Offices in Los Angeles/Encino, Glendale, Oxnard, South Bay, San Diego, Orange County & Northern California

The PBWire

A monthly publication from Pearlman, Borska & Wax reporting on the developments in California's Workers' Compensation and Employment Laws

January 2017
Vol. V Issue 1

PB&W
Pearlman, Borska & Wax
15910 Ventura Blvd.
18th Floor
Encino, CA 91436
818.501.4343

VOCATIONAL APPORTIONMENT V. MEDICAL APPORTIONMENT

By: Olivia Gordon, Esq.

Defendants must recognize the difference between an applicant alleging permanent total disability (PTD) based on medical impairment pursuant to the *AMA Guides* and PTD based on "in accordance with the fact" under Labor Code §4662(b).

In *Target Corp. v. WCAB (Estrada)*, the applicant suffered a cumulative trauma injury to his low back, neck, left knee, left shoulder, right shoulder, lower extremities, thoracic spine, left arm, left forearm, left wrist, stomach, psyche, sleep, diabetes and hypertension, while employed as a team leader/laborer. Following Trial, the Workers' Compensation Judge (WCJ) issued a decision finding applicant 100% PTD, without apportionment, "in accordance with the facts" under Labor Code §4662(b).

Continued on page 2...

THE PBWIRE CELEBRATES ITS FIFTH ANNIVERSARY!

January 2017 marks the fifth anniversary of our newsletter. Thank you to our readers for your support.

Remember, every single issue of *The PBWire* can be accessed on our website:

http://www.pbw-law.com/news/newsletters.html

TO ADVOCATE OR NOT ADVOCATE: *MAXHAM* EN BANC DECISION

By: Yvonne E. Lang, Esq.

In the newly issued en banc decision of *Maxham v. California Department of Corrections & Rehabilitation*, the WCAB outlined succinctly the difference between "communication" and "information" as follows:

"Information," under Labor Code §4062.3, constitutes: (1) records prepared or maintained by the employee's treating physician or physicians, and/or (2) medical and nonmedical records relevant to determination of the medical issues.

"Communication," as under Labor Code §4062.3, can constitute "information" if it contains, references or encloses: (1) records prepared or maintained by the employee's treating physician or physicians, and/or (2) medical and nonmedical records relevant to determination of the medical issues.

We all know Labor Code §4062.3 outlines the rules of what a party can and cannot provide to medical-legal evaluators and when the parties must produce those documents to their opponent.

It is common throughout the state for each party to complete their own 'position statement' or 'advocacy letter' to a medical-legal evaluator. In Northern California, both parties have been completing their own advocacy letters to Agreed Medical Examiners (AME) for decades. In Southern California, the parties have almost exclusively utilized the joint interrogatory for AMEs (until recently).

In *Maxham*, applicant's counsel provided defendant with draft copies of letters to the three AME doctors asking if defendant had any objection. Defendant timely objected and asked applicant's counsel to remove the objected language from the letters. Specifically, the letters discussed *Benson*, *Almaraz-Guzman II* and *Cannon*, wherein applicant's attorney seemed to have instructed the doctor on how to interpret the case law in a favorable manner for the applicant.

The matter proceeded to Trial and the Workers' Compensation Judge (WCJ) issued a decision opining the letters constituted "communication" under Labor Code §4062.3(f), rather than "information" under Labor Code §4062.3(c). As such, applicant's attorney was not required to obtain defendant's agreement prior to sending the letters. The WCJ felt "Labor Code §4062.3(f) controls and "communication", including advocacy letters, sent to an AME, need only be served on the opposing party."

Defendant filed a Petition for Removal asserting the letters

Continued on page 2...

To Advocate or Not, from page 1...

"should be classified as 'information' and not merely a 'communication' because [they are] 'non-medical records relevant to the determination of the medical issue." The WCAB explained this case does not involve "ex parte" communication, but instead involves Labor Code §4062.3(c)'s requirement the parties agree on what "information" is to be provided to an AME. In this instance, "information" meant documents to be sent to the doctor after being listed on a schedule of records for a medical-legal doctor to review.

Defendant argued the "body of the letter itself included applicant's legal position" and therefore, it was impermissible. The WCAB disagreed with defendant and recognized their "previous panel decisions on this issue may have created confusion regarding the precise delineation between "information" and "communication" and whether engaging advocacy crosses that line... Despite [our] previous indications the contrary, engaging in legitimate "advocacy" does not transform correspondence with the medical examiner from "communication" into information".

