

# Quarterly Review

Third Quarter 2000

A Legal Update for the Claims Professional

## IN THIS ISSUE

TD	Indemnity for Treatment Time	2	Penalty	4650 Delay, 5814 Jackpot	3	Medical Control	HCO Program Takes Off	4
----	------------------------------	---	---------	--------------------------	---	-----------------	-----------------------	---

**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, 10<sup>th</sup> 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 2<sup>nd</sup> Street  
Tucson, Arizona 85716-4029  
(520) 323-8188

### The Forgotten Defense

## Injured Worker's Unreasonable Refusal of Treatment Bars Compensation Expert Opinion Required on Risk, Disability Effect

By Lana M. Brown, Central Valley office

**S**acramento. – Essentially unchanged since 1917, Labor Code Section 4056 states:

*“No compensation is payable in case of the death or disability of an employee when his death is caused, or when and so far as his disability is caused, continued or aggravated, by an unreasonable refusal to submit to medical treatment, or to any surgical treatment, if the risk of the treatment is, in the opinion of the appeals board, based on expert medical or surgical advice, inconsiderable in view of the seriousness of the injury.”* [Emphasis added.]

### “Personal Idiosyncrasies”

Section 4056 provides an *affirmative defense* when an employee's unreasonable refusal of treatment causes death or contributes to disability. Its purpose, according to the landmark case of *Flores v. WCAB*, 39 Cal. Comp. Cases 41 (1973), is to “prevent injured workers with treatable injuries from resorting to unfounded beliefs, ungrounded fears, and personal idiosyncrasies or convictions to reject proffered treatment.” The statute does not provide a complete bar to compensation, except in

See *Unreasonable Refusal* – Page 2

Sorry, Wrong Number

### Neat Room Reduces Phone-Assault Award

**Long Beach** – A hotel housekeeper seeking \$155,555 in compensation benefits after allegedly being knocked to the floor with a telephone by a co-worker was awarded *only 3% permanent disability*, when **Robert J. Chimits** of our **Orange County** office presented supervisors' testimony that nothing in the room was found disturbed. ■

Fire Control

### Novel Strategy Defeats Disability Retirement Claim

**Riverside** – A fire captain who four years after retiring to become a pastor began experiencing heart trouble saw his \$1,000,000-exposure industrial disability retirement claim *ruled untimely* on appeal, despite having filed it within five years after leaving service as allowed by the workers' compensation presumption statutes. **Norin T. Grancell, CEO**,

## Winning Briefs

established the applicability of a statute which limits filing to within four months of leaving state service unless the employee had been continuously disabled since leaving. ■

There's Always Viagra...

### Rare Drug Tied to Dating Needs, Not Job Injury

**Sacramento** – A production technician who claimed that the internal effects of rotating shifts caused his \$36,000-yearly need for exotic human growth hormone (HGH) voluntarily *dismissed the case*, after **Joan Ganz** of our **Central Valley** office discovered through internet research that the divorcing employee had been ordering HGH “so I can have the testosterone levels of a 21-year-old.” ■

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 © 2000

Grancell, Lebovitz, Stander,  
Marx and Barnes

**Editor**

Lawrence Kirk

**Production Coordinator**

Ivy Mi

E-mail:

lkirk@glsmc.com

**Unreasonable Refusal**

—Continued from Page 1

**No Guarantees**

cases of death, but it does allow a reduction in compensation to the extent that the treatment would have lessened the disability.

The prerequisites to a forfeiture of benefits under Section 4056 are: (1) an admitted or adjudicated industrial injury; (2) an unequivocal tender of the treatment by the employer; (3) refusal of the treatment without good cause; (4) a Board finding that the risks of the treatment are inconsiderable in view of the seriousness of the injury; and (5) the treatment would reduce the disability to a particular extent. See *Gallegos v. WCAB*, 34 Cal. Comp. Cases 322 (1969). Expert medical opinion must support the last two elements.

*“The refusal of a blood transfusion on the basis of religious beliefs is an unreasonable refusal of medical treatment.”*

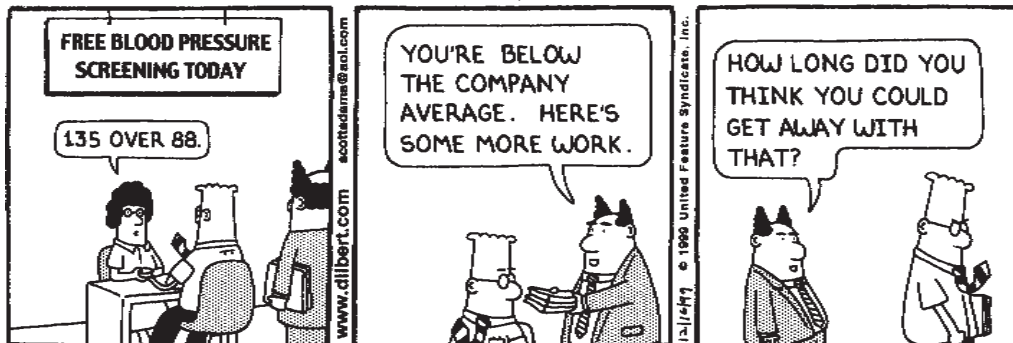
Decisions are infrequent, but instructive. The refusal of a blood transfusion on the basis of religious beliefs is unreasonable. *Martin v. IAC*, 21 Cal. Comp. Cases 361 (1956). So is a refusal of surgery which has been recommended by all evaluating physicians.

