

Quarterly Review

Second Quarter 2007

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A Legal Update for the Claims Professional

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\$2.1 Million Claim Settled For \$10,000 As Clients' Savings Climb

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Claim/Exposure

100% PD/\$2.1 million
132a/\$300,000
2 Cases/\$133,000
Knee/\$175,000
Reopening/100% PD
Depo Atty Fees/\$16,000
100% PD/\$800,000
Contribution
Old Schedule/59% PD
Dependency/\$312,000
Spine/\$5,000 TD
Liens/\$88,666
Multiple/\$100,000
132a/\$100,000
Multiple/100% PD

Order

\$10,000 C & R
Take Nothing
2 Take Nothings
Non-Employee
Nothing Further
Recon: 0
Take Nothing
\$290,000 Back
New Schedule/15%
Take Nothing
Take Nothing
Take Nothing
Take Nothing
Take Nothing
Take Nothing

Calculating Apportionment

Supreme Court Finds for Employers in *Welcher/Brodie* Unanimous Decision Holds SB 899 Did Not Change the Law to Increase Awards; *Fuentes*' "Formula A" Survives

By Norin T. Grancell, CEO and Larry Kirk, Central Coast office

"When you come to a fork in the road, take it."

—Yogi Berra, as quoted by Chief Justice Ronald George during the argument

Los Angeles – "All rise!" With those words, seven California Supreme Court justices filed into a jam-packed courtroom in the Ronald Reagan State Office Building on April 3 to hear oral argument in *Welcher/Brodie*—five consolidated cases presenting, as framed in the official calendar summary, the most significant workers' compensation issue in the last 31 years: "Did the repeal of Labor Code section 4750 and the enactment of new apportionment statutes [SB 899, 2004] change the law of apportionment of PD indemnity as determined by this court in *Fuentes v. WCAB* (1976)?" In a May 3 decision, the Court held 7 - 0 that it didn't.

The momentous ruling resulted from conflicting decisions among Court of Appeal districts, with millions of dollars at stake and final awards frozen

by the WCAB until Supreme Court resolution. *Dykes* and *Nabors* had interpreted the revamped apportionment laws (*Lab. Code* §§ 4663; 4664) as resurrecting the so-called "Formula C," which had been rejected by *Fuentes* based expressly on former section 4750: since the employer is now responsible for "the percentage of PD directly caused by [the industrial injury]" instead of for "the injury considered by itself and not in conjunction with...the previous disability or impairment," apportionment was now to be calculated by taking the dollars assigned by the benefit tables to the overall PD percentage following the latest injury and then subtracting the dollars awarded for the PD percentage from a prior injury. (*Brodie* simply tweaked the formula by subtracting the value of the prior percentage per the current tables.)

See *Welcher/Brodie* – 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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Welcher/Brodie—Continued From Page 1

But *Welcher* (followed by *Davis/Torres*) disagreed, holding that *Fuentes*' "Formula A" was intended to remain in force: subtract percentage from percentage, then apply the money charts to the remainder. The difference? In *Dykes* alone it was six figures more to the applicant—including a life pension.

Fast Tracking

Due to its blockbuster impact on the workers' compensation system, the case was fast-tracked by the Supreme Court after briefs requiring 31 hours of reading time had been filed—including those by an unprecedented 17 "friends of the court." Mark Gearhart (Pleasant Hill) and Susan Borg (San Mateo), along with CAAA *amicus* attorney David Froba (Modesto), argued the cause for the injured workers. The employers' position was presented by former Court of Appeal Associate Justice Elwood Lui (Los Angeles), representing *amicus* Los Angeles County Metropolitan Transit Authority, and Danny Chou of the Office of the City Attorney, San Francisco; United Airlines, for whom this firm was co-counsel, ceded its argument time for strategic purposes.

