

ClaimsBytes®

An electronic publication of The Graham Company Claims Services Department

Vol. No. 10 Issue I

Summer 2010

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Thanks for reading this edition of ClaimsBytes®. Please look for our Winter edition for more important claims news.

*Sincerely,
The Graham Company Claims Services Department*

Spring Claims Services' Workshop a Big Success!

The Graham Company Claims Services Department held its Spring Workshop on April 29, 2010 and May 6, 2010, entitled "Settling the Workers' Compensation Claim - Why, When and for How Much? Comparing & Contrasting the States of Delaware, Maryland, New Jersey, New York and Pennsylvania".

This Workshop was designed to help attendees understand what can be settled (wage loss, medical benefits or both), and when it can be settled so that future financial exposure for the claim can be limited. It also addressed the thorny issues of Medicare set asides, concurrent resignations and child support.

Our panel included lawyers from each of the following five states: Delaware, Maryland, New Jersey, New York and Pennsylvania.

If you would like a copy of the materials, please contact your Graham Company Claims Consultant.



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EMERGENCY CLAIMS BYTES

The Graham Company recognizes that emergencies don't just happen during business hours. The Graham Company Claims Services Department stands ready to assist our clients 24 hours a day, 365 days a year. In the event of an emergency claim, please call The Graham Company at **(215) 567-6300**. If you are calling after hours, you will receive instructions on how to reach The Graham Company's On-Call Emergency Claims Coordinator.

The Graham Company will help you record the vital information concerning the loss and obtain the appropriate experts to help you. These experts could include an insurance adjuster, an attorney, cause and origin expert, restoration specialist, media consultant, and depending upon the severity of the loss, a public adjuster. These experts are important in documenting and controlling the evidence involved in the loss. Subrogation recovery may hinge upon the investigation and immediate attention is critical.

This is a service we hope you will never have to use, but rest assured, we are here to help.

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Risk Management Bytes

Key Issues in Accident Investigation and OSHA Inspections

In today's highly volatile construction law environment, inadequate accident investigations can result in your company facing severe OSHA citations and the possibility of third-party lawsuits. In an effort to avoid the costly tangle of such legal problems, construction companies and home builders must be prepared to face the unfortunate incidents that occur during commercial and residential projects. The best method to avoid legal trouble is to be pro-active by implementing a comprehensive safety program. Part of that comprehensive program includes protocols for accident investigation and dealing with OSHA. As the number of lawsuits stemming from construction accidents continues to rise and with OSHA fines at an all time high, this article identifies key issues needed for properly handling accident investigations and in dealing with OSHA inspections.

Employee injury prevention is the primary goal of OSHA. Over the past two years, OSHA has announced that it is back in the enforcement business. OSHA's 2010 budget includes a \$25.5 million increase to its Compliance Safety and Health Office work force and a 160 position expansion of its enforcement staff. The increased enforcement staff will be focused on the oversight of construction projects. OSHA has also emphasized its plan to increase its use of unannounced inspections of dangerous work places. This aggressive stance by OSHA means that those in the construction industry must be organized and responsive.

OSHA requires employers provide a workplace that is free from hazard. Section 5 of the Occupational Safety and Health Act requires employees covered under the act to provide a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees. It further requires that employers comply with occupational safety and health hazards promulgated under this Act. Part 1926 explains the safety and health regulations that employers in the construction industry must follow in order to comply with federal guidelines. [29 C.F.R. 1926.1]. This section applies to every employment and place of employment of every employee engaged in construction work, or work for construction, alterations, and/or repair, including painting and decorating. [29 C.F.R.1926.12(a) and (b)].

When an unexpected event does occur and causes injuries at your company or jobsite, an immediate investigation should be conducted to determine the hazard and the nature of injury. Once the hazard is remedied, a corporate designee knowledgeable about the work site should lead the inquiry. Most often, this individual has been designated the "competent person" on the job. A "competent person" is defined as one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them. [29 C.F.R. 1926.32(f)].

A successful and productive investigation can hinge on the individual you choose. This individual must have experience in investigative techniques so that an exhaustive evaluation and determination of the hazard is properly conducted.

