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QUARTERLY REVIEW

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A Legal Update for the Claims Professional

HOMEOWNERS AND WC: UNDERSTANDING THE LAW AND RECOGNIZING POTENTIAL CONFLICTS

By Penny Fogel, Greater Los Angeles

The proper defense of a homeowners workers' compensation claim involves a unique understanding of the law, requiring a practitioner to be not only well versed in case law, but to be prepared to address potential conflicts that might arise.

The typical applicant filing a claim of injury that triggers homeowner's coverage issues includes domestic employees and property caretakers such as housekeepers, baby sitters, gardeners, and other mainly unskilled laborers. As of January 1971, Insurance Code Section 11590 was enacted providing that every comprehensive personal liability insurance policy issued to a homeowner or tenant is required to contain coverage for workers' compensation liability for all household employees as defined by Labor Code Section 3351(d).

In order qualify for workers' compensation coverage under such a homeowners policy, the claim must be filed by an individual who qualifies as a "household employee" under Labor Code Section 3351(d) which defines a household employee as "any person employed by the owner or occupant of a residual dwelling whose duties are incidental to the ownership, maintenance or use of the dwelling, including the care and supervision of children except as provided in subdivision (h) of Labor Code Section 3352".

Subdivision (h) of Labor Code Section 3352 excludes from the definition of an employee any such household employee who works

(Continued on page 2)

INSIDE THIS ISSUE

Homeowner's Comp – Avoiding the Minefields	1
The Things We Did Last Quarter	1
Adventures in Fantasyland – The Demise of <i>Wilkinson</i>	2
New Case Notes	3
Legislative News	3
The Regulatory Corner: Q & A with Carrie Nevans	4
GLSRT Gives Back to the WC Community	6

The Things We Did Last Quarter . . .

Six "Take Nothings" Backfire on Applicants

Joe Mendivel of the Orange County office triumphed in a consolidated case where motel employees had filed cumulative trauma cases all on the same day. There were 21 lien claimants. Prior to the filings, the six employees had met with the manager and demanded a pay raise, which was denied and they were ultimately terminated. The case was about to start the last day of a four day trial when Judge Nash unexpectedly passed away. Although the entire case has to be tried from the beginning, in her Opinion on Decision, WCJ Janet Coulter commented: "Suffice it to say that I did not find the testimony of any one of the applicant's compelling. I think that they wanted to make a point, obtain a raise, and it backfired."

Estimated Savings: \$622,000

Kathleen Roberts of the San Jose office prevailed on a CIGA case involving applicant's entitlement to almost seven years of TTD subsequent to her retirement. Despite this 75-year old applicant's

(Continued on page 5)

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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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HOMEOWNERS & WC (continued from page 1)

less than 52 hours or who earns less than \$100.00 in wages for any such employer during the period of the 90 calendar days prior to the alleged date of injury. Other exclusions, under the workers' compensation act, include household family members (i.e. the parent, spouse, or child of the owner or occupant of a residence) who perform household care or maintenance, including baby sitting.

Procedurally, the burden of proof to establish that an employee comes under a specific statutory exclusion pursuant to Labor Code Section 3352 is upon the employer. A workers' compensation claim is not covered under a homeowner's policy if there is other existing and enforceable workers' compensation insurance applicable to the injury. For example, an injured laborer who was hired by the homeowner's landscaping company that carries workers' compensation coverage for their employees. Unfortunately for the homeowner, when this same landscaping company fails to secure the proper workers' compensation coverage, the same claim of injury by the laborer may be brought against the homeowner, utilizing Labor Code Section 2750 resulting in additional complications and potential conflicts. Accurate analysis of potential liability is crucial since a household worker who fails to meet the minimum requirements of Labor Code Section 3352 might have a right to maintain a civil action against the employer under Labor Code Section 3715 (a) as outlined in *Furtado v. Schriefer*, 228 CA 3d 1608, 56 CCC 266, 19 CWR 123 (1991).

A final caveat to practitioners is to be very careful when analyzing a specific homeowner's policy. Despite the family preclusion under Labor Code Section 3352, the court in *State Farm Fire and Casualty Company v. Workers' Compensation Appeals Board* 62 CCC 1629 (December 18, 1997) found coverage for the homeowner's son who was working on his father's residential property. The homeowner's policy defined a residential employee as an employee of an insured who performs duties, including household or domestic services, without specifically listing the parent, spouse or child under the exclusion portion of the policy. This is an example of the Workers' Compensation Appeals Board's tendency to liberally interpret and construe policies in favor of the injured employee and against the author of the policy or the insurance company.

