

# GRANCELL + LBOVITZ + STANDER + REUBENS AND THOMAS QUARTERLY REVIEW

Second Quarter 2008

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A Legal Update for the Claims Professional

## THE EAMS ODYSSEY

By Peggy Sugarman, Training Director

As the controversy swirls around the DWC's efforts to update an aging case management system in the district offices, one thing is for sure: The transfer to a paperless system has been on the minds of administration officials for years. The New York State Workers' Compensation Board was an industry forerunner, implementing paperless files way back in 1995!

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In 2003, The Rand Institute for Civil Justice observed in their exhaustive study of the judicial system that:

***“ . . . the DWC computer system is woefully outdated, consumes enormous staff resources, and is in need of an overhaul.”***

Indeed, the current system is essentially the same as it was when originally implemented in 1990 to replace the old “card file” drawers. While the EAMS implementation has been fraught with some surprises, twists and turns for state officials, a project of this magnitude rarely progresses without them.

So, what does it mean for all of us? In the short term, the DWC will be internally switching from paper to electronic files as of August 25, 2008. The only change for a claims administrator is that you must use an Optical Character Recognition (OCR) standardized cover sheet that will be available on the DWC/EAMS web site. Aside from that, it will be business as usual as far as the community is concerned, while DWC begins the process of creating electronic files from the paper documents submitted. At some point in the fall of 2008, DWC will advise when and how we will be able to simply fill out the OCR forms and send all documents electronically.

The unfortunate news that the EDEX system will no longer be available after the “go live” date produced some additional controversy that has legislators scrutinizing the project. Currently, an approved subscriber can query the system for prior cases, a function that took on additional importance after the change to the apportionment laws. Under the EAMS system as it is currently configured, you will only be able to access a file to which you are a party. However, the DWC is working to address this as well as the concerns from the lien providers.

Court Administrator Kevin Starr has circulated draft regulations to implement the EAMS system. These will have to be formally adopted and have not, as of this writing, been set for public hearing. In addition, the WCAB has posted draft regulations for comment that deal with some of the issues. You can read the WCAB proposals on-line at: [wcab@dir.ca.gov](mailto:wcab@dir.ca.gov).

You can also stay current on the progress of the EAMS project by subscribing to the DWC *EAMS Insider* newsletter. Sign up at [eams@dir.ca.gov](mailto:eams@dir.ca.gov). Once the system is fully implemented, we won't be able to fathom why we waited for so long. GLSR&T, for one, is ready!

### The Supreme Court in *Brodie* (72 CCC 565)

***“The new approach to apportionment is to look at the current disability and parcel out its causative sources – non-industrial, prior industrial, current industrial – and decide the amount directly caused by the current industrial source. The approach requires thorough consideration of past injuries, not disregard of them.”***

See Tim Kinsey's article in *Adventures In Fantasyland*  
for more discussion on apportionment.

## The Things We Did Last Quarter . . .

### 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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#### Editor

Peggy Sugarman  
Training Director

*GLSR&T believes that great representation means getting the best results as quickly as possible. Read on to hear about a few of our proud moments last quarter!*

**Tim Kinsey** of Orange County was able to obtain and provide evidence of a concocted injury claim for the Orange County District Attorney's office that resulted in a plea bargain. In addition to saving the taxpayers from a costly workers' compensation fraud trial, the claimant will pay a substantial amount in restitution and be a guest of the Orange County jail for a period of six months. **Restitution to be paid to client: \$103,000.**

On a similar note, prosecutors relied primarily on the deposition obtained by **Norin Grancell** when they succeeded in obtaining a guilty verdict in a jury trial against a police officer in a workers' compensation fraud case. The officer was convicted on nine felony counts. We expect that the denied comp case will be dismissed in short order!

