FRAUD AND MINNESOTA WORKERS' COMPENSATION LAW

What is Fraud?

To establish fraud in Minnesota, courts have required:

- a false representation of a material fact has been made;
- the false representation must deal with a past or present fact;
- the fact must be material and susceptible of knowledge;
- the representing party must know the fact was false;
- the representing party must have intended another to be induced to act based upon the false representation;
- another must have actually acted based upon the false representation; and
- the misrepresentation must be the proximate cause of actual damages.

Weise v. Red Owl Stores, Inc., 286 Minn. 199, 202, 175 N.W.2d 184, 187, (1970). It is the responsibility of the employer and the insurer to prove all the elements of fraud exist.

Fraud in Minnesota Workers' Compensation Cases

Claims of fraud in the Minnesota workers' compensation system generally present themselves in one of three contexts:

- Perpetrating fraud to obtain benefits
- Fraud in the context of a workers' compensation settlement
- Fraud in the hiring process

1. Perpetrating fraud to obtain benefits

When an employee perpetrates a fraud in order to obtain workers' compensation benefits, the employer and insurer are entitled to reimbursement of benefits paid as the employee has received those benefits in bad faith. Minn. Stat. § 176.179. Minn. Stat. § 176.179 states, in relevant part, no benefits paid:

> "and received in good faith by the employee or the employee's survivors shall be refunded to the paying employer or insurer in the event that it is subsequently determined that the payment was made under a mistake of fact or law by the employer or insurer".

This statutes goes on to note:

> "Where the commissioner or compensation judge determines that the mistaken compensation was not received in good faith, the commissioner or compensation judge may order reimbursement of the compensation. For purposes of this section, a payment is not received in good faith if it is obtained through fraud, or if the employee knew the compensation was paid under mistake of fact or law, and the employee has not refunded

the mistaken compensation".

A review of prior cases involving the fraudulent receipt of benefits indicates there are several red flags to watch for which might suggest an employee's claim for benefits is suspect. These include, but are not limited to:

- a disgruntled employee;
- an employee who is taking more time to recover than the injury warrants;
- a change of doctors after having been released to work;
- a history of reporting subjective complaints without corresponding objective findings;
- the development of symptoms in body parts not initially reported as having been injured;
- an employee who has been observed (by reliable sources) participating in activities, work-related or otherwise, outside his or her restrictions;
- an employee who habitually misses medical appointments; and
- an employee who did not report the alleged injury for an unreasonable period of time thereafter.

2. Fraud in the context of a workers' compensation settlement

Claims regarding fraud in workers' compensation settlements focus on the extent of the employee's disability and whether the employee made false representations inducing the employer and insurer to enter into the Stipulation for Settlement. Boileau v. A-Plus Industries, 58 W.C.D. 549, 555 (WCCA 1998).

Once a Stipulation for Settlement has been approved by the court, it can only be vacated if an employer or insurer can establish "good cause". Good cause includes fraud. Minn. Stat. § 176.461.

> *Example: An employee injured her right upper extremity on April 14, 1989. A settlement judge issued a mediation award approving a settlement agreement on February 5, 1993, in which the parties admitted the employee had been permanently and totally disabled since her date of injury. The insurer performed an activity check in the summer of 1994, which resulted in information indicating the employee was a part-owner of a grocery store and was working there full-time. The employee claimed she was not an owner and her inability to work and medical condition had not changed. It was held the evidence did not constitute fraud, as it was obtained more than a year after the mediated agreement was entered into, and was therefore deemed insufficient to establish fraud in the inducement per Minn. Stat. §176.461.* Mehta v. Meldisco, slip op. (WCCA October 26, 1995).

Example: An employee alleged an injury to her left hand on November 20, 1991. A settlement was reached, and the Award on Stipulation was filed April 4, 1996. Surveillance was initiated April 12, 1996, and continued periodically through July 9, 1997. On July 9, 1997, the employee attended a medical examination. The doctor she saw on July 9, 1997, initially found she was still totally disabled. However, after seeing the prior videotape, the doctor concluded the employee had deliberately misrepresented her physical capabilities and was capable of gainful employment. A judge ultimately found the surveillance did show some activity illustrating ongoing limitations, but it also showed the employee was physically capable of working. Regardless, the judge concluded the employee had not knowingly misrepresented her physical condition at the time of the settlement. Therefore the earlier Stipulation for Settlement was not vacated by WCCA. Ramsey v. Frigidaire Co. Freezer Products, slip. op. (WCCA July 22, 1999).

