

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

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A Legal Update for the Claims Professional

## THE PROPER METHOD FOR ACCESSING SENSITIVE WCAB RECORDS

By Eric Barr, Esq. Inland Empire Office

**Dear Abby:** I have a case where Applicant alleges a psychological injury. From her deposition, I know about a prior psychological injury but when I tried to get those records, they were sealed and Applicant Attorney tells me I'm not entitled to them. Help! Signed, Concerned in CA.

**Dear Concerned:** First off, don't be! You are entitled to the records. CCR 10272(a) tells us what types of records may be behind the sealed record veil: mental health records; records of sexual habits or practice; records of addictions; or the catch all, "other matters of similar character".

If Applicant's prior psychological records were sealed, they were sensitive enough to warrant the Presiding Judge or the Appeals Board allowing it under CCR 10272. For the records to be sealed, not only must they meet the criteria above, but it must have also been shown that:

- 1) An overriding public interest in sealing the records overcame the public right to access the record(s);
- 2) An overriding public interest supported sealing the record(s);
- 3) There was a substantial probability if the records were not sealed, the overriding public interest would be prejudiced;
- 4) The proposed sealing was "narrowly tailored" to meet the goals in (1), (2) and (3) and;
- 5) There were no less restrictive means to have achieved the overriding public interest.

Not having enough space to get into what THAT means, I'll turn my focus to the crux of the matter – how do you get your records?

CCR 10272(f) states that sealed documents shall be made available for inspection by a party to the case or the party's representative. The inspection may be placed under "reasonable conditions and limitations" imposed by the Presiding Judge. Presuming you're not a party to her prior psychological injury claim, this section won't help.

CCR 10272(g) is your El Dorado. Under this regulation, upon a showing of "good cause", a Judge can permit inspection of sealed records by showing good cause as to why you're entitled to them. In your case, Applicant is alleging a psychological injury and testified she had a prior psychological injury. Certainly this constitutes "good cause" to determine compensability or (hint, hint...) apportionment!

And finally, you're probably wondering how to obtain the records since the CCR's are silent on the procedure. Fortunately, the California Rules of Court, Rule 2.551(h)(2) states:

*A party or member of the public may move, apply, or petition, or the court on its own motion may move, to unseal a record. Notice of any motion, application, or petition to unseal must be filed and served on all parties in the cases. The motion, application, or petition and any opposition, reply, and supporting documents must be filed in a public redacted version and a sealed complete version if necessary with (c).*

Rule 2.551(c) states:

*A record filed publicly in the court must not disclose material contained in a record that is sealed, conditionally under seal or subject to a pending motion or an application to seal.*

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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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So, your motion must contain “good cause”, be served on all parties to the cases, must be filed in a publicly redacted version, and must not disclose material that may be in the sealed record. Easy enough, right? In theory it should be, but don’t be surprised if you find yourself down at the Board arguing your “good cause”!

So Concerned, I hope that you no longer are. Go get your records!

## NEW CASE NOTES

By Julie Kennedy, Esq. San Francisco Bay Area Office

### An Employer Must Undertake Utilization Review if Treating Physician Recommends Surgery

In a unanimous en banc decision, the Board has held that when a treating physician recommends spinal surgery, the employer must undertake utilization review following the procedures and timelines governing objections to such a recommendation in Labor Code §§ 4610 and 4062 and AD Rules 9788.1, 9788.11, and 9792.6(o). If the UR physician approves the spinal surgery or if the defendant fails to timely complete utilization review, the defendant must authorize the surgery. If the UR physician denies the spinal surgery request, the employer may then object under § 4062(b), but the objection must comply with AD Rules and the correct form must be used. The employer must complete its utilization review process of the spinal surgery request within 10 days of receipt of the treating physician’s report.

