IN THE SUPREME COURT OF IOWA

NO. 18-1227

SAMUEL DE DIOS,

Plaintiff-Appellant,

v.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, and BROADSPIRE SERVICES, INC.

Defendants-Appellees.

CERTIFIED QUESTION FROM FEDERAL DISTRICT COURT

U.S. Dist. Ct. Northern Dist. No. C 18-4015-MWB

Brief of *Amici Curiae* the Iowa Defense Counsel Association and the American Insurance Association in Support of the Appellees

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CERTIFIED QUESTION TO THE IOWA SUPREME COURT

I. In what circumstances, if any, can an injured employee hold a third-party claims administrator liable for the tort of bad faith for failure to pay workers' compensation benefits?

IDENTITY AND INTEREST OF *AMICI CURIAE*

The Iowa Defense Counsel Association ("IDCA") is a group of more than 330 lawyers and insurance-claims professionals who are actively engaged in the practice of law or in work relating to the handling of claims and the defense of legal actions. IDCA represents the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the defense bar and insurance-claims professionals. IDCA is filing this brief because extending the tort of bad faith failure to pay workers' compensation benefits would have a negative impact on workers' compensation carriers and self-insured employers who retain third-party claims administrators to assist these parties with the handling of workers' compensation claims.

The American Insurance Association ("AIA"), founded in 1866 as the National Board of Fire Underwriters, is a leading national trade association representing more than 330 major

property and casualty insurance companies based in Iowa and most other states. AIA members collectively underwrite more than $134 billion in direct property and casualty premiums nationwide, including more than $220 million in workers' compensation insurance in this State, and range in size from small companies to the largest insurers with global operations. AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums nationwide. AIA also files amicus curiae briefs in significant cases before federal and state courts, including this Court, on issues of importance to the insurance industry and marketplace.

IDCA and AIA's knowledge regarding the role of third-party administrators of workers' compensation claims provides a unique perspective that will assist the Court in assessing the consequences of expanding the tort of bad faith to third-party claims administrators.

Rule 6.906(4)(d) Statement of Authorship

IDCA and AIA are represented by the undersigned counsel of the Nyemaster Goode, P.C., law firm, who authored this brief in

whole. No party, party's counsel, or other person contributed money to fund the preparation or submission of this brief.

ARGUMENT

When the tort of bad faith denial of workers' compensation benefits was first recognized in Iowa, the Court made clear that the justification for allowing injured workers to bring bad faith suits against their employer's workers' compensation insurer arose out of the employer's "affirmative obligation to furnish medical and hospital supplies to an injured employee" under the Iowa workers' compensations statutes and the workers' compensation "commissioner's regulations [that] consign these obligations to the employer's insurance carrier." *Boylan v. Am. Motorists Ins. Co.*, 489 N.W.2d 742, 743 (Iowa 1992) (citing Iowa Admin. Code r. 876-2.3, 4.10). There is no statute or regulation imposing these "affirmative obligations" on third-party administrators of workers' compensation claims and thus there is no basis under Iowa law for extending the tort of bad faith to third-party claims administrators of workers' compensation claims. To do so would needlessly increase workers' compensation

costs. The Court should answer the certified question by stating there are no circumstances under which an injured employee can hold a third-party claims administrator liable for the tort of bad faith for failure to pay workers' compensation benefits.

I. The Justifications for Recognizing the Tort of Bad Faith Denial of Workers' Compensation Benefits Set Forth in *Boylan* Do Not Apply to Third Party Administrators.

In 1992, the Iowa Supreme Court recognized that an injured worker could sue his or her employer's workers' compensation insurance carrier for the bad faith denial of workers' compensation benefits. *Boylan,* 489 N.W.2d at 744. In doing so, the Court acknowledged that it had previously held that a victim could not bring a bad faith suit against the tortfeasor's liability carrier even though "tort victims are technically third-party beneficiaries of the tortfeasor's insurance." *Id.* at 742-43 (citing *Long v. McAllister*, 319 N.W.2d 256, 262 (Iowa 1982)). Even though workers' compensation coverage is a form of liability coverage the employer, and not the employee, obtains by contract with an insurance carrier, the Court reasoned the workers' compensation "act also imposes an affirmative obligation to furnish medical and

hospital supplies to an injured employee." *Id.* at 743. The court observed that while the "statute speaks only of the obligation of the employer, the commissioner's regulations consign these obligations to the employer's insurance carrier." *Id.*

