Section L

Work Comp & Bad Faith

Emily Anderson
RSH Legal
425 2nd St. SE, Ste. 1140
Cedar Rapids, IA
eanderson@fightingforfairness.com

11 Answers to Your Burning Questions about Bad Faith

Emily Anderson
RSH Legal
425 Second Street SE
Cedar Rapids, IA 52401
Eanderson@fightingforfairness.com
www.fightingforfairness.com

In 1988, the Iowa Supreme Court recognized the tort of first-party insurer bad faith—the case before it involved an uninsured motorist insurance policy. *Dolan v. Aid Ins. Co.,* 431 N.W.2d 790, 794 (Iowa 1988). Four years later, the Court extended it to the workers' compensation context, holding that injured workers could pursue bad faith claims against workers' compensation insurance carriers. *Boylan v. Am. Motorists Inc.*, 489 N.W.2d 742, 744 (Iowa 1992). In extending the tort, the Court relied in part, on the statutory obligations placed on insurance carriers to act reasonably in providing workers' compensation benefits, including in Iowa Code sections 86.13 (penalty) and 85.27—an affirmative obligation to provide medical care.

Bad faith law has taken some twists and turns since *Dolan*, but a few things have remained the same: (1) because one of the legal elements is typically decided as a matter of law, a case will have to pass summary judgment and directed verdict; (2) the damages are unique and must justify the cost of bringing the claim; (3) how the workers' compensation attorney chooses to handle the underlying workers' compensation claim can have a significant impact on the bad faith claim.

If you believe the insurance company has acted unreasonably in handling your client's workers' compensation claim, and you are considering bringing a companion bad faith, here are 11 answers to questions you may have.

(1) Insurance companies are bad actors, so it should be easy for a jury to find bad faith, right? *Don't exactly.*

In order to prove first-party bad faith, the Plaintiff must prove all the following:

(1) The defendant denied the plaintiff's claim.
(2) There was no reasonable basis for denying the claim.
(3) The defendant knew or had reason to know that there was no reasonable basis for denying the claim.
(4) The denial was a cause of damage to the plaintiff.
(5) The nature and extent of the damage.

Element number two—there was no reasonable basis to deny the claim—is an "objective" test, not a subjective one. Whether the insurance company had an objectively reasonable basis to deny the claim will *typically* be decided by the court as a matter of law. *See Reuter v. State Farm. Mut. Auto. Ins. Co*., 469 N.W.2d 250, 255 (Iowa 1991); *but see Zimmer v. Traveler's Ins. Co.*, 521 F. Supp. 2d 910, 927 (S.D. Iowa 2007) (holding there is no rule that a directed verdict must be entered in a bad faith claim).

The Iowa Supreme Court has held, "'[T]he insurer should be entitled to a directed verdict in its favor on the insured's bad faith claim unless the insured is entitled to a directed verdict in his favor on the policy claim.'" *Bellville*, 702 N.W.2d at 474 (citation omitted). "Thus, if it is undisputed that evidence existed creating a genuine dispute as to the negligence of an uninsured or underinsured motorist, the comparative fault of the insured, the nature and extent of the insured's injuries, or the value of the insured's damages, a court can almost always decide that the claim was fairly debatable as a matter of law." *Id.*

On the flip side, in *Zimmer v. Traveler's Ins. Co.*, 521 F. Supp. 2d 910, 927 (S.D. Iowa 2007), Traveler's argued the above-quoted material from *Bellville* created a strict "directed verdict rule" in bad faith cases. Judge Pratt rejected the argument reasoning that such an interpretation would "virtually exclude the possibility of trial by jury in every first-party bad faith tort claim." *Id.* The court further opined that had the Iowa Supreme Court intended to create such a sweeping change, it would have done so.

Regarding element two—the reasonableness of the denial—the issue the court will determine is whether the claim submitted to the insurance company was "fairly debatable." Even if the insurance company did a bad investigation, that standing alone is not enough to prove, objectively, there was no reasonable basis to deny the claim. "The fact that the insurer's position is ultimately found to lack merit is not sufficient by itself to establish the first element of a bad faith claim. The focus is on the existence of a debatable issue, not on which party was correct." *Bellville v. Farm Bureau Mut. Ins. Co*., 702 N.W.2d 468, 473 (2005). "'Courts and juries do not weigh the conflicting evidence that was before the insurer; they decide whether evidence existed to justify the denial of the claim.'" *Id.* at 474.