While Tim and Norin were busy on the fraud front, **Gary Ward** of Sacramento patiently and successfully defended a lengthy psychiatric/stress claim filed by a troubled applicant who, claiming harassment, had been fired for time-card fraud. By carefully questioning the applicant's former supervisor, Gary was able to demonstrate that what the applicant considered harassment was indeed a good faith personnel action. A take-nothing order was issued. **Estimated savings: \$40,000 in liens, \$88,000 in retroactive TTD and an undetermined amount in PPD.**

**Dawn Hamam** of the Orange office defended our client in a complex case where 75% of a prior specific injury was apportioned to nonindustrial causes. The apportionment upheld on appeal, after which applicant filed a cumulative trauma case. The judge found no injury on the CT and ordered a take nothing. The WCJ noted: *"Defendant's trial brief sets forth a more detailed and fairly accurate summary of the evidence upon which to find no injury."*

**Estimated Savings: \$36,000.**

**Theresa Geoffroy** of Sacramento didn't think that the WCJ had issued the correct rating instructions. While applicant's knee injury claim was successfully resolved with a 54% rating, two contested back claims remained. After a full day of trial, the WCJ found no overlap and issued rating instructions that resulted in a recommended rating of 74%. Theresa objected to the rating and argued additional overlap at a status conference, whereupon the rating was reduced to 35% (equal to \$27,370) for the two injuries. Not one to let go, Theresa further argued that the ratings should be split. The WCJ agreed and awarded 18% for each injury. The total award was reduced from \$103,000 plus a life pension to \$19,920. **Savings: \$83,080 plus life pension payments.**

**Aaron Hemmings** of the Central Coast office achieved a Take Nothing on a case with three principal issues at stake, including the extent of PD, what schedule would apply, apportionment to nonindustrial factors and contribution between the client and co-defendant. The original estimated PD was 54%. The WCJ adopted the defense QME report and found 4% PD, applied the 2005 PDRS and ordered no contribution from our client. **Estimated Savings for TTD exposure, PD, open medical award: \$45,000.**

**Lisa Clayton of our Orange office** received a take nothing on a case where an applicant claimed a work-related back injury subsequent to his termination from his job as a supervisor in a manufacturing plant. Due to a prior, nonindustrial back claim, there was "evidence of an injury" prior to the termination. As such, the WCJ found that the post-termination defense of Labor Code §3600(a)(10)(B) did not apply but nevertheless disallowed the case "on its merits." Lisa argued that the applicant's status as a [former] supervisor played a role in that he had been trained on how to file a workers' compensation injury but had nevertheless failed to do so until after the termination. **Estimated savings: \$36,000.**

**Mike Ferguson** of Sacramento proved that a cumulative trauma injury was the responsibility of a co-defendant and not our client. Unfortunately, the co-defendant failed to recognize the strength of the medical evidence and proceeded to arbitration, whereupon the co-defendant was forced to pay one-half of all species of benefits including indemnity and medical costs. **Savings to our client: \$38,000.**

## NEW CASE NOTES

By Rich Ellis, Fresno Office

**Special Employers** - Five years after originally being decided the *Miceli* case continues, apparently now with new twists. CIGA argued that special employers should pay claims for liquidated carriers. Although initially consolidated for decision, the cases are now being litigated individually. However, CIGA seems to have taken the position that unless the special employer contains the specific endorsement discussed in *Miceli*, the solvent carrier for the special employer must assume liability. This position was rejected by the WCJ at trial who found that the intent of the parties should hold and that the temp agency, not the special employer, would provide all coverage. Another procedural issue has evolved in these cases as CIGA seeks to join the special employers and carriers more than five years from the date of the original injury. *Miceli v Jacuzzi, Inc.*, 68 CCC 434 (*en banc*)

**Concurrent Temporary Disability** - The 3<sup>rd</sup> District Court of Appeal has found that when separate injuries result in concurrent periods of temporary disability, the 104 week/2-year limitation also runs concurrently [LC 4656(c)(1)]. The applicant sustained injury to his right shoulder in February 2005 and to his neck, elbow and right shoulder in April 2005. The carrier paid TTD in April 2005 and stopped payment in April 2007 pursuant to the 104-week cap. The WCJ found that applicant was entitled to two back-to-back TD periods "because he could not receive temporary disability payments concurrently for his two injuries." The appellate court disagreed and found a single period of TD beginning in April 2005 which resulted from both injuries. *Foster v. WCAB (2008)*

**Defamation Not Within Exclusive Remedy** - In an unpublished decision, the 4<sup>th</sup> District Court of Appeal opined that the employer's reason for termination of applicant, namely a co-worker's sexual harassment complaint, did not fall under the exclusive remedy provisions of workers' compensation. The court reasoned that the underlying basis of the emotional distress claim in his wrongful termination lawsuit was damage to his reputation not contemplated in the employment bargain, and cited *Livitsanos v Superior Court*, opining that when the employer steps outside of its role and its conduct exceeds that of the normal risk in employment, there is no exclusive remedy. *Halliburton v. Remington College-Denver Campus, Inc (2008)*

