

# Workers' Comp & Bad Faith: Unacceptable Oversights

## The Insurer's Duty and the Romano Case

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The philosophy behind and the purpose of the enactment of the workers' compensation statutes in the various states was, and still is, to promptly provide benefits to an injured employee for covered and compensable injuries with a minimum of delay and hassle.

The workers' compensation system started out with an exclusive remedy provision that would not allow the injured employee to collect workers' comp benefits and then sue the employer under a tort theory for damages in excess of the workers' compensation benefits. If the employee elected to pursue workers' comp, then workers' comp would be the exclusive remedy allowed to him or her.

When benefits are not properly (and promptly) rendered, many states provide for penalties and fines while still retaining the exclusive remedy provision. For example, California can—and will—impose fines and penalties but does not allow bad faith claims.

A California court stated the underlying philosophy of workers' comp in *Hutchinson v.*

*Workers Comp Appeals Board, 209 Cal. App. 3<sup>rd</sup> 372 (1989):*

*The underlying policy of the workers' compensation statutes and their constitutional foundation as well as the recurrent theme of countless appellate decisions on the matter, has been one of pervasive and abiding solicitude for the worker.*

The states that do allow bad faith claims generally require that the acts of the employer/carrier rise above the level of mere negligence. Acts require a level of both negligence and knowing unreasonableness, such as willful, wanton, conscious, or reckless disregard of the consequences of the action.

Some states, Hawaii for example, will allow bad faith tort claims to be pursued if the actions of the claims personnel meet the negligence standard of unreasonably denying or delaying benefits.

Hawaii statutes actually provide for a presumption of coverage for a workers' compensation claim unless and until proven otherwise. In most jurisdictions the presumption is part of the industry standard, subject to reasonable evidence to the contrary. Hawaii Revised Statutes Chapter 386-85 provides:

***Presumptions.*** *In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary:*

- (1) That the claim is for a covered work injury*
- (2) That sufficient notice of such injury has been given,...*

Steven Plitt, a Phoenix defense attorney, (in his Claims Journal article of January 30, 2012 entitled **Essentials: To Sue or Not To Sue<sup>1</sup>**) elaborates:

*In the following states, the courts have held that the workers' compensation insurer is entitled to immunity under the exclusive remedy provisions of the relevant state workers' compensation act: Alabama, Arkansas, California, Connecticut, District of Columbia, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, Nebraska, New Mexico, New York, Pennsylvania, Rhode Island, South Carolina and Washington.*

*The states whose courts have allowed a common-law bad faith cause of action against workers' compensation insurers are: Arizona, Colorado, Delaware,*

*Hawaii, Iowa, Minnesota, Mississippi, Montana, Nevada, North Carolina, Ohio, Oklahoma, South Dakota, Texas and Wisconsin.*

New Mexico, which does not allow bad faith comp claims, publishes a booklet titled, **Remedies and Responses to Improper Practices or Bad Acts**<sup>ii</sup>. In the booklet, the state asserts that for the workers' comp system to function as designed, everyone must be honest and trustworthy:

*The workers' compensation system is intended to provide injured workers, quickly and efficiently, with the medical care and indemnity benefits to which they are entitled, at a reasonable cost to their employers. For the system to function at its best, all participants have to be honest and trustworthy. That is a general standard, and it applies to everyone in the system.*

The workers' comp system in the various states will work as long as *all participants* are honest and trustworthy. When parties to the system forget and depart from the philosophy and purpose of the comp system is when problems arise which can lead to fines, penalties, audits or bad faith claims.

## **THE DUTY TO INVESTIGATE**

If the worker makes a claim for a non-existent, inflated or non-work-related injury, then the defendants—the employer, carrier, and claims adjuster—hold the purse strings, most of the power and have a huge bank account with which to investigate and prove that the claim is bogus. There is a definite disparity of bargaining power between the employer/carrier and the injured worker. The employer/carrier must, as many courts have ruled, act in good faith and deal fairly with the parties to the insurance contract, including the injured worker.

