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LEGAL BRIEFS NEWSLETTER

CASES & COMMENTS ON WORKERS' COMPENSATION

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HEARD AT CAAA

WHY WE PARTICIPATE

Twice each year the management team of McDermott & Clawson, LLP braves the turbulent waters of the California Applicant's Attorneys' Convention, a 4 day event that presents panels and speakers on various topics related to legal practice in our field. While it is obviously geared toward improving the professional skills of those representing the injured worker, viewpoints from representative defense counsel are also aired. We find these events particularly useful for us in that we can get glimpses of upcoming arguments and strategies that applicant's counsel will be using to increase the value (and hence your exposure) on their cases.

While some of the strategies advocated are probably "on the fringe" of practicality, some are likely to make an effective appearance in the near future. How effective, we don't know. In some cases the determination will be made by the appellate process, and that takes a long time to run its course. However, we thought we would share some of the more interesting approaches with you so that you will be ready to work with your counsel in anticipation of what is coming down the road.

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DIRECT ADL RATING

One of the more interesting approaches being advocated involves directing a doctor (by letter or cross-examination) to make a case for foregoing the charts and tables in the *AMA Guides* and to provide an assessment of the direct impact of the employee's impairment on activities of daily living. This, the argument goes, would then allow the doctor to provide an assessment of the whole person impairment without being limited to the often minimal numbers provided by the *Guides*.

The authority relied upon for the foregoing argument comes from the first two chapters of the *Guides*. Chapter one, page five contains the following statement: "A physician can often assess a person's ability to perform ADLs based on knowledge of the patient's medical condition and clinical judgment. When the physician is estimating a permanent impairment rating, Table 1-2 can help to determine how significantly the impairment impacts these activities."

The argument is that where the charts and graphs do not adequately express the effect of the impairment on the ADLs, the doctor should determine a percentage of impairment by reference to table 1-2. Of course there are no objective criteria for making such a direct assessment, so the result would be the doctor's subjective analysis.

If this sounds vaguely familiar for those of us who have been kicking around in this system for the last quarter century or so, it should. It is exactly the same approach and rationale that allowed work restrictions to encroach upon and ultimately supplant virtually every relatively more objective assessment of disability provided by the original rating schedules.

We tend to think that the detailed instructions given the doctors in chapter 2 of the *Guides* provides a defense to this approach, at least insofar as placing an initial burden on the doctor to demonstrate compelling reasons for abandoning the systematic approaches laid out in the *Guides* in favor of a direct ADL impairment rating. The introduction to chapter 2 states that it "describes how to use the *Guides* for consistent and reliable ...utilization of medical information through a single set of standards. Two physicians, following the methods of the *Guides* to evaluate the same patient, should...reach the same conclusions." This would be impossible in a direct ADL analysis since the process would be entirely subjective.

Is it possible that doctors can be led to give testimony in deposition supporting a direct ADL approach? Absolutely! Will the Board buy it as a basis for disability rating? We don't know, but it will be interesting to see if, and how, this evolves.

"COMMENCEMENT" OF TD REDEFINED

Here is a novel approach to arguing that more than 104 weeks of temporary disability is payable based on the date the indemnity payments commence. We have always understood the rule in LC 4656(c) to require that the calendar starts counting on the day the first check is sent out. Melissa Brown, a well-known Northern California applicant's attorney, argues that since there is a mandatory notice (8 Cal. Reg. 9812) that must be sent concurrent with the initial payment, you cannot start counting the days until the check *and* the notice have both gone out. Thus, if the notice is not sent, or it does not contain all of the mandatory language, the TD being paid is not within the 104 week cap because TD has not "commenced." Sounds to us like the old 'gotcha' rules regarding vocational rehab notices, which is why this argument should invoke some concern.

APPORTIONMENT AS FEHA VIOLATION

Ok, this one is definitely "on the fringe" but given the right case and the right judge, you never know. The argument is that certain pre-existing impairments affect a protected class of individuals more than others and therefore apportioning to that impairment, even if a concurrent cause of a post-industrial disability, is discriminatory. Thus, pre-existing problems such as sickle-cell anemia or osteopenia cannot be used as a basis of apportionment because these problems are race or gender specific.

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Lest you think this is totally off the wall, take note of the case of *Vaira v WCAB* (2007) 72 CCC 1586, in which the Court agreed that the Government Code Section 11135 applied to actions of the WCAB and that apportionment to age and gender was not permitted. In its discussion, however, the court did say that apportionment to age and gender related *conditions* is permissible. Thus, so far, the argument that the WCAB should utilize FEHA standards for the protection of classes disproportionately affected by certain impairments has failed.

USING ACOEM TO ESTABLISH PD

Another panel during the session presented arguments that ACOEM opens the door for multiple specialists to become involved in a case, thereby expanding the universe of ratable impairments resulting from an industrial injury. Presenting a series of “building blocks” by which an applicant’s attorney is instructed to build a case, they point out that the “third building block is making sure the treating physician follows the mandates of ACOEM by utilizing the service of other specialists and addressing all of the injured workers’ complaints.

This concept is certainly not new. We have cases that date back to when Moses was a pup, that hold that the evaluating physician must address *all* of the patient’s complaints and that a judge is ultimately not free to pick and choose among those enumerated in a report. Nor, in principle, do we have any objection to this philosophy. If an employee is legitimately injured and the injury is severe enough to require a concordance of specialists to totally evaluate it, then the employee is entitled to these evaluations and treatment. What we *do* object to is certain well-identified treating physicians who seem to find

this necessary on *every* case that comes in the door, no matter how localized the original injury was.

Another “building block” advocated by this panel was insistence on utilization of a Functional Capacity Assessment, based on statements from page 137 of the ACOEM *Guidelines*. Danger, Will Robinson! Danger! We have seen a similar approach used in vocational assessments for dates of injury prior to 1/1/04 in order to prove up 100% disability under *LeBoeuf*.

Functional capacity assessments are an open door to direct ADL impairment ratings as discussed above, and should only be used in cases involving severe injury. With all due regard to the good folks at CAAA we would be remiss if we did not point out that this presentation was made under the topic heading of “Proving Disability for the Seriously Disabled Worker,” but we would be equally remiss if we did not point out that you should be seriously thoughtful about which cases you volunteer for an FCA.

Article by Howard Stevens, Orange Office

“Workers’ Comp in California is a lot like the weather in Rhode Island – wait 5 minutes, and it will change!” Hon. Scott Seiden, WCAB ALJ, Marina Del Rey

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