An employer that loses its right to a second opinion report by failure to meet the 10-day time limit or by non-compliance with AD Rules must authorize the spinal surgery. An employer may not opt out of utilization review and dispute the requested spinal procedure using only the spinal surgery second opinion procedure specified in § 4062(b). In its decision, the Board noted the case of *State Comp. Ins. Fund v. WCAB (Sandhagen)* (2008) which requires an employer to conduct UR whenever an injured employee’s treating physician recommends spinal surgery. The Board concluded that, contrary to the

significant panel decision in *Brasher v. State Comp. Ins. Fund* (2006), when a treating physician requests authorization to perform spinal surgery, a defendant must respond to that request through utilization review. The employer therefore must both complete its utilization review and, where denied, make its § 4062(b) objection within 10 days after its receipt of the treating physician’s report recommending spinal surgery. *Cervantes* can be seen as a road map to deal with spinal surgery requests, the utilization review process and spinal surgery second opinion. *Cervantes v. Safeco Ins. Co. of Illinois et al.*, ADJ3675309, ADJ2967795, ADJ3517685, ADJ1962561, SAL81669, SAL101259, SAL77391, SAL77392, Decision After Reconsideration en banc.

### Yearly COLA Adjustments Apply From January 1, 2004, Not From Injury or Permanent and Stationary Dates.

In a case with important consequences for injured workers with permanent disability, either total or in the life pension range, the Court of Appeal has held that the annual cost of living adjustment (COLA) under Labor Code § 4659(c) should be added to the indemnity as of January 1, 2004 and on every January 1 thereafter. In so holding, the court rejected a WCAB decision that the increases should be paid beginning on the January 1 after the date of injury, no matter when the payments are actually made, as well as an argument that the COLA should not commence until after the worker’s condition becomes permanent and stationary. The workers’ compensation judge and the commissioners had held that each PD payment received on or after January 1 following the injury date should be increased, no matter when the first payment was received. The Court of Appeal annulled the Board decision and remanded the case for further proceedings. *Duncan v. WCAB (XYZZX SJ02)*. Court of Appeal, 6<sup>th</sup> App. Dist., Nov. 25, 2009, No. H034040, certified for publication.

### An Employer’s Payment to the Death Without Dependents Unit is Reduced by Their Credit for Death Benefit Payments to the Decedents Estate

The Court of Appeal has annulled a Board decision that denied an employer credit against its liability for a \$125,000 death benefit payable to the Death Without Dependents Unit for sums the employer had previously paid in benefits to the estate of the injured worker. The Court of Appeal characterized the Board’s decision as essentially an award of two death benefits for a single death inconsistent with controlling statutes and legislative policy and concluded that the Death Without Dependents Unit was not entitled to any part of the death benefit. The Court noted that a deceased worker’s estate cannot be dependent and thus payment of a death benefit to an estate is not payment of a death benefit to a dependent. *City of Los Angeles v. WCAB (Foster)* Court of Appeal, 2d App. Dist., Div. 7, Nov. 12, 2009, No. B211331, certified for publication.

## APPELLATE CASE OF THE QUARTER: *Esquivel v. WCAB, Corrections Corporation of America, San Diego Detention, et al.*, 74 CCC 1213 (10/13/09)

By Andrea Escalante, Esq., Greater Los Angeles Office

Recently, the District Court of Appeal granted review to address the issue of whether there is a reasonable geographic limitation on an employer's risk of incurring liability under the Act with respect to new injuries an employee suffers while en route to or from a medical appointment for examination or treatment of an existing industrial injury. The DCA affirmed the WCAB's decision to deem non-compensable new injuries arising out of a vehicular accident which occurred outside a "reasonable geographic limitation".

Ms. Esquivel, who lived and worked in San Diego, sustained an industrial injury and was provided treatment by the employer's designated physician, Dr. Elfenbaum, whose office was a distance of eight miles from the employee's residence. She had been visiting her mother in Hesperia on the day of the next regularly scheduled treatment at Dr. Elfenbaum's office. She began the 130 mile transit to the physician's office and was barely beyond the Hesperia city limits when she was involved in a serious vehicular accident. The employer denied liability for any indemnity or medical treatment related to this occurrence. Ms. Esquivel claimed that the injuries from the car accident were compensable consequences of her original industrial injury. The Trial Judge agreed with Ms. Esquivel and, without citing *any* authority, deemed the car accident injuries compensable. Defendant appealed and the WCAB reversed the lower Court's determination.

