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DEFENDING THE PSYCHIATRIC CLAIM

California allows a claim for psychiatric disability either as a consequence of physical disability, or as a "stand alone" disability allegedly arising out of the employment. Many attorneys representing injured workers have made a practice of alleging psychiatric disability as a way of enhancing the value of an otherwise routine orthopedic claim.

With the SB 899 reforms in full implementation, we are seeing a renewed upsurge in attempts to include psychiatric disabilities in post-2005 claims because emotional impairments are exempted from analysis under the *AMA Guides*, and instead are analyzed on a highly subjective Global Assessment of Functioning or "GAF" scale outlined in the *DSM* (see next paragraph). Generally speaking, psychiatric cases under the reform can cost considerably more, on less evidence, than they did under the old rating system. Therefore, this seems a good time to review various approaches aimed at reducing or eliminating liability for these claims.

The Statutory Defenses

The important statutory defenses specific to psychiatric claims are found in Labor Code 3208.3 and its various sub-sections. LC 3208.3(a) requires a diagnosis pursuant to the "terminology and criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised," or by other criteria "generally approved and accepted" nationally. Since we are now up to DSM-IV-TR, (even though the statute has failed to keep pace), its national recognition makes DSM-IV-TR the standard for psychiatric diagnosis. (Further references are to 'DSM' for this article)

It is within the pages of DSM that the first potential defenses might be established after careful scrutiny of a compensable report. It is important to double check that the diagnosis of a particular psychiatric impairment falls within the diagnostic criteria which the DSM lays out. For example, at one time it was very popular for applicant-oriented psychiatrists to make a diagnosis of "post traumatic stress disorder" for

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emotional reactions to physical injury and pain. However, for this diagnosis, the DSM requires (paraphrasing here) the person be exposed to a traumatic event in which the person experienced or witnessed events involving serious injury or death *and* that the person's response involved intense fear, helplessness or horror. Most soft tissue back injuries do not fit the bill.

Major Depressive Episodes and Major Depressive Disorders also have specific diagnostic criteria which should be carefully checked against the doctor's reasoning. If there is independent evidence that seems to contradict the symptoms required to make the diagnosis, or if the diagnosis does not match the criteria in the DSM, then a professional review of the report in contemplation of cross-examining the reporting physician may be in order.

The Causation Threshold

LC 3208.3(b)(1) requires that actual events of the workplace were predominant as to all causes combined of the psychiatric injury. This has been translated to simply mean 51% or more of the cause must be the work or the consequence of a work-related physical injury. It is very rare that injured workers with real emotional impairments have no psychological baggage from outside the workplace. It is also important to separate what is an "actual event" from an event that is only "perceived." A careful and thorough deposition of the claimant is essential to providing the examining physician with the information needed to make these important legal distinctions.

A lowering of the 51% threshold occurs for victims of violence under LC 3208.3(b)(2). In such cases the cause of the impairment need only be 35%-40% caused by violent event to make the case compensable (assuming the event itself was work related).

The Six Month Requirement

Labor Code 3208.3(d) requires that an employee have been employed by the defendant employer for at least six months in order for a psychiatric claim to be compensable. The statute further states that the six months need not be continuous, therefore, sporadic employment over a long period of time will qualify if the cumulative total is at least six months. The requirement applies to both purely psychiatric claims and physical injuries *Wal-Mart Stores, Inc., et al., v. WCAB* (2003) 68 CCC 1575; *Hansen v WCAB* (1993) 58 CCC 602.

A major exception to the six month requirement is also found in LC 3208.3(d). Where the psychiatric condition is caused (predominantly) by a "sudden and extraordinary event of employment" there is no minimum employment requirement. Such an event also may provide an exception to the proscription under LC 3208(e) against making post-termination psychiatric claims (LC 3208.3(e)(1)). This is giving rise to interesting and creative arguments as to what does, and what does not, constitute a "sudden and extraordinary" employment event.

In the recent case of *Matea v WCAB* (2006), 71 CCC 1522, the court stated: "We agree with the court in *Wal-Mart* that the sudden and extraordinary employment condition language in section 3208.3, subdivision (d), is limited to "the type of events that would naturally be expected to cause psychic (sic) disturbances even in a diligent and honest employee. We also agree that the sudden and extraordinary employment condition language in section 3208.3, subdivision (d), could certainly include occurrences such as gas main explosions or workplace violence." The Court of Appeal went on to hold that a stack of lumber falling on an 18 year old employee of a lumber

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yard qualified as a sudden and extraordinary employment event.