In their probing with counsel, the Justices appeared notably concerned with the absence of evidence of the usual legislative history which would bear on a finding of whether the Legislature truly intended to change the method of calculating apportionment so as to bring a windfall to injured workers—especially in light of SB 899's declared legislative purpose to stem the tide of runaway costs. Applicants conceded that the history was "sparse," but CAAA explained SB 899 as "an emergency bill" with "no time for legislative history."

A Fictional "Tradeoff"

Applicants argued that *Fuentes*' main underpinning, section 4750, was not only repealed but replaced by

"Applicants inferred that a 'tradeoff' intended apportionable awards to be calculated 'from the top down rather than from the bottom up.'"

"language exactly the opposite"—a presumption in section 4664(b) that PD from a prior award still existed. Coupling that with the broadening of apportionment to a causation basis; no "accumulation" of awards for one region of the body in excess of 100 percent; 15 percent off each PD indemnity payment if an employer finds a new job for the injured worker; and an "exponentially" progressive increase in PD benefits for disabilities between 70 and 99% percent, applicants inferred that a "tradeoff" intended apportionable awards to be calculated "from the top down rather than from the bottom up."

Countered the employers: the tradeoff is a fiction. Section 4750 was simply recast as part of a major overhaul which made no changes in the role of "percentage of PD" in calculating earnings, benefits and apportionment. The dollars don't come into it until after the net percentage after apportionment has been determined. In short: *percentage means percentage*.

Smuggling It In

Citing *Fuentes*, the employers maintained that section 3202's "liberal construction" is merely a tiebreaker in cases of ambiguity but is no substitute for a clear expression of legislative intent. Formula A balances the interests of employers with the interests of injured workers, while Formula C is directly contrary to the intent of SB 899 to reverse skyrocketing costs.

"This court is being asked to smuggle-in a change in the law, but any change has to come from the Legislature," concluded Mr. Chou. The Supreme Court has now agreed, with remarkable speed. As a result, *Fuentes*' percentage-from-percentage Formula A remains in full force and effect—averting a windfall to injured workers who never expected one anyway. ■

Employers' Group Sponsors Pro-Employee TD Bill

Sacramento—For dates of injury on and after April 19, 2004, SB 899's cost-sensible reforms included a cap on TD indemnity: 104 weeks within a two-year period from the "date of commencement of payment" (*Lab. Code* § 4656(1)). However, a question of possible unfairness has been raised: if Hardhat Harry is paid, say, just one day of TD and immediately returns to work, with the eligibility meter apparently continuing to run, what happens if he's disabled two years later by the need for surgery? The way the law is written, Harry would seemingly get no benefits to help support his family.

Agreeing with organized labor that this problem should be fixed quickly, the California Coalition on Workers' Compensation (CCWC), an association of private and public sector employers which advocates fair workers' compensation laws, is sponsoring a cleanup bill, AB 1341 (Benoit, R - Palm Desert). It would allow for 104 weeks of aggregate TD benefits within either three years from the first date of TD or four years from the date of injury, whichever comes first. The bill would also repeal the minimum TD rate law that allows some part-time workers to actually earn more while off work than they did by working. We'll be keeping an eye on it. ■

QUOTE OF THE QUARTER

Q (*on cross-examination of stress-claiming housekeeper, through interpreter*): Isn't it true that you were terminated for slipshod work?

A: No. I cleaned that house with love.

Q: Ever think of using Ajax?"

—Actual trial testimony, WCAB – Santa Monica

ADVENTURES IN FANTASYLAND

*The Cutting Edge of the Law...***Spinal Fusion Interpreted as “Amputation” To Bypass Two-Year TTD Limit**By *Norin T. Grancell, CEO*

Salinas – Molly, a hospital worker, hurt her neck on the job in July 2004. In December 2005 she underwent a cervical-spine discectomy in which portions of a disc and part of a vertebra were removed and a graft was obtained from the hip. The employer paid 104 weeks of TTD within a two-year period ending July 22, 2006, the statutory limit for post-SB 899 injuries under Labor Code section 4656(c)(1), and terminated payments. Molly objected, contending that she qualified for a higher limit under a statutory exception. The issue was submitted to a workers’ compensation judge for decision.