**Lien Claimant Burden** - On reconsideration, a Board panel has upheld the WCJ's reduction of an ambulatory surgery center's lien from \$17,500 to \$3,590. The center had performed surgery on applicant's knee. The claim had been accepted and treatment provided, including the knee surgery. At the lien trial, the center offered a comparative summary "authenticated" by one of the center's employees, but not verified under penalty of perjury. Defendant objected to this evidence and offered expert testimony, which was relied upon and found to be credible. The center's evidence was excluded. The WCJ cited *Kunz*, and opined that while there was no applicable fee schedule, the center's fees must be reasonable and that the lien claimant stood in the shoes of the injured worker and must also prove all the necessary elements of its lien. Once the lien claimant does this, the burden shifts to defendant to rebut the showing. In this case, lien claimant did not make the required showing, and defendant's evidence was persuasive. *Valencia v. California Indemnity Ins Co (2008)*

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## ADVENTURES IN FANTASYLAND: *More on Benson & Apportionment*

By Tim Kinsey, Orange Office

**DIANNE BENSON V. THE PERMANENTE MEDICAL GROUP** En Banc Decision, 36 CWCR 12, 72 CCC 1620 (12/13/07)

The 1977 Supreme Court *Wilkinson* decision indicated that an injured employee would receive a single combined award of PD in circumstances of multiple injuries to the same part of the body that became P&S at the same time. The theory was that an employer would be held liable for the increase in PD attributable to the new industrial injury (based on Labor Code §4750, which now no longer exists). *Wilkinson* was subsequently expanded to allow a combined award on multiple injuries to the same body part that became P&S at the same time in other situations, e.g., where there was not the same employer at the time of the successive injuries or when there are specific injuries and continuous trauma injuries.

The repeal of LC §4750 and adoption of LC §§4663 and 4664 represented a major shift in apportionment, i.e., §4663 requires the physician to estimate the approximate percentage caused by the direct result of an injury and what approximate percentage of PD was caused by other factors. §4664 now provides that the employer is now only "liable for the percentage of permanent disability

(Continued on page 4)

directly caused by the injury arising out of and occurring in the course of employment.” The Supreme Court decision in *Brodie* acknowledged that SB 899 made a fundamental change in the law of apportionment and stated that 4663 and 4664 intended to reverse certain features in the prior law--and that the Legislature created a new “causation regime” that now requires all potential causes of PD to be separately addressed and considered when apportioning disability pursuant to the new provisions of the Labor Code.

NOTE: This was a split decision, 4 to 1. An appeal has been filed as well as a response and we are now waiting to see if the appellate court will or will not accept the case. In the interim, *Benson* potentially allows for the reduction of the ultimate monetary value of permanent disability where the disability is the result of multiple injuries. In fact, in cases where there is no dispute over the ultimate permanent disability percentage, it may even be beneficial to conduct discovery which would allow for the argument that there are additional industrial injuries in an effort to split-out the permanent disability into multiple injuries and reduce the monetary value of the permanent disability. This would be especially true in cases where the permanent disability extends above the life pension amount; even attributing a small amount of permanent disability to an additional injury could lower the permanent disability award from the original injury below life pension level.

## THE REGULATORY CORNER: A Q & A with DWC and Other News

By Peggy Sugarman, GLSR&T Training Director

### MEDICAL PROVIDER NETWORK ISSUES

*Q. Labor Code §4616.3 allows the injured employee free choice of a treating physician within a Medical Provider Network after the first visit. The implementing regulations require the employer or insurer to arrange for the initial evaluation with a MPN physician that meets the access standards, after which the injured employee may choose another physician. When transferring care from an employee-chosen physician to a MPN physician, is the employer required to set up the initial evaluation?*

**A. As it is the employer’s right to direct the initial treatment in the MPN, an employer can choose to waive that right. An employer can also offer to assist employees with finding a physician of choice if the employee is having difficulty finding a doctor, but the choice is ultimately the employee’s after the first MPN visit. Also, we recommend that an employee be given at least a regional area provider listing to give the worker adequate choices to find a treating physician.**