Example: An employee alleged an injury in the nature of occupational asthma as a result of his employment. On December 2, 1994, the employer and insurer took his deposition. Other than working one day for his father and one day for another employer, the employee denied any income outside of unemployment compensation. A settlement was reached. It was later discovered the employee lied about his unemployment. Criminal charges were brought against the employee alleging he committed a felony (workers' compensation fraud). The employee pled guilty to receiving workers' compensation benefits to which he was not entitled by knowingly misrepresenting or stating or failing to disclose material facts. The employer and insurer filed an application to set aside the Award on Stipulation, to which the employee did not respond. As the employee intended on the employer and insurer to act on his false representations, and counsel for employer and insurer stated in an affidavit they were induced to make payments by the false representations, the misrepresentations were found to be the proximate cause of the actual damages and the Award was vacated. Novak v. Trus Joist MacMillan, slip. op. (WCCA June 10, 1996).

In many cases, fraud can only be proven circumstantially by evidence of conduct subsequent to the settlement. Ramsey v. Frigidaire Co. Freezer Products, slip. op. (WCCA July 22, 1999). Since the court so often finds the evidence of subsequent conduct offered is insufficient, it is often misinterpreted subsequent activities cannot serve as grounds to vacate an Award. That is not so. However, the evidence necessary to vacate an Award is significant.

3. Fraud in the Hiring Process

In very limited circumstances, false representations by a prospective employee during the hiring process may serve as a basis to deny a subsequent injury. In Jewison v. Frerichs Construction, 41 W.C.D. 541, 434 N.W.2d 259 (1989), the Minnesota Supreme Court held that no compensation benefits would be awarded when the following qualifications were met:

A. the employee knowingly and willfully made a false representation as to his or her physical condition;

B. the employer substantially and justifiably relied on the false representation when it hired the employee; and
C. a causal connection exists between the false representation and the injury.

While at first glance the requirement of proving "a causal connection exists between the false representation and the injury" may not appear difficult, most Jewison defenses fail because of an inability to prove this factor which requires evidence showing:

A. The employee's disability arose out of a reasonably foreseeable accident or job related activity which, in and of itself, in the absence of a preexisting condition, would not have caused the employee to become disabled; and
B. The employee's preexisting disability substantially increased the risk the employee would become disabled from a reasonably foreseeable accident or job related activity.

Example: Four days after being hired, an employee sustained a permanent aggravation of a preexisting back injury. He picked up a box weighing between 40 and 70 pounds, walked 20 feet, and slipped on pipe conduit lying on the ground. He fell and landed on his back. Prior to hire, this same employee completed a medical history questionnaire in which he denied any prior back injury. The court found the employee's prior back problems did not make him more susceptible to his subsequent slip and fall. The employee's slip and fall could have been disabling, even without his preexisting back injury. Consequently, the employee's claim for workers' compensation benefits was not foreclosed by his false representation on the medical history questionnaire. Jewison v. Frerichs Construction, 41 W.C.D. 541, 434 N.W.2d 259 (1989).

Example: An employee had preexisting degenerative hip disease. Prior to hire, the employee denied having any physical impairment that would interfere with his job performance. However, his new job duties were heavier than he was used to and caused an increase in his back and leg pain. The court found the employee did not knowingly and willfully make a false representation as to his physical condition, as he had worked hard all his life and had not experienced pain or symptoms which interfered or precluded him from performing his normal job duties, he worked with pain for many years, and he had no medical restrictions and no permanent partial disability rating prior to his hire. Further, the compensation judge found the employee was credible when he testified he thought he could perform his employment. Therefore, the Jewison defense was unsuccessful. Hanenberger v. Erdman's SuperValu, Inc., slip. op. (WCCA January 22, 1982).

