

# Good Information TO AVOID Bad Faith Claims Handling

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## What is “BAD FAITH”?

- What is it?
- Intentional deception or dishonesty
- Intentional failure to meet obligations
- Intention to defraud or deceived another person
- Neglect of fair dealing standards



## Good Faith Dealings

- What is Good Faith?
- Honesty
- Fairness
- Lawfulness
- Without intention to defraud, act maliciously
- Without taking unfair advantage



## WCAB Definition

### Definition



- Good faith tactics or dealings
- Acting from the evidence- not manipulating an outcome
- Not misleading opposing counsel, applicants, co-defendants, judges, to achieve a desired outcome



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## takeaways

- Its okay to disagree and state your position
- Its okay to pursue further evidence to prove your point
- Its okay to stand on a factual denial even though a QME states compensability – (Involve Superiors)
- It is not okay to misrepresent the evidence to gain a desired outcome

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## Labor Code §129.5

This section provides for “administrative penalties” which can be issued for specific conduct.

For example, (a)(2) allows such a penalty for “failure to pay when due the undisputed portion of an indemnity payment, the reasonable cost of medical treatment of an injured worker, or a charge or cost implementing an approved vocational rehabilitation plan.”



## Labor Code §129.5

Subsection (e) is where it gets troubling:

“(e) In addition to the penalty assessments provided in subsections (a),(b), and (c), the administrative director may assess a civil penalty, not to exceed \$100,000, upon finding, after hearing, that an employer, insurer, or third party administrator for an employer has knowingly committed or performed with sufficient frequency so as to indicate a general business practice any of the following:”



## Labor Code §129.5

1. Induced employees to accept less than compensation due, or made it necessary for employees to resort to proceedings against the employer to secure compensation.
2. Refused to comply with known and legally indisputable compensation obligations.



## Labor Code §129.5

3. Discharged or administered compensation obligations in a dishonest manner
4. Discharged or administered compensation obligations in a manner as to cause injury to the public or those dealing with the employer or insurer



## Labor Code §129.5

If full compliance audit performance standards are not met in two consecutive, full compliance audits, then the employer, insurer, or TPA will be “rebuttably presumed” to have a general business practices which causes injury to those dealing with it.

- If this occurs, watch out for substantial civil claims citing this practice.



## Labor Code §129.5

Further, if there is a “second or subsequent filing” of this business practice, then the matter shall be referred to the Insurance Commissioner for a potential hearing to determine if the “certificate of authority, certificate of consent to self-insure, or certificate of consent to administer claims of self-insured employers, as the case may be, shall be revoked.”



## Penalties Pursuant to Labor Code §5814.6

- 10112.2. Schedule of Administrative Penalties Pursuant to Labor Code §5814.6
- a) Administrative penalties can be imposed under this section based on violations of **Labor Code section 5814**



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After more than one  
penalty award has issued  
by the Workers'  
Compensation Appeals  
Board

Applicable on or after  
June 1, 2004



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- Based on CONDUCT occurring on or after April 19, 2004
- Unreasonable delay

OR

- Refusal to pay compensation
- Within a five-year time period



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The five-year period of time shall begin:

- Date of issuance of any penalty award
- Not previously subject to an administrative penalty assessment pursuant to LC section 5814.6



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(b) The Division of Workers' Compensation at minimum submit copies of **WCAB decisions monthly**

Regarding, findings, and/or awards issued pursuant to **LC 5814 to the Audit Unit**



(c) The Audit Unit obtains monthly LC 5814 activity reports, and

They must determine if the decisions, findings, and/or awards are final

**Must be a final Award**



- If more than one **final penalty award** has been issued on or after **June 1, 2004** against a claims administrator at a single adjusting location
- The Audit Unit may proceed with an investigation



## Investigation- Purpose

- (d) To determine whether a violation described in LC 5814.6 has occurred
- Administrative Director, or his or her designee, may conduct an investigation



## Investigation-Purpose

- Which may include but is not limited to an audit of claims and/or utilization review files
- The investigation may be **independent** of (Targeted), or may be **conducted concurrently** with, a **regularly scheduled audit** pursuant to LC 129 and 129.5 (PAR Audit)



## Penalty Assessment

- (f) Administrative Director may issue a Notice of Assessment in conjunction with an order to show cause pursuant to section 10113 of Title 8 of the California Code of Regulations
- Charging both an administrative penalty under this section and a civil penalty under subdivision (e) of Labor Code section 129.5 in the same pleading



- Only one penalty may be imposed by the Administrative Director following the hearing on such charges.