Prior to this decision the law provided virtually unlimited liability on an employer in regards to any injury an employee might suffer en route to any kind of medical treatment relating to the original industrial injury, pursuant to *Laines v. WCAB (1975) 40 CCC 365*. This wide range of liability left the employer with little avail to any successful defense. The only defense an employer could use was the "deviation standard" adopted by WCAB in *Durham Transportation Co. v. WCAB (2003) 68 CCC 469*. Under this standard an injury was not compensable if the employee materially deviated from "a reasonable direct route for a purpose not germane to the medical visit." However, this still left the employer with a wide range of liability in geographical terms.

It is hardly a surprise that such a blatant display of bias exists in this askew system where the law is designed to favor the employee, but even with that in mind, the employer's wide range of exposure in regards to this particular issue was beyond the normal bias of the system. What *Esquivel v. WCAB* did for employers was to limit this scope of liability and set forth parameters in order to determine if an injury subsequent to an industrial injury is in fact compensable.

Ms. Esquivel argued that "no geographic limit" existed for an employer's liability; however the DCA reasoned that a limitation was implied under LC §4600(c) and CCR §9780(h) which combined to address the reasonable medical treatment owed to an employee and the reasonable geographic area for that treatment, thus indicating that a legislative intent exists to support a reasonable geographical limit on liability. The DCA determined that an injury sustained subsequent to the original industrial trauma will be compensable if "the employee is traveling a reasonable distance, within a reasonable geographic area, to or from that appointment". This decision by no means creates a balance in the system, but it is a welcome change for the employer community in this state.

## LEGISLATIVE NEWS

By Peggy Sugarman, Training Director

The State Legislature is back in session to continue work on legislation in the second phase of the legislative cycle. Most of the bills introduced at the beginning of the two-year cycle have either been signed or are stalled in Appropriations where committee members, concerned about the fiscal impact on state government, are loath to do anything to worsen the state's woes.

But as employer lobbyist Jason Schmelzer with the firm of Shaw/ Yoder/ Antwih pointed out, Appropriations is not so concerned about the fiscal impact of bills on the rest of the industry. As employers try to balance their own budgets,

Schmelzer found that the user-funding assessment that funds the DWC and other enforcement programs increased by 75% on average, and some companies and local government assessments doubled. Part of the increase was due to the shift to employer funding of the Labor Commissioner's enforcement budget, but the full tab amounted to \$430 million.

This is the backdrop for AB 2423, a bi-partisan bill that would amend Labor Code section 62.5 which governs the different funding mechanisms for the Department of Industrial Relations. Schmelzer points out that, while the administration has done a good job of listening to and addressing concerns, the budget process leaves them in the position of having to react and respond to the administration's proposed budget rather than requiring a process by which industry stakeholders could have a

*Legislative News - continued from page 4*

voice in building a budget that would address industry concerns. Such common problems as delays in getting a QME panel, which can take months, or getting a prompt trial are initial examples of problems that negatively affect both employers and employees.

So, for the moment, **AB 2423 (Solorio & Niello)** amends Labor Code section 62.5 to eliminate the department's exemption from the Administrative Procedures Act on funding issues. By eliminating this section, the department would have to go through a public hearing process to implement their assessment regulations. But it's only a start. "Spot bills", as they are called, are only placeholders. Schmelzer expects to have broad conversations with all industry participants so as to ensure that those affected by the system have a voice and that system efficiency is at the forefront of the DIR budget.

