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## QUARTERLY REVIEW

Second Quarter 2009

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A Legal Update for the Claims Professional

### APPORTIONMENT UNDER §4664: ARE THE "CONCLUSIVE PRESUMPTIONS" REALLY CONCLUSIVE?

By Stewart Reubens, Managing Shareholder, Novato

Labor code 4664(a) states that the employer "*shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment*".

Section 4664(b) states that "*if the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof*".

Does Labor Code section 4664 mean that if a claimant sustained an injury in 1999 that settled by way of stipulations with request for award for 15%, thereafter sustaining another injury to the same body parts in 2006 warranting the residual disability of 25%, that the residual disability after apportionment will be 10%?

The answer is not as straightforward as you would think. A conclusive presumption is not necessarily something that is conclusively presumed, at least for purposes of this labor code section and how it has been interpreted thus far. We know from the *Kopping* case that in order to obtain apportionment under labor code section 4664 the defendant has the burden of proving the prior award *and* how the prior disability overlaps with the current disability. It is insufficient to simply point out that a prior award to the same body part exists.

Unfortunately the concept of overlap (whether successive injuries to the same body part or to separate parts of the body) gets somewhat complicated when prior awards are calculated using different standards.

In one case, the AME was also the same AME for an older PDRS case. He attempted to retroactively rate the prior injury under the AMA guides. However the AME used the DRE method to do the retrospective rating yet, for the current injury, he used the ROM method. This resulted in the WCAB remanding the case back to determine whether it is possible to rate the injury under the same (ROM) standard.

In another case the AME report successfully translated two prior awards issued under the PDRS with the injury in question by examining the prior AME reports from the old injury, rating the new injury under the AMA guides, describing what restrictions would be applicable if the 1997 schedule applied and then comparing what the old versus the new restrictions would be.

The lower courts have placed importance on the criteria used to determine the percentage of disability for a prior award or disability. This has so far required an "apples to apples" comparison. Whether this will hold up in higher courts is somewhat unclear.

It is of critical importance that the evaluator be instructed on what is needed to ensure that LC 4664 apportionment holds up. A mere statement that the claimant sustained an injury to the same body parts which resulted in the stipulations with request for award and therefore apportionment is appropriate is likely insufficient. The reviewing attorney and/or claims examiner needs to be cognizant of this potential pitfall.

Please do not forget that if apportionment fails under 4664 there is always labor code section 4663 – but that is the subject of a different article.

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## *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

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Perhaps acting was in her blood, but this assistant coffeehouse manager made a mistake when she staged an industrial accident at her employment in a storeroom and claimed injury to almost every part of her body, including psychiatric. Video surveillance of the alleged fall was shown over the course of a three day trial at which **Los Angeles defense counsel Beth Barkley** successfully argued that the applicant had staged the fall due to her impending termination. Assisted by two credible defense witnesses, Ms. Barkley convinced Judge Seymour of Van Nuys that applicant had not sustained her burden of proof under LC §3202.5. **Estimated Savings: \$15,000 in medical liens, \$20,000 in EDD liens, up to \$70,000 in indemnity costs and future medical.**

A salaried manager of a large hotel claimed a psychiatric injury because of long working hours, difficulty with child care, and unpredictable schedules that lead her to believe that her employer was retaliating against her because she had children. **GLSR&T's Max Breall from Novato** patiently and carefully navigated an emotionally charged case that was laced with the claimant's allegations of sexual harassment against one employee while she was romantically involved with another, creating a conflict of interest according to the company's policy. With numerous credible witnesses, Max successfully argued that the stress experienced by the applicant was not sufficient to warrant a finding AOE/COE despite the implicit sympathy of the WCJ for the applicant's difficulties. **TAKE NOTHING – Estimated Savings: \$125,000.**

Beware of who is taking care of your elderly family members! Perhaps they had become accustomed to the living arrangements, but this live-in husband and wife who provided care for an elderly man refused to leave even after the man was removed to hospital care. In a bizarre series of events, the caretakers fabricated an altercation when the conservator attempted to evict them, then alleged injury in the fictional assault! The couple also alleged police brutality when they were forcibly evicted, a charge that was unfounded according to the sheriff's investigation. **San Diego Branch Managing Attorney Kimberly Dyess** pursued the truth throughout the tense and aggressive depositions, after which she was successful in obtaining **Orders of Dismissal** in both claims. Both prior felons, the behavior of these two caretakers may improve if the homeowner's insurance company pursues fraud claims as they are now considering. **Estimated Savings: \$65,000 each.**

