

# Quarterly Review

Fourth Quarter 2001

A Legal Update for the Claims Professional

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Despite Federal OK...

## Discontinuing Healthcare Contributions for Work-Injured Employee on Extended Disability May Bring 132a Violation ERISA, COBRA No Antidote; Burden Shifts to Employer to Prove Business Necessity

By *Diana Balabanian*, Greater Los Angeles office

**S**anta Monica - The U.S. Employee Retirement Income Security Act of 1974 (ERISA) makes the regulation of employee pension and welfare benefit plans a *federal concern*, expressly providing that it supersedes state laws in the area. By stating that employers are only responsible for group healthcare coverage for the period provided in the health plan, ERISA permits termination of an employer's healthcare premium contributions when an industrially- *or* nonindustrially-disabled employee has been off work for the period specified in the plan.

However, recent California decisions interpret the State work-injury anti-discrimination law (*Lab C* Sec 132a) as requiring an employer to continue paying the healthcare premiums during an industrially-injured employee's disability leave, irrespective of federal

law—unless a “business necessity” to the contrary can be demonstrated.

### A Shot Across the Bow

A warning shot was provided by *Beverly Hospital v. WCAB (Arbogast)* (1996) 61 Cal. Comp. Cases 491 (writ denied). There, the WCAB found Section 132a discrimination *per se* when the employer had not only canceled an employee's health insurance as provided by the plan because she had been off work for 90 days due to an industrial injury, but attempted to retroactively deny health coverage because due to TTD she had not been at work on the date coverage became effective.

See *132a*—Page 2

## Winning Briefs

*Santa Monica*

### Officer's Fraud-Restitution Check Avoids Prison Sentence

As a result of the defense provided by *Sam L. Lebovitz* of our *Greater Los Angeles* office to a police officer's job-injury claim, the claimant *pleaded guilty* to five counts of felony workers' compensation fraud and money laundering. The claimant was sentenced to up to one year in county jail—avoiding prison only by bringing a \$112,000 restitution check to court. ■

*Oakland*

### Blunderbuss Subpena Proves Strategic Blunder

The dependents of an oil-company employee were ordered to *take nothing* on their \$175,000 claim that the worker's death from pancreatic cancer was caused

by exposure to petrochemicals, when *Stewart R. Reubens* of our *Greater San Francisco* office presented disproving medical evidence—after winning a ruling that the claimants were not entitled to discovery of material safety data sheets covering all 50,000 petrochemicals used by the employer. ■

*Fresno*

### Defiant Provider Finds Paychecks Lighter

*Ted E. Richards* of our *Central Valley* office secured a \$5,936 *restitution order* after trial against a moonlighting county marriage, family and child counselor who had been inadvertently paid by a claims administrator for unapproved counseling of an injured worker. Refusing to repay, the MFCC is now having his wages garnished on a civil judgment based on the order. ■

**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

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600 South Main Street, 10th Floor  
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Encinitas, California 92024-3761  
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FAX (760) 634-0944  
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FAX (909) 778-9233  
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FAX (415) 892-7436  
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555 University Avenue, Suite 230  
Sacramento, California 95825-6505  
(916) 922-7390  
FAX (916) 922-7392  
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25 North Fourteenth Street, Suite 460  
San Jose, California 95112-6203  
(408) 977-1611  
FAX (408) 977-1661  
San Jose • Salinas

**STOCKTON/MODESTO**  
5250 Claremont Avenue, Suite 241  
Stockton, California 95207  
(209) 472-3660  
FAX (209) 472-3661

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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Grancell, Lebovitz,  
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### Editor

Lawrence Kirk

### Production Coordinator

Linda Vrana

E-mail: [lkirk@glsm.com](mailto:lkirk@glsm.com)

### QUOTE OF THE QUARTER

**"Time itself is life's only limitation."**

—Richard Button

IN THE BLEACHERS By Steve Moore



### 132a – Continued from Page 1

The federal-State conflict then emerged in *Schick Moving Systems v. WCAB (Aguilera)* (1998) 63 Cal. Comp. Cases 1307 (writ denied), where the employer terminated a job-injured worker's group benefits after a three-month absence but offered him the right under federal COBRA law to continue coverage at his own expense. When the worker elected not to exercise his COBRA rights and filed a petition for Section 132a penalties, the employer argued that COBRA and ERISA preempted Section 132a. The Board held that California workers' compensation law is to be liberally construed in all aspects, including "penal" provisions, and that COBRA "does not authorize employers to discriminate against injured workers."

