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## QUARTERLY REVIEW

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*A Legal Update for the Claims Professional*

## SUBROGATION: TIPS ON IDENTIFYING 3<sup>RD</sup> PARTY ISSUES IN CLAIMS

By Bruce Neft, Esq., Greater Los Angeles Office

**SUBROPHOBIA** [SUB-ROH-FOH-BEE-UH]; A syndrome, common among workers' compensation claims personnel, involving fear of anything relating to subrogation, civil litigation or third party matters.

Few claims examiners have the opportunity to deal with subrogation on a regular basis, and only a handful of claims have a subrogation element. However, a little understanding, early recognition and prompt handling can significantly reduce the net cost of a claim through cash recovery and can limit or eliminate future exposure.

Early recognition of subrogation potential, and prompt action to protect the employer's subrogation rights, are the keys to success. Where a work-related injury occurs as the result of the fault of a person or entity other than the employer or the employee, there may be a subrogation opportunity. Typical situations involve automobile accidents, defective products, dangerous conditions on premises and construction site accidents. Early investigation is essential, since it is the burden of the employer to prove the subrogation case. Accident reports must be prepared and obtained, witnesses must be interviewed, photographs must be taken and evidence must be preserved. In the large exposure case an experienced subrogation attorney should be retained to supervise the investigation.

If there is a contractual relationship between the employer and the responsible party, such as a lease, the document will affect the subrogation effort and should be reviewed by an attorney as soon as possible. Some provisions may preclude subrogation, while others may eliminate the need to prove negligence in order to recover.

It is important to place the responsible party on notice of a subrogation claim; however, a subrogation letter will not serve to fully protect subrogation rights. If the claim is not settled and a lawsuit becomes necessary, suit must be filed within two years of the date of the accident. There are no exceptions. And, if the responsible party is a public entity, such as a city, county or state government, one must file a claim with that entity within 180 days of the date of the accident as a prerequisite to filing suit. Failure to act within these time limits will defeat the subrogation claim. If you snooze, you loose.

By taking steps to uncover the facts and preserve the evidence, the specific facts of the case will determine whether you need subrogation counsel and what strategies to employ in order to maximize the recovery and reduce the exposure. To determine the need for counsel, here are a few easy steps:

1. Conduct a cost-benefit analysis;
2. Check to see if the two-year statute of limitations is approaching;
3. Consider the complexity of the case;
4. Determine whether employer negligence caused or contributed to the incident; and
5. Find out whether applicant is represented by counsel in the civil claim.

Subrogation is a complex "crossover" area of law. Most civil and workers compensation lawyers, and WCAB judges, have limited knowledge of this subject. Calling a subrogation specialist when the issue is first recognized will help to maximize recoveries and reduce future exposure.

*Bruce Neft handles workers' compensation subrogation cases exclusively.*

*As this is a limited summary of a complex legal subject, you may obtain more information or schedule a presentation in your office by contacting Bruce at: (310) 981-1311 or email him directly at: [bneft@grancell-law.com](mailto:bneft@grancell-law.com)*

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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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## NEW CASE NOTES

By Tony Fink, Esq. Greater Los Angeles Office

**Defendant Entitled to Credit Against 3<sup>rd</sup> Party Recovery.** Applicant's employer hired a general contractor to perform remodeling work, including a remodel of applicant's work station. When the ceramic tiles came loose and fell on her feet, she filed a third-party civil suit against the general contractor and a workers' compensation claim against defendant. Defendant sought a credit from applicant's civil recovery of \$31,000. The WCJ found that defendant did not engage in any negligent conduct that would preclude or reduce its entitlement to credit under L.C sections 3858 and 3861. Applicant filed for reconsideration contending, in part, that the defendant had been negligent in that it had not inspected the tiles after they were installed and that defendant's obligation to inspect the tiles was a non-delegable duty. The WCAB denied reconsideration. *Rodriguez v. WCAB*, (2009) 2009 Cal. Wrk. Comp. LEXIS 253, 74 Cal. Comp. Cas (advanced posting) (writ denied).

