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## QUARTERLY REVIEW

Third Quarter 2008

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A Legal Update for the Claims Professional

### LIMITATIONS ON & CREDITS AGAINST TOTAL TEMPORARY DISABILITY

By Kathleen Roberts, San Jose Branch Manager

SB 899 instituted some effective new laws limiting benefits to injured workers. As temporary disability can easily be the most expensive benefit in any case, there are now limitations on the number of weeks of benefits a claimant can receive. For dates of injury prior to 4/19/04, there is no effective limitation on TD. For dates of injury on or after 4/19/04,

however, there is a 104 week limitation. The TD must be paid within the first two years after date of injury for injuries before 1/1/08 and within five years after date of injury for dates of injury after that date. These limitations are set forth in Labor Code §4656(c).

Since the changes in the law were implemented, the applicant's attorneys' bar has been working on strategies to overcome the temporary disability limitations. These challenges have engendered a considerable amount of new case law. In this article, we explain the effect of the latest case law on administering benefits.

An early challenge which continues to be raised is "estoppel." Estoppel is the legal term which would, if successful, bar defendants from relying on the 104 week limitation. These challenges have arisen in cases where AOE/COE was initially denied or medical treatment was either delayed or denied. The claim is that defendants' delay or denial prolonged the claimant's period of TD beyond the two year period. To date, any finding of estoppel has been rejected either by the WCAB or higher courts. Examples in which estoppel was alleged include a case in which the defendant ignored a request for surgery, and the claimant waited for a year and a half to institute proceedings to obtain an order. (*Medearis v. County of Los Angeles* (6/9/08) 73 CCC xxx). There, the WCAB found no estoppel to claim the 104 week limitation. Another case on estoppel illustrates that it may be very difficult for claimants to use the estoppel bar in the future. In *Ramos v. WCAB* (5/21/08) 73 CCC 936, the WCAB found no justification to overturn the Legislature's clear 104 week limitation even in the face of alleged delays.

Another challenge was based on "date owed" versus "date paid." On this challenge, the cases have favored claimants. In *Amberwood Products v. WCAB* (11/20/07) 72 CCC 1644, the WCAB held that the statutory limitation on TTD begins on the date benefits are first paid, even if for a retrospective period. No credit is allowed for benefits paid by the Employment Development Department (SDI). However, credits are allowed for salary continuation (*Medearis, supra*) and industrial leave pay (*Brooks v. WCAB* (4/18/08) 73 CCC 447).

Another issue of note is whether a claimant may be entitled to additional periods of TD for successive injuries. The prevailing case law indicates that if the periods of TD began on the same date for injury to the same body part, no additional period of TD is owed. (*Vasquez v. WCAB* (4/28/08) 73 CCC 727). Further, even if the injuries are distinct enough to warrant separate findings of TD, the periods will run concurrently if they overlap. (*Foster v. WCAB* (4/17/08) 73 CCC 466).

Challenges based on constitutionality have also been unsuccessful. Applicant's attorneys have also unsuccessfully tried the question of whether surgical procedures amount to amputations as the 104 week limit does not apply to such injuries. On the whole, it appears the WCAB and courts have issued beneficial decisions and conformed to the Legislative intent to limit temporary disability to 104 weeks.

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#### The Supreme Court in *Sandhagen* (S149257)

***“When the employer reviews a treatment request and determines that treatment is reasonably required, the employer has engaged in utilization review.”***

*See Philip Cho's article in Appellate Court Decision of the Quarter*

## *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

*Great representation includes going the extra mile to ensure that you are paying the appropriate amounts on the right claims. Here's a look at what that can entail . . .*

When **Cheryl Tobar** of the **Ventura** office found out from the WCAB that the applicant may have had other injuries using a different social security number, she knew something was amiss. Her investigation included personally meeting with prior employers to confirm applicant's identification, matching signatures on personnel files, obtaining sub rosa films and cross examining an AME who had *already* found injury prior to the medical-legal examination. Convinced that the applicant was fraudulent, she packaged up the materials and sent it to the District Attorney. The applicant subsequently pled guilty to one count of insurance fraud and one count of perjury. He is awaiting sentencing. The DA's office is seeking restitution in the amount of \$84,179, which includes approximately \$30,000 in liens, and Cheryl saved approximately \$10,000 in permanent disability benefits. **Estimate of total restitution sought and other savings: \$94,179.**

