

Quarterly Review

First Quarter 2001

A Legal Update for the Claims Professional

IN THIS ISSUE

Insurance

132a Award is
Held Covered

2

AOE/COE

Boozy Award
Gets Bulldozed

3

Capitol Report

New Safety-Officer
Presumptions

4

Two's Company

Subsequent Injuries Fund Can Benefit Employers, Too Spotting the Issue Opens the Door to Contribution, Resolution

By *E. Cruz Eusebio*, Inland Empire office

Palm Springs. — Rick Tracy is hired by Private Eye, Inc. to lead an elite team specializing in *sub rosa* surveillance, despite having lost the sight of an eye in an old California Highway Patrol accident. In an unguarded moment, Rick is attacked by a subject's dog, causing serious injury to his functional eye which renders him legally blind.

Before Private Eye's claims administrator calls the excess carrier, it would do well to consider the role of an ally of sorts in the California worker's compensation system: the little-understood *Subsequent Injuries Fund (SIF)*. Designed to benefit the injured worker, the SIF can benefit the claims administrator as well.

A Laudable Purpose

The SIF is a tax-supported fund which provides *additional benefits* to a previously-impaired employee for his overall disability, even though only part of it is

due to subsequent industrial injury—with no extra burden placed on the claims administrator. This special fund was created by the Legislature for the purpose of (1) *encouraging employers* to hire handicapped persons without fear of liability for existing handicaps, and (2) *assisting employees* whose diminished ability to compete in the open labor market is further reduced by a subsequent work injury.

The rules governing SIF joinder are set forth in Labor Code Sections 4750-4755. Essentially, the following must be shown:

(1) The combined preexisting and subsequent industrial injury disability must be **70 percent or more**;

See *SIF* — Page 2

Winning Briefs

"Second Opinion"

Death Claim Foiled by Doctor's Fatal Inconsistencies

Riverside. — *Norin T. Grancell, CEO*, won a *take-nothing order* in a \$125,000 dependency claim involving the death of a police officer following heart-related industrial disability retirement. Testimony by the treating physician that congestive heart failure had hastened death was undermined by a *damaging cross-examination*—including his admission of certifying an unrelated disease as the only cause of death. ■

Employer Cleans Up

Defense Prevails in Major Toxic-Exposure Trial

Stockton. — In a \$1,000,000 toxic-exposure claim with national implications, expert medical and industrial-hygienist evidence presented by *Tuen Y. Wong* of our

Central Valley office persuaded a WCALJ that chemicals used by an environmental salvage company in a massive cleanup of a contaminated Army munitions site were *noncontributory* to the claimant's lymphoma. ■

Paper or Plastic?

PTP Pooh-Poohs Shopper Videotape—But Judge Doesn't

Santa Ana. — A packer temp whose trip over a pallet resulted in a 45%-PD primary treating physician's report was *awarded 4% PD (\$840)* on the defense QME report, when *Robert J. Chimits* of our *Orange County* office displayed *sub rosa* videotape of the employee lifting and carrying 30 bags of groceries just after the accident. The free-choice treating doctor had dismissed the graphic evidence as "unreliable." ■

GREATER LOS ANGELES
6701 Center Drive West, Twelfth Floor
Los Angeles, California 90045
(310) 649-4911
FAX (310) 641-8265
Los Angeles • Santa Monica
Long Beach • Van Nuys

ORANGE COUNTY
600 South Main Street, 10th Floor
Orange, California 92868-4643
(714) 543-9090
FAX (714) 543-9190
Santa Ana • Anaheim • Long Beach

SAN DIEGO COUNTY
679 Encinitas Boulevard, Suite 201
Encinitas, California 92024-3761
(760) 634-0454
FAX (760) 634-0944
San Diego • Oceanside
Vista • El Centro

INLAND EMPIRE
3880 Lemon Street, Suite 205
Riverside, California 92501-3632
(909) 778-2514
FAX (909) 778-9233
Pomona • San Bernardino • Riverside
Palm Springs • Bishop

GREATER SAN FRANCISCO
7599 Redwood Boulevard, Suite 103
Novato, California 94945-7701
(415) 892-7676
FAX (415) 892-7436
San Francisco • Oakland • Santa Rosa
Walnut Creek • Eureka

