UTILITY AND TRANSPORTATION CONTRACTOR

JINGOLI CONSTRUCTION
DCO ENERGY

April 2014

Joseph Jingoli & Son, Inc.
Completes Ninety Years In Construction

Laura Van De Pele
Most construction companies are fairly successful at keeping their employees safe and managing their overall risk because they smartly focus their claims management programming on mitigating the greatest sources of everyday risk. Despite best efforts, claims can still be somewhat unpredictable, and you may be surprised by the actual source of your biggest claims. The purpose of this article is to uncover a few unusual and often overlooked claim scenarios that could be very costly to your business. In my experience as a professional insurance broker, I have seen an increase in the type of claims I discuss below and I hope bringing these few scenarios to your attention encourages you to continue evaluating where your company is potentially exposed and take the necessary steps to mitigate these risks before a claim happens.

**Caution! Risk Scenario 1: Uninsured Subcontractors**

It has been a long, tough road for many in our industry. Hopefully, your company hasn’t experienced this with your subcontractors, but the instances of lapse in insurance coverage and outright cancellation of coverage for non-payment of premium have increased steadily over the past few years. Unfortunately, this problem is likely to worsen before it gets better because as workflow (hopefully) increases, cash flow gets tighter, especially for companies that already have been stretched thin.

So how does an uninsured subcontractor impact your insurance program? For starters, you may be charged an additional premium by your own insurance company if during your annual year-end audit it is determined that an uninsured subcontractor worked for you. Insurance companies charge you a discounted General Liability rate and nothing for Workers Compensation insurance for work that you subcontract to others because the expectation is that the subcontractor has its own insurance, but if those subcontractors don’t have insurance, you will ultimately pay the full rate as if you didn’t subcontract out the work and performed it yourself.

The second and much more costly way an uninsured subcontractor impacts you is that you would be responsible for paying for claims with your own insurance that should have been covered by your subcontractor’s insurance. This includes both Workers Compensation losses because of injuries to your subcontractor’s employees and liability claims that would have been covered either directly by your subcontractor or contractually transferred to your subcontractor. As you know, insurance companies take into account a minimum of a five-year loss history when determining pricing, so even a single claim from an uninsured subcontractor could impact pricing for years to come.

Most companies simply collect Certificates of Insurance at the beginning of a project that requires notice of cancellation. The latest version of the ACORD form says that notice of cancellation will be delivered to the Certificate Holder in accordance with policy provisions. However, very few insurance companies will actually provide a policy endorsement that notifies a Certificate Holder of a subcontractor’s policy cancellation, so you are effectively relying on that subcontractor or their broker to notify you themselves that coverage has been cancelled – which is very unlikely to happen. In addition, Certificates of Insurance are not legally binding documents, so in the event of a claim, the only thing that matters is the policy itself.

**Other Precautions**

In addition to a Certificate of Insurance, you could also require your subcontractors to provide copies of their policies’ Declarations pages showing the actual effective date. This is not bulletproof either, but at least it is another verification step in determining that coverage was in fact in place at a particular point in time.

For Workers Compensation, you can verify online that coverage was placed for a subcontractor. Each state has a portal in which anyone can verify the Workers Compensation Insurance Company.
The topic of insurance requirements for owner operators is complex. Some of the biggest claims have been incurred from a contractor's use of independent owner operators who were not properly insured. One major area of concern is that most owner operators do not carry their own Workers Compensation coverage. In fact, the only insurance they carry most often is an auto policy that may not have any coverage in it. The challenge in New Jersey is that sole proprietors are not required to carry Workers Compensation coverage, and many of your owner operators are probably sole proprietors. But in a situation where a sole proprietor who works exclusively as a trucker for you gets into a serious accident, you bet they will pursue you for the benefits provided by Workers Compensation—and they are likely to succeed. This is because the courts will always say you are the trucker’s statutory employer because you control and direct their activity. Therefore, your Workers Compensation policy will pay for the owner operator’s medical costs and lost wages that will have at least a five-year impact on your insurance rates, including impacting your Experience Modification Factor.

