

Minimizing Workers' Compensation Claims

General and subcontractors need to know their state workers' compensation laws and scope of insurance coverage to manage injury claims costs

By Michelle Daum Haskins

My daily commute takes me by a vast downtown construction project. The project involves several blocks, and there is the usual plethora of assorted construction equipment and personnel on the site.

Recently, I drove by and saw a man attempting to gingerly pick his way among the excavated earth. Why did he stand out? Amid hundreds of workers on the active site, he was walking around dressed in only a tank top, shorts, tennis shoes and no hard hat. To a passerby, this man probably did not merit a second take. To an attorney whose practice involves representing employers in the defense of workers' compensation claims, this was an unbelievable sight. I could only hope this man was not actually an employed worker.

KNOW STATE LAWS WHERE YOU WORK – THEY VARY

The construction industry has unique risks which is why special attention must be paid to prevent and minimize on-the-job injuries. Workers' compensation laws that address on-the-job injuries vary from state to state. The statutes define who is covered, what types of injuries qualify, and how much and what benefits are owed.

Generally speaking, workers' compensation laws hold that an employee who is injured in an accident arising out of and in the course of work, and whose employer is covered by workers' compensation insurance, is entitled to three types of benefits:

- 1) medical care and treatment,
- 2) payment for time lost from work, and
- 3) a judicial award or financial settlement if permanent injury occurred.

Pain and suffering is not an element, nor is loss of spousal consortium or inconvenience. Unlike other areas of law, an employee in a workers' comp case does not have to prove his/her employer was at fault. Also, the damages the employee is entitled to are limited – unlike a personal injury lawsuit where, as they say, the sky's the limit. With workers' compensation, the employer has the benefit of knowing its liability is capped.

AN EMERGENCY CHECKLIST

Unlike the restaurant employee or manufacturing worker who reports to the same location every work day, a construction crew works where the job site is located. Some crews frequently report to job sites near a contractor's home office, outside the area, and sometimes out of state. The implications of this "movable venue" are manifold:

- Where will an injured worker be directed for medical care? Does the crew foreman know where the nearest hospital is located?
- Where is the nearest occupational medical clinic?
- Will that clinic accept any injured worker, or does the employer's insurance carrier need to have secured a prior agreement for treatment?
- If construction is taking place in a small community, are there specialists available if the injury requires immediate surgery, or will the person have to be taken elsewhere by ambulance or even helicopter?

Obviously, it is important to include the potential need for medical care when planning any new project. Working away from company headquarters also brings up questions of travel and injuries or accidents occurring during travel. Some employers assume the only injury covered by workers' compensation is the one that occurs on the job site or at the home office. That thinking isn't always correct. If a worker is asked to leave his home on Sunday evening and drive 200 miles to the job site in order to begin work each Monday, and an accident happens at mile 110, is this covered by workers' compensation? Generally speaking, yes. If some of the out-of-town crew hops in a truck on a Thursday night to head to a local drinking establishment and then has a wreck, are the crew's injuries covered? More likely not, as it did not arise out of or in the course of employment.

Another concern about work areas removed from the main facility is legal jurisdiction. Most states' laws hold that an employee is entitled to pursue benefits in a state if it is:

- 1) the location of hire,
- 2) where the accident occurred, or
- 3) the location where the employee performs a majority of his work.

It is not unusual for a person to be hired in one state but to work mostly in another state. Construction work has the potential to expose employers to multi-jurisdictional claims.

Therefore, it is critical that employers check with their insurance carrier to ensure the firm has coverage in all states where employees may work. Failure to have insurance typically exposes employers to a fine and possibly a misdemeanor charge. Repeated instances of failing to obtain insurance could result in felony charges.

BUILD TEAMWORK, NOT PROBLEMS

Construction work is physically and mentally demanding. If an employer is lucky, the crew is committed to its work and enjoys camaraderie during the effort. Sometimes, though, a lighthearted attitude turns into horseplay. Some employers operate under the misconception that an injury suffered during horseplay is not covered by workers' compensation, but it depends upon the circumstances. For example, if an employer did nothing to stop or discourage horseplay in the past, and a worker is injured during a prank or game on the site, most states' workers' comp laws would likely find the employer responsible. So the next time a worker is seen chasing his co-worker with an automatic stapler, the foreman needs to intervene.

Likewise, employers need to be clear about a zero tolerance for drugs and alcohol in a work environment. An impaired worker endangers himself and others. The law frowns on such activity by demanding a complete forfeiture of workers' compensation benefits if drugs or alcohol contributed to a workplace accident. The law also places some responsibility on the employer, with some states requiring that a firm post notices or bulletins advising employees that the company policy forbids drug and alcohol use on the job, and that the postings specify penalties for such behavior. Common sense dictates an employer should not have to give a written warning in such cases. However, it is better to take affirmative action in the form of postings, warnings and instructions in employee handbooks, than to find out that an employer can be at risk for employees' risky behavior. The same can be said for safety devices. It's a good idea to promote the use of all safety equipment by all personnel by posting notices, demonstrating its use as part of new employee training, including information in the employee handbook and encouraging job site vigilance. Insisting employees wear hardhats on a job site is a good example. Not only will management oversight help minimize risk, it can help defeat legal liability in a workers' compensation case. These common sense practices also have implications with other laws such as OSHA.

THAT CRITICAL OUNCE OF PREVENTION

It's not unusual for general contractors to grow frustrated and confused after receiving a workers' comp claim filed by an employee of a subcontractor. Some states provide for a general contractor to be primarily liable not only for their own employees but the employees of their subcontractors. This may occur because the subcontractor failed to obtain workers' compensation insurance coverage. In that case, the law can provide that the general contractor is the 'statutory employer' of the injured worker. The injured worker can then recoup all the rights and benefits he would have had if he were pursuing the subcontractor.

This scenario is preventable. General contractors need to be vigilant and aggressive when it comes to subcontractors' workers' comp coverage. They must require their subs to carry it and they also must demand to see written documentation of coverage. A subcontractor should be able to produce a certificate of insurance, which the general contractor should verify by calling the insurance firm. The general contractor needs to ensure that the subcontractor is covered for the type of work being done, the location of the job site, and that the policy is current.

In one particular case, a general contractor was being prosecuted by a subcontractor's employee. The subcontractor denied responsibility and it soon became apparent why. The subcontractor failed to obtain insurance to work in the state where the accident occurred. The subcontractor contended that it had insurance in other states. However, the insurance carrier was quick to show, via a deposition and documents, that the subcontractor had lied on its application for coverage. The subcontractor responded in the negative to questions about whether it did work at heights greater than eight feet, whether it did work that required ladders and whether it performed work outside of the state they were located in. Negative responses to these questions were interesting, given that this subcontractor was a roofing firm with jobs in more than one state. The worker was allowed to pursue a case against the general contractor and was awarded benefits.

The lessons to take away from these real life workers' comp cases is the construction field requires physical work as well as detailed planning by professionals. Well supervised work sites, consistent and clear employee training, posted company policies, current insurance coverage (and proof thereof), are all critical if your firm is going to minimize its workers' compensation claim settlements and awards.

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