Applicant, a nurse, underwent neck surgery with tragic results when an incorrect medication was administered causing brain hypoxia and quadriplegia. In a separate malpractice action, the hospital settled with applicant for \$6 million. **Defense counsel Larry Turner** from our **Orange County** office was brought in on the issue of whether the need for surgery was industrially related. To complicate matters, there was a looming concurrent issue of general/special employment. Larry successfully established at the trial level that neither the medical record nor applicant's intentions supported a finding of injury AOE/COE resulting in a **TAKE NOTHING** for the applicant in this case with a **potential exposure of \$10 million**. It also brings to mind the potential impact of proposed legislation that would create a separate presumption of compensability for hospital workers with neck/back injuries that is currently going through the legislative hearing process (See AB 664, Skinner).

And let's not forget about the battles that are won on the lien front, **Penny Fogel** from our **LA office** prevailed in a lien trial, appearing in front of WCJ Pamela Foust and resulting in a **TAKE NOTHING** for lien claimants. **Savings: \$12,000.**

## NEW CASE NOTES

By Amy Vanderwood, LA Office

**Must Object to Late QME Report Before Receipt to Obtain a New QME.** In *Teytud v. Clan Innovation Corp.* (BPD) 36 CWCR 283, the defense attorney objected to the QME report after receiving it because it was delayed for 5 months. The WCJ allowed the parties to obtain a new QME. The WCAB reversed the WCJ's ruling finding that the Defendant's objection was untimely and that it waived its right to object. The WCAB reasoned that by allowing parties to receive the late report and to subsequently object on grounds of lateness would constitute "doctor shopping."

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**Cannot Circumvent Panel QME Process Despite Delays From Medical Unit.** The WCAB has recently held that parties may not circumvent the panel QME process set forth in Labor Code section 4062.2 even though the Medical Unit is late in issuing a panel. The WCAB reversed the WCJ's order allowing applicant's attorney to select his own QME when the Medical Unit had not issued a panel QME from a 39 day-old request. The WCAB further indicated that while the Labor Code does not provide any remedies when the Medical Unit delays issuing a panel, a party can nevertheless file a petition for an order directing the Medical Unit to a QME Panel. It appears the WCAB is inviting parties to request an order from a WCJ directing the Medical Unit to issue panels. *Theodore Florentz v. Paint Your Castle and SCIF (BFD)*

**Total PD Payments to Increase Annually Each January 1<sup>st</sup> For Post January 1, 2003 Injuries.** The WCAB has found Labor Code section 4659(c) provides the applicant is to receive annual cost of living allowance (COLA) increases to total permanent disability indemnity and life pension payments for injuries occurring on or after January 1, 2003. The COLA increases are to occur after the first January 1 after the applicant's date of injury and are to commence after January 1, 2004. The WCAB stated that the Legislature intended the COLA increases set forth in Labor Code section 4659 to protect injured workers from inflation. The WCAB stressed that the increase is to commence from the first January 1 following the date of injury rather than from the date payment is first made. *XYZZX SJO2 v. SIF (BFD)*

**Old Schedule Applies if PD is Addressed in 2004 Reports & TD Warranted if Applicant Shows Retired Due to Work Injuries.** The Court of Appeal denied Defendant's Petition for Writ of Review which argued the WCAB should not have used the 1997 Schedule and should not have awarded the applicant TD benefits when the applicant was retired. The WCAB found that 2004 reports from both the QME and PTP addressed permanent disability even though neither report found the applicant permanent and stationary. The WCAB also found that the applicant was entitled to TD benefits because he provided an offer of proof that he voluntarily retired because he could not perform his work duties. The WCAB rejected the Defendant's argument to disregard the applicant's "self-serving" offer of proof because Defendant did not timely object to the offer of proof, did not call the applicant to testify or cross-examine on this issue, nor did Defendant provide any legal authority that an offer of proof could not constitute substantial evidence to support a finding of fact. *Sensiet Technologies Corporation v. WCAB (Rivera) 74 CCC 25.*