Homeowner's workers' compensation cases involve unique issues of law. Even in the extremely specialized field of workers' compensation, these cases are a specialty in of themselves requiring an in-depth knowledge of relevant case law, the application of Labor Code Sections 3351 and 3352, as well as the ability to recognize and respond to potential conflicts. In many of these cases the homeowner and their carrier have conflicting positions. For example, the homeowner may want the applicant to be deemed a household employee under §3352(h) to obtain coverage, while the carrier could take the opposite position. In this situation, it is likely that the carrier would have to advise the homeowner of its position in a "reservation-of-rights" letter to the homeowner. Additionally, the carrier may have to provide the homeowner with "Cumis counsel". In situations such as this, with conflicting interests between the homeowner and the carrier raised by the carrier's reservation of rights based on possible non-coverage under the insurance policy, the carrier may have to pay the reasonable costs of independent counsel for the homeowner.

ADVENTURES IN FANTASYLAND: The Demise of Wilkinson

By Max Breall, Novato

Oakland - Dianne, a file clerk, hurt her neck by way of two separate injuries. The first injury was cumulative in nature through June 3, 2003. The second occurred on June 3, 2003. The Workers' Compensation Administrative Law Judge (WCJ) found that the two injuries both became permanent and stationary on September 25, 2005, and that the two injuries combined to cause 62% permanent disability. This decision was based upon the long standing legal principle of apportionment established by the case of *Wilkinson v. WCAB*. The defendant objected and sought reconsideration, contending that, due to the changes wrought by Senate Bill (SB) 899, there must be separate Awards of permanent disability for each injury. The defendant argued that the Workers' Compensation Law Judge (WCJ) erred in issuing a combined Award of permanent disability.

Ruling: The WCAB agreed with the defendant's argument and reversed the decision, finding separate Awards for the separate injuries. The applicant was now entitled to 31% disability for each injury.

Comment: *It is now clear that the legal principle held under Wilkinson is no longer applicable, as it is not consistent with the new requirement basing apportionment on causation. The Court must now determine and apportion to the cause of disability for each industrial injury. A prior or subsequent industrial or non-industrial injury or condition must be taken into consideration by the Court. As a result, the Court may no longer combine Awards of permanent disability based solely upon the fact that the injuries became permanent and stationary at the same time. As such, if upheld by the higher Courts, this decision will reduce employer's exposure.*

NEW CASE NOTES

By Ted Richards, Sacramento

Apportionment –The 3rd District Court of Appeal ruled in an unpublished opinion that “apportionment to age, per se, runs afoul of state anti-discrimination law.” The court emphasized, however, to the extent a “condition that might contribute to a work-related disability arises or becomes more acute with age, we see no problem with apportioning disability to that condition.” Apportionment in such a case is not to age but to the disabling condition. Physicians should not base their apportionment opinion on risk factors of injury. Rather, apportionment is only proper if a preexisting condition contributes to the employee’s *disability*. *Viara v. WCAB*, (2007) 72 CCC 1586 (unpublished opinion)

Psychiatric injury – The 3rd District Court of Appeal upheld a WCAB decision denying compensability to applicant who alleged that her supervisor and co-workers had harassed and persecuted her. The court reiterated the rule that a psychiatric injury claim cannot be based upon a subjective misperception that his or her employment is stressful. It was held that an employee could not mistreat fellow employees and then claim a stress-related injury psychiatric injury when they respond unfavorably. *Verga v. WCAB.*, 2008 Cal. App. LEXIS 111 (Cal. App. 3d Dist., Jan. 23, 2008)

FEHA reasonable accommodation – The California Supreme Court ruled that an employer may fire an employee who uses marijuana to treat chronic pain, even if the use is recommended by a physician. The employee had filed suit arguing that allowing his medical marijuana use was a reasonable accommodation under FEHA. He claimed that he never smoked marijuana at work. The termination did not create liability because marijuana use remained illegal under federal law. *Ross v. Raging Wire Communication* (2008).

Apportionment in presumption cases and 2nd PQMEs after representation - The WCAB panel decision in *Ehret v. CHP* has been designated a significant panel decision. It stands for two important propositions. First, in a case with a presumption statute

containing a non-attribution clause, apportionment may be had pursuant to Labor Code section 4664, even though Labor Code section 4663 apportionment is inappropriate. Second, once an unrepresented employee obtains a panel QME report per 4062.1(c), the employee is not entitled to a second QME after becoming represented. 2007 Cal. Wrk. Comp. P.D. LEXIS 4.