**Sally Freeman** of the **Fresno** office successfully defended our client in a case in which the parties had been ordered to adjust any outstanding liens. However, after the lien claimant failed to appear at a MSC scheduled to discuss the liens, the WCJ dismissed it after the lien claimants failed to timely object to the Notice of Intention, filing their objection on the day that the WCJ issued the Dismissal. The WCAB denied the petition for reconsideration on the basis that the lien claimant had not served applicant as required by LC §5905 and CCR §10850. **Savings: \$8,560.**

**Arezoo Jafroodi** of the **Ventura** office was representing CIGA against the State Compensation Insurance Fund who, although they had entered into a joint C & R, had reserved its right to try the issue of the date of injury so as to extend the CT claim to a date under CIGA's coverage. SCIF argued that the CT injury ended on the date that the applicant returned to modified duty. Arezoo convinced both the WCJ and the WCAB that, despite the change in job title and duties, the CT extended throughout the last day of applicant's employment when the employer was insured by SCIF. This

triggered the "other coverage" specified in Insurance Code §1063.1 for the entire period. **Estimated reimbursement for our client: \$200,000+.**

**Anne Lee** of **San Jose** proved that teamwork really pays off! Applicant, a European immigrant, claimed a cumulative trauma injury while working at a very light duty job at a church. Surgery had already been recommended by the time she began working for the defendant. Ms. Lee took the issue of injury to trial and, despite a "ton of tearful testimony" in the applicant's native language, the WCJ found that the applicant's injury pre-existed this very light employment and issued a **Take Nothing**. **Estimated Savings includes TTD, surgery, PD and a Supplemental Job Displacement Benefit: \$110,000 -\$125,000.**

**Kathleen Roberts** also achieved a **Take Nothing** in the case of a very young applicant who was working for a temporary agency and assigned to a fish packing company. In his youthful exuberance, the young applicant decided to play a joke on a fellow co-worker by surprising him with a gob of fish slime in the ear, commonly known in fish-packing circles as a "wet willie". While a prank like this is not usually dangerous (depending, of course, on your choice of victims), sneaking up behind someone who is driving heavy equipment *in reverse* turned out to be no laughing matter as the forklift rolled over applicant's foot. Faced with the need for surgery, a bad infection and a hospital lien for over \$50,000, the applicant lost the case when the WCJ specifically found "horseplay" and denied the injury claim. **Estimated Savings: \$75,000.**

**Fresno's Managing Shareholder David Chun** successfully defended a WCJ's apportionment determination in *Mills v. WCAB, Sunrise Builders* (73 CCC 812, not certified for publication). This 2002 case had been submitted for decision but not finalized prior to the enactment of Senate Bill 899. Caught up in the apportionment battles that took so many by surprise, the WCJ relied on the AME opinion and apportioned 60% of a 100% disability to a preexisting, non-industrial pulmonary disease that applicant claimed had been exacerbated by his fall from a scaffold. On reconsideration, the WCAB affirmed the decision and awarded applicant a permanent disability rating of 40%. The Court of Appeal affirmed. **Estimated Savings: \$600,000.**

**Mya Wonsyld** of **San Diego** deftly dealt with the often debated limits under §4604.5 for chiropractic "visits". A chiropractor claimed that, as the PTP, the 24-visit cap did not apply and proceeded to press the court for payment of the lien for medical treatment. Using the ACOEM Guidelines in addition to the statutory cap, and despite an AME report that was inconsistent on the issue of whether the treatments were necessary, Mya proved that the applicant had received an excess of care and the WCJ issued a **TAKE NOTHING** on the lien and the accompanying request for penalties and interest. **SAVINGS: \$42,122.**

## NEW CASE NOTES

By Larry Kirk, Los Angeles

**PD Rating Schedule** – Injured worker failed to carry burden of demonstrating that Administrative Director’s adoption of 2005 schedule was arbitrary and capricious, expert testimony of insufficient supporting empirical data being indistinguishable from evidence found unpersuasive in prior *Costa* decision, so that presumptive validity of schedule’s future earning capacity (FEC) factor was not rebutted. *Boughner v. Comp USA, Inc.*, SFO 0491230 (opinion and decision after reconsideration, *en banc*, June 2, 2008), rescinding trial judge’s findings and award to the contrary (*Quarterly Review*, 3<sup>rd</sup> Q. 2007).

**Apportionment** – Causation of disability may be properly attributed in part to age-related degenerative disc disease under Labor Code section 4663 despite apparent inconsistency with antidiscrimination provisions of the Government Code, as the intent of SB 899’s apportionment reforms was to charge the employer only for the disability which the job injury directly caused. *Kos v. WCAB* (2008) 73 Cal. Comp. Cases 529 (writ denied).

