

Quarterly Review

Fourth Quarter 2002

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A Legal Update for the Claims Professional

IN THIS ISSUE

C&R

Future Med
\$2.9 Million Short

2

Psych Claims

Bad Charges,
"Good Faith"

3

Employment

Animal Husbandry
is No Job

4

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WINNING BRIEFS

San Jose

No PD, 132a After Supple Claimant Resigns

A work-uniform presser was ordered to *take nothing* on her \$134,000 claim of shoulder disability and discriminatory termination, when *Kathleen L. Roberts* of our *San Jose* office presented *sub rosa* videotape showing unrestricted car-washing activity—and three managers who established that the claimant herself had submitted a letter voluntarily resigning after the injury to “stay home and care for my children.”

Sacramento

Credit for Overpaid PD Ordered Against Future Medical

Ted E. Richards of our *Central Valley* office secured an almost-unprecedented order allowing a “reasonable and equitable” *credit against future medical*

Legislative Curveball

AB 749 Quietly Extends Assessment of Post-Award Penalty Attorneys’ Fees From Public Entities to All Employers

Little-Noted Amendment Could Have Significant Impact; Increased Vigilance Advisable

By *Rich Ellis*, Stockton/Modesto office

Sacramento – Injured workers generally have to pay their comp lawyers themselves, out of funds ordered withheld from benefits under the attorney’s lien for services rendered (Lab. Code, §4903(a)). An employer’s obligation to pay the employee’s attorney fee out of its own pocket has been limited to such events as (1) an overadvancement of permanent disability indemnity, leaving insufficient funds out of which the fee could be paid; (2) a special attorneys’ fee when the employer takes the deposition of the applicant (Lab. Code, §5710(b)(4)); or (3) a fee incurred by the applicant in successfully resisting an attempt to terminate an award of continuing medical treatment (Lab. Code, §4607).

But the Legislature has thrown us a curveball. AB 749 (effective January 1, 2003) does codify case law re-

treatment for a PD overpayment of \$11,173.18, when no other category of benefits was available for recoupment beyond five years from the date of injury. The overpayment resulted when advances were continued under threat of a penalty after an AME reduced his PD evaluation from 47% to 33%. Reconsideration was denied (30 CWCER 217). ■

Anaheim

Power of Suggestion Creates Work-Injury Claim

In a case handled by *Robert L. Chimits* of our *Orange County* office, a convention center setup person left court with *empty pockets* on a \$128,000 claim of knee injury. The 400-pound employee’s story of bumping the knee while getting into a golf cart was developed, testimony showed, after a roommate suggested he report his serious health problems as work-related. ■

stricting the award of multiple penalties but, in what some consider a labor-management tradeoff, significantly extends to private-sector employers liability for certain penalty attorneys’ fees previously assessed only against public entities—without much notice having been taken.

Enforcing an Award

Labor Code section 5814 provides, in pertinent part:

“When payment of compensation has been unreasonably delayed or refused, *either prior to or subsequent to the issuance of an award*, the full amount of the order, decision or award shall be increased by 10 percent.” [Emphasis added.]

See *Attorneys’ Fees* – Page 2

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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QUOTE OF THE QUARTER

"It is easier to do a job right than to explain why you didn't."

—Harry S Truman

Attorneys' Fees – Continued from Page 1

And until now, the relatively-obscure Labor Code Section 5814.5 provided in pertinent part:

"When the payment of compensation has been unreasonably delayed or refused *subsequent to the issuance of an award* by an employer *which has secured the payment of compensation pursuant to subdivision (c) of Section 3700*, the appeals board shall, in addition to increasing the order, decision, or award pursuant to Section 5814, award reasonable attorneys' fees incurred in enforcing the payment of compensation awarded." [Emphasis added.]

What a Difference a "(c)" Makes

Section 3700, "Employer's possible means of securing payment," simply provides three separate methods—(a), (b) and (c)—by which every employer except the state must secure payment of workers' compensation benefits. As referenced in section 5814.5, section 3700(c) applies only to "any county, city, city and county [there's only one—San Francisco], municipal corporation, public district, public agency, or any political subdivision of the state." While section 5814.5 does not expressly state that the public entity pays the attorneys' fee on top of the penalty, it is so interpreted—provided the services were rendered in the enforcement of an award. *Sonoma County Office of Education v. WCAB (Paterson)* (1997) 62 Cal. Comp. Cases 1604 (writ denied).

However, AB 749 quietly amended section 5814.5 by deleting "subdivision (c) of," thus incorporat-

ing the entirety of section 3700. The effect: employers securing comp under sections 3700(a) or (b) have to pay a post-award penalty attorneys' fee, too. And who are these additional employers? Subdivision (a) employers are those who buy insurance policies from carriers. Subdivision (b) employers are those who elect to be self-insured. In a word: *everybody*.

Higher Percentages

Of course, not every section 5814 "species" penalty will now have an attorneys' fee taxed to the employer. The injured worker will still have to pay the attorney's fee awarded on a penalty for unreasonable delay of a *pre-award* benefit. However, if a payment due under that penalty award is in turn unreasonably delayed—even by the omission of interest—a further section 5814 penalty will trigger the attorneys' fee assessment.