PD 15% adjustment – The 15% adjustment of PD found in Labor Code section 4658(d) is not applicable to life pension amounts according to a panel decision recently listed by Lexis as a significant panel decision. Lexis notes under “pub-status” of the case that WCAB panel decisions are citable authority, particularly on issues of contemporaneous administrative construction of statutory language. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on WCAB panels and workers compensation judges. *Reyes v. City of Los Angeles*, 2007 Cal. Wrk. Comp. P.D. LEXIS 113.

Diminished Future Earnings Capacity – Vocational experts can present nonmedical evidence to rebut permanent disability ratings in workers’ compensation cases, and defendants can be required to pay for it according to a WCAB en banc decision. However, the permanent disability rating schedule was held to be valid. Thus attacks to ratings will be on a case-by-case basis, requiring expert testimony to rebut the schedule. *Costa v. Hardy Diagnostic*, (2007) 71 CCC 1792 (en banc).

Temporary Disability Cap – A panel decision overturned a WCJ who found an employer estopped from asserting the 104-week cap on temporary total disability benefits where defendant had delayed authorization of two surgeries. The WCAB panel stated, “There is an absolute and clear statutory two-year, 104 week limitation on TDI, and the Legislature’s intent to limit temporary disability benefits was clearly stated in its amendment of Section 4656.” Though not designated as a significant panel decision, it does provide guidance for defendants facing an estoppel argument with regard to the TTD limit where delay of treatment is being alleged. *Daniel Ramos v. Frito-Lay*, (2008) OAK 326483.

LEGISLATIVE NEWS . . .

By Peggy Sugarman, Training Director

As legislative years go, 2007 was a relatively quiet year for workers’ compensation changes. Lawmakers focused on areas identified by industry experts as worthy of adjustment while allowing the courts to settle the more volatile disputes. Here are some changes that will directly affect your claims handling practices:

Temporary Disability Cap: AB 338 (COTO) amends Labor Code §4656 and extends temporary disability benefit eligibility for dates of injury on or after 1/1/08 to 104 aggregate weeks within a five-year period from the date of injury. §4656(c)(1), which affects

dates of injury on or after 4/19/04, limited eligibility for TTD to 104 weeks *within a period of two years from the date of commencement of temporary disability payment* unless the injury fell within one of nine exempted diagnoses.

Because the language in §4656(c) as amended by SB 899 was distinctly different from prior limitations of . . . “240 weeks within a period of five years *from the date of injury*”, the WCAB’s en banc decision in *Hawkins vs. Amberwood Products and SCIF* (72 Cal. Comp. Cas 1644) extended total temporary disability eligibility

(Continued on page 4)

THE REGULATORY CORNER: A Q & A with Carrie Nevans on UR

By Peggy Sugarman, GLSR&T Training Director

Q. *We know that the DWC began investigating claim's administrators and UR companies in October, 2007. What are you seeing so far?*

A. So far we have reviewed files with five UR organizations. Although the investigations are not yet complete, the biggest finding so far is that over half of the requests from physicians are not on a DFR, PR-2, or a narrative with an authorization request at the top. While the types of errors made vary from subject to subject, some of the observations include not having appropriate documentation of dates (receipt, verbal notice, written notice) which can cause issues with timelines, not sending -- or sending incomplete -- notices to the patient and/or patient's attorney, making "verbal" approvals of written requests with no written notice, or addressing causation of treatment without addressing medical necessity.

Q. *On that issue of not sending written notice, where prior-authorizations described in the UR plan allow approval of a defined set of treatments, must claims administrators still provide written notice to the physician and if so, how should these be reflected in the claims file?*

A: First the UR plan's description of what qualifies within the 'prior authorization' process must be clear about what is required by the treating physician and how the physician will be

informed of what falls within the prior authorization treatment process. A prior authorization system is part of UR and must be submitted to the DWC administrative director as part of, or as a material modification to, the written UR plan. (8 CCR § 9792.7(a)(5)). Therefore, under a UR plan that contains a prior authorization process, we only would expect to see notes regarding payment for the service once it's been billed. If the request is made in advance of treatment, and if the request is first made orally, the UR regulations require the PTP to follow up with a written request and upon receipt of the written request the UR timeline begins, so we would expect to see timely responses with the proper content.

Q. *The DWC website provides a complaint form for anyone who wishes to complain about utilization review issues. Can you tell us how many you are getting these days and how many appear to be valid complaints?*

A. Between July 2006 and now the division has received 914 UR complaints. About 7% of them are valid. Besides receiving a surge of complaints in August of 2007, the number we're receiving is holding steady, with a range of between 35 and 97 complaints per month.