While the nature and quality of the insurance company's investigation is not dispositive of the objective test, it is relevant to element three—whether the insurance company knew or should have known its denial was unreasonable. As a result, discovery on these matters is important in a bad faith case, as discussion below in question nine.

(2) What is the difference between a penalty under Iowa Code section 86.13, and bad faith? *Both are based on the reasonableness of the denial, but the standards, burden of proof, and the nature and amount of money that can be awarded vary greatly.*

"If workers' compensation benefits are unreasonably delayed or denied, then there are 'two distinct methods' by which an employer's workers' compensation carrier may be penalized. The first method is to seek relief from the workers' compensation commissioner, pursuant to Iowa Code section 86.13. The second method is a private cause of action brought by the employee for first-party bad faith." *Pfab v. United Wis. Ins. Co*., 2012 Dist. LEXIS 34407 at 9; 2012 WL 860321 N. Dist. IA (March 13, 2012) (citing *McIlravy v. North River Ins. Co*., 653 N.W.2d 323, 328 (Iowa 2001).

The Workers' Compensation Act's penalty statute states:

> 4 (a) If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> (b) The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> (c) In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all of the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

There are distinct differences in both the proof necessary to bring claim for 86.13 penalty benefits versus bad faith claims, and the type, nature and extent of "damages" an injured worker can receive under either claim.

Regarding proof – the elements for bad faith claim place the entire burden on the plaintiff to prove unreasonableness on the part of the insurance company. However, in a claim for 86.13 benefits, the plaintiff has established the defendant delayed or denied benefits, a the burden shifts to the employer to show the denial was reasonable. *Christiansen v. Snap-On Tools Corp*., 554 N.W.2d 254, 260 (Iowa 1996).

In a claim for penalties, the insurance company must meet three specific criteria in order to prove its denial was reasonable: (1) it was preceded by a reasonable investigation; (2) the result of the investigation was the actual basis for the denial; and (3) the reason for the denial was contemporaneously conveyed with the denial.

Regarding "damages" – 86.13 benefits are far more limited than bad faith damages. First, the Agency can only award up to 50 percent of the amount of the unreasonably delayed or denied benefits. There is no hard cap on what can be awarded in a bad faith claim (however, see discussion on relationship between actual and punitive damages) and the categories of damages available in a bad faith case (discussed below) are much broader, including physical and mental pain and suffering, punitive damages and economic damages.

Second, the Agency cannot award penalty benefits for unreasonably delayed or denied medical care. *See Klein v. Furnas Elec. Co.*, 384 N.W.2d 370, 375 (Iowa 1986). Causally related damages for delayed medical care can be awarded in a bad faith claim.

(3) Whatever the Agency finds in the underling workers' compensation case will be binding in civil court, right? *It depends on what was submitted to the Agency, and what was found.*

Four scenarios are discussed below.

Scenario 1: If the issue of penalty is submitted and the Agency finds there *was* a reasonable basis to deny/delay benefits, thus no penalty is awarded, that finding *will* likely be binding in the district court action.

In considering whether a bad faith case should be stayed during the pendency of the underlying workers' compensation claim, while the Court did not mandate it stay, it expressed a strong preference for it, holding in part, "[W]e believe that decisions made through this administrative process that are relevant to the issues in the bad faith action will, in many instances, carry preclusive effect…." *Reedy v. White Consol. Indus. Inc.*, 503 N.W2.2d 601, 603 (Iowa 1993).

"[Plaintiff is] precluded from relitigating the determination of the Iowa District Court that his workers' compensation claim was fairly debatable with respect to work-relatedness. Because that ruling adversely determined an essential element of [plaintiff's] claim of bad faith failure to pay benefits, [the insurer] is entitled to summary judgment." *Gilbert v. Constitution State Service Co.*, 101 F. Supp. 2d 782, 787-88 (S.D. Iowa 2000) (holding state district court's reversal of commissioner's decision to award penalty benefits precluded plaintiff from arguing his claim was not fairly debatable) (citing *Reedy*); *see also Belger v. Liberty Mutual Ins. Co.,* 2009 U.S. Dist. LEXIS 288405; 2009 WL 790152 (S.D. IA, March 23, 2009) (granting defendant's motion for summary judgment and holding the Agency's finding that Liberty Mutual had a reasonable basis to deny the claim had a preclusive effect in the bad faith case).

