Combating medical fraud in workers' compensation claims

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Workers' compensation is a "no-fault" insurance system that was established to provide benefits (medical care and lost wage benefits) to employees injured or who suffer illness or disease while in the course and scope of their employment. An employer, or more typically, its insurance carrier, pays benefits to the injured worker irrespective of who is found to be at fault in causing the injury. In exchange for coverage of expenses related to the work injury or illness, employers generally have immunity from personal injury lawsuits.

Medical fraud negatively impacts the workers' compensation system as a whole. It not only negatively affects the injured worker's treatment and recovery, but it also creates unnecessary financial burdens on the employers and insurance carriers, which in turn escalates insurance premiums.

A large part of any workers' compensation claim is the injured worker's medical care. The employer's insurance carrier will cover the employee's medical expenses resulting from the work injury or illness, such as doctor's visits and consultations, imaging, medications, therapy, medical devices, etc.

Most workers' compensation systems — both state and federal — have their own fee schedules, where certain treatment may be billed at a reduced rate. In addition, medical benefits under workers' compensation typically aren't subject to deductibles, co-pays or other financial limits; however, some state laws might limit coverage of treatment based on certain medical-based guidelines, such as the number of therapy sessions or injections warranted.

What is medical fraud?

As with most insurance claims, workers' compensation carriers are entitled to conduct investigations throughout the course of the claim to determine whether the injured employee might be committing fraud to obtain a financial gain. Yet, fraud can be committed by anyone in the workers' compensation system — the injured worker, the employer, or medical providers attempting to defraud the system by capitalizing on the treatment of their patients.

Health care providers can commit fraud by recommending unnecessary treatment or testing, billing for treatment or services that were not actually provided, simultaneously billing the injured employee's health insurance and workers' compensation insurance for the same treatment or service, or charging higher amounts for services covered under the workers' compensation fee schedule. In addition, a lawyer and physician may conspire to commit fraud by the lawyer sending all of that lawyer's clients to the same doctor and the doctor in turn issuing biased medical reports to continue receiving patient referrals and obtain a financial gain.

In a scheme to defraud the U.S. government and private insurance companies, two Louisiana physicians recently pleaded guilty to conspiracy and fraud charges involving workers' compensation patients.

In July 2021, U.S. District Judge Timothy L. Brooks presided over a plea hearing in which Dr. Robert Dale Bernauer Sr., an orthopedic surgeon in Lake Charles, Louisiana, pleaded guilty to one count of conspiracy to commit mail fraud, wire fraud, health care fraud, fraud to obtain federal employees' compensation, and illegal remunerations, or taking "kickbacks." (*USA v. Bernauer* (5:21-cr-50044), Arkansas Western District Court).

According to court documents, an Arkansas company recruited Dr. Bernauer and other physicians to dispense pain creams and patches to his workers' compensation patients by offering him a 50% split of the profits collected from successfully billing insurers for those medications. Unlike many "mainstream" medications, the specialty or "compound" medications are not in the medication fee schedule and are often charged at exorbitant rates. Here, the company billed insurers at markups from 15 to 20 times the costs of the medications. The company submitted claims to both the U.S. Department of Labor, Office of Workers' Compensation Programs, which covers federal employees, as well as private insurers.

Dr. Bernauer admitted that he and his co-conspirators knew that he did not have a license to dispense medications from his clinic, which

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was required under Louisiana law, but he nonetheless entered into contracts whereby he agreed to buy topical medications from the company at set rates and dispense them exclusively to his workers' compensation patients.

In turn, Dr. Bernauer and the company would each get half of all amounts successfully collected from insurers. Between 2011 and 2017, Dr. Bernauer received over $1 million for dispensing these medications and defrauded both federal and private workers' compensation insurers by taking "kickbacks" for recommending certain treatments, prescriptions or services. Dr. Bernauer alone accounted for a loss of approximately $2 million, of which $664,176.50 was paid by the federal agencies whose employees were treated by Dr. Bernauer.

In his plea agreement, Dr. Bernauer agreed to pay $664,176.30 directly to the Department of Labor as restitution and pay $361,096.70 to the court clerk's office, to be distributed to other insurers wronged by the scheme. Dr. Bernauer was further subjected to an additional restitution order of approximately $1 million, as a shared obligation with any later-convicted co-conspirators. Dr. Bernauer may be sentenced to a maximum of five years in prison, to be determined by the Court.