**New vs. Old Schedule** – Old schedule held applicable for higher rating where a 2004 medical report indicated that, if recommended surgery was not undergone, applicant would be permanent and stationary with defined ratable factors. Even though applicant then had the surgery in 2005, the report “indicated the existence of permanent disability prior to January 1, 2005” under a Labor Code section 4660(d) exception to the applicability of the new schedule. *Tenet/Doctors Medical Center v. WCAB* (2008) 73 Cal. Comp. Cases 329.

**Psychiatric Injuries** – Twenty-foot fall from ladder by roofer does not meet the “sudden and extraordinary employment condition” exception to statute barring compensability of psychiatric injury to employee of less than six months, as this type of fall, though “sudden,” is within the scope of risk of the particular occupation and thus not “extraordinary.” *Villicana v. WCAB* (2008) 73 Cal. Comp. Cases 217 (writ denied).

## APPELLATE CASE OF THE QUARTER: *Sandhagen, UR and LC §4062*

By Philip Cho, Fresno Office

**SCIF V. WCAB AND BRICE SANDHAGEN** Supreme Court Decision, S149257 (July 3, 2007)

When Brice Sandhagen’s consulting physicians recommended a MRI, SCIF’s utilization review physician determined that the MRI was not medically necessary based on the ACOEM Guidelines. When SCIF did not communicate its decision within the 14-day statutory deadline, Sandhagen requested an expedited hearing. The workers’ compensation judge found that SCIF’s failure to comply with statutory deadlines precluded it from relying on the utilization review process or on the UR physician’s report to deny treatment. The workers’ compensation judge ordered SCIF to authorize the MRI.

SCIF sought reconsideration and argued that the consequences for failing to comply with utilization review guidelines are set forth in section 4610, subdivision (i), and in section 4610.1, and that nothing in the statutory scheme allows for the exclusion of a utilization review report.

The WCAB held that the section 4610 deadlines are mandatory and SCIF’s failure to meet the deadlines means that it was precluded from using the utilization review process or any utilization review report it obtained to deny treatment. However, the WCAB also held that, while precluded from using the utilization review process, SCIF could nonetheless dispute the treating physician’s treatment recommendation using the dispute resolution procedure set forth in section 4062.

Sandhagen filed a petition for review after the Court of Appeal affirmed both of the WCAB’s holdings.

**Ruling:** The utilization review process is the employer’s only avenue for resolving an employee’s request for treatment. Section 4062 is not available to employers as an alternative avenue for disputing employees’ requests for treatment:

1. An employer may not use section 4062 to object to a medical determination concerning medical issues ‘*subject to section 4610.*’ By passing SB 899 and rewriting section 4062, the Legislature eliminated the statement that employers could use the section to object to the ‘*extent and scope of medical treatment...*’ under section 4062.

(Continued on page 4)

2. The utilization review process includes the process by which treatments are approved, with or without a physician review.
3. Subdivision (e) of section 4610 allows only a licensed physician who is competent to evaluate the specific clinical issues involved, to modify, delay, or deny requests for treatment. Accordingly, while medical review is not required if the employer approves the treatment request, section 4610 requires that a licensed doctor deny, delay, or modify the request.

**What if the requested treatment is for a disputed body part?** In this case, you would continue to use Labor Code section 4062 and not UR. The question of whether the treatment is medically necessary for the condition is separate from whether the condition is compensable. Sandhagen limits the defense to UR when the ONLY issue in dispute is appropriateness of medical treatment.

## THE REGULATORY CORNER: *Upcoming Regulatory Changes* By Peggy Sugarman, GLSR&T Training Director

*Regulators from all sides of the workers' compensation system are proposing changes that will further challenge the industry, requiring the incorporation of new business processes into your daily routines. In the world of workers' compensation, there are five separate regulatory authorities that can make changes in how things are done. If you are feeling that changes are happening too fast, there is a good reason for it. Changes to different parts of the system have been proposed by the administrative director, the court administrator, and the WCAB. Here are a few to keep an eye on . . .*

**Court Administrator:** The Electronic Adjudication Management System is the subject of the Court Administrator regulations. These regulations specify the manner in which the division of workers' compensation will begin to operate in a paperless file environment. The rules set forth new Optical Character Recognition forms that must be used for filing Applications of Adjudication, Declarations of Readiness, Settlements and mandatory Document Cover Sheets and Document Separator Sheets to ensure that all filed documents are properly identified. Public hearings were held in July, 2008 and are expected to be adopted shortly.

