

Tackling fraud in employers' liability cases

Insurance companies have generally focused on defeating motor insurance fraud. However during a period of recession other areas are susceptible to fraud, in particular employers' liability.

The cause for concern is twofold - during a recession redundancies can occur and this may increase the potential for disgruntled employees to submit dubious claims referring to an alleged accident or an alleged unsafe system or place of work. In addition, due to financial constraints on organisations, they may look to prioritise their workload with a subsequent reduction in their risk management activities.

Similarly, industrial disease is an area in which potentially fraudulent claims may arise, where symptoms can be speculative as to their nature and cause, such as HAVS, tinnitus and to some extent deafness.

A difficulty for insurers is that, in cases where there may be a suspicion of fraud, a defence may be prejudiced by failure on behalf of the defendant company to provide a safe place or system of work and/or instigate proper reporting procedures and risk management.

We recently handled a number of claims on behalf of a company, many of which were submitted some time after the alleged event causing the injury and following a series of redundancies. Unfortunately liability investigations revealed that the system of work did not adhere to best practice and as such, although causation arguments could be raised, the claims were extremely difficult to defend. It is important in such cases to look carefully at the claimant's medical notes and records and absence records.

In addition to normal investigations concerning the system/place of work, other factors to consider are as follows:-

- has there been a delay in bringing the claim i.e. referring to an alleged accident or unsafe system of work occurring months/years previously?
- has the claimant recently been made redundant? Does this coincide with the letter of claim?
- has the accident/injury been reported and an entry made within the accident report book?
- was the accident reported to a supervisor, if so can he/she be identified? NB. in some instances, supervisors may have also been made redundant and they may be instrumental in instigating the claims
- are there any witnesses? If so are they still employed within the organisation?

- are there any relevant entries in the first aid book?
- when did the claimant first report his symptoms to his GP? Copies of the GP notes are essential in all cases as these will assist in investigating causation and any possible link to the accident/system of work
- are there any risk assessments available to cover the activity carried out by the claimant?
- are there any previous accidents/injuries arising from the unsafe system of work?
- has the delay in reporting prejudiced the defendant's investigation?

Problems can also occur when insurers are faced with a considerable number of genuine claims from one source, such as industrial deafness, where work colleagues may be tempted to "jump on the bandwagon" and submit claims even where exposure to noise is virtually non-existent.

We are handling a number of industrial deafness claims on behalf of a defendant organisation where liability has been admitted. More recently, claims have been submitted in which attempts have been made to extend the previously agreed period of noise exposure. These claims are quickly identified and are subject to detailed investigation as regards exposure, protection and causation.

Organisations can help reduce the risk of fraudulent employers' liability claims by:

- ensuring that a competent risk management system is in place
- ensuring that reporting procedures are in place
- immediately investigating the cause of any reported injury
- maintaining close liaison between the Health & Safety and first aid departments
- recording and keeping all e-mails and conversations relating to possible claims

One of the main factors that employers consider when introducing a redundancy programme is the individual's sickness record. The cause of sickness absence should be thoroughly investigated to identify the potential for any claim being made against the company that the redundancy procedure is unfair.

For further information please contact Paul Chadder (paul.chadder@henmansllp.co.uk)



EL Update – Importance of record keeping

The Court of Appeal recently handed down a significant decision in the case of *Keefe v Isle of Man Steam Packet Co Ltd*. In summary, the court held that a defendant's failure to provide records of noise measurements should not count against a claimant in determining whether the claimant had failed to prove his case.

Mr Keefe worked for the defendant as a seaman from 1973 to 1998. He argued that he was exposed to excessive noise during this time, that this was negligent and also in breach of statutory duty. Surprisingly, no expert evidence was called. Witness evidence was heard for both sides and the Judge at first instance dismissed the claim on the basis that the claimant had failed to prove the requisite level of exposure.

In the Court of Appeal it was held that the judge at first instance had not given sufficient weight to the defendant's failure to provide evidence of noise levels. Importantly, the defendant was obliged under statute to take noise measurements, record them and retain

them. The court felt that in such circumstances a claimant's evidence should be judged benevolently. Authority was drawn from the case of *Harris v BRB (Residuary) Ltd & anor 2005* which recognised the difficulties claimants sometimes face in obtaining evidence in these situations.

It has always been the case that if a defendant wishes to try and successfully defend a claim then the evidence will be crucial. This is particularly so in EL disease claims. The *Keefe* decision serves to reemphasise the point. A number of Regulations now require employers to keep records and this duty should be drawn to the attention of insured companies. The *Keefe* case will certainly be relied on by claimants in the future.

For further information please contact Joanne Eden (joanne.eden@henmansllp.co.uk)



Part 36 update: *Gibbon v Manchester City Council (2010)*; *L G Blower v Reeves (2010)*

The Court of Appeal has recently considered the effect and interpretation of CPR part 36 in two cojoined appeals and has provided some clear and useful guidance on the rule. The court has held that, although basic concepts of contract law underpin part 36, the rule itself is a self-contained code containing a set of formal rules and not governed by common law principles of offer and acceptance.

In the *Gibbon* case, the claimant (G) made a part 36 offer to accept £2,500 in settlement of her personal injury claim. This was initially rejected by the defendant (M), which made a number of offers, before finally offering the full amount of £2,500. G rejected this offer and so M accepted G's original offer. G then sought to withdraw that offer on the basis that M's rejection of the offer previously rendered it incapable of settlement and the rejection of M's later offer of £2,500 implied that she had withdrawn the offer.

The Court of Appeal held that a part 36 offer remains open for acceptance at any time unless the offeror has formally withdrawn it. There can be no implied withdrawal of an offer and a withdrawal must be in writing (CPR 36.3(7)) and include an express reference to the date and terms of the offer.

In *Blower*, which was heard with *Gibbon*, the defendant (R) entered into a building contract with the claimant (B). The dispute was in relation to B's invoices rendered. R made various part 36 offers in May (£8,023.14 inclusive of interest), August (£8,188.38) and November 2007 (£9,000.00). In January 2008, all except the May 2007 offer

were withdrawn and in February 2008 R repeated the August 2007 offer, inclusive of interest and costs. At trial, B was awarded £8,375.94 with interest and costs and R was ordered to pay half of B's costs from January 2008. R appealed against the costs order on the basis that the judge had been too generous to B.

The Court of Appeal held that the language of part 36 does not state that only one offer can be open for acceptance at any time, nor does it provide that a subsequent offer should be treated as withdrawing or varying an earlier one. There was no reason why a party should not have more than one offer open and leave it to the other side to decide which to accept. Each offer has its own costs consequences, depending on when it was made and accepted.

These decisions serve as a reminder to defendants to periodically review part 36 offers, particularly if new evidence has been obtained since an offer was made, such as additional medical evidence which may change your view of a claim. Also, when making a second or subsequent part 36 offer, remember to review earlier offers made and consider whether you should expressly withdraw them.

For further information please contact Jane Lightfoot (jane.lightfoot@henmansllp.co.uk)