Scenario 2: If the issue of penalty is submitted and the Agency finds there *was not* a reasonable basis to deny benefits, that finding will *not* be binding in the district court action.

In *Gibson v. ITT Hartford Ins.*, 621 N.W.2d 388 (Iowa 2001), the district court determined the commissioner's holding that the insurer had no reasonable basis for its refusal to pay additional workers' compensation benefits precluded the insurer from arguing to the contrary. The district court likewise instructed the jury there had been a previous determination that the insurer had no reasonable basis for its denial. The insurer did not challenge the instruction, so the Supreme Court did not review it. *Id.* at 398.

One year later in *McIlravy v. North River Ins. Co*., 653 N.W.2d 323 (Iowa 2002), the Iowa Supreme Court made it clear that an award of penalty benefits did not preclude the employer from arguing its denial was fairly debatable in response to a plaintiff's claim of

bad faith. The Court acknowledged *Gibson* and explained that in that opinion it never reached allegation of issue preclusion. *Id.* at 329.

Scenario 3: If the Agency finds a compensable work injury following a denial, and awards benefits, that determination does ***not*** establish the insurance company lacked a reasonable basis to deny a claim in the bad faith case.

"The claimant also relies on the fact the commissioner rejected the insurer's evidence when the commissioner ruled the claimant sustained a shoulder injury on January 17, 2003. *But the fact the commissioner was not convinced by the evidence supporting the insurer's denial does not negate the existence of a genuine dispute with respect to whether the claimant's January 2003 fall was the cause of her injury*." *City of Madrid v. Blasnitz*, 742 N.W.2d 77, 83 (Iowa 2007) (citing *Bellville*, 702 N.W.2d at 743).

On the other hand, Agency decisions that come out supporting a reason for the insurance company's denial, even *after* the denial was made, can be the end to a bad faith case. Referring to several commissioner decisions that were issued after the insurance corporation's denial of the plaintiff's claim, the Iowa Supreme Court stated, "Perhaps the most reliable method of establishing that the insurer's legal position is reasonable is to show that some judge in the relevant jurisdiction has accepted it as correct. The favorable decision need not have been available to the insurer at the time it acted on the claim. *After all, if an impartial judicial officer informed by adversarial presentation has agreed with the insurer's position, it is hard to argue that the insurer could not reasonably have thought that position viable.*" *Rodda v. Vermeer Manufacturing*, 734 N.W.2d 480, 485 (Iowa 2007).

Scenario 4: If the issue of penalty is *not* submitted to the Agency, that should not preclude the plaintiff from bringing a claim for bad faith because there is no requirement to exhaust administrative remedies first.

In *Zimmer v. Travelers*, the federal district court for the Southern District of Iowa held, **"**In order for a party to waive the ability to raise a claim, that party must take some action indicating a clear intent to waive the issue. Under Iowa law, one is 'presumed to intend the natural consequences of an act intentionally done.' *Lukecart v. Swift & Co.,* 256 Iowa 1268, 130 N.W.2d 716, 724 (Iowa 1964). While certainly Plaintiff's action in not pursuing penalty benefits before the industrial commissioner demonstrate an intent to waive his right to receive penalty benefits under § 86.13, that waiver cannot be extrapolated into an intent to waive a bad faith tort claim, which the *McIlravy* court specifically identified as a 'distinct method[]' by which an insured may pursue damages. *McIlravy*, 653 N.W.2d at 328." *Zimmer,* 454 F.Supp at 858-59.

Before *Zimmer*, the Iowa Supreme Court was presented with an argument that a bad faith claim should be precluded because an injured worker did not exhaust his administrative

remedies. *See Gardner v. Hartford Ins. Accident & Indemnity Co.*, 659 N.W.2d 198, 200 (Iowa 2003). The Court never reached the issue of exhaustion because it held the plaintiff was precluded from bringing a bad faith claim based on principles of issue preclusion because she had entered into an 85.35 compromised settlement—which at the time, required a bona fide dispute in order to reach such a settlement. Of note, the district court held the plaintiff had not failed to exhausted her administrative remedies.

