

Quarterly Review

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A Legal Update for the Claims Professional

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Good News, Bad News...

WCAB Upholds '05 Rating Schedule, Then Loopholes It Rebuttal To AMA Guides-Based Ratings Is Approved—And the Employer Pays

By Timothy E. Kinsey, Orange County office

Grover Beach – In perhaps the most significant decision in years, the WCAB *en banc* has rejected a CAAA-driven challenge by an injured worker to the legality of the reformulated PD schedule adopted effective January 1, 2005 by former AD Andrea Hoch—determining on reconsideration that the AD did indeed comply with the mandate of SB 899 by incorporating the disabilities listed in the AMA Guides (5th ed.) and adjusting them properly for diminished future earning capacity (DFEC). In a bow to the applicants' bar, however, the new schedule was held to be merely "*prima facie* evidence" of the correct PD rating, rebuttable in any individual case by testimony of a DFEC expert for which the employer must pay. *Costa v. Hardy Diagnostic and State Comp. Ins. Fund*, GRO

0031810 (opinion and decision after reconsideration, December 7, 2006).

The CAAA had taken a previous civil-lawsuit challenge to the 2005 schedule all the way up to the California Supreme Court, but lost on the technical ground that the WCAB had not first rendered its own administrative opinion. Now that it has, the State Fund as the newly-aggrieved party has filed its own petition for reconsideration. Pending a final decision, fading vocational rehabilitation counselors will be hitting the books for a new lease on life—as alleged DFEC experts.

Dueling Experts

While *Costa* is the first WCAB decision on the validity of the 2005 schedule itself, the issue of rebuttal

See *Rating Schedule* – Page 2

Knew When to Fold 'Em...

Voluntary Dismissal of Cancer-Presumption Death Claim Highlights Latest Great Results

Attorney	Branch Office	Claim/Exposure	Order
Norin T. Grancell, CEO	Los Angeles	Cancer-Death/\$500,000	Vol. Dismissal
C. Stephen Moore	Stockton	Applicant Fraud	\$60,000 Back
Michael Ferguson	Sacramento	Psych/\$410,157	Take Nothing
Eric T. Rowan	Central Coast	Wage Loss/\$13,520	Take Nothing
Rich Ellis	Fresno/Bakersfield	Knee/\$62,363	Take Nothing
Paul Najooan	Los Angeles	Ankle/\$30,000	\$1,380 Net
Alexis Orlando	Inland Empire	Stimulator/\$3,056	Unnecessary
Max Breall	Bay Area	Reopening/55% PD	Nothing Further
Kou Xiong	Sacramento	Psych/Injury Found	Recon: Reversed
Bruce Herron	Los Angeles	Psych/\$112,000	Take Nothing
Kenneth Martinez	Inland Empire	Multiple/\$66,000	Take Nothing

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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Rating Schedule—Continued From Page 1

testimony had emerged earlier in 2006, when a Grover Beach WCALJ allowed the testimony of a vocational counselor to be considered in determining 15% PD as the measure of a low-skilled worker's DFEC despite an AME report which had found 0% Whole Person Impairment under the AMA Guides. *Navarro v. Arbor View Retirement Community*, GRO 0032504 (March 17, 2006) (see *Quarterly Review*, Spring 2006 p. 3). Yet other trial judges had declined to allow such evidence. With the Board's approval of the practice in *Costa*, the certainty of the schedule has been vitiated; as in the old *LeBoeuf*-type vocational nonfeasibility cases, employers will now have to consider the likely use of their own DFEC experts.

“Meanwhile, fading vocational rehabilitation counselors will be hitting the books for a new lease on life: as alleged DFEC experts.”

But the effectiveness of the new schedule was being eroded even before *Costa*. True, in *Aldi v. Carr, McClellan et al.* (2006) 71 Cal. Comp. Cases 783, the Board ruled *en banc* that the 2005 schedule applied to injuries which occurred before its adoption unless one of the three exceptions delineated in the third sentence of section 4660(d) was present (see *Quarterly Review*, Fall 2006 p. 3). And in such cases as *Vera v. State Comp. Ins. Fund*, 34 CWR 49 (March 2006), Board panels construed one of those exceptions—a “report by a treating physician [before 2005] indicating the existence of PD”—to exclude one which predicted PD while the employee was not yet permanent and stationary.