Minimal time should be lost between the moment of an accident and the beginning of the investigation. The location of the accident and witnesses should be identified immediately. Witnesses should be interviewed and photographs taken of the scene. It is wise to prepare location charts or site map markings where witnesses observed the incident. Written statements should then be obtained to record the facts of the accident. These statements are vital for record keeping in the event an accident goes into litigation. More importantly, employers are required to “record and report work-related fatalities, injuries and illnesses” and following this requirement “does not mean that the employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for workers’ compensation or other benefits” [29 C.F.R. 1904.0]. By investigating aggressively after an accident, your company will be in a much better position to address questions of liability that may be posed by OSHA personnel. Detailed record keeping will also enable employers to learn from past experiences and make corrections for future operations.

Upon OSHA’s arrival, your company must have a designated employee in charge with dealing with OSHA. This may be the “competent person” or a senior project executive. The designated OSHA employee can not be the person most involved in the accident. The designated employee will act as a liaison between your company and OSHA. OSHA should then disclose the reason for their investigation. Most often, OSHA has the power to enter without delay, therefore, employers must be prepared. Investigators will inspect the accident scene, conduct witness interviews and perform document inspections. A closing conference between OSHA and your company will then take place at the end of the investigative process.

When dealing with OSHA investigators, five simple rules should be followed:

1. Be cooperative and do not withhold pertinent information;
2. Your company is not obligated to volunteer information, but complete disclosure is recommended;
3. Never venture a guess and always be sure of your answers;
4. Never create self-serving conclusions; and
5. Companies should never change the accident scene.

By complying with these rules, your company is taking the right step toward the avoidance of OSHA citations and will minimize the risk of creating adverse evidence that could be used in future litigation.

When a serious accident occurs, employee safety is the immediate concern. However, an employer must be prepared to protect its own legal interests from the outset. By implementing effective investigation protocols into an existing safety program, companies will be ready to deal with OSHA inspectors. Should you have any questions for implementing effective accident investigation protocols, do not hesitate to contact the undersigned or your Graham Company Claims Consultant.

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Risk Management Bytes

When to Retain and When to Destroy Insurance Policies

Most companies have instituted Records Retention Policies that run the gamut from the simple to the exceedingly complex. Records Retention Policies are important for three main reasons:

1. To ensure that you do not have liability for the regular destruction of documents,
2. To ensure that certain documents are retained to meet your specific business needs, and
3. To comply with specific statutes requiring specific documents be retained for specific timeframes.

The general rule is that if documents are destroyed pursuant to a consistently maintained and applied records retention policy, the company will not have liability for the destruction of those documents even if needed by others at a later time.

No specific statutory obligations exist for companies to retain insurance policies other than an unclear obligation to maintain accident and health insurance policies for a period of six years pursuant to ERISA. Still, it might be wise for companies to follow a policy on when they should retain and when they can destroy insurance policies. The following are some general recommendations on how this strategy should be set up, based on the type of insurance policy involved.

Occurrence-Based Liability Insurance Policies

Occurrence-based liability insurance policies, such as commercial general liability (CGL) and business auto, can be triggered far after the expiration dates of the policies. This is because of case law developed for these long-tail-type claims. These claims would include asbestos and silicosis claims, as well as pollution claims (i.e., landfill claims).

The commercial general liability policies a company purchased in the 1960s could still be called upon to provide coverage by way of both defense and indemnification if, for instance, individuals who may have been exposed to asbestos in the company's products in the 1960s made a claim today.

In light of the long-tail exposures faced by many companies, these occurrence-based liability policies should be retained forever and not be destroyed.

Property Policies

Property policies provide first-party coverage for insureds for loss to owned, rented or leased property (and may be extended to cover property of others as well) that occurs during a stated policy period. Generally, property losses are known shortly after they occur and, as such, the need to retain property policies for long periods of time is far different than that involving occurrence-based liability policies. Furthermore, unlike CGL insurance, only a single property policy is generally triggered for any given loss.

It would not be unreasonable to retain property policies for a period of six years only.

