

Quarterly Review

Third Quarter 2007

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A Legal Update for the Claims Professional

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Harley Worth It...

100-MPH Game of Motorcycle Tag Not "Horseplay," Says WCAB

Normally, Injuries Resulting From Boisterous Work-Time Behavior Do Not Arise Out of the Employment—Unless the Boss Winks at It

By Stewart R. Reubens, Bay Area office

A horse is a horse, of course, of course
And no one can talk to a horse, of course...

—TV theme song, *Mr. Ed*

Marin County – Picture this, based on a true story: Johnny, a young salesman, leaves a job-related awards luncheon on his motorcycle to return to his office in Oakland. In high spirits,

in an unauthorized manner," which in a no-fault system does not bar compensation even if done recklessly. A petition for writ of review is denied. So, if Johnny's conduct isn't "horseplay," what is?

he begins a Tom-and-Jerry chase with another motorcyclist on the Bay Bridge, both of them careening in and out of traffic at up to 100 miles per hour. Suddenly a car swerves in front of Johnny, the unavoidable impact rocketing him 60 feet onto his unhelmeted head. Severely injured, Johnny files for comp benefits.

Based on eyewitness testimony and a CHP report, a workers' compensation judge finds the injuries non-

compensable as arising from "horseplay." On recon, however, the WCAB sees it differently: Johnny was just doing "an authorized act

Summer Clearance

Our Advocacy Keeps Paying Off For The Clients

Attorney	Branch Office	Claim/Exposure	Result
Kathleen Roberts	San Jose	Fatality/\$587,000	\$20,000 C & R
David Chun	Fresno/Bakersfield	Knees/\$50,000	Voluntary Dismissal
Michael Misa	San Diego	Psych/\$40,000	Take Nothing
Rich Ellis	Fresno/Bakersfield	Quadriplegia/\$1.9M	\$500,000 C & R
Ted Richards	Sacramento	Head/100% PD	Award Voided/Fraud
Stephanie Sese	Stockton	Internal/\$1.1M	Take Nothing
Kathleen Bloch	Riverside	Multiple/74% PD	Take Nothing
Cheryl Tobor	Ventura	Contribution/\$65,000	Take Nothing
Kimberly Dyess	San Diego	TD Overpayment	\$8,500 Credit
Larry Kirk	Ventura	Old Sched/\$32,375	New Sched/\$16,743
Rich Ellis	Fresno/Bakersfield	Liens/\$25,000	\$21,264 Disallowed
Gary Ward	Sacramento	Lien/\$108,519 Award	Recon: Rescinded

Just Messing Around

While there's no solid definition of it, "horseplay," also called "sky-larking," can be viewed as rough playfulness or frolicking—or, to put it in the vernacular, just messing around. Injuries resulting from horseplay during working hours are considered by numerous decisions as not arising out of the employment.

The distinction drawn by the Board in Johnny's case was that those decisions involved two or more co-workers interacting in exuberant

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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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Horseplay—Continued From Page 1

if unproductive physical activity on the employment premises. In a recent case, for example, an employee's injuries were found to have resulted from horseplay when he lost his balance and hit his head while simulating sexual intercourse on a co-worker who was bending down to retrieve dropped coins. Other examples of such harmful foolishness include throwing a lighted paper into a bucket of cleaning fluid; diving off a balcony into a swimming pool (the employee winning the bet, but losing his life); busboys throwing hard buns at each other; and playing tic-tac-toe with a knife.

The "Condoning" Exception

As a rule, horseplay-related injuries are found compensable only when suffered by an *innocent bystander or victim*—such as when a high-pressure hose was misapplied from behind to an unsuspecting aircraft worker. But the major exception to noncompensability occurs where horseplay is found to have been expressly or impliedly *condoned* by the employer, because of the potential for injury.

In this vein, a 21-year-old Santa Barbara landscape worker was awarded benefits after testifying that during a break his foreman playfully chased and grabbed him, causing him to step into a hole and fracture his ankle. The foreman had sworn to exactly the reverse—but admitted that the subordinate had a *macho* habit of wrestling with other employees, even cutting his finger once as a result, but had never been disciplined for it. Likewise, horseplay injuries to a ranch worker were ruled compensable on the ground that "playing around" in the bunkhouse was not unusual among the young workers and could have been foreseen by the employer.

"A 'horseplay' defense may also arise when the injurious activities involve not just co-workers, but third parties—and even occur off the premises."

A Broader View

However, a horseplay issue may also arise when the injurious activities involve not just co-workers, but third parties—and even occur off the employment premises. For example, while a bartender's muscle strain was held compensable when it resulted from an arm-wrestling match with a customer (an activity encouraged by the employer), a gas-station attendant who was injured when he "popped a wheelie" on a consenting customer's motorcycle 20 feet down the road was ordered to take nothing on his claim.