CENTRAL VALLEY
555 University Avenue, Suite 230
Sacramento, California 95825-6505
(916) 922-7390
FAX (916) 922-7392
Sacramento • Stockton • Redding
Marysville • Fresno

CENTRAL COAST
6633 Telephone Road, Suite 215
Ventura, California 93003-5569
(805) 654-0256
FAX (805) 654-0339
Ventura • Santa Barbara
Grover Beach • Bakersfield

SAN JOSE
25 North Fourteenth Street, Suite 460
San Jose, California 95112-6203
(408) 977-1611
FAX (408) 977-1661
San Jose • Salinas

ARIZONA
Grancell and Zingg
3129 East 2nd Street
Tucson, Arizona 85716-4029
(520) 323-8188
FAX (520) 323-8180

Grancell, Lebovitz, Stander,
Marx and Barnes

Quarterly Review

This newsletter is prepared for the benefit of our clients as a general review of recent developments in workers' compensation, subrogation, civil and labor law. These articles should not be construed as legal advice or opinion, and are not meant as a substitute for the advice of counsel in individual cases.

Copyright © 2001
Grancell, Lebovitz, Stander,
Marx and Barnes

Editor
Lawrence Kirk

Production Coordinator
Ivy Mi

E-mail:
lkirk@glsm.com

SIF – Continued from Page 1

(2) The combined disability of the two injuries must be greater than that of the disability from the subsequent injury alone; *and*

(3) One of the following conditions must be met:

(a) The previous disability/impairment must have affected a hand, leg, arm, foot, or eye; the disability from the subsequent injury must affect the opposite and corresponding member; and the disability from the subsequent industrial accident, when considered alone and without regard to or adjustment for the employee's age or occupation, must be equal to **5 percent or more** of the total; *or*

(b) The permanent disability resulting from the subsequent industrial injury, when considered alone and without regard to or adjustment for the employee's age or occupation, must be equal to **35 percent or more** of the total. *Lab C Sec 4751.*

A Simple Procedure

Once these requirements are met, the employee receives ordinary compensation benefits from the claims administrator for the permanent partial disability caused by the subsequent injury and, in ad-

dition, compensation from the SIF for the remainder of the combined permanent disability.

When an SIF case is identified, an *application for SIF benefits* is filed with the WCAB (8 *Cal. Code Regs. Sec 10940*) and a copy is served on the Division of Industrial Accidents, SIF. If the injured worker doesn't file it, the claims administrator may. The application must set forth (1) the date and nature of the industrial injury, and (2) all factors of disability which pre-existed that injury.

Early Involvement Advised

From a practice standpoint, it is best to get the SIF involved as early in the case as possible, as it is entitled to conduct its own discovery. Much like a carrier codefendant, the SIF does serve to benefit the claims administrator by sweetening the pot to assist resolution of a high-exposure case. And, while the SIF does not make direct contribution or reimburse-

ment to the claims administrator, it often does agree to share certain medical-legal expenses.

Rick Tracy would vouch for this.

Cushioned by a joint settlement with Private Eye's claims administrator and the SIF, Rick landed a satisfying job after rehab—training seeing-eye dogs for children. ■

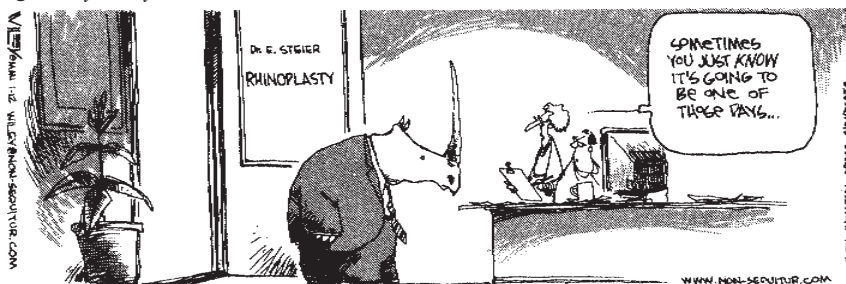
“The SIF’s involvement does serve to benefit the claims administrator by sweetening the pot to assist resolution of a high-exposure case.”