Result-Driven Decisions
 To the contrary, however, have been more recent result-driven panel decisions which misconstrue the other

two exceptions, stretching backwards to apply the old schedule at greater employer expense to injuries not stabilized until after January 1, 2005. See, e.g., *Torres v. SDM Precision Products*, LAO 832511 (opinion and decision after reconsideration, July 24, 2006) (a “comprehensive medical-legal report” prepared before 2005 need not indicate the existence of PD); *Shayesteh v. Abbott Laboratories*, SAL 0108027 (opinion and decision after reconsideration, September 21, 2006) (duty to send section 4061 PD notice “attached” in 2004 when TD commenced, not in 2005 when it terminated; see “*Adventures in Fantasyland*,” p. 3 this issue—*ed.*).

Adventures in Fantasyland,” p. 3 this issue—*ed.*)

Thus, the good news brought by *Costa* can be viewed as illusory: the new schedule may have been validated, but the latest in its Swiss cheese of loopholes is big enough to drive a truck through. So it goes, in the rollback war on SB 899. ■

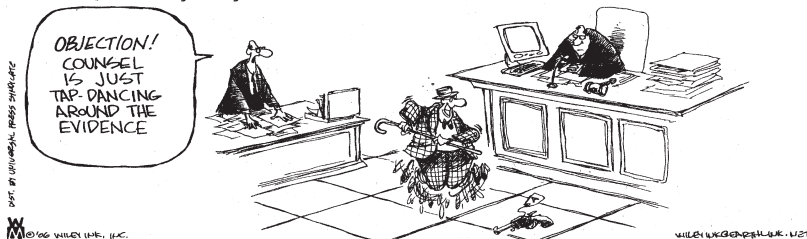
Apportionment Chaos

Supreme Court Grants Review in *Welcher, Brodie*, But Conflicting Decisions Keep On Coming

San Francisco – Bound by rule to resolve a raging conflict between Court of Appeal districts on the proper method of calculating apportionment under SB 899's reforms (see *Quarterly Review*, Fall 2006 p. 2), the California Supreme Court has granted review of district court decisions in *Welcher/Lopez/Strong/Williams* (consolidated) and *Brodie*. In *Welcher*, one district had held the percentage-from-percentage “Formula A” still valid to favor employers despite Supreme Court denial of review in *Nabors* and *Dykes*, in which other districts had explosively revived the dollars-from-dollars “Formula C” rejected by the Supreme Court 31 years ago in *Fuentes*. In *Brodie*, “Formula C” had also been approved but was revised to apply the current money charts to an old PD award in doing the subtraction.

More recently, however, in *Davis/Torres* (consolidated) the Court of Appeal in yet another district has added to the conflict by siding with *Welcher*, while in *Shevchuk* the First District Court of Appeal rubberstamped *Nabors* and *Dykes* after *Welcher* had been automatically voided by the granting of review. These decisions are likely to go up the ladder, too—with uncertainty on the issue expected to continue until a Supreme Court decision sometime later this year. This firm has been designated to present the oral argument on behalf of United Airlines in the consolidated *Welcher* appeals. ■

NON SEQUITUR By Wiley Miller



Mileage Rate Increases...Again!

San Francisco – Just six months after the last increase, the DWC has announced that the mileage rate for injured workers' travel expenses in California has increased from 44.5 cents a mile to 48.5 cents a mile, effective January 1, 2007. Prior to July 1, 2006, the rate had remained unchanged at 34 cents a mile since 2001. ■



All the Things UR...

Employer Denial of Spinal Surgery Creates Trap for the Unwary Applicants' Attorney

And: Court Takes Broader View of "Sudden and Extraordinary" Exception in Statute Barring Short-Term Psych Claims; One Dog Has His Day

Q: When Dr. Slipknife requests authorization to perform a spinal fusion on One-Millimeter Millie, I submit the request to utilization review, which declines to certify it—so I deny it. A month later, Millie's lawyer seeks an order awarding the surgery, crowing that I failed to initiate the second-opinion process as required by Labor Code section 4062(b) by objecting to the doctor's request within 10 days from receipt of his report. Will I have to eat crow?