## APPELLATE CASE OF THE QUARTER: SMITH AND AMAR V. WCAB

### Applicants' Attorneys Lose Bid for Hourly Fees When Challenging Denials of Medical Care

By Valerie Smith and Kathleen Roberts, San Jose

On May 11, 2009, the Supreme Court issued its long awaited decision in the consolidated cases of Smith v. WCAB and Amar v. WCAB. In unanimously reversing the Court of Appeal decision allowing hourly attorney's fees in cases where medical treatment has been denied, the Supreme Court held that:

"...section 4607 authorizes an award of attorney fees only to employees who successfully resist efforts to terminate their award of medical treatment. It does not permit an award of fees to employees who successfully challenge the denial of specific treatment requests."

The Court unanimously overturned the lower court decision in these cases in which the Applicants' attorneys made a claim for attorneys fees under LC 4607 when challenging a treatment denial even though the Defendants had properly complied with statutory requirements and followed utilization review procedure under Labor Code §4610.

In holding that Labor Code section 4607 did not apply to denials of particular treatment requests, the Court cited to unambiguous language of the statute and stated that the Legislature provided for no liberal or alternative interpretation of LC 4607. The Court further reasoned that UR is the proper procedure and that a remedy is available to the Applicant to dispute a UR determination. The Court also noted that the overbroad application of LC §4607 promoted by the Applicants would, in turn, make other statutes and regulations dealing with medical treatment largely irrelevant. The Court pointed out that LC 5814.5 (and the hourly fees under that section) is still operative when there is an unreasonable denial of treatment.

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*Smith and Amar v. WCAB (continued)*

In these consolidated cases, and innumerable cases litigated since these were first decided, Applicants' attorneys have claimed that an hourly fee award should be permitted under Labor Code section 4607 when a particular request for medical treatment is denied. The main argument was that if no such potential for fees existed, Defendants issue blanket denials of medical care. The Court pointed out the statutory scheme of Utilization Review and noted that only a physician using approved criteria can deny treatment requests and that Defendants may not do so on their own.

Defendants no longer face the risk of being ordered to pay exorbitant hourly attorneys fees after an award of medical treatment. As long as we meet all of the statutory time lines and fully comply with UR regulations and the *Sandhagen* decision, there is no danger in submitting treatment requests to UR and challenging awards of denied treatment when reasonable. Applicants' attorneys are now bound to follow the appeal procedures set forth in statutory and case law and cannot threaten excessive fees to pressure defendants into authorizing medical treatment properly denied under UR. As the Supreme Court held, it is clear the Legislature intended Labor Code section 4607 to apply to instances in which Defendants attempt to terminate a medical care award and to discontinue all further treatment.

## THE REGULATORY CORNER: *New Audit Rules Effective 5/20/09!*

By Peggy Sugarman, GLSR&T Training Director

The DWC issued updated audit regulations that are effective on May 20, 2009 for audits conducted on or after that date. There are few big changes to report other than a few new required additions for maintaining a proper claim file, whether hard copy or electronically, and some reporting requirements to the Administrative Director. Claims administrators are now required to file an Annual Report of Locations due by December 31 in addition to the submission of the annual report of inventory due by April 1, although the latter is not necessary where an administrator is compliant with the WCIS reporting. Moreover, any changes of adjusting location, adjusting entity, contact persons, and email addresses must be reported to the Administrative Director within 45 days of the effective date of the change.

The DWC extended the effective date of the claim file content subsection to June 19, 2009 to allow full compliance with the new provisions, which include requirements to keep documents chronologically or by identifiable sections for hard copy files. For electronic files, documents must be "easily retrievable".

The Audit Unit will continue with the same basic procedures for Profile Audit Reviews (PAR), Compliance Audits and Full Compliance Audits. Notices for Supplemental Job Displacement Benefits and QME/AME forms are now required to be maintained and will be considered by the Audit Unit when determining your PAR score.