**Control Over "Manner and Means" is Key to Independent Contractor Dispute.** Applicant, a nuclear cardiology technologist, was injured while working for defendant, a physician. The claim was denied on the basis that applicant was an independent contractor. Among other things, applicant set her own schedule, set her compensation level, paid her own malpractice insurance, worked in a similar capacity for another physician, and invoiced the defendant for her work. The WCJ found injury. On appeal, the WCAB reversed and found that the applicant was indeed an independent contractor. The WCAB explained that, under *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations*, (1989) 48 Cal. 3d 341, 54 Cal. Comp. Cas 80, the primary factor to consider in determining whether a worker is an employee or an independent contract is the amount of control the principal has over the manner and means of accomplishing the worker's work. *Rasmussen v. WCAB*, (09/08/09) 2009 Cal. Wrk. Comp. LEXIS 241, 74 Cal. Comp. Cas (advanced posting) (writ denied).

**Injury from Driving Company Truck Without a License or Authorization is AOE.** Applicant caused a motor vehicle accident while driving a company owned truck to a job site with his two sons, also employees. Defendant denied the claim AOE/COE and the WCJ issued a take nothing for the applicant. The WCJ ruled that applicant's injury was outside the scope of employment because he lacked a driver's license and had been authorized only to travel in the company truck, not to drive it. Both sides appealed, with defendant arguing that the injury was also barred by the "going and coming" rule. The Board rescinded the WCJ's order, indicating that even if the injury occurred while the authorized travel was conducted in an unauthorized manner, it arose out of and occurred in the course of employment. Further, the travel to the job site conferred a benefit not only upon the employee, but also upon the employer, who obtained the advantage of having the truck secured by the employees available at the work site. *D.H. Smith Company, Inc. v. WCAB*, (Martinez) (9/17/09) 74 Cal. Comp. Cas 1278 (writ denied),

**Dual Benefit and a Talk with HR Sufficient to Overcome Employment and Statute of Limitations Defense.**

Applicant claimed psychiatric and emotional injuries in 2005 based on an incident on 7/15/02 in which a young, intoxicated student jumped from the electric utility vehicle that applicant was driving. The student was seriously injured and died a few days later. In this factually complicated case, the legal questions involved employment and the statute of limitations.

Applicant had been employed by defendant, Pomona College, on a 10 month contract that ended on 5/31/02 but which required some work during the summer. During the summer, applicant and other Pomona College employees worked for Upward Bound, a youth program that contracted with Pomona College. While applicant was technically employed by Upward Bound, he had been asked to perform an errand by defendant earlier in the day and lost his wallet. When returning to find it, he used the Pomona College vehicle and was giving some of the Upward Bound students a ride back to the dorms when the incident occurred.

Ultimately, applicant prevailed. On the employment issue, the Board found that the activities performed by applicant during the summer months were of dual benefit to defendant and Upward Bound. Because the services were accepted and even required by defendant during the "off months", employment was established. Notice was further established that applicant suffered emotional trauma because applicant had undisputedly spoken to the human resources department about the incident after which he was referred to the college's EAP program. The WCAB denied Reconsideration. *Pomona College v. WCAB*, (Robusto) (9/3/09) 74 Cal. Comp. Cas 1284.

## APPELLATE CASE OF THE QUARTER: 132a Claim Must Meet Three Tests. *Gelson's Market, Inc. v. WCAB, Cal. App. (D. Cal. 11.13.09)*

By Val Smith, Esq., San Jose Office

The recent decision of *Gelson's Market, Inc. v. Workers' Comp. Appeals Bd.*, 2009 Cal. App. (D. Cal. Nov. 13, 2009) reaffirms *Department of Rehabilitation v. Workers' Compensation Appeals Bd.*, 30 Cal. 4<sup>th</sup>, 1281 (2003). (Lauher).

The dispute in *Gelson's* focused on a series of return to work reports. The treating doctor initially felt applicant could not work. Despite his misgivings, the doctor released applicant to work 1 hour per day. The employer sought clarification regarding the type of work applicant could do, only to then receive a report that applicant was released to return to work full duty. Because of the discrepancy of the reports and applicant's recent major surgery, the employer did not allow applicant to return to work without further clarification. The initial finding of discrimination at the trial level was sustained on Reconsideration and ultimately overturned at the Appellate level.

As is well known, the court in *Lauher* unanimously held that in addition to showing that an action taken by the employer resulted in a detriment to the injured worker, a successful *prima facie* case must also be founded on facts which demonstrate disparate treatment of the employee.