*Q. So, are you saying that you do not see a distinction between the employer’s responsibility to set up the first visit at the beginning of a claim and the transfer of care into the MPN? That the right to direct the initial treatment extends to the transfer of care scenario?*

**A. Title 8 CCR 9767.6(d) states: “The insurer or employer shall notify the employee of his or her right to be treated by a physician of his or her choice within the MPN after the first visit with the MPN physician...,” which can be read to mean that the employer may direct the first visit with an MPN physician after an employee is transferred into the MPN.**

*Q. We had a case recently in which the injured worker selected a physician from the MPN list and was treating at the location specified in the MPN plan. However, the worker discovered that the MPN physician maintained an office closer to the worker's residence, so the worker wanted to treat at the non-MPN location. Does the actual location matter?*

**A. MPN applicants have the right to specify which locations for which MPN physicians are allowed to provide covered MPN treatment.**

*NOTE: More regulatory wranglings are in process as the DWC releases proposed changes to the PDRS, discusses converting the Official Medical Fee Schedule to a Resource-Based Relative Value Scale and finalizes the new QME regulations.*

*Also, new regulations are being proposed by DIR’s Office of Self-Insurance Plans. Look for more coverage of these topics in the next issue!*

#### QUOTE OF THE QUARTER

**“The range of a judge’s discretion is broad, and litigants cannot always predict exactly where on that broad range a particular judge might alight in a particular case.”**

**Obregon vs. Superior Court  
67 Cal.App.4<sup>th</sup> at p. 434**

## LEGISLATIVE NEWS By Peggy Sugarman, Training Director

*The 2008 California legislative session is in full throttle as bill sponsors and their legislative authors argue their points in the various committees to see whether they can persuade a majority of lawmakers to vote in their favor. The following bills are currently under discussion:*

**SB 1271 (Cedillo)** would extend the firefighter's cancer presumption to firefighters employed by U.S. Department of Defense (DOD) installations. Currently, the presumption is limited to public employees. This bill, according to the Senate analyst, would represent a "significant departure from established public policy" by extending the presumption of liability to some members of the private sector under contract to the federal government. Sponsored by the International Association of Firefighters Local I-25, they argue that these firefighters not only perform the same functions as in the public sector but that they may face increased exposure to cancer-causing toxins due to the nature of fires on DOD sites that contain significant amounts of jet fuels and accelerants. The bill passed out of the Senate Labor & Industrial Relations Committee in April.

**SB 2091 (Fuentes)** would provide the Administrative Director with authority to raise pharmaceutical fees for drugs not covered under the Medicare fee schedule that are currently limited to 100% of the Medi-Cal fees. The sponsor attempts to address two issues: To clarify the authority of the AD to raise fees to the extent that [s]he determines it necessary to ensure proper access to pharmaceuticals that fall into this category and to prevent reductions in payments based on the Medi-Cal schedule which can change according to the state budget. This bill passed out of the Assembly Insurance Committee with a unanimous vote.

**SB 1189 (Cedillo)** would revise the process for issuing supplemental job retraining benefits by coordinating the "trigger" dates for RTW offers that are currently different for the voucher and the 15 %  $\pm$  PD payment. A similar attempt was made by the sponsors last year but was vetoed by the governor, who gave specific directions that the issue should be further discussed among his staff and the affected parties. The Administrative Director has been holding advisory meetings in an attempt to work out some of the problems associated with the voucher, and the Commission on Health & Safety & Workers' Compensation is providing technical support for the ideas that are being generated. Whether or not this bill receives bipartisan support will depend largely on the agreements that can be forged in this advisory committee.

**AB 2987 (Benoit)** also tackles the issue of supplemental job displacement benefits. Under this bill, if a worker does not return to work within 60 days of the date of the first report received by the claims administrator containing an initial evaluation of permanent impairment by either the primary treating physician, a QME or an AME in the form and manner

prescribed by the administrative director, the worker would be eligible for the training voucher. This bill passed out of the Assembly Insurance Committee with a unanimous vote.

**AB 2181 (Ruskin)** would provide the Department of Industrial Relations with \$50,000 to create a Return-to-Work website and other materials in order to increase participation in the workplace modification program available to small employers. This bill passed out of the Assembly Insurance Committee with no apparent opposition.

