

Quarterly Review

Summer 2006

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A Legal Update for the Claims Professional

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Work-Injury Discrimination

As Comp Benefits Decline, ADA/FEHA Filings Increase Labor Code Section 132a, Supplemental Job Displacement Benefit Won't Shield Against High Exposure For Failure to Accommodate Disability

By Jerry P. Rempel, Redding/Chico office

Chico—Until the seminal case of *City of Moorpark v. Superior Court (Dillon)* (1998) 63 Cal. Comp. Cases 944, the courts had repeatedly held that an industrially-injured worker was limited to Labor Code section 132a relief under the workers' compensation laws if (s)he claimed disability discrimination for failure of the employer to make reasonable accommodations to allow a return to work. But in *Dillon*, in which the injured worker sought relief under California's Fair Employment and Housing Act (FEHA), the California Supreme Court held that work-injury discrimination is a fundamental *violation of public policy* and outside the compensation bargain—so that workers' compensation is not the exclusive remedy. Moreover, since the Americans with Disabilities Act (ADA) is a federal statute under the umbrella of the Supremacy Clause of the U.S. Constitution, there never was a valid argument of exclusive remedy against an ADA claim.

With this background, consider the changes in the workers' compensation laws as enacted by SB 899 and

AB 749. Now we have reduced levels of permanent disability, limits on the length of temporary disability, and no vocational rehabilitation. The result: injured workers are demanding that their disabilities be accommodated. Failure to accommodate will likely result in civil litigation under the ADA and the FEHA, *in addition* to the comp claims.

Shifting the Burden

The elements of a failure-to-accommodate action are generally (a) a disability that prevents the employee from performing the essential functions of his/her regular job, (b) a demand for accommodation of the disability, and (c) an unreasonable failure to accommodate on the part of the employer. However, if the decision in *Green v. State of California* (2005) 132 Cal. App. 4th 97 is upheld on review by the California Supreme Court, a plaintiff in a civil work-injury discrimination action will only need to show disability, an adverse employment action, and some causal connection between them. This would place on the

See ADA/FEHA – Page 2

Defense Prevails!

Take-Nothing Order on Catastrophic Claim Leads Outstanding Performances

Attorney	Branch Office	Claim/Exposure	Order/Award
Shannon Lang	Orange County	Paraplegia, \$2,000,000	Take Nothing
Shannon Lang	Orange County	Multiple, \$499,000	Take Nothing
Kelly Sieckman	Inland Empire	Psych, 100% PD	Take Nothing
Medy Beauchane	Redding/Chico	Car Accident, \$80,000	Take Nothing
Teresa Pagan	San Jose	Multiple, \$100,000	Take Nothing
Ted Richards	Sacramento	RSD/Psych, 100% PD	57% PD, 0 Psych
Theresa Geoffroy	Stockton	132a, \$100,000	Take Nothing
Dawn Hamam	Orange County	Multiple, \$209,000	Take Nothing
Todd Whates	Los Angeles	Cancer, \$150,000	Take Nothing
Antony Loo	Los Angeles	Fibromyalgia, 100% PD	Others' Liability

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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ADA/FEHA—Continued From Page 1

employer the burden of showing that the employee could not perform the essential job functions even *with* reasonable accommodations.

Under the ADA, disability is defined as a medical condition, impairment, or disorder that *substantially limits* one or more *major life activities*. However, the FEHA does not require that the medical condition “substantially limit”; it need only *limit* a major life activity. Whether a condition limits or substantially limits a major life activity is a matter to be sorted out by a trier of fact, but it is abundantly clear that it is much easier to obtain a finding of disability under the FEHA.

“The determination of whether a person could do the job with reasonable accommodation must be done on a case-by-case basis. The employer cannot categorically decide that every person with a certain disability is unable to perform a specific job.”

