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Dear Subscriber,

Judge David W. O'Brien Honored with 79th Birthday Luncheon and Launch of "The O'Brien Form"

On August 28th, the Workers' Compensation community gathered to celebrate the 79th birthday of one of the most knowledgeable and respected members of the field. For over thirty years, David O'Brien has authored the definitive resource for Workers' Compensation information in the state of California: California Workers' Compensation Claims and Benefits.

At his birthday celebration, Judge O'Brien announced his most recent accomplishment, achieved with significant input from the California Dept of Insurance, District Attorneys and the Employers' Fraud Task Force: The O'Brien Form.

The O'Brien Form is designed to reduce the existence of medical fraud in the workers' compensation industry by informing the applicant of treatment charges sent to the carrier. The applicant is provided with the contact information for the adjuster and requested to advise of any billing inaccuracies or charges for services not rendered. Many in the industry, including Judge O'Brien, have been seeking to implement such a form, as has been done in private health and dental insurance for years.

Congratulations to David O'Brien on his 79th birthday and for remaining a steadfast inspiration on the cutting edge of the worker's compensation community!

WCAB Decides Removal of Disk Material and Bone Graft are Not 'Amputations' under the meaning of Labor Code Section 4656(c)(2)(C).

Cruz v. Mercedes-Benz of San Francisco, (2007) [cite pending]

In an En Banc decision, *Cruz v. Mercedes-Benz of San*

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Francisco, SFO 0501425 (full cite pending), the WCAB held that the removal of disk material and a bone graft do not constitute an 'amputation' under Labor Code Section 4656(c)(2)(C), sufficient to allow for an exception to the two year limit on temporary disability.

In this case, the applicant claimed an entitlement to temporary disability beyond the two year limit due to undergoing a procedure including an anterior L5-S1 discectomy, partial L5-S1 vertebrectomy, L5-S1 fusion with a graft from the left iliac crest bone, bilateral L4-L5 laminotomy, and decompression of L5 nerve roots bilaterally. The applicant's claim for temporary disability was premised upon the position that the removal of disk material and bone material during the procedure constituted an 'amputation', thus, meeting an exception to the two year limit on temporary disability.

In reaching their decision, and reversing the trial judge, the WCAB reviewed numerous definitions of 'amputation' and ultimately concluded that the common usage of the term 'amputation' was "the severance or removal of a limb, part of a limb, or other body appendage, including both traumatic loss in an industrial injury and surgical removal during treatment of an industrial injury." Noting their mandate to provide commonsense meanings to words in legislation, the WCAB found that the most commonsense meaning of amputation revolved around the removal of a limb or appendage, as a result of or during treatment for and industrial injury.

Fifth District Court of Appeal Holds Presumption of Compensability Under Labor Code Section 5402 Code Rebutted by Medical Evidence

Muna v. WCAB, (2007)

[cite pending]

In an unpublished opinion, *Muna v. WCAB*, FRE 0220730 (full cite pending), the Fifth District Court of Appeals held that the presumption of compensability set forth in Labor Code Section 5402 resulting from failure to timely deny a claim, can be rebutted by medical evidence obtained outside of the 90 - day investigation period. A myriad of lesser issues were raised by applicant with the primary issue being that of substantial evidence to overcome the presumption of compensability.

In this case, the defendant failed to issue a denial of a timely submitted claim within the statutory 90-day investigation period. Thereafter, the parties stipulated at MSC that the claim was admitted, subject to rebuttal evidence by defendant. Thereafter, the applicant eventually

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secured a QME who found that the applicant did not sustain a new injury and, rather, that the applicant's disability and injury were caused entirely by an old industrial injury. This opinion was further supported by the applicant's treating physician.

The matter went to trial with applicant relying upon the presumption of compensability in Labor Code Section 5402. Applicant prevailed at trial.

On reconsideration, and supported by the Court of Appeal, it was held that the presumption of compensability was rebutted by both the defense and applicant QME reporting and that there was no medical evidence upon which to base a finding of compensability, notwithstanding the presumption.

Courts Hear More Challenges to Proper Application of AMA vs. 1997 Rating Schedule.