To mitigate this scenario, consider requiring owner operators to purchase Occupational Accident Insurance. This is a quasi-Workers Compensation policy that pays for injuries suffered in the workplace, but the coverage provided by these policies varies greatly since they are not state-mandated. This means you could still be left holding the bag for medical and indemnity benefits for your injured owner operator. There are numerous benefits to using owner operators in your business, but having to pay unanticipated Workers Compensation benefits for owner operators requires much of this benefit.

Caution! Risk Scenario 3: Related Company Lawsuits

It is common knowledge that Workers Compensation is usually an insured worker’s sole remedy, and it is what the injured worker from using your employer. However, this is not always the case, and the industry is seeing more situations where an injured worker does sue their employer.

Here’s the scenario—an employee works for ABC Paving, Inc., which is a parent and road contractor that owns multiple material plants, including quarries. The asphalt plants and quarries are owned by a separate company called Materials Company, Inc. An employee working for ABC Paving, Inc. at one of the quarries gets injured and reports a Workers Compensation claim. The injured employee receives medical treatment and payment for loss of wages from ABC Paving’s Workers Compensation insurance company. The employee, not satisfied with his Worker’s Compensation settlement, fires a lawyer and sues Materials Company, Inc., the owner of the quarry where he was working, for pain and suffering. Unfortunately, the injured employee of ABC Paving is not barred from suing Utility and Transportation Contractor, APRIL 2014

Materials Company because that is not technically their employer, even though both companies are owned by the same people and insured on the same policies. Now the employee stands to collect twice from the same injury—first from ABC Paving’s Worker’s Compensation policy, and possibly from Material Company’s General Liability policy. I say possibly because this type of suit may not be covered by Material Company’s General Liability policy (the policy includes an insured exclusion, assuming that both companies are insured on the same policy. Simply put, even if the lawsuit is not covered by insurance, the employer would be responsible out of their own pocket for defense costs and any settlement the employee may be granted.

There are some things you can do proactively to reduce the likelihood of these types of lawsuits. You should speak with your insurance broker and employment lawyer to implement the best strategy to minimize this unreal but costly claim scenario from occurring. In addition, you should make sure your General Liability policy is worded correctly to provide coverage for this scenario in case you cannot proactively prevent this type of lawsuit.

Caution! Risk Scenario 4: Employee Participation in Recreational Activities

If you are like me, after the winter we have had, I’m dying to get outside and be active again. For some employees, this time of year marks the beginning of the season for the company softball team. Unfortunately, my body doesn’t move like it used to, and I’m sure the same is true for some of your employees. So what happens when your lead estimator trips a line drive down the right field line and tears his hamstring trying to stretch a double into a triple for the company-sponsored softball team? Is your estimator entitled to Worker’s Compensation benefits? The answer is yes. Consider these questions:

* Did the company pay the team’s registration fee?
* Did the company gain any goodwill or business benefit by supporting the team?
* Did the employee on the team feel compelled to play?
* What is the relation between the time and place of the game to the employee’s actual work schedule?

These are some of the questions that the courts have tried to determine compensability of these types of claims, and there are mixed results. One thing we all know in New Jersey is that the courts go to great lengths to protect injured employees. This possible claims scenario is not solely limited to sporting events, it is also included any company-sponsored recreation. One way to reduce the possibility of being faced with paying this type of claim is to have employees who participate in company-sponsored sporting events or recreation sign a waiver. You should speak with your insurance broker and attorney to develop the best strategy to reduce the likelihood of this type of claim affecting your company’s loss record.

About the Author: Carl Bloomfield is a Partner at The Glucksman Company, the largest property and casualty insurance broker in the Mid-Atlantic region. He is a member of the Construction Division at Bloomfield Associates. The Glucksman Company is a member in several construction industry organizations, including the Utility & Transportation Contractors Association, Associated General Contractors, General Contractors Association of New York, New Jersey Property & Casualty Association, the Contractors Association of Eastern Pennsylvania and the General Building Contractors Association of Pennsylvania. Carl can be reached at cbloomfield@glucksman.com or 716-356-0430.