For those of you who are scheduled for a review this year, there are some survival techniques that you can employ. First, there is no reason that you shouldn't review the files selected for audit and correct things that aren't up to the standard. While it may not save you from an administrative penalty, you could very well be saving yourself the time and trouble of a \$5814 complaint. Under that statute, no \$5814 penalty can be awarded if you correct the mistake within 90 days of your discovery as long as no claim has been lodged by the employee. You are required to include a self-assessed 10% penalty with the payment of the amount delayed, but you will save yourself from having to defend a \$5814 claim while perhaps easing or eliminating unnecessary stress on the applicant.

Another advantage to pre-auditing your selected cases is that you will be better prepared to address any potential performance concerns and can begin the internal discussions for how to correct them for the future. The Audit Unit will appreciate an administrator that is willing to address problems in a proactive way. And if you believe the Audit Unit is being unreasonable? We at GLSR&T can assist you in defending against any penalties that you feel are being inappropriately assessed. So if it begins to go downhill during the audit process, help is just a phone call or email away. Contact Norin Grancell at: 310-981-1111 or: [ngrancell@grancell-law.com](mailto:ngrancell@grancell-law.com).

### QUOTE OF THE QUARTER – DIR DIRECTOR JOHN DUNCAN TO WCAB ON ALMARAZ/GUZMAN . . .

*"[The decisions] have caused much controversy in the workers' compensation community . . . are having a substantial impact both on the administration of the workers' compensation adjudication system and on the level of workers' compensation benefits due injured workers...*

*I hereby request that you vacate the decisions on your own motion because . . . the announced rebuttal criteria discussed in Almaraz and Guzman are unclear and the lack of clarity is having far-reaching, system-wide effects."*

[Source: CWCR, April, 2009, Vol. 37, No. 3, p.68]

## LEGISLATIVE NEWS

By Peggy Sugarman, Training Director

Legislative committees continue to hear hundreds of bills while struggling with a budget deficit that threatens to continue to worsen with the failure of the ballot measures in the May 19 election. Clearly these pressures spill over to some of the proposed workers' compensation legislation, as news of rising medical costs confound what had previously been the hallmark of the 2003/2004 changes. Still, the expanded cancer presumption legislation for firefighters (AB 128, Coto) is now in Appropriations along with a bill that would require employers to provide a standard 20 minute break to lactating women contiguous with regular breaks (AB 514, De Leon).

Also coming up for a hearing before the Assembly Appropriations committee is another presumption bill (AB 664, Skinner) that would extend a workers' compensation presumption to hospital workers who contract methicillin-resistant *Staphylococcus aureus* (MRSA), blood-borne infectious diseases, and neck/back injuries. Sponsored by the California Nurse's Association, they face heavy opposition from the hospital industry, employer organizations and the insurance industry who argue that there is no rationale for extending provisions normally reserved for public safety officers to all hospital employees.

AB 1093 (Yamada) emerged from the Assembly Insurance Committee with a 10-0 vote. This bill resulted from the much publicized case where the compensability of a homicide at the victim's place of employment was questioned because the killer was motivated by the race of the victim. Under the current case law, a murder that occurs at the workplace is not compensable where there is a personal relationship between the killer and victim. This bill which would re-define a "personal relationship" to exclude persons who are motivated by his or her beliefs regarding the race sex, race, color, religion, ancestry, national origin, marital status, or sexual orientation of the victim.

Two Senate bills that were making some progress were abruptly killed when the Senate Appropriations Committee determined that the bills would have too great a fiscal impact in this fiscal climate. SB 3 would have changed the Supplemental Job Displacement Benefit by standardizing the amount to \$6000 regardless of the level of permanent disability and conforming the trigger requirements for the job offer notices for both the SJDB and PD 15% adjustment. SB 773 would have increased permanent disability benefits by increasing both the maximum earnings on which the PD benefit is based as well as the weeks of PD per percentage.