Thus, any successful claim for discrimination under LC §132a must firmly rest on three tests to be valid. First, the applicant must show that he suffered an industrial injury which resulted in some detrimental consequence. Next, the applicant must show that he was singled out by the employer for disadvantageous treatment because of the industrial injury. Last, the applicant must show that he was treated differently by making him suffer disadvantages not visited on other employees because of the industrial injury.

Essentially, “[a]n employer . . . does not necessarily engage in “discrimination” prohibited by §132a merely because it requires an employee to shoulder some of the disadvantages of his industrial injury.” *Lauher*, 30 Cal. 4<sup>th</sup> at 1088. Rather, the Applicant must show that he was singled out by the employer for disadvantageous treatment because of the industrial injury.

In the instant case, applicant Fowler failed to establish the essential second leg of the argument. Specifically, he failed to demonstrate that he was singled out by the employer for disadvantageous treatment because of the industrial injury. Failing such a showing, it is clear that any such claim of alleged discrimination cannot be supported, as held in both *Lauher* and *Gelson's*.

Therefore, it is important for employers to ensure that there is a clear return to work policy established that encompasses all injured and ill employees, not just those who have workers compensation claims. This will go a long way to defeat the second test, which appears to be the failing of most injured worker's in their 132a claims.

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## LEGISLATIVE NEWS

By Peggy Sugarman, Training Director

To my surprise, the governor signed a few pieces of workers' compensation this year that may increase costs. Here are several which will require some attention from the claims community:

**AB 361 (Lowenthal)** adds new section 4610.3 to the Labor Code. Modifying the UR process, this new section prohibits the denial of payment for medical treatment after it has been both authorized and provided. Medical providers argued that payment for such treatment was often denied when employers found that the provider was not a member of their MPN. Further, they argued that payment for services authorized in error should not be the responsibility of the injured worker,

citing similar protections in group health settings. Employers may rescind or modify authorization for a series of treatments or services that have not yet been provided.

Also on the medical front, **SB 186 (DeSaulnier)** deletes the 12/31/09 sunset provision on predesignation of personal physicians, thus continuing to allow workers to continue to opt out of a Medical Provider Network established by the employer. Retaining the right to predesignate a personal physician in the event of a work-injury was a high priority for Labor advocates.

In a turnabout from 2007 when he vetoed a similar bill, the Governor signed legislation that amends Labor Code section 4850. **AB 1227 (Feuer)** removes references that limit 4850 time to “safety members who are members of the PERS

*Continued on page 4*

*Legislative News - continued from page 4*

system, the LA City Employees' Retirement System, or subject to the County Employee Retirement Law of 1937". Sponsored by the California Professional Firefighters and the Peace Officers Research Association of California, proponents argued that safety officers covered by other retirement systems were unfairly and inadvertently excluded from eligibility for the same protections as some of their co-workers. Opponents, the California Association of Joint Powers Authority and the DIR, cited that the provisions increase public employer salary costs at a time when they are least able to afford it.

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

**Penny Fogel** of the **Los Angeles office** puts out fires all the time for her clients, but this was a big one. Hollywood is famous for producing exciting movies, especially those with fire and explosions. Behind the scenes, movie-makers try to make sure that those involved in this risky business are protected. Protections include the use of fire retardants, but in this case applicant experienced a severe reaction when a fire retardant was sprayed directly onto her clothing. Applicant received a permanent and total disability award for the injuries sustained. Applicant later filed a Serious and Willful claim for increased benefits under Labor Code section 4553 and a cause of action for safety violations under Labor Code section 4553.1.

After three days of testimony, the WCJ issued a **TAKE NOTHING** for these two claims. In her Opinion on Decision, the judge concluded that the improper spraying of the retardant directly onto her clothing was intended to be a protective act and that applicant's severe reaction to the chemical, marked as a potential "irritant", could not have been foreseen. Further, none of the safety violations were found to have caused or contributed to applicant's unfortunate injury. **ESTIMATED SAVINGS: One Million Dollars.**