(4) Even though the workers' compensation claim isn't over, can I still move forward with my district court action? *It depends on what your district court judge decides.*

A plaintiff who elects to file a bad faith claim before the resolution of his or her workers' compensation claim should be prepared for the insurance defendant to file a motion to stay.

While there are no cases that specifically require a final Agency decision before proceeding with the bad faith claim, the Iowa Supreme Court has expressed its preference to keep a bad faith case stayed until the underlying workers' compensation claim has been administratively adjudicated. *Reedy v. White Consol. Indus. Inc.*, 503 N.W.2d 601, 603-04 (Iowa 1993) (holding, "In our view, it would be clearly preferable to have the extent of the defending party's liability for such payments determined in the first instance by the administrative agency entrusted with the administration of the Iowa workers' compensation laws"). Ultimately, whether the bad faith claim is stayed is a decision left to the discretion of the trial court.

(5) What role can I have in the bad faith case if I've handled the workers' compensation case? *It depends on whether you are a material witness.*

Iowa Rule of Professional Conduct 32:3.7 prevents at attorney from being a fact witness in the same trial he is representing a client in an advisory role, unless certain conditions are met. The rule states:

(a) A lawyer shall not act as advocate at trial in which the lawyer is likely to be a necessary witness unless:
    1. The testimony related to an uncontested issue;
    2. The testimony relates to the nature and value of legal services rendered in the case; or
    3. Disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by rule 32:1.7 or rule 32:1.9.

If you intend to represent an injured worker in the underlying workers' compensation case, *and* the bad faith case, you may only do so if one of the three conditions above exist. Be prepared to defend a "motion to recuse" by the defendant, seeking to disqualify you from representing the plaintiff in the bad faith case.

Disqualification under this rule is a high bar—the party moving to recuse an attorney must prove he is a material witness and that disqualification is strictly necessary. *Williams v. Borden., Inc.*, 501 F. Supp 2d 1219, 1223 (S.D. Iowa 2007). A judicial decision to recuse an attorney is reviewed for abuse of discretion. "Disqualification motions are subject to 'particularly strict judicial scrutiny' because of their potential for abuse." *Id.*

There are no Iowa appellate decisions interpreting the current version of the advocate-witness rule; however, the Eighth Circuit interpreted Missouri's attorney/witness rule, which is identical to Iowa's. *Machea Trans. Co. v. Philadelphia Indem. Co.,* 463 F.3d 827, 833 (8th Cir. 2006). The Court held that, "an attorney is a 'necessary witness' only if there are things to which he will be the only one available to testify.'" *Id. The Eighth Circuit's ruling in Machea has been replied up on by Iowa federal district courts in interpreting Iowa's rule 3.7. See United States v. Melton*, 948 F. Supp. 2d 998, 1007-08 (N.D. Iowa 2013); *Williams*, 501 F. Supp. 2d at 1223.

A recent Iowa district court case out of Muscatine County, *Saltern v. HNI Corporation,* decided the issue where the plaintiff's law firm represented her in the underlying workers' compensation claim and the accompanying bad faith claim. CVCV23484 (Dist. Ct. Muscatine County, July 11, 2018). The defendant filed a motion to recuse, arguing that all the attorneys of the firm representing the plaintiff were material witnesses in the bad faith case and must be disqualified from representing the plaintiff pursuant to Iowa Rule of Professional Conduct 32:3.7. The plaintiff attorneys argued that they are not "necessary witnesses" under Rule 32:3.7 because they could obtain testimony regarding delays from other sources of evidence. Further, the plaintiff attorneys argued only one of the members of its firm represented the plaintiff in the underlying case, and even if he must be recused, the rest of the firm members should not.

The Court held that only the attorney who represented the plaintiff in the underlying workers' compensation claim should be recused—not the other two attorneys in the firm. The court reasoned that any testimony about the underlying claim could be obtained through the recused attorney, meaning the remaining attorneys were not material. Further, the recused attorney would only be disqualified from representing the client in trial and at depositions. The court held that "complete disqualification 'excessively curtails' [the plaintiff's] interest in choosing her legal representation and does not advance the purpose

of rule 32:3.7 by preventing the attorney's conflicting dual role as witness and advocate." The court allowed the disqualified attorney to continue helping with litigation strategy, pretrial hearing, mediation, motions and legal consultations with other counsel.