**SB 1717 (Perata)** again introduces a bill to increase permanent disability benefits by increasing the number of weeks per percentage of disability. The effect would result in doubling the current number of weeks for dates of injury on or after 1/1/11 and providing stepped increases during the three-year lead beginning with 1/1/09. This is the same method of increasing the overall permanent disability level that was vetoed by the governor last year. To provide an additional incentive for employers this year, Perata included language that would have eliminated the 15%  $\pm$  but backed away upon finding significant opposition from labor organizations.

**AB 2081 (Coto)** would put into place prohibitions on any financial relationships between a claims administrator and a utilization review company. Under the provisions as currently written, it would prevent claims administrators from offering or accepting compensation to or from utilization review companies based on any percentage of savings or the number of denials.

This bill also revises the definition of "employee" in Labor Code §3351. Under this revision, corporations would be prohibited from providing employees with minimal ownership of tiny portions of the company for the purpose of labeling them "shareholders" and thus avoid the requirement for workers' compensation coverage. That practice may be a violation of §17200 of the Business and Professions Code and one such investigation has been undertaken by the Attorney General.

**SB 1115 (Midgen)** would prohibit apportionment to factors that are generally considered to be discriminatory in nature, e.g., to such factors as race, national origin, gender, sex, and/or genetic predisposition towards a particular condition. The sponsors argue that the changes to Labor Code Section 4663 in SB 899 have resulted in overall discriminatory practices when determining causation.

# ANNOUNCEMENTS

**Vanessa Nguyen** is welcomed by Managing Shareholder **Joanne Thomas** in the **Riverside** office. Vanessa received her bachelor's degree from UC Irvine and attended law school at Chapman University in LA. Admitted to the State Bar in December, 2007, Vanessa was the recipient of the Orange County Asian American Bar Association Scholarship and the Dean's Law Scholarship.

Ms. Nguyen was also a competitor in the 2006 National and International Law Moot Court Competitions, served as President of the Vietnamese American Students Law Association, and served as Competition Chair of the Appellate Moot Court Executive Board. She received a CALI award for her winning arguments and brief in the Ninth Circuit Court of Appeals on an immigration issue while assisting an indigent client at the Chapman University School of Law Ninth Circuit Clinic.

**Darlene de Guzman** joins Stewart Reuben's **Novato**

office. She brings with her close to eight years of litigation experience in the workers' compensation field in the San Francisco Bay area as a former associate partner with a competing firm. In addition to her knowledge of all aspects of workers' compensation litigation, she also has experience as a tax attorney.

**Joshua Dyer** joins Managing Shareholder **Kathleen Roberts** in the **San Jose** office. Joshua completed his undergraduate studies at the University of California, Berkeley and his legal studies at Loyola Law School in Los Angeles. Admitted to the State Bar in December, 2007, Joshua brings a year of experience as a law clerk for a workers' compensation defense firm in addition to a business background in marketing, recruiting and consulting.

**Ted Richards** announces the merging of the Stockton office with the Sacramento team. We will continue to serve the Stockton/Modesto area out of our new and improved Sacramento location.

## **GLSR&T IN THE COMMUNITY!** *Did you know . . .*

The **Association of Workers' Compensation Professionals** is holding a mini-conference in Pomona on June 3, 2008 at the Sheraton Suites Fairplex beginning at 10:30 AM. The afternoon session will begin with an update from Administrator Carrie Nevans and DWC policy staff on what's new with DWC. This will be followed a panel discussion on the QME/AME process featuring GLSR&T's San Diego managing attorney, Kimberley Dyess, Anaheim WCJ Janet Coulter and Applicant Attorney Tom Martin.

The discussion will be facilitated by Peggy Sugarman, GLSR&T's Training Director. Be sure to stay to hear DWC Audit Supervisor Cora Lee discuss the Benefit Notice Regulations!

For more information, contact Connie at (916) 290-8017 or by emailing to: [Connie@awcp.org](mailto:Connie@awcp.org), or visit their website at [www.awcp.org](http://www.awcp.org).

## **IN THE NEXT ISSUE**

**Temporary Disability Benefits:  
The Limitations of and Credits Against TTD**

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