Claims-Made Insurance Policies

Claims-made insurance policies (such as professional liability and directors' and officers' liability insurance) are triggered only by claims that are made against the insured during the policy period and during the existence of a "tail" following the expiration of the policy period. The determination of coverage under a claims-made policy is dictated by the date the claim is made and not by the date when the accident or acts occurred. A tail period permits the reporting of claims first made within the tail period related to acts or omissions which occur during the policy period.

It is the existence of the tail and the unusual feature in these policies that later made claims related to any earlier covered claim would be covered under the earlier policy, that complicate records retention matters for claims-made insurance policies. Because of this, retention periods for claims-made policies should begin not from the expiration date of the policies but rather from the expiration of the tail coverage.

A reasonable retention period for claims-made policies would be six years after the expiration of the tail period.

Workers Compensation Policies

Employers can remain liable for employee injuries for an unlimited period of time. An example of a claim that may occur far in the past but give rise to a claim in the present is an asbestos claim, where the injured employee was exposed long ago and only now suffers the effects of that exposure. The policies in place when the employee was exposed may be triggered to provide coverage.

As such, workers compensation policies should be retained forever.

Benefits Insurance Policies

The Employee Retirement Income Security Act of 1974 (ERISA) regulates employee benefit plans. Section 107 of ERISA contains a general records retention requirement that applies to essentially all ERISA plans, which provides that ERISA plan records be maintained for a period of six years after the filing dates of the documents in question.

Although not specifically addressing the insurance policies themselves, we believe it is prudent to comply with this six-year retention obligation for benefits insurance policies (which would include medical, dental and disability policies as well as stop loss policies for those insureds who are self insured).

Because there is virtually no statutory or regulatory guidance on retention periods for insurance policies, retention terms are dictated more by business need than legal requirement. The above recommendations are suggested as minimum retention periods, and the particular needs of your specific business should be evaluated when selecting a retention period for insurance policies that is right for you. Furthermore, the retention period, as you can see, is driven more so by the type of insurance policy than the program under which it is written. Therefore, for example, insurance policies written in connection with captive insurance programs would follow the same retention guidelines as those under fully insured programs.

As a final note, insurance policies are like any other contracts and may be retained in hard copy or in electronic form. Electronically stored policies are also equally admissible at trial. As such, it is entirely reasonable to retain policies electronically only (with the caveat that you have sufficiently robust systems in place to ensure that these electronically stored documents are not lost). Even if you are just starting out with retaining insurance policies, fear not. Generally, insurance brokers retain them for extended periods of time and many times, simple evidence of their existence (such as copies of certificates of insurance issued to customers, etc.) may be sufficient to demonstrate that the coverage was in force.

Should you have any questions regarding the retention or destruction of insurance policies, please do not hesitate to contact the undersigned or your Graham Company Claims Consultant.

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Workers' Compensation Bytes

Pennsylvania Workers' Compensation: Return to Work Challenges & Tips in a Troubled Economy

The poor economy and high unemployment rate have created additional challenges for employers in defending Workers' Compensation claims. Most employers know the benefits of having a modified duty program for injured workers. A well-managed modified duty program benefits both the employee and the employer. The employee benefits by remaining a productive member of the workforce while still under medical restrictions, having the ability to keep fringe benefits and having the ability to transfer back to full duty. The employer benefits by increased employee morale and decreased workers' compensation costs.

But what can an employer do once an employee is already out on workers' compensation? What must an employer do? What should an employer do?

Beginning in 1996, the Pennsylvania Workers' Compensation Act has given employers the ability to reduce or stop indemnity benefits utilizing an earning power assessment ("EPA"), also known as a labor market survey. An employer can demonstrate that an injured worker has earning power, despite the fact that the employee is not yet fully recovered from the work injury. The employee's earning power must be established through "expert opinion evidence" from a qualified vocational expert that is based on "the employee's residual productive skill, education, age and work experience," showing that the employee can "engage in any other kind of substantial gainful employment" in the claimant's usual employment area.