(g) Administrative Director, or his or her designee, shall issue a Notice of Assessment for administrative penalties against an employer and/or insurer as follows:



## Penalty Assessment- No Joke!

(a) Any employer or insurer that **knowingly violates** Section 5814 with a **frequency that indicates a general business practice** is **liable** for **administrative penalties** of not to exceed four hundred thousand dollars (**\$400,000**) Penalty payments shall be imposed by the administrative director and deposited into the Return-to-Work Fund established pursuant to Section 139.48.





(2) \$ 30,000 for each penalty award by the Workers' Compensation Appeals Board for a violation of Labor Code section 5814 for an unreasonable delay or refusal to comply with an **existing compensation order**



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- (3) For each penalty award by the Workers' Compensation Appeals Board for payments of temporary disability benefits or salary continuation payments in lieu of temporary disability; life pension, or death benefits:
- (A) \$ 5,000 for 14 days or less of indemnity benefits



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(B) \$10,000 for 15 days through 42 days of indemnity benefits

(C) \$15,000 for more than 42 days of indemnity benefits



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- (4) For each penalty award by the Workers' Compensation Appeals Board for authorization for medical treatment:
- (A) \$ 1,000 for retrospective medical treatment



- (B) \$ 5,000 for prospective or concurrent medical treatment
- (C) \$15,000 for prospective or concurrent medical treatment when the employee's condition is an imminent and serious threat to his or her health.



- (5) For each penalty award by the Workers' Compensation Appeals Board for reimburse an employee for self-procured medical treatment costs:
- (A) \$ 1,000 for medical treatment costs of \$100 or less, excluding interest and penalty





- (B) \$2,000 for medical treatment costs of more than \$100 to \$300, excluding interest and penalty
- (C) \$3,000 for medical treatment costs of more than \$300 to \$500, excluding interest and penalty
- (D) \$5,000 for medical treatment costs of more than \$500, excluding interest and penalty



- (6) \$ 2,500 for each penalty award by the Workers' Compensation Appeals Board for a **supplemental job displacement benefit**
- Required by section 10133.51(b) and section 10133.56(c), respectively



- (8) For each penalty award by the Workers' Compensation Appeals Board for a violation of Labor Code section 5814 for an unreasonable delay or refusal to make a payment of permanent disability indemnity benefits:
- (A) \$ 1,000 for 15 weeks or less of indemnity benefits;



- (B) \$5,000 for more than 15 but not more than 50 weeks of indemnity benefits
- (C) \$7,500 for more than 50 but not more than 95 weeks of indemnity benefits
- (D) \$15,000 for more than 95 weeks of indemnity benefits



## Components of LC5814 Allegations

- (a) When payment of compensation has been **unreasonably delayed or refused**
- **Prior to or subsequent** to an award being issued



- The **amount of the payment unreasonably delayed or refused** shall be increased up to **25 percent** or up to ten thousand dollars (**\$10,000**), **whichever is less**
- The **appeals board** shall use **its discretion** to accomplish a fair balance and **substantial justice between the parties.**



- (b) If a **violation is discovered prior** to an applicant **claiming a penalty**
- Claims, has **90 days from the date of the discovery**, to **pay a self-imposed penalty** in the amount of **10 percent along with the original payment due**



- **This self-imposed penalty shall be in lieu of the penalty in subdivision (a)**
- Don't be afraid to pay a penalty that you owe. You'll save yourself in the end



- (c) Upon the approval of a compromise and release, findings and awards, or stipulations and orders, it **shall be conclusively presumed that any accrued claims for penalty have been resolved, regardless** of whether a **petition** for penalty has been **filed**
- Unless the claim for penalty is expressly excluded by the terms of the order or award.



- (g) No action may be brought to recover penalties under this section **more than two years from the date the payment of compensation was due**
- **Pay attention to dates**



## THE POINT?

Your file becomes an open **(CHECK) book**

The burden shifts to you to disprove the investigation findings

Its important to self audit along the way!



