

Quarterly Review

Fall 2006

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A Legal Update for the Claims Professional

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Statutory Symphony

"Cost of Living" TD Adjustment is WhipSAWWed By Conflicting Anniversary Events

One's a Kickup, the Other's a Kickout; Better Red-Flag Both

By Theresa C. Geoffroy, Stockton/Modesto office

Pasadena – Before the floats begin to roll in next January's Tournament of Roses parade, a careful checkup will have to be given to every file's TTD, permanent total disability (PTD) and life pension rates—factoring in additional complications for TD involving an old statutory two-year rate kickup and a new statutory two-year finish line. This will be the effect of a significant recent development in the law, with penalty traps for the unwary: the addition of an annual "cost of living" increase to certain indemnity payments.

These increases are computed by using the State Average Weekly Wage ("SAWW"), a number reported by the U.S. Department of Labor based on the average weekly wage of California employees covered by unemployment insurance for the 12 months ending

March 31 of the preceding calendar year. In addition to applying to life pensions and PTD indemnity for injuries after January 1, 2003 (*Lab. Code* § 4659(c)), the SAWW calculation is particularly pertinent to TTD rates commencing January 1, 2007 (*Lab. Code* § 4453(a)(10))—just around the corner.

Watch Your Stip

The annual SAWW increases—there's no provision for a decrease—demand specificity when stipulating to earnings. In no event should wages ever be simply stipulated to as "maximum." For injuries which occur on or after New Year's Day 2007, the SAWW law will result in a minimum TD rate of \$132.25 per week (\$198.37 x 2/3) and a maximum TD rate of \$881.67 per week (\$1,322.50 x 2/3), based on the 2006 SAWW increase of 4.96%. (*For the Record*, p. 4.)

See SAWW – Page 2

No Runs, No Hits, No Errors...

Firm's Aces Just Keep Pitching Shutouts

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Claim/Exposure

Coverage/over \$1M
3 Cases/\$248,000
Psych/100% PD
MVA/\$80,000
Multiple/\$91,000
Spine/\$208,716
Reopening/100% PD
Retro TD/\$11,611
Continuing TD/\$75,000
Reopening/96% PD
Spine, 132a/\$80,000
Ankle/\$29,000
Continuing TD/\$33,000

Order

No Liability
3 Take Nothings
Take Nothing
Take Nothing
Take Nothing
Take Nothing
Nothing Further
Recon: 0
TD Terminated
Nothing Further
Take Nothing
Cause: Felony
No Employment

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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SAWW—Continued From Page 1

But the cost-of-living increase in the TD rate may also affect indemnity rates for injuries prior to January 1, 2007. Under section 4661.5, if a payment of TD is made two years after the date of injury, the TD rate is to be computed in accordance with the then-current average weekly wage calculation specified in section 4453 unless it produces a lower payment. (Note: section 4661.5 doesn't apply to result in an increase in PTD payments, despite their being pegged for life to the TD rate. *Duncan v. WCAB* (1978) 43 Cal. Comp. Cases 733 (writ denied).)

“Section 4661.5 doesn't result in an increase in PTD payments, despite their being pegged for life to the TTD rate.”

Thus, if TTD is paid two years after the injury, cognizance must be taken of the new maximum rate in effect at the time the payment is made, especially if the injured worker was a high earner. For example, if Jane Doe's wages at the time of a 2002 injury were \$1,500 per week and she becomes TTD in 2006, her TD rate is \$840 per week—but if TTD persists into 2007, her rate increases by SAWW's 4.96% to \$881.67.

Promoting Litigation

As if that weren't enough, now there's an interrelationship with yet another two-year indemnity provision, this one not a kickup but a kickout: Labor Code section 4656(c)(1). This SB 899 reform provides that aggregate TD payments for a single injury occurring on or after the law's effective date, April 19, 2004, “shall not extend for more than 104 compensable weeks within a period of two years from the date of commencement of TD payment”—subject to an exception for certain severe

injuries or conditions (*Lab. Code* § 4656(c)(2)).

