

Quarterly Review

Third Quarter 2001

A Legal Update for the Claims Professional

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Eureka

Claimant Backlashed by Undisclosed Whiplash

A supermarket deli clerk who claimed a permanently-disabling cervical spine injury after one day of employment was *ordered to take nothing*, after shareholder *Stewart A. Marx* of our *Orange County* office established that identical complaints had followed a motor vehicle accident 46 days before the alleged job injury. The employee had denied the prior accident at deposition, and "forgot" to mention it to her QME. ■

Fresno

Bus Driver's Hepatitis Held Unrelated to Park-Bench "Sting"

In a major hepatitis C case handled by *Ted E. Richards* of our *Central Valley* office, a WCALJ ruled that a bus driver who felt a sting in the buttocks upon sitting in an "unsavory" park while waiting to start a trip *failed to carry her burden of proof* on compensability. Based on cross-examination admissions by the claimant and the treating physician, it was found that the disease had more likely been caused by unprotected sexual activity than by a drug-addict needle stick. ■

Van Nuys

Sky's-the-Limitation Ruling Reversed

Granting a petition for reconsideration filed by shareholder *Anthony J. Fink* of our *Greater Los Angeles* office, the WCAB held that adjudication of an accepted 1994 chemical-inhalation claim was *barred by the statute of limitations* because the application had been filed beyond both one year after the last furnishing of benefits and five years from the date of injury. A WCALJ had found that the statute did not apply "because defendant had furnished benefits without raising the issue of non-receipt of a claim form." ■

Go Directly to Jail....

Liability for Comp Benefits Doesn't Stop When Applicant is Incarcerated

He May Not Get the Money, But His "Ex" Might; Discovery, Testimony May be Allowed Behind Bars

By *Liliana C. Naficy-Royal*, Greater San Francisco office

*Papa said, "Oy,
If I get that boy,
I'm gonna stick him
in the House of Detention...."*

—"Me and Julio,"
Simon and Garfunkel

San Quentin. – Tattoo Tommy, 6 foot 6 and 444 pounds of steroid rage, injures his back while employed by Dave's Harley Shop. The next day he's sentenced to 3 to 5 years in the state penitentiary here for felonious assault. How do you handle the comp case—put it on a 5-year diary? File a petition to dismiss? Can you get a medical evaluation? A deposition?

First, check the statute of limitations. The statute is not tolled (suspended) by incarceration where the injury occurs before the incarceration. Thus, if an incarcerated applicant makes a re-

quest for vocational rehabilitation beyond five years from the date of injury and beyond a year after compromise and release approval, the request is barred. *Boyd v. WCAB*, 56 Cal. Comp. Cases 219 (1991) (writ denied); likewise barred is a petition to reopen filed by an incarcerated applicant beyond five years from the date of injury. *Perry v. WCAB*, 38 Cal. Comp. Cases 151 (1973) (writ denied).

Checks to the Ex

Where the statute of limitations doesn't apply, don't bother petitioning for dismissal; the employer's liability to provide benefits continues during incarceration—even though, at least as to a state inmate, no benefits are paid to him while he is incar-

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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.

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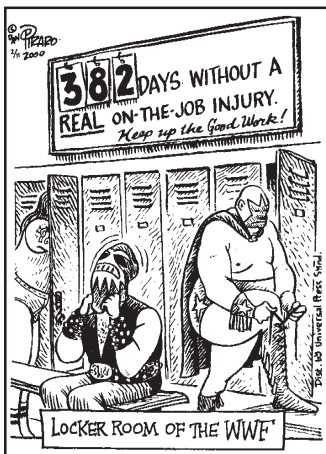
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QUOTE OF THE QUARTER

*"What we call experience
is often a dreadful list of
ghastly mistakes."*

—J. Chalmers Da Costa, M.D.,
"THE TRIALS
AND TRIUMPHS
OF THE SURGEON"



Incarcerated – Continued from Page 1

cerated. *Lab C* Sec 3370 (a) (3). Instead, TD and PD benefits for a pre-incarceration injury which would otherwise be payable to him are paid to his dependents.

For this purpose, "dependents" are defined as the inmate's spouse or children, *including an ex-spouse via divorce* and the inmate's children from that marriage. If the inmate has no dependents, TD benefits are paid to the State Treasury, to the credit of the Uninsured Employers Fund; PD benefits are held in trust for the inmate by the Department of Corrections during the period of incarceration. After release, benefit payments commence directly to the applicant—subject to suspension if he is reincarcerated in a city, county or state facility.

There are no similar restrictions regarding county prisoners, who presumably may receive TD for injuries during or prior to their detention. 1 St. Clair, *California Workers' Compensation Law and Practice* Sec 7.3 (17), p. 402 (5th ed. 1996). In *Cedars Sinai Medical Center v. WCAB (Winston)*, 56 Cal. Comp. Cases 597 (1991) (writ denied), the Board ruled that incarceration was not a valid reason for cessation of TD benefits.

Warden Threw a Party....