Example: The employee had a preexisting condition to his spine and right leg. He had work-related restrictions, but indicated on his employment application he did not have any type of physical condition that would prohibit or prevent him from performing work as a truck driver. All drivers with the employer were required to load and unload the trucks they drove. The court found the employee knowingly and willfully made a false representation regarding his physical condition, as he was provided restrictions after his

earlier injury. Although the restrictions were not indicated to be permanent, they were never lifted. In addition, the employee also falsely stated he was laid off (not fired) from a couple of prior jobs. He admitted he did not truthfully answer questions on prior employers' application forms. It was held the employer substantially and justifiably relied on the employee's false representation he had no limitations precluding him from preforming his work duties (i.e., an employee's veracity will play a part in whether there is a Jewison defense). George v. Big Bear Farm Stores, slip. op. (WCCA February 1, 1991).

Example: The employee sustained an injury and was found to have a preexisting bulge at C5-6 and a minimal bulge at C6-7. He was given restrictions but did not lose any time from work. The employee saw a physical medicine and rehabilitation specialist on July 21, 1999, and other than attention to ergonomics at work, no other restrictions were imposed. The employee was then terminated by his employer for reasons unrelated to his work injury. His new employer asked if he was able to perform the job for which he was applying and the employee said he was. Three weeks into his hire, he was released to work on a full-time basis with a change of position every hour. There was no Jewison defense, as the employer merely asked if the employee was able to perform the job, but did not ask specifically about physical restrictions. The employer admitted it asked the question only because it had been some time since the employee had done the job and it was asking with regard to the employee's ability and desire. There was no written employment application form asking specifically about physical restrictions. Wetterlind v. API/Viking Automatic Sprinkler System, et al., slip. op. (WCCA June 25, 2002).

Employers should be aware of the potential consequences of asking a prospective employee "illegal" questions about his or her workers' compensation or medical history prior to making a condition job offer. The Americans with Disabilities Act (ADA) and the Minnesota Human Rights Act (MHRA) have specific limitations on what can and cannot be asked of a prospective employee during the hiring process. While neither law precludes the use of a potential Jewison defense in a workers' compensation claim, employers should be well aware of the laws regarding the timing of certain questions to avoid claims for unlawful discrimination.

Criminal Prosecution for Fraud

The Minnesota Legislature amended the workers' compensation statute in 1992 to include a section specifically addressing fraud. Minn. Stat. § 176.178, subd. 1, provides:

> "Any person who, with intent to defraud, receives workers' compensation benefits to which the person is not entitled by knowingly misrepresenting, misstating, or failing to disclose any material fact is guilty of theft and shall be sentenced pursuant to Minn. Stat. § 609.52, subd. 3."

Note the statutory language referencing "theft" is a criminal statutory section. This statutory language does not provide for an employer or insurer to obtain reimbursement of any monetary loss paid out on account of a fraudulent claim. (Please see other references in this briefing to the employer and insurer's rights pursuant to the Workers' Compensation Act.)

However, if a person is found guilty of theft under this statute for bringing a fraudulent workers' compensation claim, he or she could be sentenced to imprisonment for up to 20 years and fined up to $100,000. The severity of the sentence will depend on the amount and type of the property or services stolen and the method by which it was stolen.

Reimbursement for Workers' Compensation Benefits Paid

In addition to criminal sanctions, Minn. Stat. § 176.179 allows for an employer and insurer to claim future credit against future indemnity benefits for the same injury when an employee receives compensation benefits he or she was not entitled to in good faith. The credit claimed may be an amount equal to 20% of the compensation otherwise payable. The credit cannot be applied against medical expenses due or payable. If the claimant has exhausted his or her benefits, the insurer may never receive reimbursement for the overpayment.

However, if the claimant receives payment of workers' compensation benefits in bad faith, the employer and insurer can claim reimbursement from the employee pursuant to Minn. Stat. § 176.179. Examples of bad faith receipt of benefits include payments received through fraud or, if the employee knew compensation was paid under a mistake of law or fact, the employee failed to refund the compensation. Establishing this level of knowledge or intentional fraud is difficult. However, if such intent can be established, the employer and insurer may not have to wait to take credit from the next payment made to the employee. Rather, they may choose to require the employee to fully reimburse them for the compensation issued.

