

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

**QUESTION: Can an employer sue the BWC for money damages for its negligence in handling a claim?**

Nearly every employer has at one time or another disagreed with the way the BWC has handled their claim. Some claims are allowed over the objection of the employer, or determinations are made with regard to wages or lost time, or an employer will contend that a claim is fraudulent, but the BWC will disagree. Recently, the Ohio Court of Appeals, Tenth Appellate District, considered a case where an employer did not simply voice its disagreement, but filed suit against the BWC seeking money damages for a breach of fiduciary duty.

*Automation Tool & Die, Inc. v. Ohio Bur. of Workers' Comp.*, 2016-Ohio-4882, concerned a claimant who claims to be injured in 2008. The BWC allowed his claim for "lumbar sprain" over the objection of the employer, and the claimant sought and received new allowances in 2009. The employer contended that the claimant was engaging in drug-seeking behavior, and received more than 14,000 doses of pain medication at a cost of \$30,000, in addition to other benefits and compensation paid by the BWC. In 2011, the employer learned that the claimant was working while claiming to be disabled, and hired an investigator to develop video evidence to this effect, which was turned over to the BWC's Special Investigation Unit. The BWC investigated the claim and declared an overpayment of some benefits, but did not seek a finding of fraud before the Industrial Commission. The employer did pursue such a finding, which was granted, and the entire claim was retroactively denied. The employer proceeded to file a complaint for declaratory judgment and equitable relief in the Court of Claims, alleging breach of statutory and fiduciary duties and seeking restitution for costs associated with the investigation. The BWC moved to dismiss, contending that it was immune from suit and the claims were barred by the statute of limitations. The Court of Claims granted the BWC's motion, prompting an appeal as of right to the Tenth District.

The Tenth District affirmed, finding that the Complaint failed to state a compensable claim against the BWC. The Court rejected the employer's contention that the BWC acted as an insurer, and thus owed the employer a fiduciary duty, finding that the duty to investigate fraud or illegalities pertaining to the workers' compensation system is a public duty. The BWC's sole fiduciary responsibility is to the State Insurance Fund, and the BWC cannot be held to respond in damages to a private individual arising from a failure to investigate a claim. The Court also specifically found that the employer failed to plead the elements of a "special relationship" that would exempt the BWC from immunity under Ohio law, although it later concluded that such a relationship did not exist.

*Automation Tool* stands for the proposition that investigation of a workers' compensation claim is a public duty for which the BWC cannot be held liable as a matter of law, even when it is negligent in performing that duty. At best, an employer can seek a retroactive denial of the claim and/or an overpayment with regard to compensation. If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

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