**Workers' Compensation Appeals Board:** The WCAB rules of Practice and Procedure will undergo changes to adjust to the EAMS system and to clearly distinguish WCAB rules from those of the Court Administrator. Public hearings are scheduled for September, 2008.

### **Administrative Director:**

**QME Regulations:** Expected to be finalized by November, this proposal implements the QME process for represented workers based on the changes to the QME process. The DWC proposes enhancements to the conflict of interest section for QMEs, creates new forms for requesting QME panels, creates a process for replacing a panel QME and addresses other issues of concern. One proposed change would require that AMEs and QMEs be available for a deposition within 120 days of the request *and* that the deposition take place in the location in which the examination occurred, clearly an attempt to help speed the process for all parties.

**Permanent Disability Rating Schedule:** The administration has recently proposed an update that uses empirical data from their study of return to work rates and two studies of uncompensated wage-losses for permanently disabled workers. The new schedule, as currently proposed, would change both the diminished future earning capacity adjustment factor and the FEC ranking of disabilities, as well as make changes to the age adjustment. The division has held hearings on these proposals in July and is considering the public's feedback. If it goes forward, the new schedule would apply to dates of injury on or after January 1, 2009. The Division estimates an approximate 16% increase in costs as a result of these new proposals.

**Return to Work, Disability Evaluation:** In concert with EAMS, changes are proposed to the return to work and disability evaluation regulations in part to allow for paperless processing of the relevant OCR forms. Included in these proposals are requirements to send in copies of all job offers and retraining vouchers to the state.

**Medical Treatment Utilization Schedule:** An update is planned for the MTUS that incorporates new treatment guidelines for the treatment of chronic pain, post-surgical treatment guidelines for physical therapy, chiropractic and occupational therapy visits that were exempted from the 24-visit caps by AB 1073 (2007), and makes specific the applicable chapters of the ACOEM guidelines by body part. Public hearings are scheduled for August, 2008. For more information, go to: <http://www.dir.ca.gov/dwc/dwcRulemaking.html> and/or <http://www.dir.ca.gov/wcab/WCABPropRegs2008.htm>

## LEGISLATIVE NEWS

By Peggy Sugarman, Training Director

*The 2008 California Legislative session is nearing closure as the California state budget crisis looms and lawmakers quickly try to make last minute amendments to their bills. Here are the updates since last quarter:*

**SB 1271 (Cedillo)** would extend the firefighter's cancer presumption to contracted firefighters employed by U.S. Department of Defense (DOD) installations that are the "functional equivalent" of federal employees. The bill was amended in June to include all fire and rescue services coordinators who work for the Office of Emergency Services.

**SB 2091 (Fuentes).** Originally designed to address pharmaceutical fees, this bill amends Labor Code §5307.2 originally enacted as part of SB 228. This bill added pharmaceuticals to the list of issues to be addressed in the "medical access" study required of the DWC, along with authority to increase pharmaceutical fees above 100% of MediCal rates if access problems were identified. The bill as amended was signed into law by the governor on July 22, 2008.

**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 % ± PD payment. The bill was held in Appropriations.

**AB 2987 (Benoit)** also tackles the issue of supplemental job displacement benefits and has been amended as recently as August 4, 2008 to change the "trigger" date for the job offer to 60 days after receipt of a P & S report from the PTP, AME or QME. Under current law, a qualifying job offer must be made within 30 days of the termination of TTD payments unless the permanently disabled worker returns within 60 days of that date. The changes would apply to dates of injury on or after 1/1/09 and the bill is still active.

**AB 2181 (Ruskin).** Originally designed to provide the DIR with funds to create materials to assist and educate employers on RTW and FEHA issues, the bill has been substantially modified. Amended on August 4, 2008, the bill now requires that the Employer's First Report of Injury (FROI) be submitted to the DWC in electronic form pursuant to rules adopted by the administrative director. This change basically switches the oversight from the Division of Labor Statistics to the DWC, consistent with the electronic reporting to the Workers' Compensation Information System.

**SB 1717 (Perata)** would increase permanent disability benefits over three years beginning with dates of injury on or after 1/1/09. The bill also proposes to eliminate the 15% decrease regardless of whether the worker accept or rejects an offer of work, but continues the 15% increase for those employers who do *not* make a qualifying offer and for those whose positions are terminated. The bill further adds intent language to protect reform savings while providing "adequate compensation" for permanently disabled workers.