**AB 1994 (Skinner)** is a new bill introduced on 2/17/10 that would create a rebuttable presumption of compensability for hospital workers regarding certain blood-borne infectious diseases along with neck or back impairments. A prior version, AB 664 (Skinner) failed the Appropriations deadline. As most causation presumptions affect public entities, this bill would extend presumptions into the private sector.

## *The Things We Did Last Quarter . . .*

**Peter Golden** of the **Chico Office** proved his ample civil prowess for a Chico auto repair shop employer in what seemed to be a simple wage and hour issue with a disgruntled former employee. The employee had been let go to make room for another former employee and manager who were brought back to take over the business from the owner. After filing his wage and hour claim, the employee engaged an attorney to accompany him to the hearing before the Labor Commissioner's office who proceeded to ask questions well beyond the scope of the hearing. It did not seem to make sense until the employer received the complaint from the EEOC. The employee's attorney used the hearing to set up a discrimination lawsuit.

Upon receiving his right to sue letter from the EEOC, and after demanding \$400,000 at the EEOC mediation, the employee filed suit in the Butte County Superior Court claiming retaliation and discrimination under California's FEHA for age and disability discrimination, breach of employment contract (claiming the employer waived employment at-will), and for penalties under Labor Code section 970 (for misrepresentations, inducement to relocate for employment). The demand at the MSC was for \$325,000 in economic damages, \$325,000 in general damages, \$1,200,000 in punitive damages, and \$85,000 in attorney's fees and costs.

A jury trial was denied by the court when the employee's attorney failed to timely post jury fees. During the two days of testimony, Peter caught the employee in several fabrications and contradictory statements. At one point, the judge turned to the employee in the witness stand, leaned forward and said, "What exactly *is* your testimony?" Despite the manner in which the case was proceeding, the employee turned down an offer of \$10,000 to settle before submission of the case and made a counter-offer of \$50,000 that was summarily dismissed in favor of taking the chance with the judge. In the end, truth and justice prevailed and the judge ruled in favor of and awarded costs to the employer. **Total Demand Denied to Plaintiff: \$1,935,000.**

**CB Everett** of the greater **Los Angeles** office took the reins firmly in hand on a case where the client had stipulated to employment, but subsequently obtained information that put the issue of employment into question. Applicant claimed that he was an employee of a recycling operation who was paid in cash while the employer had no record of his employment. In the Opinion on Decision, the WCJ recognized that there was something amiss in other areas of the applicant's testimony, including an allegation that he was denied medical treatment while the physician maintained that treatment was refused by the applicant. *"This is not a case where two people are seeing the same event and simply have different perspectives of that event. . . . This is a case where one of the two witnesses may be making a material misstatement of fact and committing perjury."*

The WCJ found that while applicant received cash for scrap metal from this recycling center, he was never an employee. The WCJ accordingly ordered that the applicant take nothing. The estimated savings includes a potential 49% PD rating valued at \$44,300, \$29,172 in retroactive TD, and future medical estimated at \$10,000. **Total Estimated Savings: \$83,472.**

The file referred to **Managing Shareholder Kathleen Roberts** was already set for trial on the issue of employment with only two days to prepare. Yet, in a complicated three-way battle between a staffing agency, a bankrupt self-insured employer and the employer's transportation carrier, defendants argued whether the bankrupt self-insured entity was a special employer. In trial and in her post-trial brief, Kathleen successfully protected the firm's client from all liability in the matter. **Estimated Savings: \$70,000.**

### Quote of the Quarter

*"If you want truly to understand something, try to change it."*

Kurt Lewin, Social Psychologist (1890-1947)

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**Joshua Dyer** of the San Jose office succeeded in obtaining a **Take Nothing Further** for our client who had promptly and accurately paid the applicant for their share of a Compromise & Release agreement. Applicant was apparently unhappy with his inability to obtain vocational rehabilitation benefits and felt he was owed an additional \$4120. This was a case where the claims examiner testified exactly as to what she did and paid, and the applicant reluctantly admitted receiving the check. The WCJ found that, despite applicant's unhappiness, the defendant had properly paid the benefit according to the terms of the C & R. **Savings: \$4120.**

## THE REGULATORY CORNER: The Benefit Notice Challenge

By Peggy Sugarman, GLSR&T Training Director

Making sure that you have complied with all of the various benefit notice requirements can be a challenging task in this evolving workers' compensation system. Only recently, the DWC met with industry participants and discussed, among other things, whether or not you are required to send "the most recent version of the QME/AME Fact Sheet and Permanent Disability Fact Sheet" in medical-only cases.