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**Norin Grancell** achieved a **TAKE NOTHING** on a claim in which applicant was seeking gardening services as part of his continuing medical award. Applicant, a former deputy sheriff, testified that he believed his homeowner's association required him to maintain his 1 ½ acre property. Because he could no longer do the work as he had prior to his injuries, he requested reimbursement to pay for gardening services, both past and future. At trial, applicant admitted that he had not had any contact with his homeowner's association to confirm his beliefs about the maintenance requirements. Armed with an AME report that did not support applicant's request on a medical basis, Norin saved the client from a lifetime of expenses related to the request. **ESTIMATED SAVINGS: Tens of thousands for past and future services.**

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**Medy Beauchane's TAKE NOTHING** in a wage and hour claim proves that courtroom drama isn't restricted to big dollar cases or fictional depictions. After his layoff as a millwright/mechanic, Plaintiff claimed that he was never provided a meal or rest period and that he was owed overtime payments for after-hour "call-ins". He alleged that uninterrupted breaks, as required by Industrial Wage Orders, were not possible because of constant work-related calls made to his company cell phone. He also claimed that he was called in to work both before and after his shift to work on down equipment for which he was not paid at the overtime rate.

At the hearing, Plaintiff admitted that he took his meal periods and rest periods at approximately the same time every day. Medy then proved – using the phone records for the company provided phone – that many of the "interrupting" phone calls were either placed by the Plaintiff or were from numbers unrelated to his work. During examination, Plaintiff denied knowing one of the phone numbers listed as an "incoming call" on the phone records.

"Really?"

Medy then called the number from his own cell phone, put it on speaker and listened very pleasantly to Plaintiff's answering machine pick-up, "Hello, you've reached Tom and Linda..." Additionally, the employer had a very nice written policy indicating that employees were obligated to cease all work during their breaks, and the plaintiff's supervisor had previously told the Plaintiff to "turn off his phone" if it interrupted his breaks. Medy then proved, through a combination of skillful questioning and the production of pay records, that Plaintiff had been paid for all "call-ins" at the proper overtime rate, winning on all counts. Clients and movie scouts can find Medy in the Chico office. **SAVINGS: \$5600.**

### Quote of the Quarter

**Lost in Translation** - - "I first visited China as a trade union official some years ago. The Australia trade union delegation, of which I was a member, was taken to a factory.

While on the tour, I asked our hosts "Do you have workers' compensation in China?" After much deliberation, the translator replied: "No. If the workers break anything, they don't have to compensate us . . . straight away."

– Tim Harcourt, Australian Trade Commission, in his article "Sino-the-times in labour market and economy"

## THE REGULATORY CORNER: Proposed Revisions to MPN Regs

By Peggy Sugarman, GLSR&T Training Director

Revisions to the MPN Regulations were the subject of public hearings in October, 2009. While I anticipate additional changes to be circulated, it is clear from reviewing the proposals that the DWC is trying to simplify the employee notification process. Their implied logic is that employees need only basic information about their employer's work-injury medical provider network prior to an injury. Uninjured employees are unlikely to pay much attention to the details of the second, third and Independent Medical Review process or the cessation of use language as is currently required. Instead, the regulations propose to have only 5 basic items in the "Initial Employee Notice" that would be required to be sent within 14 days prior to the implementation of the MPN or at the time of hire:

1. That medical treatment for new work injuries will be provided through the MPN as of the effective date of coverage unless the employee has properly pre-designated a physician or medical group.
2. The effective date of coverage of the new MPN.
3. That existing work injuries may be covered under the prior MPN or may be transferred into the new MPN.
4. That for periods when the worker is not covered by a MPN, an employee may choose a physician 30 days after the date the employee notified the employer of his or her injury.
5. The MPN contact's name, number, address, and a MPN website, if applicable, where the worker can obtain more information.

The proposed regulations would require an expanded explanation in the "Complete Written MPN Employee Notification", to be provided at time of injury or when transferring care into the MPN. This would be the complete set of instructions and rights that the employee would need to obtain care through the MPN.

One proposed change that drew some criticism from the industry was the proposal to provide the notice in ". . . English and Spanish, or whichever is appropriate for the employee." One employer confided that it will be more difficult for employers to make a presumption of which language was the best one and foresees problems if this provision is adopted. I anticipate at least one more comment period before these proposals are adopted. The complete set of proposals can be viewed on the DWC website: [http://www.dir.ca.gov/dwc/DWCPropRegs/MPN\\_Regulations/MPN\\_Regulations.htm](http://www.dir.ca.gov/dwc/DWCPropRegs/MPN_Regulations/MPN_Regulations.htm)

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

San Diego Branch Manager **Kimberly Dyess** loves to play golf and manages to put her skills to excellent use. This quarter she and her office cohort participated in the **Canine Companions for Independence (CCI) Charity Golf event in Carlsbad**. CCI is the largest assistance dog organization in the world. Through volunteers, CCI breeds and trains canines to meet the needs of our disabled population. Since their inception in 1975, they have placed assistance dogs with over 3000 people. To find out more about this organization, go to [www.cci.org](http://www.cci.org).