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## Claims Handling vs Legal Strategy

- Claims are responsible – **At the Wheel**
- **Paying** what you **owe timely**
- Sending **notices** to **give instruction** and **guidance**
- Providing **Medical Treatment** – **UR system**
- **Partnering** with **Legal** to **move** through **obstacles**
- **Legal strategy** provides **direction** through **legal processes**
- Legal strategy **navigates** **opposing parties** and the **WCAB**



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## A Not-So Hypothetical Case

If significantly egregious, the actions taken on a single case can result in substantial penalties and a referral to the audit unit.



## A Not-So Hypothetical Case

Facts of case:

Applicant suffered an admitted injury to her right ankle and required surgery. As a result of the procedure, Applicant ended up with a blood clot in his right calf, and a serious infection (sepsis) (which the doctor identified as a compensable consequence).



- This complication added additional need for treatment of orthopedic and internal, to include kidneys, dialysis, treatment for diabetes, and amputation of the right lower extremity to just under the knee.
- The applicant did have pre-existing diabetes which was aggravated by the blood infection, and injury to her kidneys, and amputation.



## A Not-So Hypothetical Case

Facts (cont'd). Applicant **required additional hospitalizations on an emergency basis, but they were not authorized.** As such, **Medi-Cal paid for her hospitalization** and her subsequent, **self-procured treatment at “a facility unequipped to deal with the complexity of injuries.”** **Kidney Dialysis and amputation of her ankle to just below her right knee.**

The WCJ issued an **Amended Findings and Award**, which found **causation for the compensable consequences** of the infection, blood clot, aggravation of diabetes, and required amputation. **The applicant was awarded immediate medical treatment. Also reimbursement of Medi-Cal.**





## A Not-So Hypothetical Case

Facts (cont'd). **Treatment continued** to be **denied** (even after the additional Orders), at times without consulting with a medical professional or referring the RFAs to Utilization Review.

Defendant continued to deny or delay care through the end of applicant's life, failing to authorize her final hospitalization, which ultimately led to the end of the applicant's life due to the complications of her amputation and failed kidneys.



## A Not-So Hypothetical Case

Some of the specific delays in treatment involved:

- Unreasonable delay in providing a wheelchair
- Unreasonable delay in providing critical and immediate care for a medically documented compensable consequence.
- Unreasonable delay in reimbursing Medi-Cal for the hospitalization payments.



## A Not-So Hypothetical Case

The WCAB was beyond disturbed. In citing historical precedent, the WCAB stated that an employer/insurance company “has both the right and duty to investigate the facts in order to determine its liability....but [they] must act with expedition in order to comply with the statutory provisions for the payment of compensation, which require that [they] take the initiative in providing benefits.”



- The WCAB in this case found there was a failure to follow any of the legislated processes that safeguard against unreasonable delay and denial such as medical opinions, UR, and bringing disputes before the WCAB to make findings.
- When defense clearly ignores the WCAB rulings without following a process of dispute, the system has failed, and ultimately the injured person has been failed.



## A Not-So Hypothetical Case

Substantial penalties were issued for the delays and denial. The Judge sanctioned the defense and made clear of his position on the clear neglect and willful disregard for this applicant. He made it known that her case would go to the audit unit with his recommendations for a serious investigation.



## A Not-So Hypothetical Case

The Lesson:

- Make sure to consider the potential for bad faith allegations when denying benefits.
- Always ensure you have legal/factual grounds for any denial.
- Actions taken by an adjuster can impact both the case at issue and the insurance company as a whole.



## Trial Time on Bad Faith

I've defended arguably bad faith actions at trial before

- Be firm but polite
- Have all your docs in a row
- Be careful with characterizations
- Is their house clean?
- Minimize
- Be prepared not to appeal



## Be Firm But Polite: Take the High Road

- Often these types of trials can get real heated
- My role is to show the judge that while I really care about the issue, I'm not going to yell or behave unprofessionally
- If I can highlight my opponent's unprofessional behavior I can perhaps swing that as leverage to our side



## Have All Your Docs in a Row

Well before the MSC, I will need:

- Any and all docs related to issue in dispute
- Including proofs of service (if it's important, use a proof of service)
- Often I can find something in that huge pile of docs to list as a trial exhibit that a) you may have forgotten about that b) shows "hey we were trying to do something good" c) may even show "AA was at fault b/c of this"
- Sometimes can find notes in medical reports that undermine AA's narrative



## Have All Your Docs in a Row

Why all the docs?