In the current regulations for claims occurring on or after 1/1/94 in which liability has been accepted, CCR section 9812(g)(3) requires that the claims administrator provide the Notice of QME Procedures and the Panel Request Form with the last payment of temporary disability **OR within 14 days after the claims administrator determines that the injury has caused no permanent disability**, and: where the condition becomes P & S and the claims administrator alleges that the injury has caused no permanent disability; the injured worker is unrepresented; and where there has been no previous comprehensive medical evaluation.

This regulation creates controversy because the language of the regulation refers to any instance in which the claims administrator "alleges" that an "injury" has not caused any permanent disability. This appears to sweep all claims, including medical-only, into this category.

Regardless, the industry appears to have convinced the DWC that this requirement is burdensome and unnecessary. Acting AD Carrie Nevans has instructed the Audit Unit not to assess in these situations and has developed proposed changes that would clarify that the notice will only be required in cases where the employee has sustained compensable lost time from work. However, it will still be required in cases where all liability has been denied, including in medical-only claims, where the denial is related to a medical issue. DWC initiated a forum to circulate draft language and I expect will open a rulemaking to deal with this issue within the next month or two.

Still, there are plenty of other pitfalls. For example, the benefit notice regulations require you to send the *most recent version* of the DWC Fact Sheet. Hopefully, you all know that the QME Fact Sheet E was revised in November, 2009 and you are including that version with your notice. If not, be sure to download the revised instructions from the DWC website at [www.dir.ca.gov/dwc](http://www.dir.ca.gov/dwc).

Meanwhile, there are other notice changes contemplated in the current rulemaking governing Medical Provider Networks. The current proposed changes are the subject of a 15-day comment section. While the proposals continue with the simplified MPN initial notice and the more expanded "complete" MPN notice provided at the time of injury or transfer of care, the AD has removed a proposal to provide the notice in the language "most appropriate for the employee" – which promised to be much more than a pitfall. Look for final MPN rules in a few months.

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

**Ted Richards, Esq.**, Managing Shareholder of the Sacramento office spoke on a panel with Workers' Compensation Judge Allyson Hall at the WC Defense Attorneys' Association conference in December, 2009 at Half Moon Bay. The topic was that pivotal issue in any medical dispute: **Substantial Evidence**.

**Jerry Rempel, Esq.**, Branch Manager of the Chico office will be giving a presentation to the Sacramento area crowd at the monthly lunch meeting of the Association of Workers' Compensation Professionals on March 17, 2010. His topic is titled "**Fusion Confusion: The State of Spinal Surgery Second Opinion Process**". Go to [www.awcp.org](http://www.awcp.org) for details.

Congratulations to the following GLSR&T attorneys who recently passed the State Bar Workers' Compensation Certification exam: Bethe Barkley and Julie Feng (Greater Los Angeles); Alexis Orlando (Inland Empire), Aaron Hemmings (Central Coast), Nick Webber (Fresno), Teresa McGinity

(Sacramento), and Darlene de Guzman, Julie Kennedy and Katie Siemont (San Francisco Bay Area).

**Sherman Grancell**, a co-founder of this firm, celebrated his 100<sup>th</sup> birthday on February 5, 2010. Previously, he was a judicial referee and deputy commissioner for the Industrial Accident Commission (predecessor of the WCAB) and then started what was Hanna and Brophy's Southern California branch which evolved into Grancell, Kegel and Tobin. Sherman retired from our firm in 1990.