Case By Case

A “major life activity” refers to those activities that are of *central importance to daily life*. These include, but are not limited to: *standing, sitting, walking, lifting, reaching, talking, eating, breathing, hearing, seeing, speaking, working, and learning*. Also note that page 22 of the AMA Guides says that the doctor is supposed to “[d]escribe the residual function and the impact of the medical impairment(s) on the ability to perform activities of daily living and, if requested, complex activities such as work.”

When work alone is the life activity that is limited, there may not be a finding of disability under the ADA. And, if the employee could not perform his essential job functions even with the employer’s reasonable accommodation, he is not protected under the ADA. Yet if *Green* is upheld, such inability will become an affirmative defense for the employer to establish under California FEHA. The determination of whether a person could do the job with reasonable accommodation must be made on a case-by-case basis. The employer cannot categorically decide that every person with a certain disability is unable to perform a specific job.

Comp-Related Issues

The reasonable-accommodation requirement is one of the most litigated areas of the ADA. Under the ADA

and FEHA, an employer must make reasonable accommodations to the known physical and mental limitations of employees, unless the employer can demonstrate that the accommodation would cause undue hardship. And, most importantly, *reasonable accommodations should be considered a process, rather than an event*.

The first comp-related issue this raises is that, at least for on-the-job injuries after January 1, 2004, there is no longer a rehabilitation counselor in this process. Under the former vocational rehabilitation (VR) system, once there was a finding of QIW status the QRR would first contact the employee and then the employer to determine whether there was modified or alternative work available. This would have begun the FEHA-required interactive process in a timely fashion. Employers must affirmatively address the return-to-work issue independent of the VR process. See *Albertsons Inc. v. FEHC/State of California* (2006) 71 Cal. Comp. Cases 178 (“Casenotes,” p. 4 this issue).

Risky Business

Another problem arising from the repeal of VR: the employer may believe that the maximum exposure for not providing modified/alternate work is the new supplemental job displacement benefit and increased PD indemnity. This is a dangerous underestimation. In failure-to-accommodate cases, the employee may claim all tort damages (special, general, and punitive). Equitable relief may also be available (*i.e.*, injunctive relief). The exposure can be substantial. If a jury awards the plaintiff anything, under California law the employer would generally be liable for all reasonable attorney’s fees and costs.

Given the reduced value of workers’ compensation claims, we are seeing a dramatic increase in “failure to accommodate” actions being filed under ADA and FEHA. Indeed, most of these cases started out in the comp forum. Be warned, and be prepared: this trend is likely to continue. ■

We SAWW It Coming...

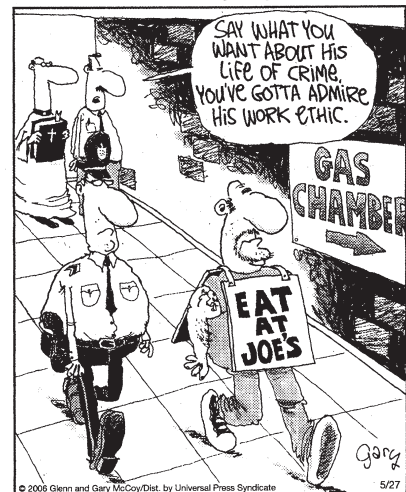
New Year’s Day to Bring Raise in Key Benefits

San Francisco – Effective January 1, 2007, the minimum and maximum rates for temporary total disability (TTD) and 100% permanent total disability (PTD) will be the 2006 minimum and maximum rates plus 5.72%, equal to the increase in the state average weekly wage (SAWW) during the 12 months ending March 31, 2006. *Lab. Code* § 4453(c)(10). The changes at a glance:

	2006	2007
Maximum TTD/PTD Rate	\$840	\$888.05
Minimum TTD/PTD Rate	\$126	\$133.21

Life pension and PTD rates for injuries on and after January 1, 2003 will likewise be increased by 5.72%. *Lab. Code* § 4659(c). ■

THE FLYING MCCOYS By Gary & Glenn McCoy



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All I Want is a Rheum Somewhere...