The two regulations cited in *Boylan* are Iowa Administrative Code rules 876-2.3 and 876-4.10. *Id.* Rule 876-2.3 provides,

> All licensed insurers, foreign and domestic, insuring workers' compensation and all employers relieved from insurance pursuant to Iowa Code section 87.11 shall designate one or more persons geographically located within the borders of this state, which person or persons shall be knowledgeable of the Iowa Workers' Compensation Law and Rules and shall be given the authority and have the responsibility to expedite the handling of all matters within the scope of Iowa Code chapters 85, 85A, 85B, 86, and 87.
>
> The Iowa workers' compensation commissioner shall be advised by letter of the name, address, and telephone number of each of the persons so designated. Any change in the identity, address or telephone number of the persons so designated shall be reported to the Iowa workers' compensation commissioner within ten days after such change occurs.

Iowa Admin. Code r. 876-2.3. This rule applies to "licensed insurers" and "employers relieved from insurance pursuant to Iowa Code section 87.11." It does not, however, apply to third-party administrators of workers' compensation claims.

Rule 876-4.10 states, "Whenever any insurance carrier shall issue a policy with a clause in substance providing that jurisdiction of the employer is jurisdiction of the insurance carrier, the insurance carrier shall be deemed a party in any action against the insured." Iowa Admin. Code r. 876-4.10. Again, the rule applies to an "insurance carrier," but not third-party administrators of workers' compensation claims. Thus the "affirmative obligations" imposed on employers by statute and insurance carriers or self-insured employers by regulation that lay at that foundation of the rationale for recognizing a claim of bad faith denial of workers' compensation benefits are completely absent from a claim made against a third-party administrator of workers' compensation benefits. *Boylan,* 489 N.W.2d at 743.

The Court has continued to recognize the necessity of being subject to the "affirmative obligations" discussed in *Boylan* in order to be liable for bad faith denial of workers' compensation insurance benefits. In *Reedy v. White Consol. Indus., Inc.*, 503 N.W.2d 601 (Iowa 1993), where the tort was extended to self-insured employers, the Court noted, "To be a qualified self-insured

employer under the act, it is necessary to voluntarily assume a recognized status under the workers' compensation laws as an insurer." *Id.* at 603. This result is consistent with Rule 876-2.3, which imposes an obligation on "employers relieved from insurance pursuant to Iowa Code section 87.11." Iowa Admin. Code r. 876-2.3.

In contrast, in *Bremer v. Wallace*, 728 N.W.2d 803 (Iowa 2007), the Court held that an employer who fails to obtain workers' compensation insurance *cannot* be liable for bad faith denial of workers' compensation insurance benefits because that employer is not an insurer or self-insured employer and thus "stands in a much different position." *Id.* at 805-06 ("The common thread in these decisions is the defendant's status as an insurer, or in the case of a self-insured employer, the substantial equivalent of an insurer."). There is no statute or regulation imposing the affirmative obligations of an insurer on third-party administrators of workers' compensation claims and thus no basis under Iowa law to subject third-party administrators to the type of bad faith claim recognized in *Boylan* and *Reedy*.

II. The Terms of the Contract Between the Workers' Compensation Carrier or Self-insured Employer Should Not Determine Whether a cause of Action for Bad Faith Denial of Workers' Compensation Benefits Exists.

Appellant has proposed a "factor test" to determine whether a third-party administrator can be liable to an injured worker. *See* Appellant's Br., at 14. The four factors Appellant proposed are:

> (1) whether a third-party administrator has the power to decide to deny the payment of workers' compensation benefits without the approval of an insurer; (2) whether a third-party administrator has the power to pay workers' compensation benefits without the approval of the an insurer; (3) whether a third-party administrator has the financial motivation to act unscrupulously in the investigation and servicing of the claim; and (4) whether the third-party administrator assumes some of the financial risk of loss from the claim.