### "Realities of Doing Business"

Once the employee shows that following an industrial injury, or the claim of one, (s)he suffered a detriment at the hands of the employer, the burden shifts to the employer under Section 132a to establish that its conduct was necessitated by the realities of doing business. *Judson Steel Corp. v. WCAB (Maese)* (1978) 43 Cal. Comp. Cases 433. In a few health-premium cases the employer has been able to make this "business necessity" showing.

In *Zare v. WCAB* (1998) 63 Cal. Comp. Cases 1449 (writ denied), the Board found that an employer had justifiably removed an employee from group health insurance coverage once he was off the active payroll. The employer, a small towing company which needed all employees at work due to scheduling requirements, demonstrated a business

necessity for terminating the employee after he failed to return to work. See also *Braden v. WCAB* (1999) 64 Cal. Comp. Cases 1069 (writ denied).

### Beast of Burden

Meeting the business-necessity burden can be difficult, however. In an unpublished decision, the Court of Appeal ruled that sufficient evidence of business necessity was not presented by a mere showing that county ordinances and an agreement with the employee's union allowed the employer to cease health-insurance contributions and sick leave/vacation accrual upon an employee's absence from work on TTD for one year, since neither local ordinances nor collective-bargaining agreements supersede Section 132a. *Abrate v. WCAB* (2000) 65 Cal. Comp. Cases 790.

Even more illustrative is *Maraviou v. Tenet Health Systems Hospital, Inc.* (1997) 25 CWCR 341, where a Section 132a violation was found when employer contributions for health insurance were terminated after 12 weeks of disability according to a uniform leave-of-absence policy—despite a strong showing by the employer that the cost of contributions for all employees off work for any reason could exceed a million dollars.

These and other group-insurance cutoff decisions challenge an employer to convincingly demonstrate business necessity *with respect to the particular injured worker*, and not to the workforce in general, in order to escape Section 132a liability. California workers thus get more protection—and California employers get more litigation—than Congress may have contemplated. ■

**"COBRA does not authorize employers to discriminate against injured workers."**

### On Further Review:

## TD For Post-Award Treatment Time Off?

**S**an Diego - Annuling an eyebrow-raising WCAB decision previously noted here (*Quarterly Review*, 3d Q. 2000, 1<sup>st</sup> Q. 2001), the Court of Appeal has held that there is no authority requiring the payment of temporary disability indemnity for time taken off work by a permanent and stationary injured worker to attend a medical-treatment appointment under an award of further medical treatment.

The Court also reversed the Board's ruling that an employer unlawfully discriminates under Labor Code Section 132a by requiring the injured worker to use sick leave and vacation time for these appointments. *Department of Rehabilitation/State of California v. WCAB (Lauher)* (2001) 66 Cal. Comp. Cases 993.

The California Supreme Court has accepted the case for review. ■

—Thomas E. Youngdale, San Jose office

## ADVENTURES IN FANTASYLAND

*Striking a Balance...*

## WCAB Awards \$65,000 Penalty for Late \$97.87 Payment Court of Appeal Annuls, Finds Award “Grossly Disproportionate”

*By Thomas L. Hathaway, Orange County office*

**P**aso Robles – After a 100%-PD award against his county employer on a 1973 injury, Russell won a Labor Code Section 5814 10% “unreasonable-delay” penalty in 1991 on past, present and future medical treatment benefits which eventually totaled \$650,000. The parties informally agreed that a penalty check could be issued following the end of each quarter on treatment expenses paid for that quarter. In 1995, a penalty payment of \$97.87 for one quarter was two months later than usual, but Russell did not notify the county until he filed a penalty petition in 1997.