In the event an employer believes it paid benefits to an employee that were not received in good faith, a request for a refund or for reimbursement can be made in writing and served upon the employee. A copy of the request should also be mailed to the attorney representing the employee. According to Minn. Rule 5220.2580, the request must include:

A. the amount of the alleged overpayment;
B. what the original payment was for;
C. the date the payment was made;
D. the mistake of fact or law which forms the basis for the claimed overpayment;
E. the reason why the payments were not received in good faith; and
F. a statement informing the employee if he or she has questions about his or her obligation to repay any claims for overpayment, he or she should contact a private attorney or the Department of Labor and Industry.

Other forums through which an employer and insurer can seek reimbursement include claims court or district court.

Investigative Services Unit

After the creation of Minn. Stat. § 176.178, the Department of Labor and Industry created the Investigative Services Unit. This Unit investigates fraudulent activity in the workers' compensation system and gathers evidence. When the evidence indicates illegal activity, the Investigative Services Unit refers the matter to the local county attorney for appropriate civil, criminal or administrative action. "Illegal activity" includes, but is not limited to, the following:

- making a knowingly false statement or misrepresentation to obtain or deny workers' compensation benefits;
- presenting a knowingly false material written or oral statement in support of, or in opposition to, a claim for workers' compensation benefits, including a notice, proof of injury, bill and payment for services, test result, and medical or legal expense;
- knowingly assisting persons or parties who engage in illegal activity; and
- knowingly making false material statement or material representation regarding entitlement to benefits with the intent to discourage an injured worker from pursuing a claim or with the intent to encourage an employee to pursue a claim.

The Investigative Services Unit investigates allegations of illegal activity of employees, employers, insurers, health care providers, rehabilitation providers, attorneys, or any other person whose representation or omissions constitute material facts resulting in the wrongful payment or receipt of workers' compensation benefits.

Since its inception on January 20, 1993, the Investigative Services Unit has successfully investigated more than 3,300 cases, referring more than 200 for criminal prosecution to the appropriate attorney for criminal prosecution. The issues in these cases have involved premiums, medical providers, claimant fraud, attorney, adjuster, and agent fraud, and individuals claiming the benefits of deceased workers. From 1998 to 2001 (fiscal years), a total of 430 tip calls were made to the Investigative Services Unit regarding possible fraudulent workers' compensation claims. From 1995 to 2001 (fiscal years), criminal fraud charges were brought in 99 cases. During this same period of time, there were 74 fraud convictions. The total monetary value of all charges at issue in fraudulent workers' compensation claims from 1995 to 2001 (fiscal years) was approximately $2,692,500.

In 2002, the Minnesota Legislature passed a bill establishing an insurance fraud prevention unit within the Minnesota Department of Commerce and abolishing the Investigative Service Unit. The Investigative Services Unit's personnel will be transferred to the Department of Commerce. The effective date of this legislation is July 1, 2003.

Further Considerations if Fraud is Alleged

1. Hourly Fees

The Workers' Compensation Court of Appeals has recently held that an employee's attorney may be awarded hourly fees if the employee prevails against a claim of bad faith receipt of benefits. The employee's attorney may be entitled to hourly fees if the contingency fees available are insufficient to reasonably compensate the attorney.

2. Penalties

If the employer and insurer claim the defense of fraud and that defense is later determined to be frivolous, the employer and insurer may be subject to penalties pursuant to Minn. Stat. § 176.225. The penalties can amount to 30% of the total amount of compensation due to the employee.

What To Do if You Suspect Fraud

The Department of Labor ad Industry/Investigative Services Unit has a toll free number to report suspected fraudulent activity: 1-888-FRAUD MN. If you have concerns of facts regarding an employee's injury or his or her receipt of benefits, contact MCIT (651/209-6400, or toll-free at 1/866/547-6516). The Minnesota Counties Insurance Trust and RSKCo will act promptly to investigate.

Recognize if you have evidence a workers' compensation claim may be fraudulent, per Minn. Stat. § 176.861, subd. 2, you must give written notice and all relevant material to the commissioner of the Department of Labor and Industry. The Investigative Services Unit will accept this information on behalf of the commissioner. Pursuant to Minn. Stat. § 176.861, subd. 3, you will at that point be provided with "good-faith immunity" against liability for revealing the potential fraud.

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