Less than a year later, in March 2022, Dr. Robert Clay Smith, a physician in Alexandria, Louisiana, waived indictment by a grand jury and pleaded guilty to committing health care fraud, wire fraud, and illegal remunerations. (*USA v. Smith* (5:22-cr-50020), Arkansas Western District Court). Dr. Smith, according to court documents, was similarly recruited by the same medical supply and billing company to dispense pain creams and patches to his workers' compensation patients by offering him a split of the profits. The company paid Dr. Smith 50-55% of the profits collected from insurers.

Dr. Smith's involvement in the scheme ran from 2013 to 2017, and he was paid more than $650,000. In addition to receiving illegal kickbacks, Dr. Smith was aware that he did not have a license to dispense medications from his clinic, yet he conspired with the company. Dr. Smith may be sentenced to up to five years in prison. Additionally, the company's former billing director pleaded guilty to participating in criminal conspiracies with the two doctors and others.

Impact of medical fraud on the system

Medical fraud negatively impacts the workers' compensation system as a whole. It not only negatively affects the injured worker's treatment and recovery, but it also creates unnecessary financial burdens on the employers and insurance carriers, which in turn escalates insurance premiums.

In response to these types of health care schemes, insurance carriers will go to greater lengths to spend time and money verifying and investigating claims, which is turn results in higher costs and delays to the injured worker's treatment and benefits.

Following the Bernauer plea deal, in a July 30, 2021, statement from the U.S. Attorney's Office, Western District of Arkansas, Special Agent in Charge Michael Mentavlos of the Defense Criminal Investigative Service Southwest Field Office stated: "Physicians, marketers and billing companies who attempt to take advantage of the program by paying and receiving kickbacks for prescribing unnecessary medications expose our workforce to potential physical harm and waste valuable taxpayer dollars.

While medical fraud may never be eliminated entirely, employers, insurance carriers, attorneys, and injured employees can all do their part by conducting their own research and taking action when medical fraud is suspected in claims.

According to The Coalition Against Insurance Fraud (CAIF), insurance fraud costs U.S. consumers at least $80 billion every year, with $30 billion attributed to workers' compensation insurance fraud alone.

The goal of any workers' compensation system is to provide benefits and medical care to injured workers to allow them to rehabilitate from their injury and return to work. Medical fraud, such as the schemes outlined above, prevents the system from operating as it was designed to do. When a doctor receives kickbacks for prescribing certain medications or services that they recommend, it is more likely to harm the patient by encouraging a treatment that may not be best for the patient's care.

In addition, it can prevent or delay the injured worker from earning their full wage potential, as workers' compensation disability benefits are only a percentage of their salary, subject to caps on compensation rates, which vary from state to state. On the other hand, when additional treatment is recommended, the workers' compensation adjuster will scrutinize the claim and, if it appears the additional treatment is unnecessary or unwarranted, insurance carriers become more wary of fraud and will initiate further investigation.

Preventing medical fraud

The federal government and many states have in place their own statutory penalties for those who commit fraud within the workers' compensation system. Pursuant to 18 U.S.C. §1347, it is a federal felony to engage in a scheme designed to defraud a federal health care benefit program. Each violation can result in fines and up to 10 years imprisonment.

In Georgia, anyone who knowingly and intentionally makes a false or misleading statement to obtain or deny benefits or payment can be fined anywhere from $1,000 to $10,000 per violation. (O.C.G.A. § 34-9-1). Some states have also enacted laws that require an injured employee to choose a provider that is on a list or "panel" that has been pre-approved by the state's workers' compensation agency.

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While medical fraud may never be eliminated entirely, employers, insurance carriers, attorneys, and injured employees can all do their part by conducting their own research and taking action when medical fraud is suspected in claims. All parties can — and should — research medical providers and check their medical licensures and credentials with state boards prior to selecting a physician.

Continued investigation and peer review throughout the course of the patient's treatment may also be necessary to ensure that the injured worker is receiving care commensurate with their injury. Potential penalties and imprisonment by state and federal governments should serve to dissuade and prevent medical fraud in the workers' compensation system, but these recent schemes demonstrate that the lure of cash can even lead physicians astray.

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