Following lengthy proceedings which included a remand by the California Supreme

Court, a WCALJ awarded a second Section 5814 penalty for the delayed payment. The WCAB denied reconsideration, agreeing with the judge that the county had not met its burden of showing that the delay was reasonable.

On review, the Court of Appeal *annulled the decision* and remanded the matter to the Board with directions to grant reconsideration and deny the penalty petition. Scolding that mere delay by itself does not support assessment of a penalty, the Court applied a “fair balance” test to determine that the delay was not unreasonable in light of the size of the late payment in relation to the amount of the potential pen-

alty—which here was found to be grossly disproportionate.

**Comment:** Perhaps the most disturbing element of this case is that the California Applicants’ Attorneys Association would actually write an *amicus* brief in support of the Board’s unconscionable decision. Factors influencing the Court included the employer’s prompt correction of a solitary, inadvertent delay (construed as only 15 days), no specified payment time, and the worker’s own passivity. ■

*County of San Luis Obispo v. WCAB (Barnes)* (Oct. 19, 2001) 3 WCAB Rptr 10,297.

*Even Without Legal Notice...*

## Lack of Comp Insurance Automatically Suspends Contractor’s License, UEF Contends; Property Owners Imperiled

### And: It’s OK to Send “Dance” Letter, Set QME Concurrently; Treating Physician Must Say Why Videotape Doesn’t Change His Opinion

**Q:** After the contractor’s license number given by Sincere Sam checked out as valid and he represented that he had comp insurance, I hired him to fix my roof—which his helper just fell off, breaking a leg. It turns out that Sam never got insurance, but the State registrar never sent him a 30-day statutory notice of his license’s “automatic suspension by operation of law” as a result. Am I liable under my homeowner’s policy for workers’ comp benefits?

–*Seasick in Seaside.*

**A:** Not unless the Court of Appeal in a pending case handled by this firm reverses the WCAB on review, as sought by the Uninsured Employers Fund. The Board had held that, absent changes in the language of the Contractors State Licensing Act, until the uninsured contractor has received notice of suspension his license remains valid to maintain his status as an independent contractor. Otherwise, the property owner could be unprotected by homeowner’s “residential employee” coverage if the injured worker didn’t meet threshold hours/earnings requirements on that particular assignment. *Smith/UEF v. WCAB (Lee)* (Sept. 21, 2001) 3 WCAB Rptr 10,270.

–*Norin T. Grancell, CEO.*

**Q:** I sent 4062 objections to a free-choice PTP’s determination of continuing TTD and sought agreement with the applicant’s attorney on an AME, stating that if we couldn’t agree in 10 days I’d pick a defense QME. To gain lead time, concurrently with my objection letter I set a QME appointment for 20 days from the date of the letter. Applicant kept the appointment, but his attorney is now moving at the MSC to exclude my QME report on the ground that I jumped the gun. Did I?

–*Remorseful in Riverside.*

**A:** No. In *Rivas v. Zurich American Ins. Co.* (Oct. 2001) 29 CWCR 253, the WCAB held that a QME evaluation may not be excluded from evidence on the sole ground that the appointment was made during the 10-day statutory cease-fire period. Section 4062(a)’s provision that “after the period to reach agreement has expired, the objecting party may *select*” a QME was interpreted to mean only that the employee may not *attend* a QME evaluation before the agreement period expires.

–*Kimberly D. Richard, Inland Empire office.*

**Q:** Anabolic Arnie’s free-choice treating doctor states in a supplemental report only that his sedentary-PD opinion hasn’t changed after watching 55 minutes of ABC-TV videotape showing Arnie winning the “World’s Strongest Man” contest. My defense QME states in detail why the vigorous activities depicted on the tape are inconsistent with the PTP’s work restriction. Do I have any chance of rebutting the treater’s presumption of correctness?