Comp Policy Covers 132a Awards, Rules Court

Fresno. – Upholding the major portion of a \$650,000 civil-jury verdict for insurance bad faith, the Court of Appeal has held that an employer's liability under the anti-discrimination provisions of Labor Code Section 132a is covered under a standard workers' compensation insurance policy, despite statutes prohibiting insurance for willful acts. As a result, concluded the Court, the carrier had a contractual duty not only to defend a sign-company owner against a Section 132a petition, but to indemnify him against a \$54,000 award on it. *Melton v. Industrial Indem. Co.*, 2001 Daily Journal D.A.R. 569 (January 18, 2001) (portions certified for nonpublication). ■

—Lawrence Kirk, Central Coast office.

QME By Wiley



QUOTE OF THE QUARTER

*“Q: Please describe your complaints.
“A: I’m no whiner; I don’t complain about nothin’.”*

—Sacramento deposition testimony, submitted by Tuen Y. Wong



Armoring Your Claims Notes

Confining Sensitive Comments to Communications With Counsel Avoids Harmful Disclosure

And: Pattern of Sexual Suggestions Removes Short-Term Employment Barrier to Psych Compensability; Treatment Time Charged to Sick Leave Brings 132a Violation

Q: An applicant's attorney is subpoenaing and photocopying my claims file. I have some very candid comments in my computer notes about the case. Do I have to print out these notes and include them in the material given to the copy service?

—Concerned in Cucamonga.

A: Except for *privileged attorney-client communications*, all elements of a claims file are generally discoverable. Developing case law suggests that this could broadly include computer entries which are reducible to hard copy. A sensitive communication can be shielded if its "dominant purpose" is transmittal to your counsel in the course of professional employment. Otherwise, though discovery can be resisted on other grounds, compose your computer notes as if you'd suddenly see them on the front page of The New York Times. ■

—Paula A. Farrell,
Greater San Francisco office.

Q: Supervisor Sherri keeps hitting on Subordinate Sam in the lingerie department, to the point where Sam resigns his mannequin job and files a psychiatric-injury claim. Since Sam was employed for only three weeks, isn't his adjustment disorder with mixed emotional features excluded from compensability?

—Confident in Costa Mesa.

A: In *Rojas v. Springfield Ins. Co.*, 28 CWCR 136 (2000), a series of supervisorial sexual-harassment incidents was held to constitute a "sudden and extraordinary employment condition," establishing a statutory exception to the noncompensability of psychiatric injuries to workers with less than six months of employment. Sam still has to demonstrate by a preponderance of the evidence that the injury was more than 50% caused by Sherri's acts. *Lab C Sec 3208.3(b)(1), (d)*. ■

—Jiblet Croft,
Orange County office.

Q: I treat my employees injured on or off the job alike, by charging their half-mornings off work for medical appointments to their accrued sick leave and vacation time. Since I'm not discriminating against job-injured workers, why am I being sued by one of them for Labor Code Section 132a penalties?

—Dumfounded in Del Mar.

A: A recent case held that an employer unlawfully discriminates under Section 132a by requiring an injured worker to use sick leave and vacation time during business-hours treatment for an industrial injury, in the absence of a showing of business necessity. Also, this is the first reported case requiring the payment of TD on a wage-loss basis for time off from work for medical treatment due to an industrial injury. *Lauher v. State of California Dept. of Rehabilitation*, 28 CWCR 103 (2000) (*Quarterly Review*, 3d Q. 2000, p. 2). ■

—Tracie L. Glatter, Greater San Diego office.

ADVENTURES IN FANTASYLAND

Wait'll You Hear This One...

Bulldozer Topples After Tipsy Operator Ignores Owner's "Go-Home" Order; WCAB Awards Comp

Foreman Hadn't Been Told of Directive; Court of Appeal Annuls Decision, Criticizes Board

Van Nuys. —Mike, a bulldozer operator, returned to the construction site after lunch "reeking" of liquor and was directed by the company's owner to go home. The owner then left without informing the foreman of the order, assuming his son would do it. Mike continued to work and sustained injuries to his elbow, neck, and back when the bulldozer toppled over. Blood-alcohol readings at the emergency room were inconclusive.