Traveler's Indemnity Company of Illinois v. WCAB (Byers) (2007)

[cite pending]

In an unpublished opinion, the Third District Court of Appeal, in *Traveler's Indemnity Company of Illinois v. WCAB (Byers)* [cite pending], held consistent with the en banc opinion of the WCAB in Pendergrass II that the 1997 rating schedule is properly applied under the 'notice' exception only when the date the notice was actually due is prior to January 1, 2005.

In *Byers*, the applicant attempted to challenge the WCAB's second en banc opinion in Pendergrass II wherein the WCAB reversed itself and held that the actual date that notice is due, rather than the date that the duty to eventually send the notice is established. The applicant sustained a continuous period of temporary disability beginning prior to January 1, 2005 and ending after January 1, 2005, at which time notice was actually due to be sent.

The Third District Court of Appeal, in a short opinion, relied upon the language set forth by the WCAB in Pendergrass II and held '[b]ecause Travelers was not required to provide the section 4061 notice to Bryer as of January 1, 2005, the 2005 table must be used to determine the extent of Bryer's permanent disability, and the WCAB erred in concluding otherwise.'

City of Galt v. WCAB (Ramos) (2007)

[cite pending]

Addressing a second exception to application of the 2005

rating schedule, in *City of Galt v. WCAB (Ramos)* [cite pending] an unpublished opinion, the Court of Appeals, Third District, held that a medical report outlining modified duties was not sufficient to constitute a finding of permanent disability that would fall within the exceptions allowing the use of the 1997 rating schedule.

In *Ramos*, the applicant provided two medical reports that were issued before January 1, 2005 as medical evidence of the existence of permanent disability. One of the reports contained the opinion of the treating doctor that the applicant should have modified duties. These modified duties were outlined within the report. Based upon this evidence, the applicant argued for the application of the 1997 rating schedule to his claim.

In holding that the medical report was insufficient to establish the existence of permanent disability prior to January 1, 2005, the Court cited language from the recent opinion in *Costco v. WCAB* wherein the Fourth District Court of Appeals stated 'a medical-legal report, like a treating physician's report, must contain an indication of permanent disability to trigger use of the pre-2005 rating schedule.' (*Costco Wholesale Corp. v. Workers' Comp. Appeals Bd.*, supra, 151 Cal.App.4th at p. 155.)

The Third District Court of Appeal continued, stating "[t]he only 'indication of permanent disability' that Ramos contends exists in any comprehensive medical-legal or treating physician's report is the work restrictions contained in a March 20, 2003 'treating physician report' of Dr. Vincent Marino. In that 'report', however, Dr. Marino expressly states that Ramos 'is not yet permanent and stationary.' (Italics added.) Accordingly, Dr. Marino's report does not support Ramos's argument.

Based upon the above, the Court held that the applicant was bound to the 2005 AMA rating schedule.

HSR and XL Specialty Insurance Co. v. WCAB (Mariscal) **(2007)**

[cite pending]

In yet another case addressing application of the appropriate rating schedule, the Sixth District Court of Appeals, in *HSR and XL Specialty Insurance Co. v. WCAB (Mariscal)* [cite pending], an unpublished case, held that a 'check the box form' signed by a doctor prior to January 1, 2005 indicating the existence of permanent disability was not substantial evidence to preserve the application of the 1997 rating schedule.

In *Mariscal*, the applicant sustained an admitted laceration injury to his left leg when he was struck by a concrete saw

on October 21, 2004. Thereafter, and while still receiving temporary disability benefits, the applicant's treating doctor issued a form on December 22, 2004, wherein a box was checked purporting to indicate the existence of permanent disability.

At trial, the WCJ applied the 1997 rating schedule and found that the December 22, 2004 report constituted evidence of permanent disability prior to January 1, 2005. Thereafter, on a petition for reconsideration filed by defendant, the WCAB denied reconsideration.

