of videotapes for the purpose of impeaching the claimant or for the purpose of establishing wage earning capacity. Nine of these decisions include findings that establish that the videotapes were reviewed by a physician. An examination of these cases shows some of the factors that make use of a physician's testimony in the criminal prosecution of a malingering case extremely difficult.

### 1. Videotape evidence of activities presented to an examining physician *ex-parte* by the employer or carrier may not be admissible

In a post *Salaam* decision, *Johnson v. Chicago Bridge and Iron Company*, I.C. No. 734549 (Filed January 21, 1998 by Bunn), the Full Commission struck from the evidentiary record testimony from a treating physician who had reviewed a videotape sent to him *ex parte*, as well as testimony from a non-treating physician who had conducted an independent medical evaluation and had viewed a videotape sent to him *ex parte*. (It is unclear as to whether suppression of testimony in a workers' compensation hearing will also result in suppression of such testimony in the criminal context.) The Full Commission awarded continuing benefits in the case based upon opinions rendered by physicians who had not viewed the videotape.

However in a pre-*Salaam* decision, *Vasillion v. Raleigh BPO Elks*, I.C. No. 944892 (Filed February 3, 1995 by Ward), the Full Commission did not strike from the evidentiary record a treating physician's opinion about the claimant's ability to return to work despite the fact that he had viewed a videotape that had been submitted to him *ex parte* by the carrier. The Commission noted that the claimant was not prejudiced by the viewing of the videotape because the treating physician had opined that his medical opinion about the claimant's ability to return to work was not based upon the videotape, but was instead based upon his own examinations, other medical records and a functional capacity evaluation. The Full Commission did not award continuing total disability compensation benefits to the claimant.

### 2. Videotape evidence of activities need to clearly establish that violations of medical restrictions have taken place.

In *Lewis v. U.S. Air*, I.C. No. 508683 (Filed July 8, 1998 O&A by Bolch), the claimant had been restricted from returning to work until after he completed back surgery. During this time period, the claimant assisted his wife at a videostore that she operated. The employer videotaped the claimant and the tape was presented to the treating physician who opined that the claimant was performing activities inconsistent with his representations of his ability to the physician. The employer terminated the claimant worker based upon the claim that the injured worker had engaged in workers' compensation fraud. A review of the medical records included a detailed description of the range of motions demonstrated by the claimant to the physician during the course of treatment. The physical activities on the videotape were consistent with the range of motions the physician had recorded in his medical records. The Full Commission awarded payment of continuing temporary partial disability compensation to the claimant.

In *Lewis v. B.E. & K. Construction Company*, I.C. No. 237012 (Filed January 14, 1997 O&A by Ward), the claimant was videotaped on two consecutive days cutting limbs with a chainsaw after having been released to return to work following back surgery. The claimant's treating physician testified that he had advised the claimant to increase his activities to condition himself for a return to work. The claimant was engaged in activities that he had not been specifically restricted from doing by his treating physician. The Full Commission awarded payment of continuing total disability compensation to the claimant.

In *Gore v. KSI*, I.C. No. 633744 (Filed June 17, 1998 O&A by Bolch), the claimant was videotaped performing various weightlifting and aerobic exercises on two separate occasions during a time period when she was undergoing pain management therapy. One of the claimant's treating physicians opined that while the injured worker's aerobic exercise and weight training activities were overdoing it, he had urged the injured worker to use her arm as much as possible in a normal fashion. The Full Commission awarded payment of continuing total disability compensation to the claimant.

In *Leyva v. Sampson Gin Company*, I.C. No. 316478 (Filed April 23, 1998 O&A by Scott), the claimant was restricted from standing more than two hours a day, not use his feet for repetitive movement, only bend and reach occasionally, and not to squat, kneel or climb. The claimant was videotaped during a two month period performing several physical activities, including standing, walking, kneeling, and squatting. His treating physician reviewed the videotape and opined that he saw nothing on the videotape which changed his opinions about the claimant's restrictions or capabilities. The Full Commission awarded continuing total disability compensation to the claimant.

However, in *Mishak v. Williams Electric Company*, I.C. No. 029310 (Filed September 25, 1995 O&A by Mavretic), the claimant's treating physician opined that there was a great discrepancy between the claimant's office examination and what the claimant was doing on a videotape. The Full Commission did not award continuing total disability compensation to the claimant.

Also, in *Hastings v. North South Textile Enterprise*, I.C. No. 281458 (Filed May 1996 O&A by Ward), the claimant's treating physician opined that activities depicted on a videotape did not show pain behavior that he had seen when he had examined the claimant in his office. The Full Commission did not award continuing total disability compensation to the claimant.

3. Videotaped evidence of activities will usually need to show prolonged ability to engage in a particular activity.

In *Hashemi v. Winn Dixie Inc.*, I.C. No. 2714209 (Filed October 31, 1996 O&A by Bunn), the claimant was videotaped on two separate occasions engaged in physical activities such as stooping, reaching and kneeling while coaching his daughter's soccer games. The claimant's treating physician opined that it would not be unusual for the claimant to be bedridden for a couple of days after engaging in such activity. In an answer to an interrogatory question, the claimant responded that he could not climb, balance, stoop, kneel, crouch reach, handle, (lift) without pain. The claimant testified that he was bedridden following these episodes and the Full Commission made findings consistent with this testimony. The Full Commission awarded continuing total compensation to the claimant.

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In order to establish that an injured worker has misrepresented his abilities to his physician, a combination of some or all of the following factors will likely need to exist before a case can be successfully prosecuted:

1. The physician has an opinion to a reasonable degree of medical certainty that the injured worker was not accurately representing his or her physical abilities at the time that the worker made any statements or representations about his or her abilities.
2. In order that such an opinion will be rendered, there should be a close nexus in time between the statements and representations made to the physician and others and the performance of physical activities inconsistent with such statements and representations.
3. There should also be diagnostic tests that do not corroborate the injured worker's claim of limited physical ability.

## Conclusion

The Industrial Commission has only two investigators charged with the responsibility of investigating workers' compensation fraud for the entire state. These investigators are also responsible for the investigation of employer fraud as well as for the investigation of death benefit claims involving law enforcement personnel and firemen. The Unit has no financial resources to conduct surveillance and it has no financial resources to conduct depositions of witnesses as do other states. Despite these limitations, the Unit has investigated eleven cases that have been processed through the criminal justice system and there are fifteen other cases that have been accepted for prosecution. The legislature has appropriated resources for an attorney general whose duties will include advising the unit and enforcing collection of penalties against non-insured employers. Parties interested in the development of prosecutable fraud claims need to have realistic expectations about the type of cases that can be successfully prosecuted. A reform that includes establishing a duty to report earnings and/or work activities will enhance the ability of the Fraud Unit to increase the number of successful claimant fraud prosecutions in the State of North Carolina.