Once this evidence is obtained, the employer can file a Petition to Suspend or a Petition to modify benefits. The evidence is presented to a Workers' Compensation Judge ("WCJ"). The claimant invariably will present evidence opposing such a petition. The claimant's evidence will attempt to show either that the claimant cannot do any work, or that the jobs identified in the earning power assessment are either not suitable or are really not available. Only if the WCJ accepts the employer's evidence as more credible than the claimant's evidence will benefits be suspended or modified.

Before an employer even files such a petition based upon an earning power assessment, it must consider whether it is able to offer the claimant a job. The Act requires that "if the employer has a specific job vacancy the employee is capable of performing, the employer shall offer such a job to the employee," before proceeding to file a Petition to Modify or to Suspend.

This does not mean that the employer must create a job for the employee. Only specific vacancies must be considered. If more than one job vacancy (which the employee is capable of performing) exists, the employer has the right to determine which job is to be offered. If there is no job vacancy, then the employer is not obligated to make a job offer.

The employer's duty does not require the employer to hold a job offer open indefinitely. Job offers are to be made consistent with the employer's usual business practice.

The making of a job offer is also governed and controlled by any relevant collective bargaining agreement. For example, if there is a collective bargaining agreement that addresses bidding rights, the employer is not required to make a job offer if doing so would violate the collective bargaining agreement.

An employer who files a Petition to Modify benefits based on an earning power assessment therefore must prove that it either did make a job offer to the claimant (which job the claimant refused, ignored or failed to respond to) or that no job vacancy exists which the employee is capable of performing.

If there is a job vacancy that the claimant is capable of performing, but the employer chooses not to offer it to the claimant, the Petition to suspend or modify will be denied as a matter of law.

Even if the employer does not have a specific job vacancy to offer to a claimant, there is a substantial and practical reason for considering creating and offering a modified duty job. Unemployment nationwide is at record highs. Each month brings more news of more job losses and increases in first time unemployment compensation filings. Pennsylvania is no exception. The rate of unemployment in Pennsylvania for December 2009 was 8.9 percent.

With a poor economy and high unemployment, a workers' compensation judge may be skeptical of evidence from a vocational counsel or concerning the employee's earning power based upon an earning power assessment. Workers' compensation judges may presume that there are dozens, if not hundreds of applicants for each job vacancy. Therefore, a workers' compensation judge may think that even if the jobs identified by the vocational expert in the earning power assessment are available and open, the jobs do not accurately reflect the claimant's actual earning power. The WCJ might also think that if the employer does not have work available to claimant, then it is not reasonable to believe that other businesses will have work available to the claimant.

In light of this, then, a prudent employer will always give serious consideration to making a modified duty job available to a claimant. While there are frequently good reasons not to make such a job offer, there is one very good reason to do so – to substantially increase the chances of prevailing in litigation and suspending or modifying benefits, and consequently reducing workers' compensation costs.

Questions to Consider:

1. Is there any evidence that claimant is fully recovered from the work injury, or do all medical experts agree that the claimant has medical restrictions as a result of the work injury?
2. Are these medical restrictions temporary or permanent?
3. Will claimant adversely affect the morale of fellow employees if he or she returns to work?
4. Will claimant's supervisors adequately manage claimant and ensure that the claimant is not asked to perform any tasks beyond the claimant's medical restrictions?
5. Does employer have a process in place to monitor the claimant and to periodically get medical updates to determine the claimant's medical condition?
6. Is there any evidence that this claimant may falsely claim additional injuries if he/she returns to work?

Tips for Making a Job Offer:

1. Although not required to be in writing, it is always helpful to document any job offer by way of a letter sent to the claimant.
2. The letter should be sent to claimant by both first class mail and registered mail (return receipt requested).
3. The job offer letter should be accompanied by a copy of a medical report that offers the claimant's physical capabilities as well as the Notice of Ability to Return to Work that the insurance company must issue.
4. The job offer should detail what job and which specific tasks are being offered to the claimant.
5. If a job description or job analysis is also sent to the claimant, it should not indicate that the job includes tasks that exceed the claimant's physical capabilities.
6. The job offer letter should clearly state the date and time that the claimant is expected to report to work and to whom claimant should report as well as claimant's work schedule.
7. Adequate time should be given to the claimant between claimant's receipt of the job offer letter and the start date so that the claimant can discuss the job that is offered with his or her physician.
8. The job offer letter should state the salary for the position. We encourage our clients to offer the same wages as the pre-injury average weekly wage.

