

Fraudulent EL claim successfully defended at trial - lessons to be learnt

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As the credit crunch bites and the unscrupulous start to look at ways to supplement their income, the number of cases of fraudulent employer's liability claims is certain to rise.

Drawing on a recent claim which we successfully defended, in this note we highlight ways to approach this sort of case, and look at whether an insurer should also consider follow-up proceedings for contempt of court.

The case

In this case, an employee claimed he sustained a disc prolapse in his back following a manual handling accident at work, which left him partially disabled.

However, the claimant had no contemporaneous or independent evidence of any sort that there was any incident at work, nor that he had sustained a traumatic injury.

The parties did, however, agree that, around the time of the alleged accident, the claimant had developed an unpleasant lower back condition. We also accepted that if the

claimant really had hurt his back as alleged then he would have a good chance of establishing breach of duty arising in negligence and/or under the Manual Handling Regulations.

The defendant's approach

However, from the outset, acting for the defendant we vigorously disputed the circumstances surrounding the accident and called upon the claimant to prove his version of events.

We had to persuade the judge that the claimant's account of how he was injured was untrue and, therefore, fraudulent. This raised the litigation stakes. We had to ensure that the judge was satisfied that the claimant was lying; if we failed, the cost of the action would be significantly increased.

In order to speed matters up and keep costs under control, the judge ordered a split trial,

with the issue of liability to be determined first and quantum to be decided later. It's worth noting that a split trial may not always be appropriate, for example when issues of medical causation are inextricably tied up with the liability issues, but it made sense in this instance.

We began by carrying out a careful forensic analysis of the claimant's documents, including his medical records and his statements of case. As well as an application for invalidity benefits which exposed inconsistencies about the date of the alleged accident, our investigations revealed that he had failed to mention the accident either to his GP or the consultants who were treating him for a pre-existing condition. Sometimes it is what is **not** said in personal records rather than what is that is important in a case.

The fact that he was claiming benefits on the ground that his back injury rendered him

incapable of work was also contradicted by the evidence of one of the defendant's witnesses. Even though she was abroad at the time of the trial, we were able to serve her statement using a Civil Evidence Act ("CEA") Notice. At trial, the judge noted that the witness statement was from a retired dentist and that he was perfectly happy to accept her evidence.

The trial

During the trial, we asked the judge to consider

- the allegations in the Letter of Claim;
- the claimant's account of the accident to his medico-legal examiner;
- the description of the accident in the Particulars of Claim;
- the claimant's replies to a Part 18 Request for Further Information by the defendant; and, of course,
- his witness statement.

Not only did we draw the judge's attention to the many inconsistencies in these documents, but the judge himself also pointed out in his judgment that the claimant's evidence given in the witness box was different in a number of respects to his original pleaded case. During cross examination, counsel for the defence highlighted no fewer than five different versions of events given by the claimant.

Looking at all the facts before him, the judge was not satisfied that the accident happened as the claimant described, and dismissed his claim.

This demonstrates that such cases can be successfully defended, but should insurers pursue fraudulent claimants beyond the trial?

Contempt of court

CPR 32.14 allows for proceedings for contempt of court to be brought in circumstances where a person has knowingly lied. Permission is needed to commence committal proceedings and this can only be granted by a circuit judge or, alternatively, through a direct application to the Divisional Court.

In *Kirk v Walton* [2008] EWHC 1780 (QB), for example, the applicant applied for permission to bring proceedings against the respondent for contempt of court in making false statements in documents. In *Kirk*, video surveillance evidence coupled with medical reports contradicted the respondent's claimed disability following a minor road traffic accident. This was such as to raise a strong prima facie case against her.

As these cases clearly suggest, the courts are rightly fed up with fraudulent and exaggerated claims!

What should insurers do?

If you suspect that a claim might be exaggerated or fraudulent, we suggest the following steps to take:

- carry out a detailed forensic review of documents;
- consider using a Part 18 Request for Further Information;
- serve CEA Notices where potential witnesses might be absent;
- consider contempt of court proceedings in appropriate cases

Fighting such fraudulent claims requires insurers to be robust in their approach and willing to take suspicious claimants through the legal process to trial. ■

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