The Court did require the plaintiff to submit, in writing, her informed consent of any potential conflict of interest arising from the continued representation for the remainder of the firm.

(6) What can I do in the workers' compensation case to set my client up for success in her bad faith case? *Paper the defendant's file. Get good expert reports. And paper the defendant's file again.*

Documentation:

While there may have been a "reasonable basis" for the insurance corporation to deny an injured worker's claim initially, if the insurance corporation receives new or additional information, it has a duty to conduct a further review. *See McIlravy v. North River Ins. Co.*, 653 N.W.2d 323, 331 (Iowa 2002) (holding "we must consider whether North River initially had a reasonable basis for denying McIlravy's claim, and, if so, whether North River later continued to have a reasonable basis to deny McIlravy's claim after its initial denial); *Dirks v. Farm Bureau Mut. Ins. Co*., 465 N.W.2d 857, 862 (Iowa 1991) (holding that the jury had to consider whether, "at some later date, Farm Bureau became aware there was no reasonable basis to continue denying plaintiff's claim for underinsured motorist benefits").

Because it is the plaintiff's burden to prove the insurance corporation had no reasonable basis to continue denying his or her claim, it is essential to request—in writing—that the insurer reconsider its denial every time new information surfaces. In *McIlravy*, the plaintiff's doctor only sent a short letter stating the plaintiff's injury was work related, but offered no further explanation. The Court held that this letter did not require the insurer to reconsider its denial. However, after the doctor offered an explanation for why the injury was work related in his deposition, the Court held a genuine issue of material fact existed as to whether the insurer had a reasonable basis to continue to deny the plaintiff's claim.

Therefore, plaintiffs should:

- lock in as soon as possible the defendant's initial denial and the reasons for it;
- formally request that the insurer reexamine its denial whenever new information comes up;
- document all interaction between the plaintiff/plaintiff's counsel and the insurer/insurer's counsel—phone calls will not cut it *and* may make you a material witness under professional conduct rule 32:7.7;
- request all the medical records the insurer has and inquire about the date when the insurer received each important record; and

- request the adjuster's notes and determine what medical information he or she had each time the claim was denied.

Exert testimony:

Question ten has a larger discussion on damages. There must be a causal connection between the bad faith denial of a claim and the plaintiff's damages—not just the work injury itself and plaintiff's damages.

If you are exercising your right to an IME and obtaining treating doctor opinions, consider asking the experts whether the delay in treatment was the cause of additional pain and suffering beyond what was expected from the work injury; permanent impairment above what was expected from the work injury due to the delay; mental distress not just from the physical injury, but resulting from the denial of benefits.

(7) What deadlines apply to bringing the bad faith claim? *There is a five-year statute of limitations.*

The Iowa Supreme Court's holding in *Brown v. Liberty Mutual Insurance Company*, 513 N.W.2d 762, 764-65 (Iowa 1994), decided the issue of the applicable statute of limitations in bad faith workers' compensation case, including when the claims accrue.

> *"[S]uits of this nature fall within the 'other actions' category for statute of limitations purposes. [W]e hold the five-year limitation period of section 614.1(4) applies to actions based on bad-faith nonpayment of workers' compensation benefits.*

Iowa Code section 614.1(4) states:

> Unwritten contracts — injuries to property — fraud — other actions. Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years, except as provided by subsections 8 and 10.

Accrual date: "[A] Claimant's causation of action for bad faith failure to pay workers' compensation benefits accrues upon receipt of notification that the carrier has denied the claim. At that point both the essential elements of the action are, or should within reasonable diligence be, known to the plaintiff.

"Because an action for bad faith focuses on the carriers pre-denial conduct—not benefit eligibility—the industrial commissioner's ultimate decision should not control the target date for accrual purposes."

(8) Who can I sue in a workers' compensation bad faith claim? *Insurance carriers and self-insured employers.*

Insurance carrier? *Yes.*

Self-insured employer? *Yes.*

Employer? *No.* The exclusive remedy bars suits against the employer. *Boylan v. Am. Motorists Ins*., 489 N.W.2d 742, 744 (Iowa 1992)

Third party administrators? *No, but…*
The Iowa Supreme Court recently held that Iowa does not recognize a claim of bad faith against third party administrators who handle workers' compensation claims. *De Dios v. Indem. Ins. Co. of N. Am.*, 2019 Iowa Sup. LEXIS 56; 2019 WL 2063289 (Iowa 2019) (Wiggins and Appel dissenting).