And penalty attorneys' fees tend to be in higher percentages than the 9-to-15% fees usually awarded out of indemnity or lump-sum C & Rs. In a recent Oxnard case, the applicant sat still for an award to his lawyer of 40% of a \$6,112.50 penalty for a three-month gap in payment of PD advances.

With indemnity rates also increasing under AB 749, claims administrators will need to be even more vigilant in administering payments due under WCAB awards. Without fanfare, the proverbial installment that "just fell off automatic pay" could now bring not only a penalty, but a penalty attorneys' fee assessment as well. ■

"In a recent case, an applicant sat still for an award to his lawyer of a 40% fee out of a PD penalty."

Short C & R

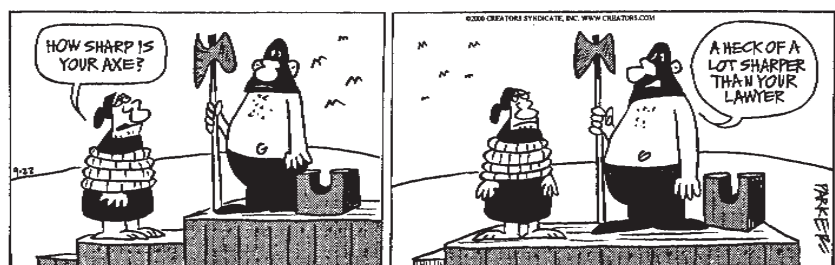
\$2.9 Million Negligence Verdict Hits Applicant's Attorney

By Joan S. Sheppard, Central Coast – South office

Los Angeles – A Superior Court jury awarded a judgment of \$2,873,962 to an injured worker against an attorney who had advised him to settle his workers' compensation case for an amount that failed to cover his future medical treatment costs.

The applicant was injured on the job in 1990 when he fell in a supply room and hurt his back. After doctors agreed that he was entitled to future medical care, he signed a \$60,000 C & R on his comp attorney's advice. By the time the civil suit was filed, the worker's ongoing medical expenses were approaching \$166,000. **Implications:** Applicants' attorneys may be reluctant to settle future medical in certain cases. ■

THE WIZARD OF ID By Brant Parker and Johnny Hart



ADVENTURES IN FANTASYLAND

Psychiatric Injuries

Investigation of Racial Discrimination Charge Remains “Good Faith” Personnel Action Even if it Fails to Substantiate the Accusation, Rules Appellate Court

WCAB Ordered to Determine if Defense Contractor’s Action Was 35-40% Cause of Resulting Injury; If So, Reform Statute Bars Compensability

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

Van Nuys - Robert, a tooling inspector for a large defense contractor, was accused by a co-worker of racially discriminating against an African-American employee he was training. After a detailed investigation, the employer was unable to substantiate the allegation but did find evidence of training and documentary irregularities, issuing a final warning and a 3-day disciplinary suspension.

A WCALJ found Robert’s ensuing claim of psychiatric injury compensable, relying on his testimony and the reports of his psychiatrists. Awarding 20% PD plus further medical treatment, the judge found that the injury resulted from a “false” accusation of racial prejudice by the employer, so that “no lawful good faith

personnel action constituted a substantial [35-40%] cause of the injury.” Reconsideration was denied.

On review, the Court of Appeal *reversed the award*, finding that the employer’s action constituted a lawful, nondiscriminatory, good faith personnel action under Labor Code section 3208.3(h). Reasoning that the investigation was mandated by state and federal law as part of the employer’s affirmative duty to prevent discrimination, with no evidence of an improper intent, the Court concluded that the ultimate lack of substantiation of the original charge did not remove the investigation from the realm of good faith. The cause was remanded to the WCAB for a determination of whether the

employer’s action met the statute’s 35-40% causation threshold so as to render the injury noncompensable.

Comment: Under the law as it existed prior to the 1993 psychiatric-injury reforms, an employer generally did have to prove up an illegal-conduct charge in order to defeat a claim of investigation-related psychiatric injury. This decision reflects concern with current events: “The lives of American military personnel and those who serve with our coalition partners should not be endangered by inadequate training by a supervisor employed by a major defense contractor or falsification of documents.” ■

Northrop Grumman Corp. v. WCAB (Graves), 2002 DJDAR 13163 (November 21, 2002).



Ready, Willing... But Not Able

No 132a Back Wages When Terminated Injured Worker is TTD

And: “Normal Bodily Movement” is Normally Compensable; Oversized Claimant Reimbursed for Oversized Spa

Q: I write a letter to Bricklayer Benedict, terminating him while he’s off work on TD benefits “because you have disloyally sued my company.” Now he’s filing a Labor Code section 132a petition, not only seeking reinstatement but also penalties and back wages. OK, so I should’ve called my lawyer first—but can Benedict really sock me for a year’s retroactive wages?