If there is a reasonable basis to believe that the claim does not arise out the employment and/or did not occur in the course of employment, then the defendants have a duty to investigate and deny if appropriate. Delaying or denying benefits is appropriate if and only if the defendants promptly, properly and objectively investigate and evaluate the claim and document the basis for delay or denial.

The workers' comp system was basically designed to be non-adversarial and for the defendants to properly and honestly pay compensable claims without forcing the injured worker to jump thru needless hoops or file for hearings when benefits are delayed or denied. The defendants should not force the injured worker to file for a hearing to collect benefits, unless the

defendants have a genuine and reasonable belief, based on a proper and timely investigation, and have documented a reasonable basis to contest the claim as non-compensable.

## **PAYING CLAIMS, NOT BOLSTERING PROFITS**

The temptation on the part of one or more of the defendants to delay or deny comp benefits to further their own financial gain can lead to the mishandling of legitimate claims. The employer, carrier or adjusting outfit may have an incentive or bonus program tied to the reducing the number of comp claims or reducing the benefits paid.

In the article, **Slouching to Gomorrah: Adjuster Pay Plans and Bad Faith**<sup>iii</sup>, which appeared previously in *Claims Magazine*, Kevin Quinley, CPCU, made some interesting points. Although he was addressing insurance carriers and claims adjusters, the same rationale goes for employers, especially in workers' comp cases.

*The job of the claims department is to pay claims. The adjuster's job is not to turn a profit, to advance a company's A.M. Best rating or to max out on the incentive compensation plan. Once these factors start seeping into the adjuster's consciousness at the file-handling level, mischief creeps in. Dysfunctional incentives drive suspect claim practices.*

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 of a number of other unacceptable reasons.

Some of the claims handling that has resulted from these reasons and others 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 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 workers' employment.

In some states, the courts have reasoned that subsequent to the worker's 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. Certain states will allow the tort claim for bad faith only if the injured worker is successful within the comp 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.

## **ROMANO vs. KROGER & SEDGWICK CMS**

A California case still winding through the judicial system offers insight. The 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.

In his recent article, **California Applicants' Attorneys Association Wants TPA, Adjuster Prosecuted for Worker's Death**<sup>iv</sup>, Greg Jones, the Western Bureau Chief with WorkCompCentral reports that:

*In May, (2013) the (California) Workers' Compensation Appeals Board 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 said 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 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 staphylococcus 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.

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 industrial 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.

For complete details please refer to the April 16, 2013 **Opinion and Decision After Reconsideration**<sup>v</sup> of the WCAB in the case of **The Romano Trust, on behalf of Charles Romano, deceased vs The Kroger Co. dba Ralph's Grocery Co. and Sedgwick CMS**. (You can Google *Romano v Kroger*)

## **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 who handled Romano's case.

## **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 above.

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 workers' 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**<sup>vi</sup>, 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 basis or red flag indicating possible non-compensability, then an investigation should be promptly initiated and completed. The adjuster should give at least equal consideration to the injured worker and 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.

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Footnotes:

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- i. Steve Platt, **Essentials: To Sue or Not To Sue**, Claims Journal, January 30, 2012
  - ii. New Mexico, Worker's Com p, Booklet, C5 - **Remedies and Responses To Improper Practices or Bad Acts**
  - iii. Kevin Quinley, **Slouching to Gomorrah: Adjuster Pay Plans and Bad Faith**, *Claims Magazine*, October 2004
  - iv. Greg Jones, Western Bureau Chief, WorkCompCentral, **California Applicants' Attorneys Association Wants TPA, Adjuster Prosecuted for Worker's Death**, Workers' Compensation Institute, June 20, 2013
  - v. California Workers' Compensation Appeals Board, **Opinion and Decision After Reconsideration, Romano v Kroger**, April 16, 2013
  - vi. James J. Markham, editor, **Principles of Workers Compensation Claims**, an Insurance Institute of America textbook, First Edition, 1992