Victorious Treater's Lien Filing-Fee Reimbursement is Extended to QMEs

And: Surfing the Web For Defunct-Carrier Data; Don't Worry About Medicare Set-Asides For Medi-Cal Liens

Q: Labor Code section 4603.2(b)(1)(B) provides that if the WCAB determines that any contested itemization is payable for "medical treatment provided or authorized by the treating physician," the defendant shall be ordered to reimburse the provider for the \$100 lien filing fee. This wouldn't apply to our contest of the \$3,200 bill of Dr. Fibro, a rheumatological QME on a bruised-finger claim, would it?

—*Incensed in Encinitas*

A: It could. In *Cardoso v. State Comp. Ins. Fund*, 34 CWCR 77 (April 2006), the Board on reconsideration extended reimbursement of the lien filing fee to a chiropractic QME, on a regulatory interpretation that medical-legal providers were intended to be included—conditioned on recovery of "any contested

amount" from the employer. If you can show there was no reasonable necessity for the report, there'll be no order of reimbursement. ■

—*Dennis W. Pate, San Diego office*

"An MSA is a trust required only by Medicare, to ensure that it doesn't end up unfairly paying for medical treatment arising out of the industrial-injury claim being settled."

Q: I need to know the exact date on which a certain carrier went into California liquidation. Since I can't call the company any-

—*Clueless in Cupertino*

A: A website that lists the dates of comp carrier insolvencies is <http://www.cacllo.org/perl/insolvent.pl>. You can even download the order appointing the Insurance

Commissioner as liquidator. Another site to check is <http://www.califega.org/insolvencies.cfm>. ■

—*Kathleen Siemont, Bay Area office*

Q: I've got a case where the injured worker isn't getting Medicare or social security benefits, but is receiving Medi-Cal benefits. Did I goof by not getting a Medicare Set-Aside (MSA) for a structured-settlement C & R?

—*Redfaced in Red Bluff*

A: No. An MSA is a trust required only by Medicare, to ensure that it doesn't end up unfairly paying for medical treatment arising out of the industrial-injury claim being settled. Medicare is a federal government program. Medi-Cal is California Medicaid, and it will generally file a lien which is usually resolved at or before settlement. ■

—*Jerry P. Rempel, Redding/Chico office*

ADVENTURES IN FANTASYLAND

Carved in Jell-O

Where Injury Causes New and Further Disability in Conjunction With Disability From Subsequent Injury, Prior Award Can't Be Apportioned Out, Rules WCAB

Stockton—Dave, a university employee, got a stipulated award of 24-1/2% PD for a 1999 specific injury to his right upper extremity. In 2003 he filed a second application alleging cumulative injury to his back and knees through May 31, 2003, shortly followed by a petition to reopen the 1999-injury award for new and further disability. The employer stipulated that there was good cause to reopen the specific injury claim.

After trial, a WCALJ found that the first injury had caused new and further disability which became permanent and stationary at the same time as disability from the second injury. A joint award was issued of 90% PD (606.5 weeks x \$230 = \$139,495 plus life pension) based on overlapping work

restrictions from Dave's QME, with a credit to the employer against the new award for the \$14,880 previously paid on the stipulated award. The university sought reconsideration, contending that the award should have been calculated by apportioning out 24-1/2% from the new overall disability of 90% for a remainder (rounded upward) of 66%—bringing Dave only 394.25 weeks x \$185 = \$72,936.25 per the 2003 indemnity tables.

The result: **reconsideration denied**. Adopting the trial judge's report, the WCAB held in effect that apportionment can't apply where a timely-reopened injury's new and further disability becomes permanent and stationary at the same time as overlapping disability from a subsequent injury at the same employer. In

such cases, the employee is entitled to a joint award under *Wilkinson* principles at the PD rate applicable as of the last date of injury, less credit for sums previously paid.