— *Some Nerve in San Clemente*

A: Not if he’s on TTD. In *Coulter v. WCAB* (2002) 67 Cal. Comp. Cases 1013 (not certified for publication), the Court of Appeal held that a work-injury discrimination claimant failed to meet his burden of proof that lost wages were caused by the employer’s action when (1) he was not able to return to his usual work anyway because of disability from the injury and (2) he did not show that there were light duty jobs available with the employer that he could perform within any temporary partial disability work restrictions. ■

— *Angel Barnes*,
Orange County office

Q: Dashing Dave, a youth counselor at a boys’ club, is standing at the front counter when he bends his head down to fill out a form and aggravates a high school neck injury. Since this was just a normal bodily movement, can I deny payment to his chiropractor?

— *Trusting in Tustin*

A: You’ll need medical support. Though early cases held to the contrary, a causal connection is established between injury and employment if the injury is precipitated by a movement incidental to the employment, even if it is a normal bodily movement, unless there is a positive showing by the employer that the injury was wholly spontaneous and solely caused by an “inherent defect” of the employee. *Allied Signal, Inc. v. WCAB (Briggs)* (2001) 66 Cal. Comp. Cases 1333 (writ denied). ■

— *Suzanne M. Banks*,
Orange County office

Q: Giant Geraldo, a former pro football tackle, is awarded lifetime medical treatment for his knee. On the prescription of his treating physician for a “spa with jets,” Geraldo has a Jacuzzi installed which is big enough to hold several New York Jets. Can I reimburse him based on my nurse case manager’s estimates for a normal-size spa?

— *Prudent in Pasadena*

A: Probably not. In *City of Manteca v. WCAB (Shaefer)* (2002) 4 WCAB Rptr 10,301, a 6-foot-6 injured worker

had an 8’ x 8’ Jacuzzi installed under a general spa prescription and submitted a bill for \$7,537.13. The employer had a witness testify to the cost of a standard-size Jacuzzi, unaware that due to the claimant’s dimensions he could not recline in one. The employee was awarded reimbursement—and a penalty. ■

— *Diana Balabanian*,
Greater Los Angeles office

CASENOTES

Employment – University student injured during field portion of animal husbandry class is not an “employee,” despite arrangement for profit-sharing between school and students on sale of the livestock; profit-sharing is inconsistent with working for pay and, rather than the student “rendering service” to the university, the school was rendering service to the student. *Land v. WCAB* (2002) 67 Cal. Comp. Cases 1109.

Vocational Rehabilitation – 2001 VR reinstatement request to Rehabilitation Unit (RU) made beyond five years from 1995 injury not barred by statute of limitations where, in 1998 between carrier’s request to RU for VR termination order and RU’s termination order, applicant had filed a “stealth” (per dissent) petition to reopen PD award with the WCAB including a request that VR be reopened, and the petition had been granted in 2000 for an increase in PD. *Martino v. WCAB*, No. B155646 (Ct. App., 2nd Dist. Div. 6, November 4, 2002).

Injury AOE/COE – Stanford assistant physics professor suffered compensable death when he was struck by runaway automobile while researching during paid sabbatical leave on university-supplied “virtual office” laptop computer at a Starbuck’s in New Jersey—to which state he had traveled for the dual purpose of visiting his parents and having them babysit his children to free him for research. *CIGA v. WCAB (Schneider)* (2002) 67 Cal. Comp. Cases 1160 (writ denied).

Psychiatric Injuries – High school campus supervisor with prior VA 30% psychiatric-disability pension failed to establish claim of psychiatric, internal and headache injuries when she offered no explanation of why principal who she contended was “out to get” her subsequently rehired her for two school terms. *Colburn v. WCAB* (2002) 67 Cal. Comp. Cases 1190 (writ denied). ■

—David J. Chun,
Fresno/Bakersfield office

IN THE NEXT ISSUE

Is There Still a Statute of Limitations?

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

Joanne M. Thomas, shareholder/managing attorney of our *Inland Empire* office in Riverside, announces the association of **Tom Valentine**. Mr. Valentine is a graduate of Western State University College of Law, with legal experience in personal injury and medical malpractice.

Ted E. Richards, branch manager of our *Central Valley* office in Sacramento, announces the association of **Teresa A. McGinity**. A graduate of McGeorge School of Law, Ms. McGinity has a broad legal background including experience in employment and labor law and general civil defense litigation.

Frank Zgrablich, a graduate of University of West Los Angeles School of Law, has joined the team of shareholder/team manager **R. Jeffrey Stander** in our *Greater Los Angeles* office. Mr. Zgrablich, an experienced workers’ compensation litigator, has an extensive background as a licensed engineering contractor.

Sam L. Lebovitz, a shareholder/team manager in our *Greater Los Angeles* office, announces the association of **Nedrudee Liu**. Ms. Liu secured her degree from Loyola Law School and has substantial courtroom experience in a variety of construction and business litigation.

Colin Gallagher, a graduate of University of California, Hastings College of the Law, has joined our *Greater San Francisco* office in Novato, announces **Stewart R. Reubens**, shareholder/branch manager. Mr. Gallagher’s intensive experience in workers’ compensation defense includes employment as staff counsel with the State Compensation Insurance Fund.

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