After trial, a WCALJ found that the injuries arose out of and occurred in the course of employment—reasoning that the owner should have advised the foreman of his order but failed to do so and that, since the foreman observed Mike working after the order, under

"agency principles" the employer had condoned the resumption of work. Reconsideration was denied, the WCAB also concurring that the employer had failed to prove its affirmative defense of intoxication as the proximate cause of the injury.

On review, the Court of Appeal *annulled* the decision. Ruling that the Board had improperly applied the rules of agency, the Court held that when Mike ignored the "go-home" order his operation of the bulldozer was an *unauthorized departure from the course of employment*, rendering the injury noncompensable. "As a matter of public policy," declared the Court, "an employer retains the right to terminate the employment bargain when an inebriated employee comes to a job site and thereby

endangers himself and his coworkers." The intoxication defense was deemed unnecessary.

Comment: The Board was properly rebuked by the Court here for expecting an employer to go beyond unequivocally ordering a suspect employee to leave the workplace. This decision does recognize that an injury which merely occurs during *the performance of a duty in an unauthorized manner* remains compensable—though it may constitute serious and wilful misconduct on the part of the employee. ■

R.J. Scuffy, Inc. v. WCAB (Fritzler), 65 Cal. Comp. Cases 1265 (2000).

By Lawrence Kirk,
Central Coast office

A N N O U N C E M E N T S

Joanne M. Thomas, shareholder/manager of our *Inland Empire* office in Riverside, announces the association of **M. Eric Parkan**. Mr. Parkan is a 1963 graduate of the UCLA School of Law following undergraduate election to Phi Beta Kappa, and brings 37 years of workers' compensation practice to the firm.

Michael C. Miller has rejoined the firm, announces **Anthony J. Fink**, a shareholder/team manager in our *Greater Los Angeles* office. Mr. Miller has specialized in workers' compensation defense for 20 years, including service in our *Orange County* office from 1983 to 1986.

Valerie A. Smith, a 1997 graduate of Western State University College of Law, has relocated from Orange County to join our *San Jose* office. Ms. Smith has an intensive background in civil and workers' compensation litigation.

Theresa Carter Geoffroy, a 1998 graduate of Santa Clara University School of Law with a degree in political science from Stanford University, has joined our *Central Valley* office in Sacramento. Most recently practicing workers' compensation defense in San Jose, Ms. Geoffroy has particular expertise in appellate work.

Stewart R. Reubens, shareholder/manager of our *Greater San Francisco* office in Novato, announces the association of **Paula A. Farrell**. A 1997 graduate of Santa Clara University School of Law, Ms. Farrell's diverse background includes workers' compensation defense in Santa Rosa and 22 years as a registered nurse.

R. Jeffrey Stander, a shareholder/team manager in our *Greater Los Angeles* office, announces the association of **Sonja D. Gipson**. A 1994 juris doctor graduate of Southwestern University School of Law, Ms. Gipson last served as staff counsel for Liberty Mutual Insurance Company.

CAPITOL REPORT

Hepatitis, Meningitis Added to List of Presumptive Safety-Officer Injuries

Sacramento. – Codified in new Labor Code Sections 3212.8 and 3212.9 effective January 1, 2001, the Legislature has added *hepatitis and meningitis* to the list of presumptively-compensable injuries to certain law enforcement and firefighting public employees. Until now, these injuries have been limited to hernia, cancer, heart trouble, pneumonia, and tuberculosis. (*Lab C* Secs 3212 – 3212.7.) ■

New Benefits-Increase Bill Introduced, With an Eye to the California Economy

Sacramento. – Following Gov. Davis' veto of SB 996, which proposed to increase benefits to injured workers (*Quarterly Review*, 4th Q. 2000, p. 4), Sen. John Burton has introduced SB 71. Its aim is to raise benefits while meeting the governor's concerns about the adverse effect of a massive increase on the California economy. ■

IN THE NEXT ISSUE

Judicial Creep: Post-Injury Earnings

**GRANCELL, LEOVITZ, STANDER, MARX AND BARNES
QUARTERLY REVIEW**

FIRST CLASS
U.S. POSTAGE
PAID
Permit No. 022
Los Angeles, CA

*How to Use the
Subsequent Injuries Fund*

POSTMASTER: Please send address changes to GLSM&B,
P.O. Box 45045, Los Angeles, CA 90045

YOUR SUBSCRIPTION ENCLOSED