The most important aspect of this en banc decision is the Commissioners' opinion about what would make such advocacy impermissible:

"Correspondence engaging in "advocacy" or asserting a "legal or factual position" can, however, cross the line into "information" if it has the effect of disclosing impermissible "information" to the AME without explicitly containing, referencing, or enclosing it. Misrepresentation of case law or legal holdings, engaging in sophistry regarding factual or legal issues, or misrepresentation of actual "information" in a case are three ways in which a party might attempt to convey purported "information" to a medical examiner to which the opposing party has not agreed." What does this mean for the defense community going forward? Practically speaking, this decision does not change anything we do on a daily basis. Defendants of course should not provide information to a doctor which misrepresents facts and/or case law.

A WCJ has "wide discretion" in assessing the contents of "advocacy letters" to make sure they do not confuse or misdirect an AME.

Therefore, there are a couple of important practice points: (1) ensure you timely object to applicant attorney's "advocacy" letter if it arguably constitutes a misrepresentation of facts or law, or otherwise engages in prohibited "sophistry," which may "confuse or misdirect" the physician and (2) ensure your own "advocacy" letters fairly represent the facts/law and all "information" is properly supported.

Apportionment, from page 1...

Defendant filed a Petition for Reconsideration, arguing the WCJ should have found apportionment pursuant to the opinions of the orthopedic PQME and AMEs in psyche and internal medicine.

The WCJ recommended denial of the petition as the Trial decision was based on applicant's vocational expert reporting, which was persuasive over defendant's vocational expert. The WCJ also made his findings on applicant's credible testimony and the medical reports of the psyche AME and the primary treating physician, who both found applicant PTD and unable to compete in the open labor market due to the combined effects of his industrial injuries. The WCJ opined none of the doctors' opinions on apportionment were substantial medical evidence.

Because the finding of PTD was based on applicant's vocational non-feasibility and Labor Code §4662(b), rather than on the *AMA Guides* impairment rating, the apportionment analysis focused on applicant's vocational capabilities rather than exclusively on the *AMA Guides* impairments found by the doctors.

When a finding of permanent disability is based upon applicant's vocational non-feasibility, and not upon individual medical impairments, the apportionment analysis should be a separate, vocational one, and should not rely exclusively on each medical cause of impairment criteria under the *AMA Guides*.

Moreover, the apportionment analysis must not be limited to asking what each doctor thought was causing each underlying impairment under the *AMA Guides*, but must answer the ultimate question of what is causing a total loss of earning capacity and ability to compete in the open labor market.

The WCAB granted defendant's Reconsideration and affirmed the WCJ's finding of 100% PTD, without apportionment. The WCAB stated applicant's vocational expert properly noted vocational apportionment is not the same as medical apportionment.

Medical impairment may develop as we age or may involve longstanding impairments an individual may have had throughout much of their life. Many individuals who have medical impairments are able to function effectively in the workplace without impediment.

Continued on page 3...

Apportionment, from page 2...

It was noted applicant started working for Target in 1989 and worked continuously for 20 years. On a vocational basis, no evidence was found applicant had any significant work disabilities prior to his industrial injury. Although he may have had some preexisting medical impairment, he was capable of performing physically demanding work on a regular basis.

Applicant's vocational expert indicated she would have reconsidered her opinion if a medical evaluator found the non-industrial medical problems produced impairments which would have terminated or shortened applicant's work life absent industrial factors.

However, the WCAB indicated there was no substantial medical evidence supporting non-industrial apportionment.

Defendant's Petition for Writ of Review was denied.

IS STRESS A PHYSICAL OR MENTAL INJURY?

By: Josephine K. Broussard, Esq.

In *Schulke (deceased) et al. v. Xerox Corporation, et al.*, the WCAB found applicant's stress caused an industrial physical injury.

Applicant, a copy repair technician, was driving to work in a company vehicle when he suffered a fatal heart attack. The parties utilized an Agreed Medical Evaluator (AME) who found applicant's coronary artery disease was predominantly caused by his tobacco use, elevated LDL cholesterol, elevated C–reactive protein, and obesity. The AME apportioned 90% to these factors and 10% to stressful work. The facts showed applicant had complained to his wife about work stress and he had suffered from, and treated for, chronic anxiety disorder. In addition, prior to leaving his home on the morning of the heart attack, applicant told his wife he was having chest pain.

Defendant argued applicant's heart attack was caused by stress - a psychiatric injury which did not meet the threshold of compensability under Labor Code §3208.3 (which requires at least 51% industrial causation).

At Trial, the Workers' Compensation Judge (WCJ) found applicant's injury non-industrial based on physical injury to the heart. The WCJ concluded there was no stress related psyche injury.

The WCAB reversed the WCJ's decision and found the injury AOE/COE. The WCAB opined applicant was driving the company vehicle to work when he suffered the heart attack (during 'the course of employment'). Further, the WCAB stated stress in itself is not an injury, diagnosis, disease or syndrome, but it may cause physical injury or psyche injury. Based on the AME's opinion applicant's exposure to acute and chronic stress contributed to his heart attack ('arising out of employment').