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

San Diego attorneys Kimberly Dyess, Charlie Hoffman, Mya Wonsyld and Michelle Shabo exercise more than their rhetoric as they assemble their bowling skills and compete in an industry league under the apropos name *Motion to Strike*. Just having fun with industry colleagues doesn't go far enough, as Kimberly snares other GLSR&T attorneys to support various charities using clubs rather than bowling balls:

- Mya and Kimberly are sponsoring and playing in the Connected Through Kids 2<sup>nd</sup> Annual Charity Golf Tournament that supports San Diego foster children and the families who care for them.
- Kimberly and crew are also sponsoring and playing the "Not So Serious Women's Golf Outing" benefitting the Orange County Child Abuse Prevention Center.
- Meanwhile, Tim Kinsey and Kimberly are sponsoring and participating in the OC RIMS 13<sup>th</sup> Annual Golf Classic, benefitting the OCRIMS Scholarship Fund.

### **NEED TRAINING?**

*GLSR&T customizes programs and brings them right to your team of adjusters, saving valuable time and travel costs. If we haven't listed it, we can create it. Here are some of the more popular ones:*

- ADA/FEHA AND WC CLAIMS
- ALMARAZ/GUZMAN AND OGIIVIE
- APPORTIONMENT – 2009
- EAMS WORKSHOP
- SUBROGATION
- SUCCESSFULLY DEFENDING CLAIMS – LC §5402
- SLEEP DISORDERS AND OTHER WPI "ADD-ONS"
- THE 2009 QME PROCESS
- WORKERS' COMPENSATION 101 – AN INTRODUCTION TO THE CALIFORNIA SYSTEM

### **IN THE NEXT ISSUE**

### **UNDERSTANDING SUBROGATION**

*Continued next page*

- RIMS gets another boost as Mya and Kim will be sponsoring a hole at the San Diego RIMS Coronado World Premiere Golf Tournament as the first ever *Grancell Oompa Loompas*, complete with giant candy bowling, chocolate fondue fountains and enough candy to make Willy Wonka as proud of them as we are at GLSR&T. Proceeds will benefit RIMS continuing efforts for education in our industry.

As industry training continues to be a high priority for GLSR&T, you will find GLSR&T at various podiums around the state. **Managing Shareholder Sam Lebovitz** took the stage at the Council of Self-Insured Public Agencies (COSIPA) in Walnut Creek and Newport Beach in March providing a case law update while **Training Director Peggy Sugarman** gave them an insider's look at the DWC's Electronic Adjudication Management System (EAMS).

**Kimberly Dyess** adds her voice to RIMS and AIP when giving her presentation on "Almaraz/Guzman: Tipping the Scales of Justice or Toppling them Over Entirely?" She also authored the lead article in the San Diego RIMSail April Newsletter on *Almaraz/Guzman*.

## ANNOUNCEMENTS

**Sam Lebovitz** welcomes **Christopher Brian Everett**, better known as CB, to the Los Angeles team. CB received his Bachelor of Science degree in Business Administration from John Carroll University in Cleveland, Ohio. The recipient of multiple scholarships, CB was also awarded a Michael Lavelle Fellowship. His academic excellence was also honored at Southwestern University School of Law where he was the recipient of a University Scholarship and the CALI "Excellence for the Future" Award. CB brings almost two years of workers' compensation defense experience to the firm.

**Jeff Stander** welcomes **Art Shahnazarian** to his team in Los Angeles. Art was conferred his Bachelor of Arts degree in the double major of History and Political Science by University of California at Berkeley and received his Juris Doctor degree from UCLA School of Law. A competitive body builder, Art was employed by the Los Angeles County District Attorneys office prior to commencing work with our firm. He will be a strong addition to the LA office!

**Tim Kinsey** is pleased to introduce **Jesse Peck** to our clients of the Orange office. Jesse received his Bachelor of Arts degree in Political Science from UC San Diego and his Juris Doctor from Whittier Law School in Costa Mesa where he was the recipient of a Merit Scholarship. He earned a Certificate in Intellectual Property Law, is fluent in Spanish and was honorably discharged from the United States Army where he served in the Intelligence Unit. In addition, we note that he has experience as a wine sommelier – a perfect fit for GLRS&T!

**Joanne Thomas** welcomes **Zane Uribarri** to her team in Riverside. Zane graduated from California State University, San Marcos and the McGeorge School of Law in Sacramento where he graduated in the top 5% of his class. The recipient of a Dean's scholarship, he received the Witkin Award for the highest grade in alternative dispute resolution, negotiations and settlements as well as honors in trial advocacy. He brings several years of experience in employment law to the Riverside team.

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