Comment: This decision serves as a reminder that where successive injuries combine to produce a higher disability than that awarded for the prior injury alone, the prior disability award can't be subtracted via apportionment unless (a) the time to reopen it has expired or (b) a finding is made that the prior injury has not caused new and further disability. Only then is the prior award deemed carved in granite. ■

University of the Pacific v. WCAB (Hern) (2006) 71 Cal. Comp. Cases 312 (writ denied).

A N N O U N C E M E N T S

R. Jeffrey Stander, a shareholder/team leader in our Greater Los Angeles office, announces the association of Jennifer W. Tsai. Ms. Tsai, a graduate of Loyola Law School, served as a law clerk for the California Courts of Appeal and prior to joining the firm practiced civil law as well as workers' compensation defense.

Charles Alan Hoffman has transferred from our Orange County office to our Inland Empire office in Riverside.

Apportionment

Appeals Court Annuls Nabors' Percentage-From-Percentage Award Calculation, Follows Dykes' Dollars-From-Dollars; Further Appeal Expected

San Francisco - Annulling an en banc decision of the WCAB (see Quarterly Review, Fall 2005, p. 3), the District Court of Appeal has ruled that where an injured worker sustains successive injuries to the same parts of the body at the same employer, whether the employer was self-insured for both injuries or not, the award on the second injury must be calculated under SB 899's new Labor Code apportionment sections 4663-64 by subtracting the dollar value of the prior award from the dollar value of the current overall PD, rather than by subtracting the percentage of the prior award from the percentage of the current overall PD and applying the money charts to the remainder. Nabors v. WCAB, 2006 DJDAR 7104 (June 8, 2006), following E & J Gallo Winery v. WCAB (Dykes) (2005) 134 Cal. App.4th 1536 (see Quarterly Review, Winter 2005-06, p. 3). Since Nabors is not considered final, a further appeal being likely, we may report more in the next issue. However, it should be noted that the California Supreme Court denied review of Dykes on March 1, 2006.

CASE NOTES

New and Further Disability - WCAB has no jurisdiction to award TD beyond five years from the date of a hip injury, despite a stipulation between the parties in a 1990 PD award reserving the Board's continuing jurisdiction on any subsequent postsurgical TD. Finley v. WCAB, 34 CWCR 69 (April 2006).

Permanent Disability - Professional basketball player awarded 95% PD plus life pension without apportionment on a combined rating of three injuries to multiple body parts with three different NBA teams insured by same carrier. Golden State Warriors v. WCAB (Grayer) (2006) 71 Cal. Comp. Cases 327 (writ denied).

Civil Actions - Employer has obligation under FEHA to contact industrially-injured worker to clarify discrepancies in medical reports about employee's limitations and ability to return to work under its duty to provide reasonable accommodations for employee's disability. Albertsons Inc. v. FEHC/State of California (2006) 71 Cal. Comp. Cases 178.

Apportionment - No basis found in 49% PD award for apportionment of disability to nonindustrial causation under Labor Code sections 4663-64 when AME attributed 75% of neck pathology to natural aging process but failed to attribute any specific percentage of permanent disability to nonindustrial factors. California Water Service v. WCAB (Pizzurro) (2006) 71 Cal. Comp. Cases 251 (writ denied).

Safety Officers - Work-injured police officer entitled to salary continuation benefits under Labor Code section 4850 when employee objected to city's recommendation to PERS that he be granted an industrial disability retirement, he was not permanent and stationary, and he was participating in vocational rehabilitation. City of Oceanside v. WCAB (Woodall) (2006) 71 Cal. Comp. Cases 255 (writ denied).

IN THE NEXT ISSUE
TTD: Two-Year Kickup, Two-Year Limit

GRANCELL, LEBOVITZ, STANDER, BARNES AND REUBENS

QUARTERLY REVIEW

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