

Quarterly Review

First Quarter 2002

A Legal Update for the Claims Professional

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Crossing the Threshold

Employer Fault in Third-Party Case Delays Comp-Case Credit

Expert Defense Team Needed When WCAB Becomes a Negligence Arena

By Bruce B. Neft, subrogation attorney, Greater Los Angeles office

Carson - When a bride is being carried across the honeymoon-cottage threshold, it helps if the groom is strong and there are few steps to climb. The same principles apply to getting the employer across a certain line in the area of third-party credit.

An employer may have the right to be fully or partially relieved from the obligation to furnish workers' compensation benefits after the injured worker has received money for the injury from a third-party "tortfeasor" (wrongdoer) defendant. The right to credit arises under Labor Code Sections 3858 and 3861 after (a) an employee suffers an industrial injury caused, at least in part, by the fault of a third party, (b) the employee receives a judgment or settlement from the third party, and (c) the employee either asks the WCAB to award additional workers' compensation or remains

entitled to receive previously-awarded compensation.

Getting It Is One Thing...

The credit can be applied against the employer's liability for "compensation," which has been held to include temporary disability, permanent disability, medical expenses, vocational rehabilitation costs, penalties (including increased compensation for the employer's serious and willful misconduct), medical-legal costs, and the applicant's attorney's fees. The employer can assert the credit as a defense to a claim for additional compensation, or it can petition the WCAB for an order allowing credit.

The amount of the credit is the employee's actual net recovery from third parties, though Sections 3858 and

See Threshold - Page 2

WINNING BRIEFS

Goleta

Senior's Memory Lapse Blunts AME Blade

A 66-year-old motel maintenance worker saw his petition to reopen a back-and-finger award to include severe cumulative injury to the knees *denied* despite a verifying AME report, after *Lawrence Kirk* of our *Central Coast* office emphasized in a trial brief the employee's history to the AME that he "didn't remember" feeling knee pain during the employment. On cross-examination, he did recall a prior knee-injury settlement he'd neglected to disclose to the AME. ■

Long Beach

Home Gunshot Injury Too Remote From Job

In a case handled by *Timothy E. Kinsey* of our *Greater Los Angeles* office, a WCALJ's take-nothing order was *upheld by the WCAB on reconsideration* despite the contention of the motorcycle-officer claimant that a hand injury which occurred when he accidentally shot

himself with his service weapon at home on vacation was work-related. Although he was "demonstrating gun safety to his family" and was on-call, the Board found that there was no benefit to the employer from the activity. ■

Oakland

Worker Claims Full Recovery, Total Disability From Same Event

A two-week employee was ordered to *take nothing* on his \$130,000 claim of a back injury when the WCALJ found the laborer's testimony of full recovery from a previous back surgery "not credible." *Stewart R. Reubens* of our *Greater San Francisco* office presented evidence that five months prior to his hire the worker had filed a social security disability claim, certifying that as a result of the surgery he was permanently unsuitable for gainful employment. ■

Grancell, Lebovitz,
Stander, Barnes and
Reubens

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.

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Threshold – Continued from Page 1

3861 specifically exclude amounts that the employer is reimbursed from the third party, the employee's litigation costs, and his attorney's fees in the third-party case. While subrogation may allow an employer to recover its costs incurred for workers' compensation benefits previously paid, credit can limit future exposure and can even result in dismissal of the compensation claim and closure of the file.

"The employer is required to continue benefits until the amount paid is equal to its proportionate fault share of the employee's damages in the third-party case."

...Taking It Is Another

Once the right to credit is secured, the employer can exercise it by declining to furnish additional benefits. However, it faces Section 5814 "unreasonable delay" penalties if it does so where the employee has not yet been paid by the third party; or, where the employee's net recovery turns out to be minimal; or—most important of all, but not well-understood—where its fault in contributing to the accident requires it to continue benefits until the amount paid is equal to its proportionate share of the employee's damages in the third-party case. It is only beyond this "threshold" that the employer can actually start taking the credit. See *Associated Constr. & Engr'g Co. v. WCAB (Cole)* (1978) 43 Cal. Comp. Cases 1333.

