

From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

Question: I represent an Ohio employer with an employee who had a serious injury at work. It turns out the employer did not have workers' compensation coverage. What is the extent of their liability, and can they be sued by the injured worker? Can they appeal a claim to court?

Employers with employees in Ohio who do not establish or maintain workers' compensation coverage are deemed "non-complying employers" pursuant to ORC Chapter 4123. If done with the purpose to defraud the Bureau of Workers' Compensation (BWC) or with knowledge that another person is facilitating a fraud, a failure to secure workers' compensation coverage is a felony. The State of Ohio can and does pursue fraud cases against non-complying employers, particularly those who choose to pay their employees "under the table," and jail time is a real possibility, particularly in more egregious cases or with repeat offenders.

From a civil standpoint, the claimant's right to compensation is the same as if the employer had coverage: an FROI-1 application for benefits will be processed in the same way, and (if allowed) the claimant receives the same benefits from the BWC. Those benefits are paid out of the Surplus Fund, and will later be assessed against the non-complying employer. Employers are responsible for all amounts paid, and the BWC will initiate proceedings against non-complying employers to secure these amounts. *R.C. 4123.75*. Judgments secured against non-complying employers will be deemed a lien upon real and tangible personal property of the employer located in the county where judgment is taken. *R.C. 4123.76*. The BWC will also record a "certificate of noncompliance" in the amount of the premium due in the county where the employer has property, and that certificate acts as a lien. *R.C. 4123.78*. Most importantly, from the standpoint of your client, non-complying employers lose the "statutory immunity" conferred by *R.C. 4123.74*, and are subject to suit for personal injuries arising from the wrongful acts, neglect, or default of the employer. This is true even if the claimant seeks and receives workers' compensation benefits. (The BWC retains the right to reimbursement for any amounts paid.) Non-complying employers also lose the right to certain common-law defenses, such as the "fellow servant doctrine," assumption of risk, and contributory negligence. *R.C. 4123.77*. Non-complying employers are also not permitted the benefit of certain statutory defenses provided by Chapter 4123, so these defenses (including intoxication) also may be limited or unavailable to defend against the claim. Any "Interested Parties" may also obtain injunctive relief to preclude further operations, and other penalties (such as precluding the enforcement of certain construction contracts) can be asserted without regard to fault. *R.C. 4123.79*.

The first step is to determine why no coverage was obtained. Does the client contend that his employee was in fact an independent contractor? Once an injury or occupational disease has occurred, employers can contest the claim administratively and, if necessary, perfect an appeal into the common pleas court pursuant to an *R.C. 4123.512* appeal. In some cases, such as where an employer contends that an employee is in fact an independent contractor, the employer is entitled to a jury trial on this issue. If no injury has occurred, it is usually best to secure coverage.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, you can contact me.

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