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Claims Adjuster, TPA Could Face Criminal Charges for Worker Fatality

The Romano v. Kroger Co. Case and Avoiding Bad Faith

By Everette Lee Herndon, Jr.

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The egregious mismanagement of a California workers' compensation claim is being blamed for an injured worker's severe infection and resultant death.

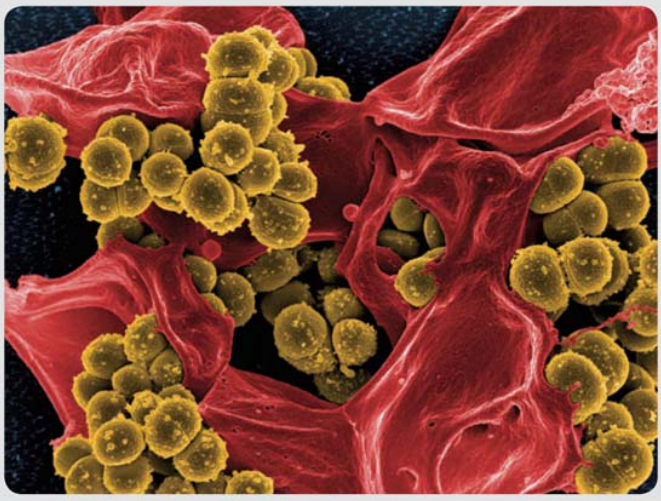
The ongoing case is drawing ire from various associations, including the California Applicants' Attorneys Association (CAAA), which is lobbying that criminal charges be filed against Sedgwick Claims Management Services, the third-party administrator involved in the claim, as well as one of its adjusters.

The initial workers' compensation claim originated when Charles Romano injured his shoulder and cervical spine on Dec. 20, 2003 while stocking shelves at a Ralph's grocery store (part of The Kroger Co.) in Camarillo, Calif. After undergoing surgery for the resultant injuries on August 29, 2005, Romano contracted methicillin-resistant straphylococcus aureus (MRSA), which not only caused renal and pulmonary failure but also paralysis below the shoulders (from C8 down).

Romano later sought treatment for the serious infection at the Ventura County Medical Center, where he had no choice but to use Medi-Cal—the state's version of Medicaid—because Sedgwick refused to authorize treatment. In fact, Medi-Cal paid for Romano's medical bills dating from November 2005 through February 2007, ultimately picking up a tab for $300,000.

Fatal Consequences

On October 25, 2006, a workers' compensation judge issued an amended findings and award, ruling that the MRSA infection was a "compensable consequence" of Romano's work injury. Under the judgment, Sedgwick was required to pay for all reasonable expenses related to medically treating the infection. However, the self-insured employer—Ralph's, a Kroger company—as well as Sedgwick CMS, the acting TPA, failed to comply. Ostensibly ignoring the judge's orders, the entities continued to deny and delay Romano's treatment.



Methicillin-resistant Staphylococcus Aureus (MRSA) is a type of staph bacteria that is resistant to certain antibiotics called beta-lactams. Most MRSA infections occur in people who've been in hospitals or other health care settings, such as nursing homes and dialysis centers. When it occurs in these settings, it's known as health care-associated MRSA (HA-MRSA). HA-MRSA infections typically are associated with invasive procedures or devices, such as surgeries, intravenous tubing or artificial joints.

Sadly after numerous hospitalizations, Romano's condition continued to deteriorate, leading to his death on May 2, 2008. He died at Community Memorial Hospital from cardiorespiratory arrest, respiratory failure, and pneumonia, all caused by his health care-associated MRSA infection and related medical conditions. Remarkably, Sedgwick denied payment until the bitter end, refusing to grant treatment at Community Memorial.

As of April 16, 2013, the date of the Opinion and Decision After Reconsideration, the medical bills had still not been paid, even after the October 25, 2006 award.

Legal and Ethical Oversights

In May of this year, the state Workers' Compensation Appeals Board (WCAB) referred Sedgwick CMS to the Division of Workers' Compensation's Audit Unit for "unreasonably delaying or denying treatment for a patient who was dying from an infection he contracted after undergoing surgery for a compensable work injury."

In the decision, *Romano v. Kroger Co.*, the WCAB charged that Sedgwick demonstrated "blithe disregard for its legal and ethical obligations and a callous indifference to the catastrophic consequences of its delays, inaction and outright neglect."

The WCAB upheld penalties imposed against Sedgwick CMS in the amount of the maximum penalty allowed by law—$10,000 for each of 11 instances of unreasonably delaying medical care.

Covering the case, Greg Jones, the Western Bureau Chief at WorkCompCentral, reported in "California Applicants' Attorneys Association Wants TPA, Adjuster Prosecuted for Workers' Death," that the CAAA is now urging the Ventura County District Attorney's Office to file criminal charges against Sedgwick Claims Management Services and Theresa McDivitt, the claims adjuster who handled Romano's case.

Jones quoted Jill Singer, the president of the central coast chapter of the CAAA, as saying McDivitt "had callous indifference and reckless disregard for approving necessary medical treatment and went so far as to deny a court order."The following is an excerpt from Jones's article:

"The WCAB decision says McDivitt on several occasions denied or refused to authorize treatment 'without consulting a medical professional and without referring the request for treatment for utilization review. [Moreover] in one case, the Appeals Board said McDivitt refused to authorize a bi-level positive air pressure machine because Romano's paralysis was affecting the muscles that control his breathing based on her own interpretation of the medical records. In another case, Sedgwick didn't approve Romano's hospitalization in April 2008 for potential heart failure because the adjuster said she had no clue as to why he was being hospitalized."