While only our California Legislature could have created a term as ambiguous and litigation-promoting as “the date of commencement,” it is theoretically possible that a two-year rate kickup under section 4661.5 may only last for a few days before all TD payments terminate under section 4656(c)(1)—or the kickup may never kick in at all.

Like a Sousa March in the Rose Parade, these statutory instruments will have to be played in harmony in order to avoid an underpayment—or an overpayment—of benefits. ■

Bang-Bang Decisions Challenge Nabors - Dykes Apportionment

Oakland—When on August 23 the California Supreme Court denied a petition for review in *Nabors v. WCAB* (2006) 140 Cal. App. 4th 217—having already denied review of the decision on which *Nabors* relied, *E & J Gallo Winery v. WCAB (Dykes)* (2005) 134 Cal. App. 4th 1536—it appeared that SB 899, to the surprising detriment of employers, had been definitively interpreted to require the use of the long-discredited “Formula C” in calculating apportionment (*Lab. Code* §4664): subtraction of the dollars set forth in a prior award from the dollar value of the current overall PD, rather than subtraction of the PD percentage in the prior award from the overall PD percentage with application of the money charts to the remainder. (See *Quarterly Review*, Summer 2006, p. 4.) But now, two rapidfire Court of Appeal decisions have unsettled the issue again.

In *Brodie v. WCAB* (2006) ___ Cal. App. 4th ___ (1st Dist. Ct. App., August 30, 2006), the court modified *Dykes'* Formula C method by subtracting from the amount of benefits currently scheduled for a 74% PD rating the *current* dollar value of a preexisting 44.5% disability award, observing that simply crediting the dollars received in a perhaps-remote prior PD award against the benefits due for the current overall disability seemed to work a disadvantage to the employer. The modified calculation reduced a firefighter's award by \$11,500. And in *Welcher/Lopez/Strong/Williams v. WCAB* (2006) ___ Cal. App. 4th ___ (3rd Dist. Ct. App., August 31, 2006), another Court of Appeal district rejected the *Nabors* and *Dykes* decisions of the First and Fifth districts, respectively, concluding that the WCAB's original percentage-from-percentage decision in *Nabors* had been right all along. Since there are now conflicting decisions at the Court of Appeal level, Supreme Court review of *Welcher* appears likely. ■

—Norin T. Grancell, CEO

While You Were in Waikiki...

Mileage, Medical-Legal Rates Raised, Lien Filing Fee Abolished

Sacramento—Over the summer, three noteworthy developments occurred which will have an everyday effect on workers' compensation practice:

- The mileage rate for deposition, medical and medical-legal travel expenses was increased from 34 cents a mile to 44.5 cents per mile, effective July 1, 2006.
- A 25% increase in fees for medical-legal evaluations took effect by DWC regulation on July 8, 2006.
- Labor Code section 4903.05 was amended to abolish the \$100 lien filing fee. However, to prevent the filing of frivolous liens, providers must wait until (a) 60 days after the date of acceptance or rejection of liability for a claim, or expiration of the time provided for investigation of liability, whichever is later; (b) the time provided for payment of medical treatment bills (*Lab. Code* § 4603.2) expires; or (c) the time provided for payment of medical-legal expenses (*Lab. Code* § 4622) has passed. ■

—Ted E. Richards, Sacramento office



Safe Harbor

Self-Imposing 5814's New 10% Delay Penalty May Avoid Its 25% Penalty, Even Where the Delay is First Discovered by the Employee And: The Perils of Sending Videotape to Your QME Too Soon; Do You Need a Fraud Unit?

Q: Dyspeptic Dave, applicant's attorney, inquires why the payments on his client's award are \$14,000 short. Forty-seven days later we issue a \$14,000 check to bring the applicant up to speed, along with a \$1,400 10% penalty check—but Dave's now petitioning for a 25% 5814 penalty, *plus* a 5814.5 attorney's fee for "enforcement of an award." Doesn't our 10% check excuse us from these penalties?