Two examples illustrate how the threshold applies:

1. Suzy suffers an industrial injury caused 100% by a third party. The employer has paid \$25,000 in workers' compensation benefits. She receives a gross recovery of \$150,000 from a settlement. Her attorney's fees and costs are \$50,000. The employer gets a subrogation recovery of \$25,000 for benefits previously paid out and a credit of \$75,000 against benefits that would otherwise be payable in the future because Suzy's net recovery is \$75,000 (\$150,000, less \$50,000 attorney's fees and costs and \$25,000 reimbursed to the employer). The employer may assert its credit against all further workers' compensation benefits immediately following Suzy's receipt of her net recovery proceeds.
2. Same facts, except the case goes to trial and the jury in awarding damages of \$150,000 to Suzy determines that the Suzy had no fault, the employer was 25% at fault and the third-party defendant was 75% at fault. The employer's proportion of fault is \$37,500—25% of \$150,000. The employer may not recover from the third party because its proportion of fault, 25% or \$37,500, exceeds the amount of benefits paid, \$25,000. Furthermore, the employer must continue to pay benefits until the total of \$37,500 is reached. It is only beyond that threshold that the employer may *begin* to assert the full amount of its \$75,000 credit.

High Court Narrows Scope of ADA "Disability"

Washington, D.C. – Reversing a judgment of the U.S. Sixth Circuit Court of Appeals that an automobile assembly line worker's carpal tunnel syndrome qualified as a "disability" under the Americans With Disabilities Act (ADA), the U.S. Supreme Court has ruled that disability under the ADA must "severely restrict" the performance of tasks that are "of central importance to daily life"—such as household chores, bathing, and brushing one's teeth. *Toyota Motor Mfg. v. Williams*, 2002 DJDAR 197 (see *Quarterly Review*, 4th Q. 2001, p. 4).

However, commentators observe that this should not affect lawsuits brought under the more worker-friendly California Fair Employment and Housing Act (FEHA), which requires accommodation of workers whose disabilities merely "limit" the performance of a "life activity." ■

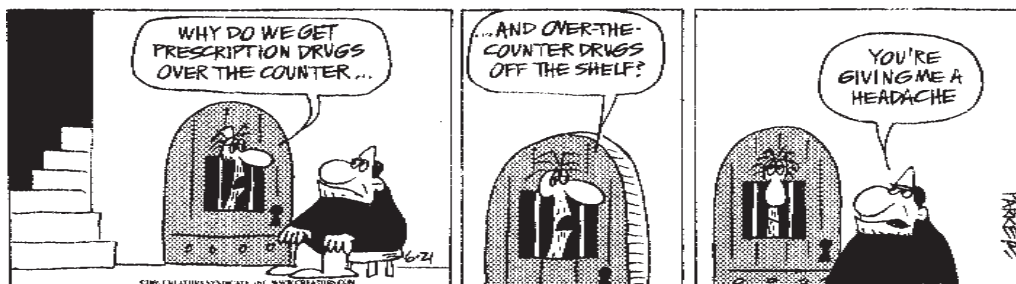
—Robert J. Chimits, Orange County office

Judge and Jury

When an injured worker interposes a plea of employer fault to an assertion of credit, but the third-party case settled without a jury verdict, a prudent employer will ensure that its team at the WCAB includes not only a versatile workers' compensation defense attorney but also an experienced subrogation attorney. The two attorneys coordinate their expertise in mounting the equivalent of a full-scale Superior Court-type demonstration to the WCALJ, who is likely a novice in civil tort concepts, of the lowest possible contribution of employer fault to the accident—the ideal being zero.

The employer can then be carried—like a joyous bride—across the threshold and into the honeymoon of its third-party credit rights. ■

WIZARD OF ID By Brant Parker and Johnny Hart



QUOTE OF THE QUARTER
 "This is a very, very large hit on employers. This will bury a lot of manufacturers."
 —Willie Washington,
 California Manufacturers and
 Technology Association, on
 AB 749 (see Page 4)



3-Cent Pickup

Grace Period Granted on Mileage-Raise Audit Penalties, But Retroactive Adjustment Required

And: Odd Psych Disabilities Get Ratings, Too; No 132a Liability for Terminating Non-QIW on Credible Fear of Reinjury

Q: I just heard that the mileage rate for comp travel was increased from 31 cents to 34 cents, effective October 1, 2001. Will I get hit with an audit penalty for paying it at 31 cents after that date, and do I have to go back and pick up the difference now?