Id. In other words, Appellant's position is that if these factors are found in the third-party administrator's contract with the workers' compensation insurer, then the third-party administrator would owe the injured worker a duty of good faith. If these factors are not found in the contract, however, then the third-party administrator would not owe the injured worker a duty.

Appellant's position is completely unsupported by Iowa law, runs contrary to good public policy, and is unnecessary.

As discussed above, the tort of bad faith denial of workers' compensation benefits does not arise out of the insurance contract; instead, it arises out of the statutory and regulatory obligations imposed on workers' compensation insurance carriers or self-insured employers under the workers' compensation act. *See Reedy*, 728 N.W.2d at 805. The terms of the contract were irrelevant to the decisions reached in *Boylan* and they should be irrelevant in this case as well.

Appellant has not provided any justification for subjecting some third-party administrators to liability for bad faith denial of workers' compensation benefits, but not imposing liability on others. The likely consequence of establishing such a test is that third-party administrators will simply modify their contracts, thereby placing greater burdens and costs on self-insured employers and insurance carriers, who are already liable for the bad faith denial of a workers' compensation claim.

III. The Creation of a Claim of Bad Faith Denial of Workers' Compensation Benefits by a Third-Party Administrator is Completely Unnecessary and Will Result in a Waste of Judicial Resources.

This brings us to the final point, which is that the creation of a claim of bad faith denial of workers' compensation benefits by a third-party administrator is completely unnecessary and will only serve to waste judicial resources because the injured worker already has a full and complete remedy in the event of a bad-faith denial. The injured worker can still file a suit against the insurer or self-insured employer whose third-party administrator denied the claim in bad faith.

As Judge Jarvey of the Southern District of Iowa noted in *Raymie v. Ins. Co. of State of Pennsylvania*, No. 4:09-CV-00222-JAJ, 2009 WL 8621559 (S.D. Iowa Sept. 29, 2009), the workers' compensation carrier or self-insured employer "is responsible for the acts of its agents conducted within the scope of that agency relationship." *Id.* at *3 (citing *Johnson v. Farmers Ins. Co.*, 168 N.W.264, 266 (Iowa 1918) and *Miller v. Hartford Fire Ins. Co.*, 102 N.W.2d 368, 373 (Iowa 1960)). The injured worker would, therefore, have a remedy for any harm suffered because of a bad

faith denial. The fact that the insurer or self-insured employer would be responsible for compensating the injured worker instead of the third-party administrator is irrelevant because in a bad faith case, " 'the focus, of course, is on the recompense available to the affected insured not the extent to which the [tortfeasor] may be subject to [punishment] for its misconduct.' " *Id.* (quoting *Dolan*, 431 N.W.2d at 794 (second alteration in original)).

An injured employee has an adequate remedy if his or her workers' compensation claim is denied in bad faith by an insurer's, or self-insured employer's, third-party administrator. There is no basis under Iowa law for recognizing this new tort against third-party administrators and, as importantly, there is no need to do so. The Court recognized in *Bremer* that bad faith denial of workers' compensation benefits is limited to workers' compensation insurance carriers and those employers who have met the "precise requirements needed to acquire" standing as a self-insured employer. *Bremer*, 728 N.W.2d at 805. Thus, creating the tort of bad faith denial by a third-party administrator will do nothing to improve the remedies of an injured worker. The

addition of one more party to these cases—the third-party administrator—will do nothing to enhance the injured workers' remedies and will only serve to waste judicial resources by increasing the expense and complexity of litigating bad faith claims.

CONCLUSION

The IDCA and AIA respectfully request that the Court answer the certified question by stating that there is no circumstance under which an injured employee hold a third-party claims administrator liable for the tort of bad faith for failure to pay workers' compensation benefits. The claim is unsupported by Iowa law, an adequate remedy already exists for bad-faith denials of workers' compensation benefits, and creating this new tort will only add needless expense to the workers' compensation system.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because it contains 2194 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa. R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook 14 point font.

/s/ Keith P. Duffy AT0010911

PROOF OF SERVICE AND CERTIFICATE OF FILING

I hereby certify that on November 29, 2018, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel of record.

/s/ Keith P. Duffy AT0010911