In reversing the WCAB, the Sixth District Court of Appeal held that the 'check the box' form issued by the doctor on December 22, 2004, was not substantial evidence and, as such, could not form the basis for establishing the existence of permanent disability. In so holding, the Court reasoned that the report did not comply with the requirements of the California Code of Regulations and provided no basis for the opinion or any supporting facts or history of the injury. Based thereon, the Court held that the report, though admissible due to a lack of objection at the time of trial, was inadequate evidence upon which to base a finding that there was permanent disability prior to January 1, 2005 and, as such, the 2005 AMA rating schedule was applicable.

Court Holds ACOEM is Presumptively Correct Regardless of Date of Injury.

Sutton v. WCAB (2007)

[cite pending]

In *Sutton v. WCAB* [cite pending], the Court of Appeal, Fifth District, held in an unpublished opinion that regardless of the date of injury, the WCAB is bound to consider the reasonableness of treatment requests in light of the American College of Occupational and Environmental Medicine guidelines, per Labor Code section 4600.

On May 9, 1985, the applicant in Sutton entered into a stipulated award for industrial injury to his back. Over the ensuing years, the applicant received consistent chiropractic treatment for purported flare-ups of his industrial back injury. Though unclear from the record before the Court, the defendant later contested the reasonableness of the ongoing treatment, eventually leading to a trial on this issue.

At the time of trial, defendant argued that the ACOEM guidelines were a presumptively correct indicator of the needed treatment for the applicant's injuries. Insofar as the guidelines are concerned, defendant pointed out that chiropractic care is to be limited to 24 visits per year.

Applicant argued at trial and in subsequent proceedings that because the award predated the adoption of the ACOEM guidelines within the Labor Code, they were inapplicable to his claim.

The WCAB held that the applicant was entitled to a six more months of chiropractic care based upon the treating physician reports.

On Appeal, the Court held that ACOEM provided the presumptively correct treatment modalities and duration and that the legislature was clear in enacting Labor Code Section 4604.5(c) that ACOEM applied to all injuries, regardless of date of injury.

Exception to Labor Code Section 3208.3 Bar on Psyche Injuries Addressed by the WCAB

Chapman v. Curran's Custom Plastering (2007)

[cite pending]

In *Chapman v. Curran's Custom Plastering* [cite pending], the WCAB held that where an applicant who had worked for the employer for less than six-months sustained orthopedic injuries as a result of the collapse of a scaffolding, the 'sudden and extraordinary event of employment' exception applied, thus entitling the applicant to psyche benefits.

In *Chapman*, the applicant worked as a plasterer with his employer for less than six months when, while walking on a wooden plank across scaffolding the plank broke causing the applicant to fall and sustain orthopedic injuries. Subsequently, the applicant claimed compensable consequence injury to his psyche, which was denied based upon the Labor Code section 3208.3 bar against psychiatric injury for those employed less than six-months.

At trial, the applicant claimed that his claim fell within the exception to Labor Code section 3208.3 which allows for injuries to the psyche to be compensable for employees of less than six-months if caused by a sudden and extraordinary event of employment. In so raising this exception, the applicant testified that he had never experienced or witnessed such an accident in his 30 years as a plasterer, though he had seen co-workers sustain injuries while falling.

The trial judge ruled that his claim for psyche injury was not caused by a sudden and extraordinary event of employment and, as such, was barred by Labor Code section 3208.3.

On petition for reconsideration, filed by applicant, the WCAB overruled the trial judge holding that no evidence

was presented by defendant to counter the applicant's testimony that the events leading to his injury are not of the sort to be expected. In so holding, the WCAB further cited to *Matea v. WCAB*, wherein the Court utilized the Webster Dictionary definitions of 'sudden' and 'extraordinary', thereby substantially broadening the exception. In applying the definitions, the WCAB found that the event of the plank breaking was sudden as it was not anticipated, and extraordinary as it was not a common occurrence. Based thereon, the WCAB ruled that the applicant had met the burden of proving the 'sudden and extraordinary' event of employment and awarded psyche injury benefits.

Again, we thank you for your interest in FS&K Work Comp News and look forward to keeping you informed on the Workers' Compensation issues that most affect you.

Sincerely,

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Jason C. Hilfrink
(Chief Legal Editor)

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