



LAW OFFICES
of
McDERMOTT & CLAWSON, LLP

LEGAL BRIEFS NEWSLETTER

CASES & COMMENTS ON WORKERS' COMPENSATION

December 2009

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Things to Know for 2010

New Minimum and Maximum TD Rates

The State Average Weekly Wage (SAWW) increased in 2009, climbing 2.99% from \$984.83 to \$956.20. This in turn will affect the maximum and minimum indemnity rates payable for temporary disability for all workers whose date of injury is on or after January 1, 2003. The new maximum rate is \$986.69, up from the current \$958.01. Minimum payments will be \$148.00, up from the current \$143.70.

These increases take effect on January 1, 2010. They will apply to any situation where temporary disability is being paid more than two years after the date of injury, and also to those cases where the date of injury occurs in 2010.

New Mileage Reimbursement Rate

As of January 1st, the mileage reimbursement rate will drop to 50¢ per mile. Adjusters will pay at that rate regardless of the date of injury for all travel on or after January 1st, but reimbursements for travel prior to January 1st must be made at the rate applicable for the date of travel (55¢ for travel in 2009). To assist adjusters and because of a string of recent mileage rate changes, DWC has posted downloadable mileage-expense forms, including the 2010 mileage form at: <http://www.dir.ca.gov/dwc/forms.html>. The collection of Mileage reimbursement forms are about halfway through the 'Legacy Forms' section, and you can also search here for the DWC Newslines about mileage reimbursement.

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New Rates for Life Pensions & Permanent Total Awards

The increase in the State Average Weekly Wage also triggers an increase of 2.99% in indemnity rates paid for Life Pensions and 100% Permanent Disability Awards for cases with dates of injury on or after January 1, 2003. Be aware, however, that there is an ongoing dispute as when (in any given case) the rate increases go into effect. This is because these increases compound over the life of the recipient. Every time there is an increase, it is potentially on top of the previous increases.

Applicant's attorneys had contended the increases should be calculated from the date of injury. However, they got an unexpected gift when the 6th DCA, at the end of November, issued a ruling in *Duncan v WCAB* (formerly entitled "XYZZX v WCAB") The Court ruled cost-of-living adjustments must be applied to an injured worker's total permanent disability benefits or life pension starting on Jan. 1, 2004 -- not the Jan. 1 following the date of injury. This would be true no matter how long after the date of injury the life pension begins. The case is *Duncan v. Workers' Compensation Appeals Board and X.S.*, H034040, (11/25/2009). Noting the history of increases after 1/1/2004, we calculate that the compounded percentage increases since then would raise the indemnity rates 19.15% overall.

Defendants would want to argue that the increases should not begin until January 1st of the year following the beginning of the Life Pension payments. Considering that some Life Pensions do not start until many years after the date of injury, the effect of such a calculation would be a greatly reduced pension payment to begin with.

As we go to press, the DIR has asked for a rehearing in *Duncan*. Stay tuned.

Clarification of Spinal Surgery Dispute Rules

Utilization Review and lightening speed is the name of the game when questioning the necessity of proposed spinal surgery. If an authorization request for spine surgery is received, the adjuster must immediately either authorize the surgery or forward the request for Utilization Review. The adjuster has 10 days from the date the request is received to complete the UR process. This is because LC§4062(b) requires an objection be lodged to the request within 10 days of receipt, and an adjuster cannot lodge the objection and deny the surgery absent a UR opinion denying certification of the requested procedure. Therefore, an employer must request a second opinion almost immediately after receiving a Utilization Review report.

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Once the UR process is completed, the case may go through the Qualified Medical Evaluator or Agreed Medical Evaluator process under Sections 4062.1 and 4062.2, but the entire process must still be completed within 45 days after the defendant receives the treating physician's report. Failure to meet the deadlines requires authorization of the requested surgery. *Cervantes v. El Aguila Food Products Inc. and Safeco Insurance Co. et al.*, (11/19/2009 WCAB *en banc*), 74 CCC 1336.