Continued on page 4...

N	M	C	G	L	T	K	C	N	C	E	V	B	D	C
O	I	P	N	P	J	T	N	E	N	Z	O	Z	O	Q
I	L	A	I	C	E	P	S	O	R	C	Z	M	L	L
T	E	J	O	Y	T	H	T	H	C	E	M	Y	A	Y
A	P	A	G	P	R	S	P	A	S	E	M	U	Q	R
R	O	C	N	E	E	A	S	M	M	Y	N	O	E	M
B	S	D	O	L	N	I	S	O	U	N	T	N	N	Q
E	T	Z	I	D	O	O	R	R	A	I	E	O	Q	Y
L	G	M	K	N	M	A	R	Z	E	W	R	Y	B	Y
E	L	B	I	R	T	H	D	A	Y	V	L	T	J	E
C	H	L	A	I	N	N	E	U	Q	N	I	U	Q	A
K	Y	A	O	F	I	F	T	H	R	P	E	N	K	R
E	X	N	P	E	V	I	F	F	T	C	Q	A	N	S
Q	N	E	Y	P	N	F	I	E	C	E	T	G	W	A
X	T	Y	B	S	Y	G	Y	W	G	D	F	R	I	R

PBWIRE O SEARCH D

ANNIVERSARY	MILEPOST
ANNUAL	MILESTONE
BIRTHDAY	OCCASION
CELEBRATION	ONGOING
CEREMONY	QUINQUENNIAL
COMMEMORATION	RENEW
FIFTH	SPECIAL
FIVE	TRIUMPH
HAPPY	YEARS

Physical or Mental, from page 3...

This case illustrates stress may lead to physical or mental injury. To argue stress caused a psyche injury, under Labor Code §3208.3, defendants need medical evidence to establish: (1) there is an underlying psyche injury; (2) the psyche injury is not compensable under Labor Code §3208.3; and (3) the psyche injury is the sole industrial cause of the physical condition. Even if the defendant in *Schulke* developed the record for a psyche injury, it still may not have prevailed given the AME's findings.

WHEN IS A REST BREAK NOT A REST BREAK?

By: Douglas H. Hoang, Esq.

In *Augustus v. ABM Security Services, Inc*., the California Supreme Court (SC) reaffirmed the requirement employees (EEs) be provided with paid 10 minute rest breaks, which are completely duty free and uninterrupted. The SC ruled and reiterated California law requires EEs on rest breaks to be relieved of all duties during their rest breaks.

In *Augustus*, a class action lawsuit was filed on behalf of security guards against ABM Security Services for failure to provide uninterrupted rest breaks. California law requires all non-exempt EEs who work more than 3.5 hours per day be allowed to take a paid 10 minute rest break (during which the EE should not be required "to work") every 4 hours of work or major fraction thereof. The guards argued they were not allowed their rest breaks as they were required to be "on-call." The company conceded it required guards on rest breaks to keep their radios and pagers on, remain vigilant, and respond when needs arose. However, the company argued, merely by being "on-call," the guards were still relieved of their duties for purposes of a rest break.

The SC agreed with the guards and ruled the company's requirement of keeping radios and pagers on, remain vigilant, and respond if the need arose during rest breaks, failed to satisfy the company's obligation to provide duty-free rest breaks.

The SC rejected the company's argument the guards were relieved of their duties because they did not perform the same tasks during rest breaks they performed during their regular work hours.

Based on *Augustus*, employers should review their rest break policies to ensure full compliance with California law, including the obligation to provide duty-free rest breaks, with no exceptions. If an EE's rest break is interrupted because of work, an employer should either provide a different uninterrupted 10 minute rest break or pay the 1 hour penalty. Lastly, while under certain circumstances EEs may choose to waive a meal period, EEs cannot waive rest breaks.

Join our mailing list?

Questions? Comments?

Suggestions?

E-mail us:

pbwire@4pbw.com

To view past issues of *The PBWire*, please visit our website:

http://www.pbw-law.com/news/newsletters.html

LIEN CLAIMANT SUBJECT TO OFFICIAL MEDICAL FEE SCHEDULE

By: Sean Richards, Esq.

In *Grossman Medical Group v. WCAB,* the WCAB considered the reasonableness of medical treatment fees where applicant sustained an admitted injury and received skin grafts to over 70% of his body. The WCAB opined all lien providers are subject to the Official Medical Fee Schedule (OMFS) unless it falls under the statutory exemption.