- Many AAs struggle with document management and may be totally unaware of docs that undermine their narrative
- It's easy to get caught up in a false narrative
- Generally speaking, it can be hard to prove intent, bad faith intent
- Gives me the opportunity to suggest that AA has no idea about the real facts



## Is Their House Clean?

“People who live in glass houses shouldn’t throw stones.”

- If I can find wrongdoing in their pleadings or practices, I will definitely highlight it
- Can swing that to try and turn the tables back on them, and allege LC 5813



## Is Their House Clean? LC 5813

LC 5813 says WCAB can order costs, sanctions, attorney fees, expenses if those were incurred by

- A) bad faith tactics or actions
- B) frivolous or solely intended to delay

So if AA oversteps and starts making bad faith or false allegations, I ask for LC 5813.



## Set the Theme: It Wasn't That Bad

While lots of AAs like to toss around that phrase bad faith...

- Was there any actual harm as a result?
- Harm: prejudice, costs, medical outcome, delay
- Price tag?



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## Take Care to Avoid Misstatements

Sometimes we on our side have a belief that turns out to be true ...

- Ex: Witness told us applicant was a liar, but witness' version of events later disproven
- We cannot repeat those misstatements in our trial pleadings, as that is sanctionable
- Have to take the emotion out of it, and carefully avoid those
- Also avoid getting personal with the judge, and AA (WCAB doesn't look upon that favorably)



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## Take Care to Avoid Misstatements

Have seen panel decisions (not from our firm) where...

- Trial doesn't go as planned
- Defense attorney files petition for reconsideration with "half-truths" in it about something a state agency did/didn't do
- State agency's counsel says "oh that's not true"
- Half-truths = Large sanctions
- Takeaway: You may want to make an allegation in court, but it better not be a "half-truth"
- Half-truth example: I sent you this, but you didn't do anything. (In reality, I did send it to you, and you responded.)



## Be Prepared Not to Appeal

Pros and cons of appealing:

- Pros: May overturn unfavorable ruling
- Cons: Even if successful, case may get remanded back to trial for more litigation. Sometimes on remand, they may strengthen their case against you.
- Cons: If the bad faith behavior was really egregious, the WCAB may send a stern warning. I have seen them threaten to sanction an AA firm for bad faith tactics in their pleadings, ie "do it again and we will punish you."
- Cons: Draws more attention, from WCAB and other in the industry
- Cons: Media attention?





## Other Side Effects

Besides a trial at the WCAB, parties can sue after the fact. Examples:

- Reinsurers, or high deductible employers (who pay after the first \$250k/\$500k/\$750k policy limit) can sue to argue that mishandled claim should have never gotten to the monetary threshold where it kicks in
- Employers can sue alleging negligence, breach of fiduciary duty, and accounting



## Other Side Effects

Examples:

- The county that I live in sued a large TPA and carrier alleging that they mishandled their comp claims under their loss-portfolio transfer policy, which allegedly depleted the limits of their policy and led them to pay once the policy limits were reached.
- The main allegation was that the claims handling practices were below the standard of care, charged for services they shouldn't have charged for, didn't apportion claims correctly, etc.



## Other Side Effects

**Examples:** While this next real-life example didn't have bad faith allegations, it is another example of a type of suit that bad faith allegations could play a key role in:

- A large group insurance fund suddenly realized it needed to charge its employers additional assessments to the tune of \$28 million. In short, the employers were refusing to pay their assessments, arguing that they should have noticed them years earlier. This battle stretched on for years, and the parties went to mediation.
- Hypothetically speaking, if those group members found bad faith practices that increased costs, you can bet that they would have mentioned that as a defense to having to pay those assessments.



## Side Effects of These Suits

These types of suits lead to:

- Expert witnesses armchair QB'ing every claims decision you ever made
- Your experts will be expensive
- Massive litigation costs, and inefficient as you prepare for trial



## Side Effects of These Suits

These types of suits also feature:

- Claims for tens of millions in damages
- Audit Unit trouble
- Hate to say it: but someone is probably getting fired when these happen



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## Media Coverage

When I was a reporter, I loved covering a lawsuit with lots of juicy material. For a defendant in a bad faith lawsuit, that means:

- Unwanted publicity (you should probably listen to your lawyer and not comment publicly)
- Lawsuit details will most definitely make it into the article
- The reporters aren't your biggest problem, the online comments sections are. People are harsh and may suggest new allegations, or creative ways to punish you



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