As for conducting discovery (or even a hearing) while an applicant is incarcerated, the case of *Hammond v. WCAB*, 64 Cal. Comp. Cases 449 (1999) provides some guidance. There, an

imprisoned British citizen moved to set aside an approved settlement because he had not been advised of his dependents' right to receive his indemnity benefits. The Board ordered the matter taken off calendar over his objection because his incarceration prevented him from attending a hearing. Responding to the applicant's petition to the Court of Appeal for a writ of mandate, the Board offered options which included deferring action until he was out of prison, holding a trial in prison, or transporting him to the Board for hearing—but contended that taking his deposition in prison was "the most appropriate remedy for giving a prisoner meaningful access to Board proceedings." The petition was denied.

Taking that as a hint, the best approach appears to be to contact the institution and find out what arrangements can be made—not only for a

"Taking his deposition in prison is the most appropriate remedy for giving a prisoner meaningful access to Board proceedings."

deposition (which can serve by stipulation as both pretrial discovery and trial testimony), but for a medical-legal evaluation. Qualified physicians can be found who are

willing to travel to a lockup facility. If the authorities—and the applicant—are willing to cooperate, the case can proceed much like any other. Otherwise, secure a special discovery order from the Board.

When you get it, just make sure Tattoo Tommy's expecting visitors. ■

SB 71 Sent to Governor; Veto Uncertain

Sacramento. – Senate Bill 71 (Burton, D-San Francisco), this year's major workers' compensation package, has passed the Legislature and is now on Governor Davis' desk for signature. The Governor is said to be "cool" to the proposal, in the absence of substantive reforms to the entire system. Industry observers believe the bill would increase the cost of workers' compensation to employers by as much as \$3.6 billion.

Prior to the bill's passage, there had been hope that some negotiation would ensue after the Governor revealed his own \$1.5 billion counterproposal. However, Senator Burton then predicted at a press conference that any veto of SB 71 would spark not only a ballot initiative that would double employers' costs, but a vote by injured workers for former Los Angeles mayor Richard Riordan. Whether the Governor would veto the bill remained uncertain at press time. ■

—Norin T. Grancell, CEO



State Panel QME Report Must Still Rebut Treater's Presumption

And: Grounds to Petition AD on Mandatory New Form For Doctor Removal No Longer Include "Inappropriate Treatment"; Late Payment of Post-Award PD Without Interest Brings Only One Penalty, Not Two.

Q: I enter into a C & R with Propria Persona, an unrepresented Brazilian supermodel, based on a 9% DEU summary rating determination on Dr. Respectable's panel QME report. Dazed by Propria, the WCALJ is now threatening to disapprove the C&R unless it gives equal weight to the 56% PTP report of Dr. Giveaway—on which I'd refused to settle in invoking the panel QME process. Doesn't a panel QME report become the measure of the case?

—*Perturbed in Pleasanton.*

A: Not necessarily. When a state panel QME is obtained under Labor Code Section 4061(d) or 4062(b), either party may still rely on the presumption of correctness of the treating physician provided by Section 4062.9. See *Rajo v. Santa Barbara Cottage Hospital*, 27 CWCR 17 (1998). Salvage a favorable disposition by a persuasive showing that the panel QME controverts the presumption by preponderantly indicating a different level of impairment. ■

—*Valerie A. Smith, San Jose office.*

Q: I'm about to petition the Administrative Director (AD) for a change to an employer-designated physician, on a state form I've been using (with occasional success) for the past five years. Do I really need my own doctor's report when it's obvious that the free-choice witch doctor's chicken-leg therapy is inappropriate?

—*Exasperated in El Segundo.*

A: 8 Cal. Code Regs. Section 9786 was amended effective January 1, 2001 to eliminate the inappropriate-treatment ground from AD petitions; a *medically-supported* showing that the employer is prepared to offer more effective treatment must now be addressed to the WCAB. Furthermore, a revamped two-part form for the petition (DWC Form 280) was promulgated by new Section 9786.1, and the AD will no longer act on the prior form. *Eaton v. Vail Lake Village Resort*, 29 CWCR 109 (2001). ■

—*R. Jeffrey Stander, Greater Los Angeles office.*

Q: I was late in picking up accrued PD indemnity under an award after VRMA was terminated, and failed to include interest in my payment. Now I'm being hit with a petition for two 5814 10% penalties, one for the late payment and one for failure to add the interest. How is the second penalty calculated?

—*Confused in El Cajon.*

"A medically-supported showing that the employer is prepared to offer more effective treatment must now be addressed to the WCAB, not the AD."

A: It isn't. An award of two consecutive penalties in this situation was recently reversed by the Court of Appeal in *California Highway Patrol v. WCAB (Erebia)*, 2001 DJDAR 5951 (June 2001), on the ground that multiple penalties may be imposed only for *separate and distinct acts*. The failure to pay post-award indemnity and interest timely was held to be but a single act. ■

—*Michelle G. Bettis, Greater San Diego office.*

ADVENTURES IN FANTASYLAND

Where There's No TD...