> Two things of note in the decision:
>
> First, De Dios raised the concern that the workers' compensation carrier could "'completely delegate its authority to a third-party administrator and that third party administrator [could] arbitrarily deny coverage and delay payment of a claim to an injured worker with minimal consequences…'" *Id.* at 21. The Court addressed this concern by stating that (A) if the third party is an agent, then vicarious liability applies; and (B) the nondelegable duties imposed by Iowa statutes and administrative regulations remain on the carrier regardless of any attempt to pass them to a third party.
>
> Second, in Justice Appel's dissent, he discussed the evolving caselaw on third party administrators' liability in the insurance context, and addressed a potential cause of action for "negligent" claims handling based on the proposition that tort liability is distinguishable from contract liability, and that agency principles do not provide immunity where an independent insurance service provider is granted wide discretion in making claims decisions. *Id.* at 35-36.

Uninsured employer: *No. In Bremer v. Wallace*, 728 N.W.2d 803, 804, 806 (Iowa 2007), the Iowa Supreme Court held, an uninsured employer cannot be sued for bad faith, in part because an uninsured employer is not held to the same standards as an insured or self-insured employer with regard to obtaining certifications with the state and supervision of the insurance commissioner. The court held, "the [uninsured] defendant in this case is in

a much different position. He did not purchase workers' compensation insurance or join a self-insurance association. Thus, he is not an insurer, nor is he the substantial equivalent of an insurer. Consequently, the actual issue in this case is whether bad faith tort liability for failing to pay workers' compensation benefits should be imposed under circumstances that do not involve an insurer/insured relationship." The court held it should not be.

(9) Should I approach discovery different in a bad faith case than I do in the workers' compensation case? *Yes!!!*

Written discovery:

Insurance company's like to keep a tight lid on claims files, claims adjusting manuals and polices, etc. Typically, documents created or placed in the claims file before the insurer's denial are discoverable. *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 688 (Iowa 1995). Documents that are prepared after the denial are considered work product and are only discoverable upon a showing that the requesting party has a substantial need for the documents and the information cannot be obtained from another source. *Id.* If the plaintiff plans on arguing bad faith based on a continued denial, the attorney should draft the petition to include a claim that the company persisted in the denial of benefits in the face of subsequent information. This will boost the plaintiff's argument that he or she has a substantial need for documents contained in the file after the denial.

Documents the plaintiff should consider requesting in a bad faith case include:

- letters and communication between the workers' compensation carrier and the doctor;
- the claim file;
- a list of all persons who were involved in handling the plaintiff's claim;
- a list of documents or materials that are ordinarily contained in a claim file;
- the adjuster notes;
- company policies, training manuals, and any other documents relating to the handling of workers' compensation claims;
- any manuals, company policies, training manuals, and any other documents relating to the handling of workers' compensation claims that have been modified since the plaintiff's claim was made;
- copies of textbooks, articles, CLE materials, pamphlets, statutes, case law or other authority that claims handlers rely on to adjust claims;
- medical records reviewed by the insurance corporation in the order they were received (which can be compared to the adjuster notes to determine what information the adjuster had when he or she denied the claim);
- computer logs from the adjuster;

- a list of all other claims for bad faith or penalty benefits of which the defendant was a party;
- copies of all notes, correspondence, memorandum, telephone messages, email messages, or any other document that discusses the plaintiff's claim;
- documents pertaining to the loss reserve set aside for the plaintiff's claim;
- any marketing information including but not limited to brochures, videos, electronic media, or products, for the past five years that the insurance corporation used to advertise its workers' compensation products, coverage, benefits and the like;
- information regarding the defendant's financial condition, which is relevant to a punitive damage claim.

Depositions:
Iowa Rule of Civil Procedure 1.707(5) and Federal Rule of Civil Procedure 30(b)(6) allow a party to depose a representative of a corporation who will speak on the corporation's behalf regarding matters the deposing party chooses. Plaintiff attorneys should consider using these depositions to lock the insurance corporation in on the policies, procedures, information and reasons that it relied on when denying the plaintiff's claim.