*Southern Calif. Edison Co. v. IAC (Harris)*, 12 IAC 365 (1925). Likewise, the refusal of a knee operation because the employee demands a 100% guarantee of success. *Reynolds v. City of San Carlos*, 126 Cal. App. 3d 208, 178 Cal. Rptr. 636 (1981).

While this affirmative defense isn't easy to prove, it is one that is too often overlooked. An injured employee should not gain at the employer's expense when (s)he unreasonably rejects specific treatment that would lessen disability or avoid death. ■

**DILBERT**

By Scott Adams



**QUOTE OF THE QUARTER**

*“Failure to prepare is preparing for failure.”*

—Benjamin Franklin

**Lost Time for Medical Treatment Held Compensable**

A recent WCAB panel decision ruled that an employer must pay temporary disability indemnity on a wage-loss basis for an injured worker's time off from work for medical treatment, despite the lack of direct statutory authority. *Lauher v. State of California*, 28 CWCR 103 (2000). (Note: if post-injury earnings are over \$735 per week, no wage-loss indemnity would be payable. *Coronel v. The Regents of the University of California*, 27 CWCR 227 (1999), *Quarterly Rev.*, 4<sup>th</sup> Q. 1999, p. 3.) ■

—Norin T. Grancell, CEO



Wait-'n-See Blows QME

## Board Puts "Reasonable Time" Rhythm in 4061 Dance And: How to Avoid VR Reinstatement Beyond 5 Years From Injury; Limit Redefined on Termination of Employer's Provisional-Treatment Liability

**Q:** Since Labor Code Section 4061 sets no time limit on contesting the treating doctor's PD determination—unlike Section 4062, on other medical issues—can I wait until Sciatic Susie files a Declaration of Readiness before deciding whether to settle on her PTP's report?

—*Buzz B., Berkeley.*

**A:** In *Strawn v. Golden Eagle Ins. Co.*, 28 CWCR 105 (2000), a WCAB panel held that Section 4061 implies a "reasonable time"

after receipt of the PTP's report to invoke the AME/QME process. There, the carrier's *four-month delay* without explanation was found excessive, resulting in the exclusion of its QME report from evidence. A foolproof solution: use the 20-30 day period of Section 4062. ■

—*Stewart R. Reubens,*  
Greater San Francisco office.

**"Section 4061 implies a 'reasonable time' ...to invoke the AME/QME process."**

**Q:** Patellar Paul hurts his knee at work on September 1, 1995, and is adjudicated a QIW by the Rehabilitation Unit. In 1998 we agree on VR interruption for a definite six-month period, and I send him a Reg 10129 notice that unless he requests reinstatement within five years from the date of injury his right to VR will terminate. On September 2, 2000 Paul requests reinstatement, citing cases which hold that an interruption impliedly reserves Board jurisdiction beyond five years from the date of injury. Does he win?

—*Concerned in Santa Clara.*

**A:** Not according to the Court of Appeal, in *Sacramento County Office of Education v. WCAB (DeBoard)*, 2000 Daily Journal D.A.R. 7723 (July 12, 2000): "We find no authority for an implied reservation of jurisdiction in the face of a *defined period* of suspension [emphasis added]." ■

—*David J. Chun,*  
San Jose office.

**Q:** Carpal Cathy got a "may be" need for medical treatment award seven years ago. I want to close my file. Wasn't there a recent decision which held that an employer is free to seek termination of its liability under such a provisional award even beyond five years from the date of injury, since this is the flip side of the employee's right to *enforce* the award indefinitely?

—*Excited in El Segundo.*

**A:** Yes, but the California Supreme Court has *reversed* that Court of Appeal decision, holding that Labor Code Section 5804 deprives the WCAB of jurisdiction to terminate future-medical liability if the petition is filed beyond five years from the date of injury. However, the employer may still litigate whether a particular *form* of treatment is attributable to the injury. *Barnes v. WCAB*, 28 CWCR 197 (2000). ■

—*Bruce V. Herron,*  
Greater Los Angeles office.