Grossman Medical Group (GMG) treated applicant's burns and charged a total of $523,001.82, less $346,201.41 in payments, leaving an alleged outstanding balance of $176,800.41. GMG filed a lien for the remaining balance. The parties stipulated the services were reasonable and necessary. The Workers' Compensation Judge issued a decision finding the paid fees were not reasonable or sufficient and ordered defendant to pay GMG the full remaining balance of $176,800.41.

Defendant filed a Petition for Reconsideration. The sole issue was whether the WCAB could determine what constituted a reasonable amount for medical services/fees and whether they could grant fees in addition to the provision for fees under the OMFS.

Labor Code §5307.1 (a) directs the Administrative Director (AD) to "adopt and revise periodically an official medical fee schedule that shall establish reasonable maximum fees paid for medical services." When discussing the various exceptions to the OMFS, the Court noted:

"Under the current 2004 OMFS, there are a handful of limited, itemized

Continued on page 5...

Lien Claimant, from page 4...

facility exceptions…and are paid on a "reasonable cost basis." These include: critical access hospitals, children's hospitals, cancer hospitals, Veterans Administration hospitals, long term care hospitals, rehabilitation hospitals or distinct rehabilitation units of an acute care hospital, psychiatric hospitals or distinct psychiatric units of an acute care hospital, and out of state hospitals. Between January 1, 2008 and January 1, 2011, Labor Code section 5307.1 permitted the AD to adopt a fee schedule for burn centers. However, the AD did not adopt a burn center fee schedule."

On Reconsideration, the WCAB held, absent one of these exceptions, the WCAB could not award fees in excess of those set forth in the OMFS. GMG argued if Labor Code §5307.1 did not permit rebuttal of the OMFS, the statute was unconstitutional. The WCAB stated it did not have the ability to determine the constitutionality of the statute.

GMG's Writ of Review was denied by the Court of Appeal.

DIR STAYS LIENS WORTH OVER ONE BILLION DOLLARS!

By: Ani Baghdassarian, Esq.

Pursuant to Senate Bill (SB) 1160 and Assembly Bill (AB) 1244, the Department of Industrial Relations (DIR) has stayed more than 200,000 liens from 75 medical providers accused of criminal fraud charges. The combined total value of these stayed liens is more than $1,000,000,000.00!

The DIR's list of criminally charged providers, which is updated regularly, can be accessed at: http://www.dir.ca.gov/fraud_prevention/List-of-Criminally-Charged-Providers.pdf

Under SB 1160, the DIR is required to stay the liens of any provider indicted/charged with crimes. The stay is in place until disposition of the criminal proceeding. As such, a lien claimant who falls under this category is not legally entitled to pursue its lien(s) at the WCAB, nor is a defendant legally required to negotiate, settle or pay any said lien(s), until the criminal proceeding has concluded.

If a lien is stayed, a claims administrator is afforded two beneficial options: (1) defer addressing or negotiating the lien until conclusion of the provider's criminal proceeding (advantage - the lien may eventually have no value; disadvantage – claims may need to keep the file open until the criminal proceeding resolves which certainly could take years) or (2) negotiate and settle the lien for a very nominal amount (advantage – allows claims to quickly close a file; disadvantage – claims pays out on a lien which may subsequently become worthless after disposition of the criminal proceeding). Claims administrators should consider these options and determine what is best for their files.

Under AB 1244, the Administrative Director of the Division of Workers' Compensation (DWC) is required to exclude any medical provider, convicted of fraud, from the workers' compensation system. The DWC will issue suspension notices to convicted providers. A list of excluded medical providers will be posted soon on the DIR's website.

The DIR has increased its efforts in combating fraud throughout the workers' compensation system, whether from medical providers, employers, employees and/or insurers/third party administrators.

Additional information can be found at: http://www.dir.ca.gov/DIRNews/2017/2017-04.pdf

PB&W
PEARLMAN, BORSKA & WAX

Office Locations

15910 Ventura Blvd.
18th Floor
Encino, CA 91436
(818) 501-4343
Fax: (818) 386-5700

330 N. Brand Blvd.
Suite 250
Glendale, CA 91203
(818) 245-4285
Fax: (818) 245-4291

500 E. Esplanade Dr.
Suite 510
Oxnard, CA 93036
(805) 604-1134
Fax: (805) 604-1194

1411 W. 190th Street
Suite 225
Gardena, CA 90248
(310) 856-4729
Fax: (310) 436-0525

5935 Cornerstone Court
West #250
San Diego, CA 92121
(858) 875-5500
Fax: (858) 875-5540

333 S. Anita Drive
Suite 780
Orange, CA 92868
(714) 221-1700
Fax: (714) 221-1741

2033 N. Main Street
Suite 365
Walnut Creek, CA 94596
(925) 627-3333
Fax: (925) 627-3335