—*Cringing in Coronado*

A: No, but Millie's attorney will. An employer can use *either* utilization review *or* the second-opinion process, *or both*. If the employer denies a physician's recommendation for spinal surgery pursuant to utilization review (section 4610), it is the *employee* who must file section 4062(b) objections within 10 days of receipt of the employer's denial. *Brasher v. Nationwide Studio Fund* (2006) 71 Cal. Comp. Cases 1282. ■

—*Kimberly D. Dyess, San Diego office*

Q: On his second day of employment at our warehouse, Hardly-Here Harry was struck on the head by a 20-pound light fixture that fell from the ceiling, leading to a depressive disorder. While Labor Code section

3208.3(d) bars compensation for a psychiatric injury to an employee of less than six months, Harry says his injury qualifies under the exception provided for one caused by "a sudden and extraordinary employment condition." But isn't there a case which restricts that to "occurrences such as gas main explosions and workplace violence"?

—*Denying It in Danville*

"A 'sudden and extraordinary employment condition' is an uncommon and unusual event, occurring unexpectedly, which would naturally be expected to cause psychic disturbances even in a diligent and honest employee."

A: Yes, you're thinking of *Wal-Mart Stores, Inc. v. WCAB (Garcia)* (2003) 68 Cal. Comp. Cases 1575 (*Quarterly Review*, 4th Q. 2003 p. 3). However, in a recent case where a 12-foot rack of lumber fell from a wall display onto a short-term worker, the exception was more broadly viewed as applying to "an uncommon and unusual event that occurred unexpectedly and would naturally be expected to cause psychic

disturbances even in a diligent and honest employee." *Matea v. WCAB*, 2006 DJDAR 15344 (6th Dist. Ct. App., November 21, 2006). ■

—*Chris J. Lee, San Jose office*

Q: Rodolfo, my chauffeur, was bitten by my chihuahua while washing the Lamborghini limo outside my 10-car garage. I have mansion-owner's insurance which covers his comp claim, but now he's suing me for a million dollars in Beverly Hills Small Claims Court under Civil Code section 3342, which affixes strict liability on a dog owner for dog-attack injuries. Can he really get two bites of the apple here?

—*Rabid on Rodeo*

A: No. Workers' compensation is the sole and exclusive remedy for an employee whose injury arises out of and in the course of his employment, subject to a limited number of exceptions which do not include the California Dog Bite Statute—notwithstanding that it creates a special statutory cause of action. *Lab. Code* §§ 3602, 3706, 4558; *Pale v. Coble*, D048283 (4th Dist. Ct. App., November 7, 2006). ■

—*Julie C. Feng, Greater Los Angeles Office*

ADVENTURES IN FANTASYLAND

Another Exception Taken...

WCAB Holds Duty to Send 4061 PD Notice Attaches When TD Payments Commence, Not When They End, Determining Whether Old or New Rating Schedule Applies to Pre-'05 Injury

By *Larry Kirk, Central Coast office*

Salinas – Shagha, a laboratory worker, sustained an industrial injury to her spine in 2004. The employer paid TTD indemnity from August 2004 through June 12, 2005, when the condition became permanent and stationary. After trial, a WCALJ awarded Shagha 27% PD as calculated under the old 1997 rating schedule.

The employer filed a petition for reconsideration, contending that the new 2005 schedule should have been applied to result in a substantially lower award: since *prior to 2005* there was (1) no comprehensive medical-legal report, (2) no report by a treating physician indicating the existence of PD, and (3) no requirement that a section 4061 PD notice be sent "together

with the last payment of TD," none of the three exceptions provided by SB 899's section 4660(d) clicked in to allow applicability of the old schedule to this pre-2005 injury.

Granting reconsideration, the WCAB *affirmed the award*. It did observe that no section 4061 notice duty arises where there is no TD. However, distinguishing between "when the duty to send the PD notice *attaches* and when the duty is required to be *executed*," the Board held that since the PD-notice exception is phrased by section 4660(d) in the *present tense*, the duty to send the notice "attaches when TD indemnity is *payable* [here, in 2004], although it need not be executed until the last payment is made." Result: the old schedule applied.