*"About 7% of [UR complaints] are valid."
Reports DWC Administrative Director,
Carrie Nevans*

LEGISLATIVE NEWS . . .

(Continued from page 3)

beyond 104 weeks in cases where the applicant remained temporarily disabled and the commencement of payment was not made until after the date of initial eligibility for such payments. Thus, for those claims with dates of injury from 4/19/04 through 12/31/07, any period of delay prior to the first payment will not count against the 104 week cap. AB 337 makes it clear that, for injuries on or after 1/1/08, TTD payments

are limited to an aggregate of 104 weeks but allows those payments to be made over the longer period. The bill had bipartisan support.

Physical Therapy Cap: AB 1073 (NAVA) will remove the 24-visit cap to allow for postsurgical physical medicine and rehabilitation services so long as the services are consistent with the medical treatment utilization schedule (MTUS) as adopted by the administrative director. This bill retroactively amends SB 228 which provided a hard cap to all cases unless the insurer decided to authorize treatment. Proponents of the bill argued that the limitation interfered with the recovery of surgical patients who, having perhaps expended many of the available visits trying to avoid surgery, were left unable to fully recover once surgery became medically necessary while opponents pointed to the much-higher than average use of physical medicine services in California compared to other states. DWC is in the process of updating the MTUS and is currently proposing use of the Official Disability Guidelines' postsurgical guidelines to address this issue.

QUOTE OF THE QUARTER

"Applicant weighed the consequences and miscalculated. Extremely poor judgment and foolishness do not equate to serious and willful misconduct."

Grant Joint Union HS District v WCAB (2007) 72 CCC 1518

The Things We Did Last Quarter – Continued from Page 1

assertion that she had “intended” to work up until her current age, Ms. Roberts enticed an admission that she had relocated shortly after her retirement and had never looked for work. The WCJ found applicant’s assertions that she did not permanently intend to retire unconvincing, noting that she had requested retirement from her employer one week prior to the date of the injury.

Estimated Savings: \$60,000.

Sally Freeman of the Fresno office succeeded in showing that a lien claimant was not entitled to anything further than the amount paid according to the Official Medical Fee Schedule. At issue was an agreement between a UR consultant and the lien provider as to whether the provider would be paid at a specified discount off of the total charges or at the significantly lower OMFS rate. Sally introduced evidence that convinced the WCJ that the negotiations leading up to the agreement included the reference to the OMFS payment levels and he ordered a take-nothing further.

Savings: \$29,456.

Jennifer Yeoh of the L.A. office obtained a Take Nothing in Van Nuys on a disputed mid-back claim that was part of an admitted low back and right shoulder injury. The judge found no mid-back injury, no PD at all and awarded no attorney’s fees.

Estimated Savings: \$18,000 in PPD and \$5,000 to 10,000 in future medical.

Mya Wonsyld of San Diego successfully thwarted an applicant’s DFEC expert which would have resulted in a 54% PD rating. The WCJ found the defense DFEC expert more persuasive and awarded PPD of 9%. Because the applicant’s attorney hired the DFEC expert prior to the issuance of a report that was ratable under the AMA Guides, our client was required to pay only for the testimony time, not the report preparation. Mya simultaneously defeated a claim for retroactive temporary disability payment and penalties when the WCJ allowed credit for a TD overpayment.

Estimated savings: \$60,000 in PPD, \$5000 in retro TD and penalties, \$1000 for applicant’s DFEC report.

Kathleen Roberts of San Jose prevailed with another Take Nothing on a death claim where an industrial injury was alleged to have aggravated the decedent’s non-industrial leukemia causing death earlier than it would have occurred. The WCJ found no industrial injury that caused or contributed to applicant’s death.

Savings: \$125,436 plus burial expenses.

Kelly Sieckman of Riverside had a feeling that applicant was not being honest. After recommending sub rosa and a search of employment records, Ms. Sieckman deposed applicant who repeatedly responded that he was not employed while receiving TTD benefits. While his memory improved after being presented with employment records that proved otherwise, the case was then referred

to the district attorney’s office. Applicant pled guilty to two counts of Felony Insurance Fraud in the San Bernardino County Criminal Court. At the sentencing hearing on 11/14/07, the Judge ordered 120 Days Incarceration in the county jail, 3 years of probation, a criminal fine of \$200, and restitution to be paid at \$500 per month to the client.

Savings: \$14,026 in restitution.