—*Stuck in Lodi.*

A: According to a DWC bulletin, the Audit Unit will refrain from assessing penalties for violations which occur before April 1, 2002 with respect to medical, medical-legal, and new-VR plan travel expenses. However, claims administrators are required to pay the injured worker for mileage at the higher rate retroactive to October 1, 2001, the only exception being a VR plan which had already set mileage at a different rate. ■

—*Tuen Y. Wong, Stockton/Modesto office.*

Q: I have a case where the WCALJ has just

requested a recommended rating from the DEU after trial for “psychiatric disability precluding working with the general public and working with money.” Is this really a ratable disability and, if so, wouldn’t it be 100% PD?

—*Gasping in Goleta.*

A: Kathleen Johnston of the DEU in Ventura advises that it is indeed a ratable disability, at 20% standard. ■

—*Cheryl E. Tobor, Central Coast office.*

Q: Jurassic Joe’s treating doctor just declared him permanent and stationary with a “no very heavy lifting” spinal restriction, and found that he wasn’t a QIW. But I’m afraid that if Joe keeps straining at his regular stock-clerk job

he will hurt himself—and me, too. Can I terminate Joe and put him through rehab without worrying about Labor Code Section 132a?

—*Edgy in Elk Grove.*

A: An employer is not chargeable with Section 132a work-injury discrimination if it removes an injured worker from his usual and customary job based

“Claims administrators are required to pay the injured worker at the higher mileage rate retroactive to October 1, 2001....”

upon a good faith belief that the job creates a danger of harm to the employee or others, and the belief is supported by credible medical evidence—preferably addressing a thorough job description or job analysis. *Rosas v. WCAB* (1998) 63 Cal. Comp. Cases 781 (writ denied). As a first step, have a job analysis done and submit it to Joe’s doctor for comment. ■

—*Ted E. Richards, Central Valley office.*

ADVENTURES IN FANTASYLAND

Close Call

Uninsured Contractor Keeps Valid License Until Notice of Suspension, Rules Appellate Court

UEF Argued “Automatic” Suspension; Independent-Contractor Status Remains In Force to Shield Customers From Comp Liability

By Norin T. Grancell, CEO and Lawrence Kirk, Central Coast office

City of Industry – Byung got a painting contractor’s license by certifying he was exempt from carrying workers’ compensation insurance because he had no employees. He hired Sung as a helper but did not get insurance, nevertheless contracting to paint Tomadur’s engine factory on a representation that he was licensed and insured. Sung fell off a ladder while working and was seriously injured.

The Uninsured Employers Fund (UEF) stipulated to a 73%-PD award but asserted that liability should be shifted to Tomadur as Sung’s “employer,” contending that under a provision of the Contractors State Licensing Act Byung’s license had been “automatically suspended by operation of law” so as to remove him from independent-contractor status the moment he

hired employees without getting insurance. A WCALJ found Tomadur jointly liable with the UEF—despite the fact that the state registrar of contractors never gave Byung a 30-day notice of the suspension, as required in the same statutory provision.

On reconsideration, the WCAB exonerated Tomadur, concluding that until an uninsured contractor has received notice of suspension his license remains valid to maintain his status as an independent contractor—shielding those who hire him from Labor Code Section 2750.5’s “pass-through” workers’ compensation liability for injuries to his employees.

On review, the Court of Appeal *upheld the WCAB*. Characterizing the case as one of first impression and “a close question,” the Court

resolved the “tension” between divergent statutory goals to conclude in a significant decision that the Legislature had not intended to enact a system which rendered a hirer of contractors the supervisor of their license conditions.