—*Shocked in Shell Beach*

A: Yes. Under SB 899's amendments to Labor Code section 5814, the employer avoids the 25% penalty if it discovers a potential violation *prior to the employee claiming a 5814 penalty* and within 90 days of the discovery pays the delayed amount plus 10% as a self-imposed penalty. This "safe harbor" provision is not limited to where the employer discovers the potential violation before the employee does. *New United Motors Mfg., Inc. v. WCAB (Gallegos)*, 2006 DJDAR 10795. ■

—*Élan C. Lambert, Bay Area office*

"A defense QME report is excludable from evidence if it is based in part on surveillance videotape which had not been provided to the injured worker's attorney before the MSC."

Q: I know that I don't have to send a *sub rosa* videotape to Claimswise Carole's attorney until after Carole signs her deposition, which she hasn't done yet. But what if I've sent the tape to my QME, who mocks Carole's uninhibited backyard trapeze performance in his scathingly skeptical report? Is Carole's attorney correct that I have to send it to him before next week's MSC, possibly compromising a fraud prosecution?

—*Horrified in Hemet*

A: Yes. A defense QME report is excludable from evidence where it is based in part on surveillance videotape which had not been provided to the injured worker's attorney

before the MSC. *Rosan/Fairchild v. WCAB (Kyles)* (1999) 64 Cal. Comp. Cases 1497; see *Parker Hannifin v. WCAB (Barrett)* (2000) 65 Cal. Comp. Cases 900. ■

—*P. Kathleen Bloch, Inland Empire office*

Q: I'm a broker. I've learned that one of the carriers I deal with does not have an internal Special Investigations Unit. I thought that was a mandatory requirement, but I can't find anything on it in the Labor Code or the comp treatises. Am I imagining things?

—*Unsure in Mt. Shasta*

A: No. A California-licensed insurer is required by Insurance Code sections 730, 1872.4, and 1875.20-23 and 8 Cal. Code Regs. sections 2698.30-43 to establish and maintain a Special Investigations Unit. It is also required by regulations to submit an annual report to the Fraud Division – SIU Compliance Review Office on its anti-fraud operations, policies and procedures, and training. ■

—*Medy F. Beauchane, Redding/Chico office*

ADVENTURES IN FANTASYLAND

Punctuation Lesson

WCAB Flyspecks Rating Reform, Narrows Use of New PD Schedule

By *Larry Kirk, Central Coast office*

Los Angeles – Raquel, a machine operator, claimed cumulative industrial injury to her hands and neck from January through August 2002. Her employer sent her to Dr. Fleming, who concluded in a 2004 QME report that her injury was not work-related, but two other doctors declared her a QIW in 2004. A WCALJ found compensability and awarded 16% PD under the revised, AMA Guides-based rating schedule—adopted under SB 899's Labor Code section 4660(d) to apply to pre-2005 compensable claims "when there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of PD." When Raquel petitioned for reconsideration on other grounds, the WCALJ gratuitously observed that the new rating schedule had been properly chosen.

Rescinding the award. a WCAB panel directed the WCALJ to rate Raquel's PD under the former schedule. The Board interpreted section 4660(d) under grammatical rules of construction to mean that, since no *comma* appeared before the words "indicating the existence of PD," a 2004 noncompensable QME report alone is enough to trigger application of the 1997 schedule to a pre-2005 injury claim—likely leading to a higher award.

Comment: This decision, and two similar recent panel decisions, are dead wrong and should be challenged. They fail to take proper cognizance of section 4658(d)(4), also part of SB 899's reforms, which provides that the new schedule shall not apply to determination of PD for compensable claims arising before April 30, 2004 "when there has been either a

comprehensive medical-legal report or a report by a treating physician, indicating the existence of PD." The comma appearing in *this* section, clearly linking *both* types of medical reports to a required finding of PD, was obviously omitted by mere inadvertence from section 4660(d). The controlling rule of statutory construction here: all provisions of a statute should be harmonized to effectuate the Legislature's intent. ■

Torres v. SDM Precision Products, No. LAO 832511 (Opinion and Decision After Reconsideration, July 24, 2006). Accord: **Habiballah v. Starbucks Coffee Co.**, 2006 Cal. Wrk. Comp. P.D. Lexis 8 (Opinion and Decision After Reconsideration, April 14, 2006); **Chilton v. Amulet Mfg. Co.**, EUR 0037686 (Opinion and Decision After Reconsideration, March 6, 2006).