Ruling: The surgery constituted an “amputation” under section 4656(c)(2)(C)—one of nine specified serious injuries or conditions

(the others: acute and chronic hepatitis, severe burns, HIV, certain eye injuries and certain lung diseases) for which the TTD limit is extended to

“Failure to provide an effective MPN may be held to constitute a constructive ‘institution of proceedings to terminate an award of medical treatment,’ entitling the claimant’s attorney to a special fee.”

up to 240 weeks within five years from the date of injury. **Result:** a continuing award.

In his Opinion on Decision, the judge characterized the surgery as removing “portions of the body...from both the neck and the hip.” Interpreting the statute by applying “the dictionary meaning of the word amputation from the general dictionary that surgery involving removal of a

part of the body is an amputation,” he concluded that “the injured worker comes under subsection C with no limit [sic] on temporary disability.”

Comment: A decision like this brings the entire system into hooting disrepute. “Amputation” is commonly understood as not scraping a bone but slicing off an appendage—e.g., a finger, a hand, an arm, or a leg—and, as even the judge acknowledged, this description is incorporated in the permanent disability rating schedule and the CPT codes. This one’s going up, with common sense from the WCAB on reconsideration to now be expected (*see Casenotes, p. 4 – ed.*). ■

Kirkpatrick v. Dominican Santa Cruz Hospital, SAL 107786 (Findings and Award and Opinion on Decision, January 19, 2007).

*We’ll Vouch For It...***No Supplemental Job Displacement Benefit If Employee Returns to Temporary Modified Work, Even if Later He’s P & S With PD**

And: Need For Over-the-Counter Medication May Support an Award of Medical Treatment—Or Maybe Not; Out of Your MPN, Into Your Pocket

Q: Languid Lorenzo, assaulted by his foreman, returns to temporary modified work last September 1 so we stop TD. I know that we can avoid liability for a supplemental job displacement benefit voucher (*Lab. Code* § 4658.5) if we offer and Lorenzo accepts permanent modified or alternative work within 30 days of returning to work (§ 4658.6), but we don’t get a doctor’s report with permanent work restrictions until today. Does this mean we have to give him the voucher?

—*Concerned in Camarillo*

A: No. When the ambiguous provisions of sections 4658.5 and 4658.6 are construed together under general principles of statutory interpretation, Lorenzo’s return to work for the employer within 60 days of the termination of TD rendered him ineligible for the voucher—even if the injury is later determined to have caused permanent partial disability.

—*Arezoo Jafroodi, Central Coast office*

Q: Cephalgic Cecilie and I get an AME report providing only for “over-the-counter medication” on

her headaches claim. Cecilie says that’s enough to get her a lifetime supply of Alka-Seltzer, because the determination supports an award of future medical treatment. Does it or doesn’t it? I get a different answer depending on which lawyer I ask.

—*Fizzing in Fairfield*

A: That’s because there’s a split of authority on the point. A frequently-cited decision is *Argonaut Ins. Co. v. WCAB (Garcia)* (1996) 61 Cal. Comp. Cases 378 (writ denied), which held that an AME’s indication that there is a need for over-the-counter medication does serve as the basis for a future medical award. There is contrary prior authority in *Rodriguez v. WCAB* (1994) 59 Cal. Comp. Cases 14 and *Taylor v. WCAB* (1981) 46 Cal. Comp. Cases 506, but arguably this authority has been eroded by *Garcia*.

—*Michael Ferguson, Sacramento office*

Q: Compliant Cathy, a 100% PD and future-medical awardholder, calls the offices of all 33 pain management specialists on our MPN list from which we directed her to pick a doctor, but 20 of them are dead,

12 don’t do comp and the last one won’t treat her. We finally decide not to contest her petition to treat with a doctor outside the MPN, but her lawyer insists that we’re still liable to him for a special attorney’s fee under Labor Code section 4607 because we “unsuccessfully instituted proceedings to terminate an award for continuing medical treatment.” That’s a bit of a stretch, isn’t it?