Thus, a broader view could have been taken of Johnny's uncondoned freeway frolic as horseplay or skylarking, as most would understand it. Perhaps the Board was swayed by the severity of the injuries—overlooking, say, the case of the compressed pooldiver. Despite its name and Johnny's anomalous award, "horseplay" is not confined to the \$2 window at Santa Anita, but remains a strong defense when the claimant's injuries result from his tomfoolery on the job. ■

QUOTE OF THE QUARTER

Q: (*To hospital janitor*): And what did your supervisor do which you found stressful?

A: Well, all the time she would say to me, "You are working too slowly, Señor Callenas! You must work faster, Señor Callenas!"

Q: And why would that stress you out?

A: I am not Señor Callenas. I am Señor Gonzales.

—Actual deposition testimony, Los Angeles

"Medical Rehabilitation" Rises From the Grave—But a Sound Decision Buries It Again

By R. James Gillis, Fresno/Bakersfield office

Clovis — As part of SB 899's correction of the apportionment laws, Labor Code section 4664(b) created in its first sentence a *conclusive presumption* that the PD reflected in a prior award exists at the time of any subsequent injury. But this was inartfully followed by the words, "This presumption is a presumption affecting the burden of proof"—the Evidence Code's definition of a *rebuttable* presumption. The apparent inconsistency was resolved in more than one WCAB decision by construing section 4664(b) in concert with section 4663 as manifesting the intention of the Legislature to still allow evidence of "medical rehabilitation"—full recovery following a prior award—as a counter to apportionment.

A recent Court of Appeal decision should end the confusion. Concluding that there is actually no inconsistency at all, *Kopping v. WCAB* (2006) 71 Cal. Comp. Cases 1229 methodically harmonized section 4664(b) as an expression of legislative intent to simply *shift the burden of proof* on the presumption issue from the employee to the employer. If the employer affirmatively establishes (1) the existence of the prior PD award and (2) that the disability from the prior injury overlaps the current disability following a subsequent injury, the conclusive presumption will click in. ■

ADVENTURES IN FANTASYLAND

*Caught in a Crosswalk***Judge Defies Board, Declares 2005 Rating Schedule's DFEC Adjustment Invalid***By Larry Kirk, Central Coast office*

San Francisco – Scott, a computer sales associate, injured his knee at work in 2005. An AME evaluated his PD under the new schedule at 8% Whole Person Impairment, but recommended work restrictions which would have rated 50% standard under the old schedule—a difference of \$60,000. Scott contended at trial that the presumptive validity of the new schedule was rebutted by evidence that it failed to adequately consider his diminished future earning capacity (DFEC)—despite the Board's 2006 *en banc* decision in *Costa v. Hardy Diagnostic* (see **Quarterly Review**, 1st Q. 2007) that the former AD had properly formulated the schedule's DFEC adjustment as directed by SB 899.

Result: In a scathing 51-page opinion citing expert testimony, analytical studies and legislative hearing transcripts, the WCALJ *agreed with Scott*. Characterizing the DFEC adjustment ratios in the 2005 schedule as “arbitrary,” the judge concluded that they were inconsistent with the authorizing statute and therefore invalid.

Specifically, found the judge, the AD failed to base the DFEC adjustments on a 2003 RAND study plus “additional empirical studies,” as required by Labor Code section 4660(b)(2). Key to her determination was the AD's cancellation of a RAND “crosswalk study” which could have brought *impairment* ratings under the new AMA Guides-

based standard in line with *disability* ratings under the old schedule. The parties were directed to develop the record on alternative methods of evaluating Scott's DFEC.

Comment: This decision has generated a storm of controversy. While the judge distinguished *Costa* by observing that the record before her was more complete, the carrier is seeking reconsideration by the WCAB on the ground that the judge was bound by *Costa*. Meanwhile, DFEC experts are soliciting business on the internet. ■

Boughner v. Comp USA, Inc., SFO 491230 (Findings & Award and Opinion on Decision, May 9, 2007).

*TD Limit***WCAB Runs Two-Year Period From Date Payment is First Made, Not From First Date For Which It's Owed****And: TD For Period Starting Beyond Five Years From Injury; We Bring Trauma Centers Within Fair Payment Standard**

Q: Sarcoid Sally's doctor has been continuously certifying her for TTD from the day of her July 17, 2005 injury, but we litigate compensability and don't pick it up retroactively until May 3, 2006, upon an award of continuing TTD. Since Labor Code section 4656(c)(1) limits aggregate TD payments for an injury on or after April 19, 2004 to “104 compensable weeks within a period of two years from the date of commencement of TD payment,” can we stop Sally's TTD on July 17, 2007?

—*Wondering in Walnut Creek*

A: No. Under the WCAB's recent *en banc* recon decision in *Hawkins v. Amberwood Products*, SAL 0107814 (June 13, 2007), your liability for TTD benefits may actually extend up to May 3, 2008. The Board interpreted the limitation period to begin on the date TD indemnity is first paid, not on the date for which it is first owed. An appeal is expected.