ANNOUNCEMENTS

Kathleen L. Roberts, shareholder/branch manager of our *San Jose* office, announces the association of **Anne M. Lee**. Ms. Lee, a graduate of University of California Hastings College of the Law, is a veteran trial attorney with experience in ADA, insurance coverage and criminal law cases.

Stewart R. Reubens, shareholder/branch manager of our *Bay Area* office, announces that **George P. Surmaitis** has joined the firm. Mr. Surmaitis is a graduate of West Virginia University College of Law and an experienced workers' compensation attorney who has acted as a judge *pro tem* at the San Francisco branch office of the WCAB.

R. Jeffrey Stander, a shareholder/team leader in our *Greater Los Angeles* office, announces the association of **Carol Herrera**. Ms. Herrera, a graduate of Whittier Law School, has practiced workers' compensation law exclusively since passing the Bar and has a background in scientific research at UCLA. ■

For the Record

Based on an inaccurate bulletin provided to us, our Summer '06 issue reported that the increase in the SAWW during the 12 months ended March 31, 2006 was 5.72%. The correct figure is 4.96%. Effective January 1, 2007, this will increase the \$840 maximum TTD/PTD rate to \$881.67 (correcting "\$888.05") and the \$126 minimum TTD/PTD rate to \$132.25 (correcting "\$133.21"). ■

QUOTE OF THE QUARTER

"SWAG.....Scientific Wild-Assed Guess.

See, e.g., L.C. § 4663 & Evidence Based Medicine"

—From Table 18, *Glossary of Terms and Abbreviations*

Commonly Used in Workers' Compensation, Workers' Compensation Laws of California, p. 1510 (Matthew Bender & Co., Inc., 2006 ed.)

CASENOTES

Apportionment – In determining new and further disability on a petition to reopen pending on April 19, 2004, the effective date of SB 899, the reformed rules of apportionment can only be applied to that portion of the PD representing an increase in the amount originally awarded. *Vargas v. Atascadero State Hospital* (2006) 71 Cal. Comp. Cases 500.

Permanent Disability – Revised rating schedule adopted effective January 1, 2005 applies to injuries occurring prior to that date, notwithstanding failure of Administrative Director to adopt the schedule prior to that date, unless one of the exceptions delineated in the third sentence of Labor Code section 4660(d) is present. *Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn*, SFO 0485703 (Opinion and Decision After Reconsideration, *en banc*, June 21, 2006) (see *Quarterly Review*, Spring 2006, p. 3).

VRMA – Employer on "moonlighting" job causing injury which disables employee only from that job is not entitled to credit against VRMA benefits for earnings received from primary job continuously maintained before and after the injury, as "wages earned" credit applicable to TD is inapplicable to VRMA due to differing statutory purposes. *Gamble v. United Airlines* (2006) ____ Cal. App. 4th ____ (4th Dist. Ct. App., August 29, 2006).

Psychiatric Injury – Where medical evidence shows that a psychiatric injury comprising multiple disorders was only 35% caused overall by industrial factors but 100% of a certain disorder was industrially caused, the standard of compensability requiring actual events of employment to be predominant (51%) as to all causes combined of the psychiatric injury cannot be met by parsing the injury into separately diagnosable components. (*Lab. Code* § 3208.3(b)(1).) *Sonoma State University v. WCAB (Hunton)*, 2006 DJDAR 11583. ■

IN THE NEXT ISSUE

*The New Rating Schedule:
Too Good to Last?*

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