—*Surprised in Santa Clara*

A: Surprisingly, it isn’t. In a similar case recently, the WCAB held that a carrier’s failure to provide an MPN from which the applicant could obtain treatment without undue difficulty amounted to a “constructive termination” of her award of medical treatment, entitling her attorney to a reasonable section 4607 fee for securing her escape from the MPN. *Pyle v. San Juan Unified School Dist.*, SAC 264544 (opinion and order granting reconsideration and decision after reconsideration, October 4, 2006).

—*Christopher C. Cramer, San Jose office*

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

Shareholder/branch manager **Joanne M. Thomas** announces the relocation of our *San Diego* office to 9191 Towne Centre Drive, Suite 390, San Diego, California 92122-6243. The telephone and fax numbers have been changed to (858) 678-9448 and (858) 678-9493, respectively.

David J. Chun, shareholder/branch manager of our *Fresno/Bakersfield* office, announces the association of **JoAnne Morales**. Ms. Morales, a graduate of San Joaquin College of Law, is an experienced workers' compensation defense attorney most recently associated with a prominent statewide firm.

Donald J. Marsau has joined our *Stockton/Modesto* office, announces **Theresa C. Geoffroy**, branch managing attorney. Mr. Marsau is a graduate of Lincoln Law School of Sacramento and comes to us from a longtime position as staff counsel to a leading national workers' compensation insurance carrier.

Timothy E. Kinsey, shareholder/branch manager of our *Orange County* office, announces that **Jeffrey Karls** has joined the firm. Mr. Karls is a graduate of Southwestern University School of Law with broad experience in the defense of workers' compensation claims on behalf of carriers, permissibly self-insureds and municipalities. ■

CASE NOTES

Apportionment – WCAB may not disregard as “[in]substantial evidence” AME’s apportionment of 20 percent of permanent disability to chronic degenerative disease of the lumbar spine, since degenerative disease can be asymptomatic but still apportionable under the new law’s causation standard. *Lab. Code* §§ 4663, 4664; *E. L. Yeager Construction v. WCAB (Gatten)* (2006) 71 Cal. Comp. Cases 1687 (review denied).

Medical Treatment – An injured worker can be required to seek treatment in the employer’s MPN regardless of the date of injury or the date of an award of future medical treatment, as a patient’s transfer into an MPN does not “reopen, rescind, alter or amend” an award. *Babbit v. Ow Jing dba National Market*, STK 0174793 (opinion and decision on reconsideration, *en banc*, January 24, 2007).

PD Rating Schedule – Applicants injured before January 1, 2005 effective date of new schedule are to be rated under new schedule if TD payments commenced prior to that date and terminated after that date,

in view of statutory provision rendering new schedule applicable if employer was not required prior to 2005 to provide the PD notice required “together with the last payment of TD” by Labor Code section 4061, since the duty to provide the notice does not arise until the last payment is made. *Lab. Code* § 4660(d); *Pendergrass v. Duggan Plumbing*, SAL 0110868 (opinion and decision after reconsideration, *en banc*, April 6, 2007), rescinding contrary decision.

PD Rating Schedule – Applicants injured before the January 1, 2005 effective date of new schedule are to be rated under new schedule if they did not receive a comprehensive medical-legal report prior to that date which indicated the existence of PD, consistent with statutory provision rendering new schedule applicable when prior to 2005 “there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of PD.” *Lab. Code* § 4660(d); *Baglione v. Hertz Car Sales*, SJO 0251644 (opinion and decision after reconsideration, *en banc*, April 6, 2007), rescinding contrary decision. ■

IN THE NEXT ISSUE
*The “Horseplay” Defense:
 Only For Santa Anita?*

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