QME Panel Procedure Limitations (Rule 30)

If you want to request assignment of a QME panel to weigh in on compensability of a claim, denial of the claim cannot be issued prior to filing the request for assignment of a QME Panel. Pursuant to 8 CCR 30(d)(3), once a claim has been denied in its entirety, only the employee may request a Panel QME. This leaves the employee free to rely on the reports of a self-procured treating physician who has a pecuniary interest in making sure that the only medical opinion on record is theirs.

Hourly Deposition Fee Rates

Unfortunately, these are all over the Boards at this time (pun intended) and we are seeing rates as high as \$350 per hour granted at Van Nuys, while Orange County seems comfortable with \$300 and at least one judge in Long Beach has cut a request to \$275.00 per hour. Typically, the Presiding Judge at each office gives the judges some degree of guidance, as well as some degree of freedom,

in granting the hourly fee requests. As always, they should be guided by whether or not the representative in attendance at the deposition was an attorney, the degree of experience involved, and whether or not (if a licensed attorney) the requestor is a Certified Specialist.

Calculating Apportionment under Benson

If you can make a case for apportionment of Permanent Disability pursuant to LC §4663 between multiple injuries, each injury gets its own post-apportionment Award. For example, if two injuries equally cause a 20% Permanent Disability, the injured worker gets two 10% Awards. This is a significant money saver for defendants because a 20% Award is worth more than two 10% Awards under the present graduated indemnification scheme. Attempts to appeal the decision in *Benson v. Permanente Medical Group* (2007) 72 Cal. Comp. Cases 1620 (Appeals Board *en banc* opinion), were unsuccessful.

Paying for Interpreters at Medical Treatment

This remains a hot topic, and we do not have definitive case or statutory guidance on this issue, thus there is presently no specific statutory support for paying for interpreters at routine medical treatment appointments. That is an important concept because Workers' Compensation is a statutory system. Every benefit involved is enabled by a statute LC §4600, which specifically speaks to enumerated benefits to be provided as part of

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medical treatment. It conspicuously does not mention interpreters.

8 C.C.R. §9795.3 provides a listing of those occasions for which the employer must provide an interpreter for the injured worker. The list includes examinations set by the claims department or when set by the WCAB, as well as for comprehensive medical-legal examinations, depositions, pre-deposition preparation time with counsel, review of the deposition transcript, WCAB and Rehabilitation Unit hearings, and conferences with the Information and Assistance officer. (Labor Code §4600(f) also provides that the employee is entitled to the services of an interpreter at medical-legal examinations.) Again, conspicuous by its absence is authorization for interpreters and medical treatment appointments.

Providing Vocational Rehabilitation

The statutes enabling the provision of Vocational Rehabilitation benefits went out of existence on January 1, 2009 via a so-called “sunset provision.” That left serious unresolved questions as to how to deal with those claims for which the benefit liability is still in the system but unresolved as of that date. Although there has been much litigation and not all of it is finalized yet, the acid test appears to revolve around whether the injured worker received a “final order” granting Vocational Rehabilitation. If not, the benefit is no longer available, no matter the date of injury. *Beverly Hilton Hotel v WCAB* (2009) (Boganim) 74 CCC 927.

Just what constitutes a “final order” is still being litigated in various jurisdictions, and

the issue includes such questions as whether an order previously appealed (with no final decision) is a “final order” such that the benefit has vanished.

Article by Howard Stevens, Orange Office

Need Assistance with Training?

McDermott & Clawson, LLP is happy to assist with the training needs of your organization. Our education committee has extensive experience in providing seminars and discussions on Workers’ Compensation topics of concern to adjusters and employers. We have worked with numerous carriers, third party administrators, and brokers to provide educational assistance, and would be happy to discuss your needs. Call or email [Howard Stevens](#) at (714) 288- 1700 or feel free to speak with any of our attorneys for further information.

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Happy Holidays!

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