—*Liliana Naficy-Royal, Bay Area office*

Q: After an AME recommends knee surgery, Antalgic Andy files a petition to reopen his 47%-PD award on September 26, 2006, a day before the five-year anniversary of his 2001 injury, but doesn't actually go

off work for the surgery until June 18, 2007. Since Andy's new period of disability didn't start until after five years from the date of injury, isn't he barred from TTD indemnity by the statute of limitations?

—*Lost in Los Gatos*

“A need for surgery which is medically determined before a timely petition to reopen is filed is ‘new and further disability,’ giving the Board jurisdiction to award TTD for a period beginning even beyond five years from the date of injury.”

A: No. In *Sarabi v. WCAB*, 2007 DJDAR 7883 (May 31, 2007), the Court of Appeal held that a need for surgery which is medically determined before the timely filing of a petition to reopen is “new and further disability,” so that the Board has jurisdiction to award TTD related to the surgery even though it's delayed to a date beyond five years from the date of injury.

—*Seema A. Savur, San Jose office*

Q: County Hospital, an inner-city Level I trauma center, bills us \$116,646 for emergency inpatient surgeries resulting from a gunshot wound to Convenience-Store Cosmo. Noting that the Official Medical Fee Schedule (OMFS) specifically exempts “inpatient services provided by a Level I... trauma center to a patient with an immediately life-threatening or urgent injury,” County asserts that its charges are *prima facie* evidence of reasonableness and demands payment in full. Do we just roll over?

—*Rover in Rancho Cordova*

A: No. In *Aslam v. USA Tire and Wheel Outlet*, SAC 0334484 (Opinion and Decision After Reconsideration, April 13, 2007), in which this firm represented the carrier, a WCAB panel held that the same method of determining reasonableness applies to Level I trauma centers as had been applied by *Kunz v. Patterson Floor Coverings* (2002) to outpatient surgery centers, which were then likewise not subject to the OMFS. This allows you to present rebuttal evidence that County or other Level I trauma centers in its geographical area accept lesser fee payments. ■

—*Gary Ward, Sacramento office*

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

Expected to take effect in October, our *Greater Los Angeles* office is relocating to 200 North Sepulveda Boulevard, Suite 1400, El Segundo, California 90245-5623. The telephone and fax numbers will remain (310) 649-4911 and (310) 641-8265, respectively.

R. Jeffrey Stander, a shareholder/team leader in our *Greater Los Angeles* office, announces the association of **Sherri L. Cunningham**. Ms. Cunningham, a graduate of University of West Los Angeles School of Law, is an experienced workers' compensation defense attorney and a board member of the California Association of Black Lawyers.

Lawrence T. Turner has joined our *Orange County* office, announces **Timothy E. Kinsey**, shareholder/branch manager. Mr. Turner is a graduate of Western State University College of Law and has a broad range of experience in workers' compensation trial and appellate defense practice. ■

“Regular Work” Form Controls Over Substance For 15% PD-Rate Adjustment

La Jolla – If a worker injured after January 1, 2005 returns to his usual job, but within 60 days after a P & S report the employer fails to make an offer of at least 12 months of such “regular work” on an AD-prescribed form, can the employer nevertheless decrease the weekly PD indemnity rate by 15%? (*Lab. Code* § 4658(d)(3)(A).) Conversely, assuming the company has at least 50 employees, does that form-shy employee actually get a 15% increase in the PD rate? (*Lab. Code* § 4658(d)(2).)

The recent recon decision in *Audiss v. City of Rohnert Park*, 35 CWCR 123 (April 2, 2007) suggests the latter. There, with *no time lost* from her usual and customary job, the injured worker's PD rate was held properly reduced by 15% because the employer *had timely provided her* with Form DWC-AD 10003 (Notice of Offer of Regular Work). The inference: even if the employee is back doing regular work anyway, promptly “offering” it on the right form will not only safeguard the decrease, but will prevent the increase—a turnaround of 30%. ■

—**Kimberly Dyess**, *San Diego office*

Bills Tweaking Reforms Advance

Sacramento – Key workers' compensation bills designed to smooth some rough edges perceived in SB 899's dramatic 2004 reforms were moving closer toward full conference vote at press time, including:

- **AB 338**: would allow injured workers to collect TD for 156 weeks in a five-year period.
- **AB 1212**: would direct the DWC to revise the PD rating schedule to increase ratings based on empirical studies and wage losses.
- **AB 1636**: would require employers to provide supplemental job displacement benefits (“vouchers”) to injured workers based on estimated PD in cases where the employee is still temporarily disabled; and
- **AB 1073**: would establish postsurgical exceptions to the 24-visit cap on PT. ■

—**Kou Xiong**, *Sacramento office*

IN THE NEXT ISSUE

Has SB 899 Killed Wilkinson?

GRANCELL, LEOVITZ, STANDER, BARNES AND REUBENS

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