Some topics a Rule 1.707(5)/ 30(b)(6) deposition notice can include are:

- the standards by which the claims adjustors are expected to adhere when adjusting a claim;
- the case law, statutes, regulations and any other rules to which the insurance corporation's claims handlers are expected to adhere in handling claims;
- efforts the insurance corporation make to ensure its claims handlers comply with Iowa statutes and case law;
- written materials the insurance corporation provided to its claim handlers to assist them in handling claims;
- the method or process by which the insurance corporation processes workers' compensation claims;
- all books, articles, treatise, and periodicals which the insurance corporation believes to be reliable authority with respect to Iowa Workers' Compensation claims or those addressing proper adjustment of such claims;
- the reason(s), rationale, policies, information relied upon, discussions, documents, correspondence, etc., that formed the basis for the insurance corporation's denial of the plaintiff's claim; and
- materials that are ordinarily contained in the personnel files of claims handlers.

(10) Does it always make financial sense to bring a bad faith case because I can get punitive damages? *Not always.*

In a bad faith case, the plaintiff may seek traditional tort damages (physical and mental pain and suffering; loss of function; past lost wages; future earning capacity; and medical expenses) in addition to economic losses caused by the delay or denial of benefits and punitive damages.

"A bad faith recovery includes damages not for the original injury or disease and its resulting incapacity, but only for the damages resulting from the bad faith acts; not for the loss of earning capacity, but for the additional costs, economic hardship, or losses due to nonpayment of amounts owed; and not for the mental anguish of originally suffering the injury, but for being subjected to the bad faith acts. Additionally, upon proper proof, a bad faith claimant can recover punitive damages." *Pfab v. United Wis. Ins. Co.*, 2012 U.S. Dist. LEXIS 34407 (N.D. Iowa, March 13, 2012) (citing *Niver v. Travelers Indemnity Co.,* , 433 F. Supp. 2d 968, 986 (N.D. Iowa 2006) (quoting *Izaguirre v. Texas Employers' Ins. Ass'n*, 749 S.W.2d 550, 553 (Tex. App. 1988)) (emphasis added).

In *Nassen v. National States Insurance Company*, the Supreme Court upheld a bad faith jury verdict allowing "economic loss arising from the premature dissipation of the plaintiff's assets" as well as for emotional distress. 494 N.W.2d 231, 237-38 (Iowa 1992).

In *Pfab*, cited above, the federal district court for the Northern District of Iowa allowed the plaintiff to submit medical bills in a bad faith case, over the defendant's argument that the only remedy available for medical bills was in the underlying workers' compensation case. Pfab, 2010 U.S. Dist. LEXIS 34407 at *12 (holding, "If Pfab proves that United Heartland denied her claim for benefits in bad faith, then she is entitled to recover those damages which are legally caused by United Heartland's bad faith. Those include medical bills which are work-related and future medical expenses related to her work injury, if she can establish that they are reasonable and necessary.").

The United States Supreme Court has held that there are constitutional limits on the amount of punitive damages a plaintiff can receive. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (holding the "Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor").

The Court created three guideposts for courts to consider when determining whether a punitive damages award is excessive. *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 575 (1996) ((1)the degree of reprehensibility of the defendant's actions; (2) the disparity between the actual harm suffered and the punitive damages; and (3) the difference

between the punitive damage award in the case at bar and in similar cases). The second guidepost is particularly relevant when attempting to value bad faith cases.

While the United States Supreme Court has been reluctant to provide a specific mathematical formula, it has held that "in practice, few awards exceeding a single digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 425. In *Pacific Mutual life Insurance Co. v. Haslip*, 499 U.S. 1, 23 (1991), the Court held that a punitive damages award that was more than four times the amount of the compensatory damages award was "close to the line" of a constitutional violation. There are multiple cases though, where ratio even higher than 10:1 has been upheld as constitutional.

Given the current judicial view of the relationship between punitive and actual damages, actual damages cannot be glossed over in bad faith cases—particularly in cases where only monetary benefits, not medical care, was denied. In those cases, plaintiffs should investigate and seek compensation for all possible forms of economic damages. *See Nassen v. Nat'l States Ins. Co.*, 494 N.W.2d 231, 237-38 (Iowa 1992) (allowing jury's award for economic loss resulting from premature dissipation of plaintiff's assets to stand). Make sure to secure proper documentation and expert testimony to establish the existence of your client's economic damages and the causal link between the bad faith denial and those damages.