Kathleen Roberts of San Jose took over a 2002 DOI case from another firm that had an ongoing TTD award and approval from the WCJ that the applicant needed back surgery. She recommended sub rosa which resulted in a change of heart by the PTP’s surgical consulting physician, the defense QME who commented: *“There is no conceivable way that he could have a significant back injury and demonstrate the activities shown on the video surveillance tapes.”* The WCJ ordered no PD, no further TD and no need for further medical care.

Estimated Savings: \$125,000-\$135,000.

Laura Silva from Orange County obtained a Take Nothing on an AOE/COE trial. Applicant alleged an orthopedic and psychiatric CT after he was terminated. Laura was able to introduce the personnel file and medical records which showed that applicant lied about prior injuries, and that the reason he missed time from work was because of back pain caused by a non-industrial fever. Also thwarted in the process was a Petition for increased benefits filed pursuant to LC 132(a).

Estimated Savings: \$29,000 in liens plus ongoing TTD and future medical care.

Steve Moore of Sacramento prevailed at the WCAB on Reconsideration on a contribution issue. In two prior CT claims settled by the co-defendant, our client had 92% exposure on the last claim. While the co-defendant filed a timely petition for joinder for purposes of contribution, they didn’t realize that they filed it on the wrong CT claim until after the year had passed. Moreover, they failed altogether to file a Petition for Contribution. The WCAB on Reconsideration overturned the trial judge’s decision that the mistake was only a “clerical error” and that the joinder constituted “instituting proceedings” under Labor Code §5500.5(e), and barred co-defendant’s claim for contribution.

Estimated Savings: Over \$55,000 in contribution, not including future medical expenses.

Paul Najooan in Los Angeles prevailed in a lien trial at the Van Nuys board against applicant-friendly Dr. Tepperman with a Take Nothing decision.

“There is no conceivable way that this patient could have a significant back injury and demonstrate the activities [as seen] on the video surveillance tape.”

ANNOUNCEMENTS

Kurt Deidrick joins shareholder **Joanne Thomas** in *Riverside*. Kurt is a graduate of Loyola Law School and Claremont McKenna College. Kurt brings several years of workers' compensation experience from another defense firm along with additional training as a supervised mediator at the Center for Conflict Resolution in Los Angeles. In addition to receiving First Honors in law school, Kurt is eligible to practice in front of the U. S. District Court.

Daniel Hawkes joins the team of branch manager **Kimberley Dyess** in *San Diego*. Daniel is a graduate of Loyola Law School where he was a member of St. Thomas More Law Honor Society. He brings an impressive list of credentials that includes almost 5 years as a WC claims examiner, a stint as a court clerk at the Orange County Superior Court and an array of academic honors received during the completion of his Bachelors, Masters, and Law degrees. Daniel also received First Honors in Insurance and Antitrust Law.

Christopher Hefley joins the team of shareholder **Jeff Stander** in *Los Angeles*. Christopher is a graduate of Southwestern University School of Law where he participated in the Interscholastic Trial Advocacy Honors program. Christopher comes to GLSR&T from the Office of the County Counsel in Los Angeles and four years of prior experience in civil liability and workers' compensation defense.

Aaron Hemmings announces that **Mike Mense** has transferred from the Los Angeles office and joined his Central Coast team in *Ventura*.

Please Note: Effective March, 2008, our **Stockton** office has merged with our **Sacramento** office. We will continue, however, to serve the Stockton/Modesto area under the supervision of shareholder **Ted Richards**.

GLSR&T IN THE COMMUNITY!

GLSR&T is participating in the Electronic Adjudication Management System (EAMS) Advisory Committee. EAMS is the name of DWC's new computer-based case management process which will replace an outdated court technology and infrastructure with a system much less dependent on paper. More information about EAMS and how it will affect you will be in the next issue of the **GLSR&T Quarterly!**

Ted Richards, managing shareholder of our Sacramento office is the Education Conference Chair for the Association of Workers' Compensation Professionals (AWCP). He spent many hours planning and coordinating the October 22, 2007 annual conference which included lectures from industry experts on current hot topics and keynote speaker Administrative Director, Carrie Nevans.

Did you know . . .

Peggy Sugarman, **GLSR&T** Training Director, coordinated and moderated the AWCP "dream team" panel at their annual conference and was a featured speaker at the California Self-Insurance Association conferences in 2007.

In addition, **GLSR&T** offers customized training programs for our clients at no charge! Our traveling teams have been presenting programs on Utilization Review, Apportionment, How to Avoid Penalties and much more. Contact Norin Grancell at ngrancell@grancell-law.com for more information.

IN THE NEXT ISSUE

EAMS and YOU: How the DWC paperless processing system will change the way you interact with the WCAB.

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