



Fighting Workers Comp And Winning

by Richard Cooley

As a small contractor, it's important that I accurately predict my expenses. I can do that now. But I used to have one expense that was about as predictable as the weather: workers compensation.

Like many contractors, I get audited every year by my insurance carrier. The auditor used to go through my books, prepare the audit, have me sign it, and a few weeks later I would be surprised with a bill larger than anticipated. Often the unexpected charges were premiums charged against wages paid to subcontractors whom I couldn't show were insured, and so who were considered by my insurer to be risks under my policy. I tried to learn the rules so that I'd know how to avoid these charges (or so I'd at least know which subs I was going to end up covering); but no matter how much I tried to learn about the system, I couldn't predict my charges.

Both my insurance agent and my carrier told me it was simple. (I work in New York State, but most of the basics in this article apply in most states.) All I had to do, they said, was multiply my uninsured payroll (employees and uninsured subcontractors) by the rates set by the rating board for each trade, and I would have my liability. They also advised me to keep it safe and simple — use only subs that carry their own workers comp, and get documentation to show it. That way, they said, I would be liable only for my own employees.

I tried to do this, but still ended up with unexpectedly high bills. Usually they would be \$500 or \$600 higher than expected. Though I hated writing the check, I would figure it was an amount I could live with. I figured I couldn't afford the time to haggle over these charges with the insurance company, especially since it seemed I would lose anyway.

After my 1990 compensation audit, however, I was given a bill for around \$3,700 in unpaid premiums. I was expecting a bill for \$600. With \$3,100 at stake, I decided to take the time to haggle. It ended up taking nine months, but I got all but \$600 of it erased.

Running Down the Facts

I started with a number of phone calls to my agent, my carrier, the state compensation board, the state insurance rating board, and the state office of consumer

affairs. I told them I suspected I was being charged for covering people I shouldn't really be charged for, and tried to get them to clarify the rules for me. They all proved better at referring me elsewhere than answering my questions.

Things didn't start moving until I hired a lawyer. Suddenly the various bureaucracies involved seemed to take me more seriously: Here was someone who wasn't going to go away. A lot of the workers comp regulations are gray, and I suspect what often decides an inquiry is how big a fuss you are willing to make.

Of course, the lawyer was more experienced in querying those involved in the dispute about the critical issues. He was able to put his finger on the regulations and rules that were being overlooked or misinterpreted by my carrier, and which were resulting in my overcharges. Specifically, he found that:

- I was incorrectly charged \$900 for covering the employees of an uninsured, but incorporated, plumbing and hvac sub I often used. Under New York State law, incorporated companies are required to carry their own comp insurance, and other companies cannot be charged for it.
- I was incorrectly charged \$1,600 for covering subs who had no employees — a mason, a drywall taper, a trim carpenter, and a painter, all of whom I use often, but who also work for others and who are independent contractors. New York law does not require that I provide comp insurance for such sole proprietors without employees.
- I was incorrectly charged another \$400 for charges relating to work done on a shop I was building on my own property. Apparently, a complicated interplay of insurance law, at least in New York, has it that a contractor does not have to pay workers comp for work on a property he owns — presumably other insurance already covers it.
- Finally, when these overcharges were corrected, I was relieved of another \$150 or so that was basically service charges connected with the other overcharges.

Getting over \$3,000 in charges canceled improved my mood.

What made me feel even better was having a firm grip on the rules involved and why I had been overcharged, so that I could prevent these overcharges from happening again.

It Pays To Know Your Stuff

I now keep my books on labor and sub charges very carefully, tracking the charges for which I am truly liable. This, and knowing what areas I have been overcharged for before, helps tremendously when the auditor comes around for his yearly visit. Dealing with this audit visit properly, I believe, is a key to preventing future problems.

When my auditor comes around, I show him both my own payroll records and the ledger on which all my chargeable subcontractor payments are listed. This ledger does not include sole proprietors working alone, and it does not include subs for whom I have proof of insurance. It does show what part of each payment is for labor, so that material costs don't get included in the basis for my charges.

The auditor then compiles the chargeable wages straight from this ledger and my payroll. He might also flip through my checkbook to check the payments there against the ledger. Anything that doesn't match, we hash over. So far, with my better recordkeeping and knowledge of the rules, I've won all my small disputes. I've had two audits since my corrections of the overcharges, and haven't had any problems.

What if he does find a problem? If the auditor disagrees with my listed chargeable wages, I'll tell him, "Fine" — he can turn in his audit to the carrier, but I won't sign it. Here I'm gambling a bit on how the audit game works: My auditor works piecemeal, and, I'm guessing, doesn't get paid for a completed audit unless I sign it. My persistence and confidence in my numbers, I like to think, has made it clear to the auditor he won't leave with my signature unless I totally agree with the audit. I think this may be one reason he's been willing to take my objections into account.

Doing Your Homework

To deal with auditors with this sort of confidence, of course, you have to be on top of your numbers

and have everything well-documented, so that if the auditor questions something, you can show him why you're right. This means having the documentation and financial records to back yourself up.

Substantiate those subs. If you don't want to have a sub's wages included in the chargeable wages, you need to be able to show either that the sub carries workers comp insurance, or that he or she is an independent contractor who works alone.

For subs with employees, this means getting copies of their certificates of workers comp insurance. I won't contract with or pay a sub unless I have a current copy of his certificate, or unless his price and/or work is so good I'm willing to carry him for the length of the job in question.

For subs working alone, your problem will be proving that a) they are working alone, and b) they are truly independent contractors and not employees. Establishing these conditions with absolute certainty is often difficult, but there are a few crucial pieces of documentation that will usually convince your auditor. One is a certificate of general liability insurance showing the sub either has a dba (doing business as) or is incorporated. If he's incorporated, then he is an employee of his own company and must, by law, carry his own compensation policy.

Another way to show a sub is independent is by doing business only under individual contracts for each job, which describe the work to be done and a payment schedule. It helps if they use their own tools, set their own hours, and are self-directed. According to the New York compensation board, it also helps your case if your subs supply their own materials.

I also make sure to get my bills from subs broken down into labor and materials; I won't pay a sub's bill that's not itemized like this.

All this has paid off. I've saved thousands of dollars. And I now know how to predict my charges and avoid being overcharged, so I can set aside the right amount of money before the bill comes at the end of the year.

Many contractors are overpaying. Most auditors know little about what to look for. Your best protection is to understand the rules, and thus your own liability, and impress upon the auditor and your carrier that you won't agree to anything more than the proper charges.

If that doesn't work, call your lawyer. For about \$400, mine saved me many thousands. ■

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