Sherman's involvement in the larger community continues to this day. A UCLA graduate of the class of 1930, he remains an avid Bruin fan who appears on campus for various functions every week. He is on the Board of Directors for Design for Sharing, UCLA Live's community outreach program for inner-city youth. For a tribute to his life of service, you can read about him here: <http://www.dailybruin.com/articles/2010/2/9/love-ucla-still-strong-100-years/>.

# ANNOUNCEMENTS

**Managing Shareholder Tony Fink welcomes three new attorneys to his team in Los Angeles:**

- **Kevin Chiang** earned his BA from UC Riverside and his Juris Doctor from Whittier Law School. Mr. Chiang has experience as a workers' compensation defense attorney and interned at the OC Superior Court, Anaheim PD, and the Santa Ana DA's office. Mr. Chiang is conversant in Mandarin.
- **Steven Lee** earned his BA from UC Riverside and his Juris Doctor from Southwestern University. Mr. Lee was a legal intern for a major motion picture company. Mr. Lee comes to GLSR&T with prior workers' compensation defense experience.
- **Julian A. Moore** earned his BA degree from the University of Virginia and his Juris Doctor from USC. Mr. Moore has broad experience in complex civil litigation. He has prior experience in 3<sup>rd</sup> party litigation and workers' compensation from both applicant and defense perspectives.

**Managing Shareholder Timothy Kinsey** welcomes two new attorneys to his team in **Orange County**:

- **Travis M. Bailey** received his BA from UC San Diego and his Juris Doctor from Chapman University. He was the articles editor of the Chapman Law Review and editor of the *Nexus Law Journal*. Mr. Bailey was a judicial extern at the California Court of Appeals.
- **Ryan P. Hubler** received his BA from CSU Long Beach and his Juris Doctor from Chapman University. Mr. Hubler gained experience as a law clerk and legal assistant at the County of Los Angeles DA's office. He joins GLSR&T with experience in the workers' compensation industry as a legal assistant and hearing representative.

**Also in Los Angeles, Managing Shareholder Jeff Stander** announces the hiring of **Andrea Escalante**. Ms. Escalante obtained her BA from UCLA and her Juris Doctor degree from

Southwestern Law School. Prior to GLSR&T, she worked for the LA City Attorney's office. She is fluent in Spanish.

**San Diego Branch Manager Kimberley Dyess** welcomes **Robert A. Singh** to her team. Mr. Singh obtained his BA from CSU San Diego and his Juris Doctor from the California Western School of Law. He participated in the San Diego Volunteer Lawyer Program in the Domestic Violence Clinic. Prior to joining GLSR&T, Mr. Singh interned for the workers' compensation firm of Austin, Brownwood and Cannon, house counsel for Liberty Mutual.

**Joanne Thomas, Managing Shareholder** welcomes **Eric S. Barr** to **Riverside**. Mr. Barr received his BA degree from CSU Fullerton and his Juris Doctor from Newport University. Mr. Barr has prior workers' compensation experience as a claims unit manager and for Safeco and Golden Eagle Insurance Companies.

**Managing Shareholder Kathleen Roberts** announces the addition of **Tamar Hawk** to her team in **San Jose**. Ms. Hawk received her BA from Binghamton University in New York and her Juris Doctor from Santa Clara University. Ms. Hawk has paralegal experience in administrative, corporate, criminal, and civil law. She comes to GLSR&T from the workers' compensation defense firm of Laughlin, Falbo, Levy and Moresi.

**Managing Shareholder David Chun** welcomes **Lisa M. Madden** to his team in **Fresno**. Ms. Madden received her BA from CSU Fresno and her Juris Doctor from San Joaquin College of Law. Throughout her college career, she worked as a paralegal in the areas of civil litigation, worker's compensation insurance defense, and subrogation.

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IN THE NEXT ISSUE

**SUCCESSFULLY OBTAINING A  
REPLACEMENT QME PANEL**