# Injured Workers May Pursue Civil RICO Claim Based on Enterprise to Deny Them Workers' Compensation Benefits

**By Robert L. Abell**

Injured workers faced with collusive and bad faith practices aimed at "fraudulently denying [them] workers' compensation benefits" can find relief via a civil RICO (Racketeer Influenced and Corrupt Organizations Act) suit, the Sixth Circuit held in *Brown v. Cassens Transport Co.*[1] This decision appears to reopen an avenue for relief for injured workers harmed by bad faith and abusive practices on their workers' compensation claims. The Kentucky Supreme Court closed this avenue in *Travelers Indem. Co. v. Reker,*[2] where it held that the exclusive remedy provision of the workers' compensation law precluded a claim under the Unfair Claims Settlement Practices Act.

The plaintiffs in *Brown* were a group of six workers, who all had suffered a work-related injury. They sued their employer, Cassens Transport, Crawford & Company, the third-party workers' compensation claims administrator used by Cassens, and Dr. Saul Margules, claiming that "the defendants used mail and wire fraud in a scheme to deny them worker's compensation benefits" in violation of RICO.[3] The plaintiffs alleged "Cassens and Crawford deliberately selected and paid unqualified doctors, including Margules, to give fraudulent medical opinions that would support the denial of worker's compensation benefits, and that defendants ignored other medical evidence in denying them benefits."[4] The mail and wire fraud consisted of communications among the defendants and to the plaintiffs regarding the plaintiffs' workers' compensation claims.[5] As stated in the plaintiffs' complaint, "Crawford, Cassens and their attorneys knew Margules and other doctors they employed to examine plaintiffs and other drivers were 'cut off' doctors, that is, doctors upon whom Crawford and Cassens could rely for opinions they could cite as grounds for cutting off or denying benefits, either by stating plaintiffs were able to work, or if disabled, their injury was not work related."[6]

The allegations of one plaintiff, Fanaly, a truck-driver, are illustrative. He had stopped overnight, while on an interstate trip for Cassens, and injured his foot as he left the hotel. He promptly reported the injury and claim. Crawford's adjuster, Litwiller, denied the claim, asserting "injury not work related," because it happened at a motel. Fanaly alleged that Litwiller's assertions, made both by telephone and mail, were fraudulent, "because the corporate defendants knew that an injury that happens to an employee while he is leaving his motel during the course and scope of employment is an injury compensable under the Act."[7]

Fanaly later suffered a shoulder injury while working and filed a claim for workers' compensation benefits. He was sent for examination by Dr. Margules with whom Cassens and Crawford had "a long-standing business relationship," having sent over the course of "many years … dozens of Cassens workers to him for opinions on whether the workers had job-related disabilities."[8] Margules was a family practice doctor, not an orthopedist, and the recipient, plaintiffs alleged, of "large sums of money for doing 'cut off' reports in workers' compensation litigation" with an "express or implied promise of future payment of money for doing such reports."[9] Margules, according to the plaintiffs' complaint, dutifully opined that Fanaly had no job-related disability relating to his shoulder, and the claims administrator notified Fanaly by mail that his claim was denied. Fanaly alleged this denial was fraudulent because (1) even if his shoulder problem was chronic, that was not a basis for denying his claim; (2) proof that he had injured his shoulder in the course of his employment had been presented; (3) Cassens and Crawford knew, or should have known, that Margules' opinion was an unreliable

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basis for denial of benefits, because he was not an orthopedic expert, and he was biased due to the amount of money "paid him over the years to examine Cassens' workers and testify against them in workers' compensation cases"; and (4) plaintiff's treating surgeons opined, based on exams and surgical review, that his shoulder pathology was work related.[10]

Plaintiffs' RICO claim was dismissed by the district court on a Rule 12 motion. The Sixth Circuit initially affirmed, but that decision was vacated upon the Supreme Court's ruling in *Bridge v. Phoenix Bond & Indemnity Co.*[11] that a civil-RICO plaintiff does not need to show that it detrimentally relied on the defendant's alleged misrepresentations. On reconsideration, the Sixth Circuit reversed the district court's dismissal of the plaintiffs' RICO claims.

RICO makes it a crime "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity[.]"[12] Basically, a "pattern of racketeering activity" requires proof of two things: (1) that the actions at issue be related, such as by "the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events"[13]; and, (2) the capacity for continuity, i.e., "a regular way of conducting or participating in an ongoing and legitimate RICO enterprise."[14]

The Sixth Circuit ruled that the plaintiffs had pleaded a pattern of racketeering activity. First, the alleged acts shared the purpose of reducing Cassens's "payment obligations towards workers' compensation benefits by fraudulently denying worker's compensation benefits to which the employees are lawfully entitled" through the acts of the same participants directed at the same victims, certain employees "eligible for workers' compensation benefits," and done by the same method, "fraudulent misapplication of the legal standards set forth" in the Michigan workers' compensation law.[15] Second, the alleged acts offered the opportunity for continuous repetition: "the legitimate business or part of the legitimate business of each of the defendants—addressing its employees worker's compensation claims for Cassens, worker's compensation claim administration on behalf of Cassens for Crawford, and offering his medical opinion on worker's compensation claims for Margules—is regularly conducted by fraudulently denying benefits to which the employees are entitled through the use of fraudulent communications by mail and wire."[16]

The court also ruled that the plaintiffs had sufficiently pleaded injury caused by the defendants' alleged RICO violations: deprivation of workers' compensation benefits and expenses for attorney's fees and medical care.[17]

The court further ruled that the Michigan workers' compensation law did not "reverse preempt" RICO, holding that the state and federal laws were congruent. The state workers' compensation law imposes sanctions

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on the denial of benefits to which an injured employee is legally entitled, an end also achieved by RICO, which led the court to assert that "the federal interest in protecting individuals against a patent of racketeering activity based on fraud is 'perfectly compatible' with the state interest in providing a certain remedy for employees who have suffered workplace injuries."[18] The court further held that the greater remedies available under RICO (treble damages and attorney's fees) did not raise any preemption issue.[19]

The "reverse preemption" analysis in *Brown* would appear to render inapplicable the exclusive remedy doctrine that drove the Kentucky Supreme Court's decision in *Reker*. Where there can be established a "pattern" of racketeering activity, *Brown* offers remedies for injured workers damaged by abusive and fraudulent practices in the handling of their workers' compensation claims.

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1 546 F.3d 347 (6th Cir. 2008).
2 100 S.W.3d 756 (Ky. 2003).
3 18 U.S.C. §§ 1961(1)(B), 1962(c), and 1964(c).
4 546 F.2d at 351.
5 *Id.*
6 Complaint ¶ 6.B. at p. 3. The plaintiffs' complaint can be reviewed at the *Kentucky Employment Law Blog*, *http://abelllaw.typepad.com/kentucky_employment_law/page/2/*.
7 Complaint ¶ 9 at pp. 5-6.
8 Complaint ¶ 11 at p. 6.
9 Complaint ¶ 6.B. at pp. 3-4.
10 Complaint ¶ 16 at p. 7.
11 128 S.Ct. 2131 (2008).
12 18 U.S.C. § 1962(c).
13 *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 240 (1989).
14 *Id.* at 243.
15 546 F.3d at 355.
16 *Id.*
17 *Id.* at 357.
18 *Id.* at 362, *quoting Humana, Inc. v. Forsyth*, 525 U.S. 299, 311 (1999).
19 *Id.* at 362.