4650 Automatic Increase Does Not Apply to First PD Payment, Only to Subsequent Payments, Rules Appellate Court

Employer Escapes 5814 Penalty for Failure to Self-Assess the Increase

By Eric E. Silva, Inland Empire office

Van Nuys. — Phil sustained hearing loss due to cumulative trauma while employed as a city firefighter. The city's QME reported PD in March 1998, but it was not until seven months later that accrued PD was paid and then continued—without the Labor Code Section 4650(d) "automatic" 10% increase.

A WCALJ awarded only a Section 5814 10% penalty against PD for untimely advances, denying the Section 4650(d) increase and a second Section 5814 penalty for the city's failure to add the increase. Phil's petition for reconsideration was denied.

Granting Phil's petition for writ of review, the Court of Appeal *annulled* the WCAB's decision. Rejecting the city's contention that since Section 4650(b) provides that PD payments begin 14 days after the last TD payment, the increase does not apply to a case with no TD, the Court harmonized the statutory scheme so as to apply the increase in non-TD cases only to subsequent periodic PD payments but not to the initial one. The Court declined to order a Section 5814 penalty for the city's failure to self-assess the increase, however, observing that its statutory interpretation "appears to be of first impression."

Comment: Although this decision will have limited effect because so few cases of PD involve no TD, it has been criticized for its failure to consider 8 Cal. Code Regs. Section 9812(g)(4). This regulation arguably supports the applicability of the Section 4650 increase to the initial PD payment by providing that notice of how PD will be paid must be given to the injured worker within 14 days after the last payment of TD or within 14 days after knowledge of PD, whichever is later. ■

Gangwish v. WCAB, 66 Cal. Comp. Cases 584 (2001).

ANNOUNCEMENTS

Tuen Y. Wong, managing attorney of our *Central Valley* office, announces the move of the office to 1545 River Park Drive, Suite 204, Sacramento, California 95815. The phone and fax numbers remain (916) 922-7390 and (916) 922-7392, respectively.

Joanne M. Thomas, managing attorney of our *Inland Empire* office in Riverside, announces the association of *Robyn L. Katchem* and *Kimberly D. Richard*. *Ms. Katchem*, a *magna cum laude* graduate of the University of California, Irvine with a juris doctor degree from Loyola Law School, was admitted to the State Bar of California in 1995 and has an intensive background in insurance defense and medical malpractice law. *Ms. Richard* is a 2000 *magna cum laude* graduate of Whittier Law School and the author of an article on electronic evidence, with a background of insurance defense litigation.

R. Jeffrey Stander, a shareholder/team manager in our *Greater Los Angeles* office, announces that *Aaron D. Hemmings* has become associated with the firm. Mr. Hemmings is a 1996 juris doctor graduate of Southwestern University School of Law with broad experience in general civil litigation.

Jacqueline Clemett, a 1998 juris doctor graduate of McGeorge School of Law whose practice has been exclusively devoted to workers' compensation defense, has joined the team of shareholder *Sam L. Lebovitz* in our *Greater Los Angeles* office.

Thomas E. Youngdale, a 1979 graduate of Lincoln University School of Law whose prominent statewide experience includes service as workers' compensation and safety manager of Kaiser Permanente Health Care Programs, has become associated with our *San Jose* office, announces managing attorney *Kathleen L. Roberts*.

Anthony J. Fink, a shareholder/team manager in our *Greater Los Angeles* office, announces the association of *Diana Balabanian*. A 2000 juris doctor graduate of Loyola Law School with two *magna cum laude* undergraduate degrees from the University of Southern California, Ms. Balabanian has most recently been employed as a RAND Corporation research attorney.

Medical Control

Harsh Decision Suggests Employer Checklist for Proper PTP Designation

By *George H. Sickman*, *Central Coast* office

San Luis Obispo. – The recent Court of Appeal decision in *Pinkerton, Inc. v. WCAB (Samuel)*, 2001 DJDAR 5763 (June 2001) starkly illustrates that where the primary treating physician (PTP) is improperly designated, the employer can lose not only its medical control (including the presumption of correctness of treating physician) but the right to rely on its doctor's discharge of the patient should an issue arise of need for continuing medical care. (See *Tenet/Centinela Hospital Medical Center v. Rushing*, 65 Cal. Comp. Cases 477 (2000).)

Here's a preventive checklist that emerges from *Samuel*:

- ↑ The notice of designation must specify the name of an individual doctor, not the name of a medical group.
- ↑ If the notice is sent following the employee's request for the one-time change of employer-designated physician allowed under Labor Code Section 4601, it must be sent within five working days of the request and must specifically state that it is being provided in response to that request.
- ↑ The notice must clearly state that the designated doctor is the PTP.
- ↑ Until administrative regulations are clarified, the better practice is to serve the notice on the injured employee (not just on the doctor) and, if the employee is represented, on the employee's attorney.
- ↑ The doctor should be advised to clearly identify himself as PTP in his first report. If he doesn't, remind him until he does.
- ↑ The report should be served on a represented employee's attorney. ■

IN THE NEXT ISSUE

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GRANCELL, LBOVITZ, STANDER, MARX AND BARNES QUARTERLY REVIEW

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