–*Overanxious in Oceanside.*

**A:** Where a treating physician does not discuss why review of videotaped activity did not change his opinion, the report does not constitute substantial evidence—not only for failure to comply with 8 Cal. Code Regs. Section 10606(n), but for failure to provide sufficient objective findings to support work restrictions when the claimant’s credibility is placed in question. As a result, Labor Code Section 4062.9’s presumption of correctness does not even apply. *Hernandez v. WCAB* (Oct. 5, 2001) 3 WCAB Rptr 10,293.

–*Dennis M. Kemp, San Diego County office*

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

The announcement in the Third Quarter 2001 issue of our *Central Valley* office's move should be deemed inoperative. The address remains 555 University Avenue, Suite 230, Sacramento, California 95825-6505, telephone (916) 922-7390, fax (916) 922-7392.

The firm announces the opening of our *Stockton/Modesto* office at 5250 Claremont Avenue, Suite 241, Stockton, California 95207, telephone (209) 472-3660, fax (209) 472-3661. **Tuen Y. Wong** has been named as branch manager.

**Sam L. Lebovitz**, a shareholder/team manager in our *Greater Los Angeles* office, announces the association of **Douglas A. Estes**. Mr. Estes is a 1996 *magna cum laude* graduate of Thomas Jefferson School of Law, where he served as a Law Review editor, and a former production manager at Boeing.

**Anthony J. Fink**, a shareholder/team manager in our *Greater Los Angeles* office, announces the association of **Bethe C. Barkley** and **Antony Loo**. Ms. Barkley had been serving as a law clerk with the firm and is a May 2001 juris doctor graduate of Loyola Law School, where she served as an editor of the Law Review. Mr. Loo, a member

of The State Bar of California since 1997, has an extensive medical and litigation background.

**Stewart R. Reubens**, shareholder/managing attorney of our *Greater San Francisco* office, announces the association of **John C. Peterson**. Mr. Peterson, an experienced workers' compensation defense attorney, secured his juris doctor degree from McGeorge School of Law/University of the Pacific in 1997.

**Angel Barnes**, shareholder/managing attorney of our *Orange County* office, announces the association of **Thomas L. Hathaway**. A 1997 juris doctor graduate of Western State University College of Law, Mr. Hathaway's workers' compensation background includes service as claims supervisor of a major insurance company and successful practice as a defense litigator.

**Tod M. Pritchett**, a University of Texas graduate with a 1995 juris doctor degree from McGeorge School of Law/University of the Pacific and broad experience in workers' compensation defense, has become associated with our *Central Valley* office in Sacramento, announces **Ted E. Richards**, branch manager.

What's a "Disability"?

## Justices Ponder CT Job Injuries and the ADA

**W**ashington – Ella developed carpal tunnel syndrome and tendinitis from sponging down new cars on an Ohio assembly line, suing under the Americans With Disabilities Act (ADA) when the company refused her request to work as an inspector. After losing and winning on the way up the federal-court ladder, Ella now finds her case before the U. S. Supreme Court—with the car maker contending that, because her injuries are only a problem at work, Ella is not entitled to the ADA's "reasonable accommodation" protection for a "qualified individual with a disability."

During oral argument recently Justice Sandra Day O'Connor remarked that the 1990 ADA "wasn't intended to replace workers' comp," adding that the law was supposed to focus on "the wheelchair-bound, not car-

By *Theresa Geoffroy, Central Valley office*

pal tunnel syndrome or bad backs." Conservative Justice Antonin Scalia chimed in about a "relatively minor impairment like tendinitis." Legal observers note that two years ago the High Court narrowed the disability-discrimination law to exclude workers with "treatable conditions or impairments."

### IN THE NEXT ISSUE

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

A ruling is expected after the first of the year. ■

*Toyota Motors v. Williams*, U. S. Sup. Ct. Docket No. 00-1089.

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