

# LAWYERS WEEKLY VERDICTS



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## INSURANCE

In a case that highlighted a disturbing trend of companies using incentive programs to minimize on-the-job injury reports, a South Dakota man recently won \$5 million in a bad faith claim against the construction company he worked for.

After a six day trial, Pennington County jurors ordered Hills Materials and its parent company Oldcastle Materials to pay Ron Hubbard \$65,000 in compensatory damages and \$5 million in punitive damages.

The plaintiffs claimed that a supervisor, spurred on by company policies and cash incentives, actively tried to get the insurance company to fight paying Hubbard's workers' compensation claims for surgeries related to carpal tunnel syndrome.

"This case examines the widespread practice of large construction companies providing cash incentives and bonuses to supervisors for underreporting injuries," said Michael Abourezk, who represented the plaintiff along with Alicia Garcia. "It's a very widespread practice all over the U.S. They're touted as safety programs, but what they really do is encourage people to minimize injuries to lower premiums and get bigger contracts for the construction companies."

He said the case also shows how stone-walling a \$5,998 claim can lead to a \$5 million verdict.

Defense counsel did not return requests for comment on the case. However, in published reports immediately following the verdict Edward Carpenter said the company planned to appeal.

## Aiding And Abetting

Hubbard, a welder, required two surgeries and expected workers' compensation insurance to cover the costs. But Hills Material fought him every step of the way, according to Abourezk, and convinced the insurance company, Liberty Mutual, to deny the claim.

Since Liberty Mutual settled quickly, the plaintiffs had to develop a legal strategy for going after the company itself.

"Really, the insurance company was the ventriloquist dummy in this case. The employer was trying to speak through them," Abourezk said.

He said that Hills Material defended its action in part by saying that it wasn't responsible for granting or denying claims, that that was the role of the insurance company.

"They said, 'The insurance company handles claims. All we did was tell them what we thought, and we had a right to do that. If they didn't handle the claim the right way, then they are the ones who should be held accountable,'" Abourezk said.

Using a little-used theory, Abourezk argued that the construction company "aided and

### THE CASE

**Name:** Hubbard v. Hills Materials Co.

**Court:** Seventh Judicial Circuit, Pennington County, S.D. ( )

**State:** South Dakota

**Judge:** Judge Janine M. Kerr

**Attorney(s):** Michael Abourezk, Alicia Garcia of The Abourezk Firm in Rapid City, S.D., for plaintiff; Edward Carpenter of Costello, Porter, Hill, Heisterkamp, Bushnell & Carpenter in Rapid City, S.D., for defendant.

**Expert(s):**

**Injuries alleged:**

**Amount of award:**

**Date of award:** Sept. 27, 2005

abetted in the commission of a tort" when it tried to convince the insurance company to deny medical claims from Ron Hubbard. The attorneys stumbled upon the theory while doing research on bad faith claims.

"We've all heard of aiding and abetting in the criminal context, but I'm embarrassed to say that I didn't even know it existed in the civil context," said Abourezk. "It's not really an exotic theory and it's recognized by the Restatement of Torts. I'm not sure why it isn't used more. It simply says that if a party gives substantial assistance or encouragement to another party in the commission of a tort they can be held liable for the tort."

In this instance, Abourezk and Garcia wanted to hold the construction company and not the insurance company, which had settled earlier, responsible for preventing their client from collecting benefits for a work-related injury.

"In this case we had an employer that vigorously got involved with calls to the insurance company asking them to deny the claims in the workers' compensation case," he said. "They even hired a lawyer to get the insurance company to deny the claim and they offered to let their attorney represent the insurance company in the case. Basically they wanted their own hand-picked hit man."

Key evidence included documents showing that Hills Materials failed to report employees' injuries to the South Dakota Department of Labor or the federal OSHA, and actively encouraged workers to not take days off from work because of injuries.

"They were not recording or reporting claims, they had a system of underreporting injuries and the reason was to try and beat the system," said Garcia.

One former employee testified that in order to reduce the number of days lost to injury, a supervisor came and picked him up the day after a surgical procedure and had him sit in the office all day.

In 1998 Hills Material was bought by Oldcastle, a Washington D.C.-based company. Oldcastle had goals in place of less than one day of lost time due to injury for every 100 employees. In 1999 the company paid nearly \$400,000 in incentive bonuses to 41 supervisors, said Garcia and Abourezk. In 2000, the company paid out more than \$400,000 in similar bonuses.

Hubbard's supervisor earned a bonus of \$10,000 in 2000, the year he was lobbying Mutual Liberty to deny Hubbard's medical claims.

"You start to see all kinds of things taking place so people can get these bonuses," Abourezk said. "By cross-examining their experts and presenting literature, we were able to show that there is underreporting because of these incentive programs."

He said large construction companies are more likely to get lucrative contracts if they can show a cleaner safety sheet.

"It's all part of a bigger picture. In the highway and construction industry, if you have a clean report card you can get more and bigger contracts because the insurance companies are very involved," said Abourezk. "When companies issue bids, the insurance companies tell them they can lower premiums and encourage them to screen their contractors and subcontractors and encourage them not to take bids from companies without a clean contract. So this can mean millions. If you lie you have an unfair advantage."

**Plaintiff's Attorneys:** Michael Abourezk and Alicia Garcia of The Abourezk Law Firm in Rapid City, S.D.

**Defense Attorney:** Edward Carpenter of Costello, Porter, Hill, Heisterkamp, Bushnell Carpenter in Rapid City, S.D.

**The Case:** *Hubbard v. Hills Materials Co.*; Sept. 27, 2005; Seventh Judicial Circuit,

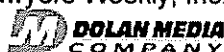
Pennington County, S.D.; Judge Janine M. Kern.

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