**Aaron Hemmings**, Branch Manager of the Central Coast office was a speaker at the annual California Self-Insurers Association Conference in October, 2009. His topic covered strategies for defending against the permanent disability "add-ons" for sleep disorders, pain and sexual dysfunction.

**Peggy Sugarman**, GLSR&T's Training Director, was elected to the Association of Workers' Compensation Professionals Board of Directors. Peggy has been an active contributor to the

AWCP's educational efforts over the past several years. She will be on several committees and is the co-chair for the 2010 annual AWCP conference.

Speaking of which, the 2009 AWCP conference featured several GLSR&T participants. **Peggy Sugarman** moderated a discussion with a panel of experts on the issue of ADA/FEHA and Return to Work. In the afternoon session, **Stewart Reubens** of Novato and **Ted Richards** from the Sacramento Office paired up to provide an entertaining Case Law update.

#### IN THE NEXT ISSUE

**THE PROPER METHOD FOR ACCESSING  
SENSITIVE WCAB RECORDS**

# ANNOUNCEMENTS

Managing Shareholder **Joanne Thomas** and Branch Manager **Kimberly Dyess** welcome **Karisa McNamara** to the **San Diego Office**. Karisa received her BA degree from UC San Diego and her JD from USC Law School. In addition to her public legal work, she has six years of experience in workers' compensation.

**Managing Shareholder Jeff Stander** welcomes **Aditya V. Barot** to his **Los Angeles** team. Mr. Barot received his Bachelor's degree and his law degree from ILS' Law College, University of Pune, India, with diplomas in Medical Jurisprudence & Forensic Sciences and in Cyber Laws. He is experienced in California workers' compensation law.

**Managing Shareholder Sam Lebovitz** welcomes two new attorneys to his Los Angeles team:

- **Stephanie Goodsen** is a graduate of UCLA. She received JD from Loyola Law School during which she traveled to Japan to study international law. Ms. Goodson comes to GLSR&T with experience handling workers' compensation cases.
- **Mark H. Yasutomi** received his BA degree from UCLA and his JD from Southwestern Law School. He joins GLSR&T with an array of legal research and writing experience in areas of firearms law and intellectual property rights. Mark is conversant in the Japanese language.

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

- **Sydney Zapiec** earned her BA degree from Emory University in Atlanta, Georgia and her JD from Southwestern Law School. She has legal experience in the areas of film production, property and landlord-tenant, products liability, and workers' compensation defense.

- **Todd E. Taylor** received his BA from Minnesota State University and his JD from Whittier Law School. While in law school, He has worked with several WC defense firms and proudly served in the United States Air Force.

- **Cristobal Tostado, Jr.** is a graduate of UCLA and received his JD from Southwestern University. His legal experience includes civil litigation, employment law, and workers' compensation. Mr. Tostado is fluent in the Spanish language.

**Managing Shareholder Ted Richards** welcomes four new attorneys to his team:

- **Peter M. Golden** obtained two BA degrees from the University of Washington and his JD from Seattle University School of Law. Peter has six years of experience in workers' compensation defense. He is in the Chico office.
- **James E. Swenson, Jr.** graduated from UC Irvine and received his JD from Lincoln Law School. He is a Certified Specialist in Workers' Compensation and was staff counsel for Travelers Insurance Company. He is in the Sacramento office.
- **Kevin L. Bryant** received his BA Sonoma State University and his JD from the McGeorge School of Law. Mr. Bryant has experience in both civil and administrative litigation as well as workers' compensation law. He is in the Sacramento office.
- **Kristen Bergesen** received her BA from UCLA and her JD from American University, in Washington, D.C. She is a member of both the Maryland and California State Bar Associations. She has experience in criminal and personal injury law. She is also in the Sacramento office.

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