Comment: This decision joins a regrettable line of cases which misapply 5th-grade grammar to widen the exceptions allowing use of the old schedule in pre-2005 cases, frustrating the cost-cutting intent of SB 899. As a dissenting commissioner noted in a later decision, the employer by the plain language of section 4061 is not obligated to serve a PD notice until it *ceases* to pay TD benefits—only at that point triggering section 4660(d)'s third exception. ■

Shayesteh v. Abbott Laboratories, SAL 0108027 (opinion and decision after reconsideration, September 21, 2006), appeal pending. *Accord: Roman v. Larse Farms, Inc.*, SAL 0108426 (opinion and order granting reconsideration and decision after reconsideration, September 27, 2006) (2 – 1 panel decision).

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

Our congratulations to **David J. Chun**, managing attorney of our *Fresno/Bakersfield* office, on his becoming a shareholder in the firm.

Mr. Chun announces the association of **R. James Gillis**. Mr. Gillis, a Vietnam veteran whose background includes work as a Sacramento police detective and Kern County deputy district attorney, is a graduate of University of California, Davis, School of Law, with 15 years of experience as a workers' compensation attorney.

R. Jeffrey Stander, a shareholder/team manager in our *Greater Los Angeles* office, announces the association of **Konstantine R. Caunca**. Mr. Caunca, a graduate of Syracuse University College of Law, is a member of the Bar in California, New Jersey and the District of Columbia and has most recently been associated as staff counsel with the State Compensation Insurance Fund.

Nadine M. Elkhattat has joined our *Inland Empire* office and **Michael N. Misa** has joined our *San Diego* office, announces **Joanne M. Thomas**, shareholder/branch manager. Ms. Elkhattat is a graduate of the University of California Hastings College of the Law with a diverse legal background. Mr. Misa, a graduate of University of San Diego School of Law, has most recently been associated for public-agency work with a Los Angeles workers' compensation defense law firm.

Timothy E. Kinsey, shareholder/branch manager of our *Orange County* office, announces the association of **Rick Erickson**. Mr. Erickson is a graduate of Western State University College of Law who has handled the defense of workers' compensation cases from Eureka to San Diego.

Kathleen L. Roberts, shareholder/branch manager of our *San Jose* office, announces the association of **Christopher C. Cramer**. Mr. Cramer, a graduate of Santa Clara University School of Law, has represented large self-insured employers and insurance carriers in all aspects of defense including workers' compensation, employment law, coverage and asbestos litigation.

Crystal Cunningham has joined our *Sacramento* office, announces **Ted E. Richards**, shareholder/branch manager. Ms. Cunningham is a graduate of McGeorge School of Law, University of the Pacific and is an experienced workers' compensation defense attorney.

C. Stephen Moore has transferred from our *Stockton* office to our *Sacramento* office.

Peggy Sugarman, former Chief Deputy Administrative Director of the Division of Workers' Compensation, State of California Department of Industrial Relations, has joined the firm as Director of Training. ■

CASENOTES

Death Benefits – Statute requiring employer to pay \$250,000 to estate of employee with no dependents who suffers a fatal compensable injury is *unconstitutional*, since only workers, their dependents and the state are specified by the California Constitution as beneficiary classes. *Lab. Code* § 4702(a)(6)(B); *Six Flags, Inc. v. WCAB (Bunyanunda)*, 2006 DJDAR 15485 (November 27, 2006) (appeal pending).

Medical Treatment – Treatment prior to the April 19, 2004 effective date of SB 899 is retroactively subject to determination of reasonableness in accordance with the ACOEM guidelines, adopted as the standard by the Act. *Lab. Code* § 4600(b); *Sierra Pacific Industries v. WCAB (Chatman)*, 2006 DJDAR 8668

(3rd Dist. Ct. App., June 30, 2006, review denied October 11, 2006).

Apportionment – When an employer establishes the existence of a prior PD award which overlaps the current disability from a subsequent injury, the prior award is conclusively, not rebuttably, presumed to still exist, so that the injured worker is not entitled to prove he had recovered from his prior injury when he sustained the new injury. *Lab. Code* §4664 (b); *Kopping v. WCAB* (2006) 71 Cal. Comp. Cases 1229. ■

IN THE NEXT ISSUE
Have Mercier On Us:
Is "Medical Rehabilitation" Dead Yet?

GRANCELL, LEOVITZ, STANDER, BARNES AND REUBENS

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