Workers' Compensation Alert

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# Denying A Claim Based On An IME Report? Could Your Organization Now Be Subject To A RICO Claim?

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In *Brown v. Cassens Transport Company* (*Cassens*), five employees of Cassens alleged sustaining work-related injuries. Cassens, a self-insured employer in Michigan, utilized a third-party administrator (TPA) to administer its workers' compensation claims. Cassens and its TPA arranged to have the five employees examined by Dr. Saul Margules. Cassens denied the employees' workers' compensation claims based on Dr. Margules' independent medical examination (IME) reports.

The employees filed a complaint against Cassens, the TPA and Dr. Margules, asserting a RICO (Racketeer Influenced and Corrupt Organization Act) claim. They alleged Cassens and its TPA solicited fraudulent medical reports from Dr. Margules, and that Cassens, the TPA and Dr. Margules conspired to fraudulently deny their pending claims to receive workers' compensation benefits. The plaintiffs argued that Dr. Margules was biased against them because Cassens and its TPA paid him a significant amount of money over the years to prepare favorable IME reports.

A plaintiff must satisfy certain elements to have a valid RICO claim, including the following: (1) an injury to a property interest; (2) mail or wire fraud; and (3) actual damages. The U.S. Court of Appeals for the Sixth Circuit ultimately denied the motion to dismiss the RICO claim filed by Cassens and its TPA, holding that the plaintiffs' allegation of personal injuries constituted a property interest because such injuries were converted into a property interest by way of the rights created by the Michigan Workers' Disability Compensation Act (WDCA). The Court also held the plaintiffs could demonstrate mail or wire fraud without showing that anyone actually relied on the alleged fraud. Additionally, the Court held actual damages could be demonstrated even without a showing that the plaintiffs would be entitled to benefits under the WDCA. Thus, the Court remanded the case to the district court to allow the plaintiffs the opportunity to prove their RICO claim. Cassens has appealed the Sixth Circuit's decision to the U.S. Supreme Court which is currently in the process of deciding whether to hear the appeal.

Another RICO claim arose out of the state of Michigan in *Jackson v. Coca-Cola*. In *Jackson*, several employees of Coca-Cola alleged sustaining work-related injuries. Coca-Cola also utilized a TPA. The employees reported their alleged injuries to the TPA, which denied their claims for benefits under the Michigan WDCA.

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The employees filed a RICO claim in federal court, asserting that Coca-Cola and the TPA engaged in a fraudulent scheme involving the mail by using a so-called "cut-off" doctor to avoid paying workers' compensation benefits. Specifically, the plaintiffs alleged the so-called cut-off doctor provided false medical reports at the request of Coca-Cola and the TPA to deny the plaintiffs their statutory benefits under the WDCA.

Coca-Cola and its TPA moved to dismiss the RICO claim. Although the lower court dismissed the plaintiffs' RICO claim, the Sixth Circuit recently held that the plaintiffs were entitled to pursue their RICO claim, and remanded the case to the district court to allow the plaintiffs the opportunity to prove their case. The case remains pending before the district court.

*Cassens* and *Jackson* raise some potentially troubling issues for employers. The practical result of the Sixth Circuit's decisions in these cases is that employers may now be subject to RICO based lawsuits in federal court that can be very expensive and time consuming to defend, win or lose. Employers are also potentially exposed to triple damages should a plaintiff actually be successful in one of these lawsuits. Moreover, by allowing these cases to proceed, the Sixth Circuit has jeopardized the exclusive remedy doctrine (i.e. no fault medical care and wage replacement for employees in exchange for protection from civil lawsuits for employers) that is so important to employers in workers' compensation.

In response to these decisions, employers should be aware of the relevance of these cases to their workers' compensation programs. Employers should confirm that their workers' compensation programs are periodically reviewed to determine if troubling usage patterns have developed with IME providers, as well as other service providers. These reviews should confirm that the programs are avoiding over utilization of certain providers so as to avoid the appearance of collusion. Finally, employers should not lose sight of the fact that the courts have not found that any of the defendants in these cases have actually committed a RICO violation. The courts have simply sent the cases back to the trial court level to allow the plaintiffs the opportunity to prove their RICO claims. Depending on the facts, plaintiffs may still have a difficult time meeting their burden of proof at trial. Nevertheless, employers should monitor these cases and take the steps noted above so as to lessen any risk that they may be the subject of a RICO lawsuit.

Please do not hesitate to contact Mark A. Shaw or Garrett M. Cravener at Eastman & Smith Ltd.'s Columbus office if you have any questions about how to reduce the chances of being named as a defendant in a RICO claim related to the denial of a claim for workers' compensation benefits.