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DISTRICT COURT CREATES CONFLICT BETWEEN INSURER AND INSURED OVER SAFETY INSPECTION REPORTS

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INTRODUCTION

In July 2010, OSHA began an inspection of Haasbach, LLC following the death of two teenage workers at a Mt. Carroll, Illinois grain elevator. The employees became entrapped in corn more than 30 feet deep in the elevator and suffocated. During the OSHA investigation, OSHA issued a document subpoena to Haasbach's workers' compensation insurer, Grinnell Mutual Reinsurance Co., seeking inspection reports and other documents related to Haasbach. Grinnell objected to the subpoena, arguing in part that loss control inspection reports created by an insurer are privileged documents that may end up in the hands of plaintiffs' lawyers or other outside parties if turned over to OSHA.

On May 2, 2011, the U.S. District Court for the Northern District of Illinois rejected Grinnell's arguments and upheld OSHA's subpoena, requiring Grinnell to provide the requested documents. *Solis v. Grinnell Mut. Reins. Co*., No. 11 C 50014, 2011 WL 1642534 (N.D. Ill. May 2,

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2011). This article discusses the potential effects of this decision on insurers and the documents prepared in the course of the insurer/insured relationship.

THE RELATIONSHIP BETWEEN WORKERS' COMPENSATION AND OSHA

Generally speaking, workers' compensation systems are creations of state law and are entirely separate from occupational safety and health standards. In some situations, however, the two systems overlap. For example, some states require workers' compensation insurers to provide consultation services to insureds whose employee injury rate (also referred to as an experience modification rate) exceeds a certain level. These consultations are designed to assist employers in improving their workplace health and safety programs with an eye toward reducing employee injuries. Often, workers' compensation insurers will provide these consultations even where not required by state law.

Thus, in some cases, workers' compensation insurers' loss control efforts align with OSHA's overall goal of improving employee safety. However, the insurer has a fiduciary duty to act in the best interest of its insured. While these interests may align, conceptually, the insurer is in a tight spot when OSHA begins investigating an insured. Loss control reports from insurers, for example, may be used by OSHA to prove that the insured had prior knowledge of a particular condition or practice that OSHA believes is violative of one of its regulations. In that case, the insurer's report is used against the insured, to whom the insurer owes a fiduciary obligation. The blurring of these interests creates concern over OSHA's ability to access and use insurers' reports during the course of an investigation.

OSHA'S SUBPOENA POWER

Under the Occupational Safety and Health Act, 29 U.S.C. § 657(b), OSHA is empowered "to require the attendance and testimony of witnesses and the production of evidence under oath." Where the recipient of a subpoena under Section 657(b) objects to the subpoena, the federal courts are authorized to order the subpoena recipient to comply. In the *Grinnell* case, OSHA issued a subpoena to the employer's workers' compensation insurer to obtain site safety inspections, applications for insurance coverage, and correspondence with the insured. Over Grinnell's objection, the court held that the subpoena was proper in that all of the requested documents "reasonably relate to the investigation of the incident and the question of OSHA jurisdiction."

The court also rejected Grinnell's arguments that the reports were privileged and would result in "chilling effect" on employers' willingness to allow their insurers to conduct safety inspections to determine the risk of loss. The court avoided resolving the "chilling effect" argument by calling it a policy decision "to be made somewhere other than in the federal courts." The court also held that insurers' reports are not necessarily privileged. The court acknowledged, however, that such reports may be privileged if they are conducted at the direction of an attorney.

RECOMMENDATIONS

The *Grinnell* decision has the potential to drive a wedge between workers' compensation insurers and their insureds when it comes to loss control activities. Therefore, it is recommended that insureds who consent to safety inspections by their insurers take the following steps to ensure that those inspections do not create liability under the OSHA Act:

- Unless compelled by state law, authorize an insurer's inspection only after consulting with legal counsel;

- Request an opportunity to review a draft report from the insurer and review the draft carefully to identify potential factual errors or editorializing;
- Ensure that any report issued by the insurer is addressed to the insured's legal counsel and that the report is marked as Privileged and Confidential. The report should not be distributed beyond the insured's decision-makers with regard to employee health and safety;
- If the report identifies hazards to employees or areas of non-compliance with occupational safety and health regulations, correct the condition immediately, and document all efforts to correct the conditions or respond to the insurer's recommendations. Taking corrective measures is not an admission that the condition violated any statute or regulation, but will help avoid "high-gravity" OSHA citations;
- Ask your insurer to notify you, before responding, of any subpoena received by OSHA or other third party, and ask for a copy of any documents provided.