### ADVENTURES IN FANTASYLAND

More Printout Goldmining Ahead

## WCAB Calculates 5814 PD "Species" Penalty for Failure to Self-Assess 4650(d) Increase As 10% of Entire Class of PD Including the Increase No Award of the Automatic Increase is Necessary for Unreasonable Delay, Adds Board; Decision Given Prospective Effect Only

By *Lawrence Kirk, Central Coast office*

**S**an Bernardino. — Patrick sustained a cumulative injury to his upper extremities. After trial, an award was issued for 52% PD, plus a Labor Code Section 5814 10% penalty for failure to make PD advances in accordance with the treating doctor's report. Sixty days later, Patrick filed a petition seeking a further Section 5814 penalty against PD because the carrier had not self-assessed an automatic 10% increase under Section 4650(d) against the one year of accrued PD due on the award.

The WCALJ found the failure to add the automatic increase to be unreasonable and supplementally awarded a second Section

5814 penalty, but specified that it "shall be calculated and paid on the total amount of the [increase]...under Section 4650(d) only" (reasoning that the increase is "a separate category of statutory benefit." Patrick filed a petition for reconsideration, contending that the new Section 5814 penalty should apply against the entire class of permanent disability benefits.

In an *en banc* decision, the WCAB *amended and affirmed* the supplemental award. It concluded that whenever a defendant unreasonably delays a Section 4650(d) increase on untimely payments of disability indemnity, the Section 5814 penalty is *10% of the entire class of the underlying indemnity as augmented by*

*the Section 4650(d) increase* (and here, as also augmented by the first Section 5814 penalty), and not 10% of the automatic increase amount alone. The Board applied its decision prospectively only.

**Comment:** In a footnote, the Board added a warning: because the increase is to be self-assessed "*without application*," a Section 4650(d) increase need not be expressly awarded before there can be an unreasonable delay in its payment. The applicants' bar has been given another lode to mine in benefits printouts. ■

*Farris v. Liberty Mut. Ins. Co.*, 28 CWCR 206 (2000).

## ANNOUNCEMENTS

**George H. Sickman**, a member of The State Bar of California since 1983, has joined our *Central Coast* office in Ventura. Mr. Sickman received his bachelor's degree from The Ohio State University and has 16 years of successful experience in workers' compensation law, with particular expertise in representing school districts.

**Jason Scott Collier**, a 1998 member of the Bar in both California and Nevada with an intensive background in workers' compensation litigation, has become associated with shareholder **Timothy E. Kinsey's** team in our *Greater Los Angeles* office.

**E. Cruz Eusebio** has returned from two years in St. Louis, Missouri to rejoin our *Inland Empire* office in Riverside. Mr. Eusebio, a 1991 member of The State Bar of California, has over seven years of workers' compensation defense experience, including four years with the firm from 1992 to 1996.

**Kathleen L. Roberts**, manager of our *San Jose* office, announces the association of **D. Hiep Truong**. Mr. Truong is a J.D. graduate of Santa Clara University School of Law and holds a bachelor's degree from the University of California at Berkeley.

*Off and Running*

## HCO Program Can Trim Workers' Compensation Costs

By **Juan Hovey**, *The Los Angeles Times*

**O**akland. — Relief from sharp increases expected in workers' compensation premiums can be found in a little-known wrinkle in California law giving employers long-term control over the medical treatment given to an injured worker—an important element in controlling workers' comp costs over the long haul.

*Pots of Money*

The premium increases reflect the fact that workers' comp insurers lose pots of money in California. **And the cost of the average claim rose from about \$27,000 in 1998 to more than \$31,000 last year.** But the state offers an alternative in the Health Care Organization (HCO) program. Launched in 1993 as part of the big overhaul of the workers' comp system, the HCO program seeks to bring the cost-control benefits of managed care to the creaky and expensive world of workers' comp. HCOs contract with health care professionals specializing in the treatment of workplace injuries and in back-to-work rehabilitation and training.

*Back on the Job*

The attraction of the HCO program lies in one simple fact: **It gives the employer con-**

**trol over the injured employee's treatment for up to a year, versus 30 days.** If you control treatment, you control costs, and you get your injured worker back on the job as soon as possible, says one expert.

Some insurers offer premium discounts of up to 10% to employers who opt for HCOs, and those savings, added to the value of controlling the treatment for injured workers, make HCOs increasingly attractive for employers. The state Division of Workers' Compensation estimates the number of employees enrolled in California's HCOs at 100,000, up from 40,000 in January, but its count may be low. One of the six HCOs currently licensed in California has seen enrollment go from 15,000 at the end of 1999 to about 65,000 currently. ■

*Condensed from a feature in the Los Angeles Times, August 29, 2000. Used by permission.*

## IN THE NEXT ISSUE

*The VR Cap: Avoiding a Gift of Corporate Funds*

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

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

*When the IW Pays for Refusing Treatment*

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

YOUR SUBSCRIPTION ENCLOSED