Comment: A key factor in the Court’s decision was that an inquiry by Tomadur to the state registrar before the injury would have shown only that Byung maintained a valid license. A contrary decision would have imperiled everyone who hires a contractor in California, especially homeowners. (See *Quarterly Review*, 4th Q. 2001, p. 3.) This firm represented the prevailing party. ■

Smith v. WCAB, Alma Piston Co. dba Tomadur Engine Co., et al., 2002 DJDAR 1771 (February 13, 2002).

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

After twenty years with our firm, **Stewart A. Marx** has announced that he will be leaving the firm on March 31, 2002 to pursue other endeavors. We thank Stewart for his valuable contribution and wish him much success and happiness.

The name of the firm has been changed from **Grancell, Lebovitz, Stander, Marx and Barnes** to **Grancell, Lebovitz, Stander, Barnes and Reubens**, in recognition of the significant achievements of **Stewart R. Reubens** on behalf of the firm.

Lana M. Shearer has rejoined our **Central Valley** office in Sacramento.

Joanne M. Thomas, shareholder/managing attorney of our **Inland Empire** office, announces the move of the office to 3801 University Avenue, Suite 270, Riverside, California 92501. The telephone and fax numbers remain (909) 778-2514 and (909) 778-9233, respectively.

The firm announces the opening of our **Fresno/Bakersfield** office at 516 West Shaw Avenue, Suite 200, Fresno, California 93704, telephone (559) 221-2661, fax (559) 221-2665. **David J. Chun** has relocated from our **San Jose** office to be managing attorney of the new office.

R. Jeffrey Stander, a shareholder/team manager in our **Greater Los Angeles** office, announces the association of **Daniel K. Robbins**. Mr. Robbins, a Gulf War veteran and former elementary-school teacher, is a 2000 juris doctor graduate of Loyola Law School with intensive experience in insurance defense.

Lavena Mathrani has joined the team of shareholder **Timothy E. Kinsey** in our **Greater Los Angeles** office. Ms. Mathrani is a 2001 juris doctor graduate of Loyola Law School whose diverse background includes experience as an English teacher in Japan.

Angel Barnes, shareholder/managing attorney of our **Orange County** office, announces the association of **Catherine M. Lynch**. Ms. Lynch was admitted to The State Bar of California in 1997 after serving as an editor of the Law Review at Ohio Northern University School of Law and is an experienced workers' compensation defense attorney.

Min Tak has joined the firm as an associate in our **San Jose** office, announces **Kathleen L. Roberts**, managing attorney. Mr. Tak is a December 2001 admittee to The State Bar of California and holds degrees from the University of Washington and Loyola Law School.

Stewart R. Reubens, shareholder/managing attorney of our **Greater San Francisco** office, announces the association of **Stacy E. McCorquodale**. Ms. McCorquodale is a 2001 State Bar of California admittee and a former legal secretary.

AB 749

Key Comp-Reform Amendments Charted

By **Dennis M. Kemp**, Greater San Diego office

Maximum PD	Jan. '03	Jan. '04	Jan. '05	Jan. '06	
0 - 69%*	\$185	\$200	\$220	\$230	*PD <20% also amended
70% >	\$230	\$250	\$270	\$270	

Maximum TD	\$602	\$728	\$840	% increase of state AWW
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Maximum dependent benefits (after Jan. '06):

3 > total	\$320,000	1 total, 0 partial	\$250,000
2 total	\$290,000	0 total, 1 > partial	\$250,000**
1 total 1 > partial	\$250,000 - \$290,000	0 total, 0 partial	\$250,000***

8x annual support *to parents or estate

- ↑ PD-trial "baseball arbitration" eliminated.
- ↑ Presumption of treating physician correctness eliminated, except when injured worker has predesignated a personal physician.
- ↑ Where injured worker secures state panel QME, later becomes represented, now entitled to additional QME, so is employer.
- ↑ Right to prospective VR can be settled for up to \$10,000.
- ↑ Medical-confidentiality disclosure exception modified.
- Penalty attorneys' -fee assessments extended from public entities to all insured or self-insured employers. Multiple-penalty awards narrowed. ■

IN THE NEXT ISSUE

How to Handle Temp-Service Employer Issues

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**Crossing the Credit Threshold:
Comp Judge as Civil Jury**

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