The Specter of Bad Faith

Remarkably, in the *Romano v. Kroger/Sedgwick* case the threat of fines, penalties and audits apparently did nothing to deter the TPA from what the WCAB, in its April 16, 2013 Opinion and Decision After Reconsideration, called "a callous indifference to the catastrophic consequences of delays, inaction and outright neglect," as noted.

The WCAB adds that "the adjuster studiously avoided information that might lead to the provision of benefits, a tactic that may have saved her employer some money in the short run—at great cost to Mr. Romano—but which clearly violated the demands of section 4600."

The WCAB further stated the Defendant's Petition for Reconsideration "cites no evidence in the record indicating that it made any serious, timely investigation into the applicant's April 2008 hospitalization. This breach of defendant's affirmative statutory and regulatory duties exemplifies defendant's efforts to evade liability, through a see-no-evil, hear-no-evil, passive approach to claims administration in a catastrophic, life-and-death case…"

In some other states, when the courts or the legislature recognized that fines, penalties and audits were not persuasive in convincing the defendants to properly handle worker's comp claims and provide the injured worker with the needed medical care and wage benefits, the tort of bad faith has been allowed. California may soon follow this path.

Avoiding Bad Faith

So what can we, as an industry, learn from the Romano tragedy? Whether your state follows the exclusive remedy rule or allows bad faith lawsuits, the workers' compensation claim should be handled in such a manner as to preclude any allegations of improper conduct.

When the claim is reported or made known to the employer and/or carrier, the investigation to determine compensability should be prompt, objective, and reasonable. If the injured worker's version of the accident and injury indicates a compensable claim, and there is no reasonable basis or red flag to indicate otherwise, then the adjuster should proceed with accepting the claim and providing benefits as promptly as possible.

James J. Markham, editor of *Principles of Workers Compensation Claims*, an Insurance Institute of America textbook, explains the Burden of Proof:

In most areas, the claimant has the minimal burden of proof to show that he or she sustained an accidental injury arising out of and in the course of employment. This is not a rigorous standard. A claimant's uncorroborated testimony may establish a prima facie case of compensability. Once the claimant meets this burden of proof, the burden shifts to the employer/insurer to show why the claimant's injury is not compensable.

If there is a reasonable question or red flag indicating possible non-compensability, then an investigation should be promptly initiated and completed. The adjuster should try as hard or harder to prove compensability as he does to prove non-compensability. The claims handler should not focus solely on finding an excuse or basis for denial or delay. It would be bad faith to ignore facts supporting compensability while trying to find facts to support a denial.

A denial or delay in providing benefits should not be based on speculation, rumor or ambiguous information. An investigation and coverage decision cannot rely on a gut-feeling or a doubt by the employer or the adjuster. Any denial or delay should be based on documented and proven facts and explained as such in the file. If the adjuster cannot clearly list the facts and proof being relied on to deny or delay the claim, then strong consideration should be given to accepting and paying the claim without delay.

To do otherwise is to invite what has become a common result—fines, penalties, audits or a lawsuit for bad faith. If your state has not allowed bad faith lawsuits in workers' comp cases, an egregious enough case might be a tipping point.

Workers' Comp and Bad Faith

The delay or denial of benefits may result from an understaffed claims office, an overworked adjuster, a poorly trained adjuster, a vindictive employer, an improper incentive program, or any number of other *unacceptable* reasons.

Some of the less-than-ideal claims handling resulting from these reasons and others have led legislatures to impose fines and penalties and audits on defendants in an attempt to convince the defendants to properly adhere to the intent of the workers' comp system. A problem with the use of fines and penalties is that some states have the fines and penalties payable to the governmental body and not to the injured worker.

While fines against the carrier or self-insured may have some deterrent effect, they do little or nothing to alleviate the suffering of the injured worker or to compensate him for being deprived of his or her benefits by the wrongful act of the claims handler.

Many courts have ruled that the workers' comp carrier has a duty of "good faith and fair dealing" to the injured worker under the workers' comp policy in the same manner as to the named insured under any other insurance policy or contract.

If (and when) these legislative measures fail some of the legislatures or the courts may conclude that a stronger measure must be taken, namely to allow bad faith tort claims to be filed outside of the workers' comp administrative system. The rationale expressed by some courts has been that the injury or damage caused by the claims handling arouse out of handling the claim as opposed to arising out of or in the course of the injured worker's employment.

In some states, the courts have reasoned that subsequent to the workers' comp accident and injury, if the unreasonable claims handling causes additional pain, suffering, distress or damages

in addition to the initial comp injury, the responsible party can be sued under a tort theory for knowingly, willfully or recklessly inflicting injury or damage. Some states will allow the tort claim for bad faith only if the injured worker is successful within the compensation system, whereas other states will allow suit for damages because of unreasonable delay and or denial even if the claim is eventually found to be non-compensable.

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Everette Lee Herndon Jr. is a claim consultant and expert witness who works primarily with insurance claims handling, coverage, and bad-faith cases. Herndon was an adjuster for more than 25 years and is a member of the California Bar. He may be reached at www.leeherndon.com; herndon@ranchomurieta.org