**AB 2081 (Coto).** After four amendments, this bill would place the burden on a corporation to show that it has properly excluded shareholders from WC coverage and would require an annual report be submitted to the DIR consistent with regulations adopted by the Director. It would also prevent claims administrators from paying or receiving compensation to or from UR companies based on the number of denials or percentage of savings. Further changes would be made to §4610 if AB 2969 is also passed and chaptered with an effective date of 1/1/09.

**SB 1115 (Midgen)** would prohibit apportionment to factors that are generally considered to be discriminatory in nature. The bill is still active, but the opponents argue that the decision in *Vaira*, which requires that medical facts support apportionment determinations, makes this bill unnecessary.

**AB 2989 (Lieber)** would require that physicians performing utilization review be licensed to practice in California

### QUOTE OF THE QUARTER

*"The management of the City of Beverly Hills will undoubtedly be stunned to discover that it is responsible under the workers' compensation law for an injury suffered by an off-duty police officer engaging in his routine recreational activity of running during a personal vacation in the dead of winter in the State of Wyoming, one thousand miles from the officer's place of employment."*

**Court of Appeal in Tomlin v. City of Beverly Hills  
(73 CCC 593)**

### IN THE NEXT ISSUE

**Sandhagen and Spinal Surgery  
Is Brasher Still Good Law?**

# ANNOUNCEMENTS

Managing Shareholder **Tony Fink** welcomes **Meredith Schneider** to his team in the Los Angeles office. Ms. Schneider brings three years of experience defending employers and insurers in the workers' compensation arena. A graduate of Boston University, she earned her BA degree in Sociology and her JD from California Western School of Law in San Diego. Meredith excelled in law school where she received an Award for Academic Excellence in Trial Practice, was a finalist in the Gill Trial Team Competition, was a Pro Bono Honor student and was appointed to the Academic Affairs Office.

Branch Manager **Kimberley Dyess** welcomes **Joy Sidhwa** to the San Diego office. Joy obtained her BS degree in Biological Psychology and English from the University of Michigan before graduating from the California Western School of Law in San Diego. She received an academic achievement award and was active in the Asian Pacific American Law Student Association where she became an officer and is on the Board of

Directors of the Pan-Asian Lawyers of San Diego. Prior to joining our firm, Joy worked as a contract attorney doing trial preparation and discovery in complex litigation cases, including SEC compliance, class action lawsuits and patent infringements.

Managing Shareholder **David Chun** welcomes **Philip Cho** to the Fresno office. Philip received his legal training at McGeorge School of Law following receipt of his BA degree in Political Science from Union College in New York. Fluent in Korean, he worked in the McGeorge Law School Immigration Clinic as a student attorney. After obtaining his JD, Philip worked for the Fresno District Attorney's office and as a criminal defense attorney prior to joining GLSR&T.

Congratulations to San Diego Branch Manager **Kimberley Dyess** and to **P. Kathleen Bloch** of Riverside who are now **Certified Specialists in Workers' Compensation!**

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

Tim Kinsey (Orange office) and Kimberley Dyess (San Diego) participated in the 5<sup>th</sup> Annual IRSF Charity Golf Classic at the Cottonwood Gold Club in El Cajon where GLSR&T provided the grand prize of the evening. Over \$60,000 was raised for the International Rett Syndrome Foundation.

GLSR&T was a Silver Sponsor at the 2008 Risk Insurance Management Society Olympic Golf Classic at the Coronado Golf Course in August, with Kimberley Dyess and Mya Wonsyld of San Diego sponsoring a hole. In honor of the opening of the Olympic Games, they took Great Britain as their theme. The tournament is hosted by the San Diego Chapter of RIMS. Both Mya and Kimberley served on the Golf Committee, working hard to make it a spectacular event.

Kimberley also participated in a panel discussion on the QME process at the SoCal Association of Workers' Compensation Professionals' (AWCP) mini-conference in June, along with GLSR&T's Training Director Peggy Sugarman as the moderator for the half-day event in Pomona.

More educational activities are in the works for the annual AWCP conference scheduled for 10/20/08 in Sacramento. Jerry Rempel (Chico/Redding) will participate as a panel member with Peggy Sugarman moderating the morning sessions. The program will also feature WCAB Commissioners Alfonso Moresi and Ronnie Caplane as well as DWC's Carrie Nevans and Anne Searcy, M.D. For more information, contact Connie at (916) 290-8017 visit their website at: [www.awcp.org](http://www.awcp.org)

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