Should you have any questions regarding Modified Duty or your Return to Work Program, please do not hesitate to contact the undersigned or your Graham Company Claims Consultant.

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Workers' Compensation Bytes

Summer Hires and Minor Employee Considerations

It's that time of year - school is almost out and summer jobs are beginning soon. The additional workforce can be beneficial for your operations, but be sure to take the proper steps to make sure that minor employees are legally employed. Not doing so can create exposure for violation of employment laws and stiff fines and penalties in the Workers' Compensation arena.

There are two main considerations with regard to the legal employment of minors: securing proper documentation prior to the start of work and placing minor employees in positions for work which they are legally allowed to perform. Most jurisdictions either prohibit minors from safety sensitive positions altogether, or at a minimum require some sort of safety and operational training. If you are considering hiring a minor, we recommend that you consult with an Employment Attorney for state-specific rules and regulations.

While each Workers' Compensation jurisdiction varies on the employment of minors, there is a common theme - imposition of fines and penalties in a claim situation. For example, if injured on the job, a minor could be entitled to collect 150%-200% of the benefits otherwise due with the amount excess of the normal benefits funded by the employer not the insurer. In addition, the minor may also have the right to sue the employer for negligence, which would trigger the Workers' Compensation policy in a second area - the Employer's Liability coverage section. These are just a few examples of how Workers' Compensation laws respond to claims involving the employment of minors.

Exposure for violation of laws and imposition of fines and penalties can be mitigated - if not avoided - by simply knowing the laws in your jurisdiction and taking the proper steps in the hiring process.

If you have any questions regarding this information, please do not hesitate to contact the undersigned or your Graham Company Claims Consultant.

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Claims Made Bytes

“Claims Made” Policies vs. “Occurrence” Policies

“Claims Made” policies differ from the typical “Occurrence” based policies (i.e. General Liability, Automobile, Workers’ Compensation and Property) in several respects – not the least of which is the claims reporting provision found in the Policy Conditions. Typical Claims Made coverages include: Directors and Officers Liability, Employment Practices Liability, Professional Liability, Pollution and Employee Dishonesty (Crime). Most “Claims Made” policies require you to report any claims made against you during the policy period no later than 12:01 AM on the last day of the policy period. Some policies permit an additional 30 or 60 days after the expiration to report claims. Once the reporting period expires the policy will no longer respond and you could be without coverage. Late notice under a “Claims Made” policy is sufficient grounds for a denial of your claim. We recommend you report your claim(s) immediately to your Graham Company Claims Consultant.

Should you have any questions regarding Claims Made policies, please do not hesitate to contact the undersigned or your Graham Company Claims Consultant.

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The Graham Company Bytes

Dawn Houpt Named Claims Manager

The Graham Company is pleased to announce the promotion of Dawn Houpt to Claims Manager at The Graham Company. Dawn has proven her organizational, technical and people skills in several key positions since she joined The Graham Company in 1988. Dawn began her career at The Graham Company as a Claims Consultant delivering value added claim services and building effective relationships with her clients. In 1994, Dawn joined Graham's Technical Development Department with responsibilities for training and auditing Claims Services Department personnel.

“Dawn brings claims expertise, good judgment and positive energy to the position of Claims Manager”, according to Ken Ewell, Executive Vice President. ***“She will help our Claims Consultants continue to find innovative new ways to service our clients and impact our bottom line from a claims perspective. We are very fortunate to have Dawn leading our Claims Services Department”.***

Dawn holds a Bachelor of Arts Degree in Business Administration & Economics from Lycoming College. She also has several insurance designations including CPCU (Chartered Property & Casualty Underwriter), AIC (Associate in Claims), and ARM (Associate in Risk Management), all provided by the Insurance Institute of America.