Forms of economic damages to consider when preparing a bad faith claim include:

- damaged credit;
- home foreclosure;
- Repossession of assets;
- inability to pay monthly bills;
- increase use of credit cards (when it resulted in paying increased interest);
- amounts withdrawn from retirement accounts;
- income tax and penalties from withdrawing retirement funds early;
- attorney fees (when hiring an attorney was necessary to secure benefits);
- COBRA payments for health insurance after a termination;
- interest and dividends that would have accrued on retirement had a withdrawal not been made.

(11) Can I settle the workers' compensation claim and then move on the bad faith case? *It depends on the type of settlement - but be careful of any settlement where the parties agree there is a dispute over something.*

In *Gardner v. Hartford Ins. Acc. & Indemnity Co*., 659 N.W.2d 198 (Iowa 2003), the plaintiff settled her underlying workers' compensation claim. Gardner and the carrier entered into a compromised settlement under Iowa Code section 85.35(3), and presented

evidence to the commissioner that a "bona fide" dispute existed under section 85.35(8) regarding whether a substantial portion of the claimed disability "related to physical or medical conditions other than those caused by the injury." *Id.* at 205. The Iowa Supreme Court ruled that by agreeing to the settlement, the plaintiff stipulated to the existence of a bona fide dispute between the parties. When the commissioner found a "bona fide" dispute existed during the settlement approval process, in essence, she found the claim was fairly debatable. Thus, the settlement, and the agency's approval thereof, precluded the plaintiff from arguing there was no reasonable basis for the insurer's denial in her bad faith tort action.

Again, in *Wilson v. Liberty Mutual Group*, 666 N.W.2d 163 (Iowa 2003), the plaintiff agreed in the 85.35 settlement documents that a "bona fide" dispute existed over whether his injuries were work related. The Supreme Court held that a "bona fide" dispute is the equivalent of having a reasonable basis for denying a claim, rendering the settlement inconsistent with bad faith action.

In both *Gardner* and *Wilson*, it appears the "bona fide" language was essential to the Court's holding. In 2005, section 85.35(3) was restructured and the language which stated that a "settlement shall not be approved unless evidence of a *bona fide* dispute exists," was redacted. While the "bona fide" language is no longer contained in section 85.35, the section still uses the word "compromise" making it questionable as to whether a bad faith case is preserved.

Claimant's attorneys should also be wary of signing any sort of "global" release within the workers' compensation claim. While it is technically outside the jurisdiction of the workers' compensation commissioner to approve such a release because it contemplates claims outside the workers' compensation context—if a global release is agreed to on the side—it can waive any bad faith claim. To be safe, claimant's attorneys should avoid these releases, or at the very least, specifically preserve the claimant's right to bring a bad faith claim.

Recent cases of note:

Thornton v. Am. Interstate Ins. Co., 897 N.W.2d 445 (Iowa 2017). The jury found the insurance company acted in bad faith when it failed to admit that Thorton was permanently and totally disabled and when it disputed Thorton's petition to commute his future workers' compensation benefits to a lump sum. The jury awarded $25 million in punitive damages and $284,000 in compensatory damages. The Supreme Court upheld the finding that the insurance company acted in bad faith when it failed to admit Thorton was totally disabled; however, it reversed the finding that the insurance company acted in bad faith when it disputed Thorton's commutation petition. The Court reversed the

jury's verdict, including its assessment of damages, and remanded for further proceedings on the remaining claims for bad faith.

Dunlap v. AIG, Inc., 2019 Iowa App. LEXIS 50; 927 N.W.2d 201; 2019 WL 141012 (Iowa Ct. App. January 9, 2019). The Court considered whether an insurer had a reasonable basis to deny a workers' compensation claim where it had obtained a questionable medical opinion denying causation. The Court held that the reasonableness of a denial depends on the reasonableness of the medical opinion being relied upon. Ultimately, the Court overruled the district court's entry of summary judgment in favor of the insurance company, finding a genuine issue of material fact existed as to whether the insurance had a reasonable basis to deny the claim.