In contrast, a foreseeability standard has been applied in many cases to determine whether an event, however sudden, was also in fact “extraordinary.” Thus, a roofer falling off a roof (*Bayanjargal v WCAB* (2006) 71 CCC 1829), a limo driver getting into a car accident (*Diaz v WCAB* (2004) 69 CCC 218) and an electrician getting struck by a cable and falling from a 12 foot ladder (*Romero v CIGA* (2005) 33 CWCR 75, panel decision) have all been held not to be extraordinary employment events, and the psychiatric components of the claims were barred by the six month employment requirement. In claims involving untested factual situations, each side will need to be prepared (using a combination of statistical and anecdotal evidence, peppered with a liberal dose of common sense) to prove that an event was or was not “extraordinary” to the particular employment situation.

The Good Faith Personnel Action

Perhaps the most litigated issue in psychiatric claims unrelated to physical industrial injury, this affirmative defense allows the defendant to establish that the actual events of employment which were the predominant cause of the impairment were, in fact, “lawful, non-discriminatory, good faith personnel actions.” The burden of presenting facts to support this defense lies squarely with the defendant.

Just what does constitute a “good faith personnel action”? In an unusual episode of prescience, we first visited this question in the January 2001 edition of *Legal Briefs* which you can review on our website at www.McDermott-Clawson.com (go to recent events). A month later, the WCAB, in the *en banc* decision of *Rolda v Pitney Bowes*

(2001) 66 CCC 241, cited an earlier panel decision (discussed below) which set forth a multi-level analysis of what does, and what does not, constitute a “good faith personnel action.”

In *Larch v Contra Costa* 63 CCC 831, the WCAB adopted a judge’s determination that what constitutes a “personnel action” depends on the subject matter and factual setting for each case. The term includes, but is not necessarily limited to a termination of employment. *Bray v. WCAB* (1994) 59 CCC 475. An employer’s disciplinary actions short of termination may be considered personnel actions even if they are harsh and if the actions were not so clearly out of proportion to the employee’s deficiencies so that no reasonable manager could have imposed such discipline. *Clutts v. WCAB* (1997) 62 CCC 1142, 1143 (writ denied). In *Clutts*, the applicant had alleged psychiatric injury as a result of letters written to him by his employer warning of disciplinary action for his failure to perform certain job duties.

In *Larch*, the judge stated that a personnel action is “conduct attributable to management in managing its business including such things as done by one in authority to review, criticize, demote, transfer or discipline an employee in good faith.” The judge stated that the term “personnel action” was not intended to cover all actions by any level of personnel in the employment situation or all happenings in the workplace done in good faith.” It is clear, however, that the actions must be both lawful and non-discriminatory.

In presenting this affirmative defense, an employer-level investigation early in the case, with witness statements and relevant personnel documents will become of paramount importance. Where it is suspected that key

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witnesses may not have longevity with the employer to be available if and when the case comes to trial, the claims examiner should consider authorizing a deposition of the witness for the purpose of preserving testimony should that witness not be available for a future trial on the issue.

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FROM THE COURTHOUSE

Apportionment

The Supreme Court announced on January 18th that it will give priority to deciding the *Brodie* and *Welcher* cases, which will provide all parties with the rules for calculating the dollar value of an apportioned case under the new apportionment rules. See the December 2006 edition of *Legal Briefs* for more discussion on this topic, or for an in-depth discussion, send an email to hstevens@mcdermott-clawson.com and request a copy of Rob Robinson's recent seminar material on the subject.

Post Award UR Denials Can Cost You

In a so far little-heralded decision, the second district Court of Appeal has held that even informal denials (post UR, for example) of some aspects of recommended medical care after an F&A can make the defendant liable for attorney fees for an applicant's attorney who gets the WCAB to award the care after litigating the dispute, or even for getting the carrier to authorize the care after submitting the issue to an AME.

On January 16th the Court published its decision in the companion cases of *Smith v. WCAB* and *California Youth Authority and Amar v. WCAB and Mel Clayton Ford*, B190054 and B190655, 1/16/07 (official citations not yet available). The Court relies on a very liberal interpretation of LC

4607, which allows for attorney fees to be paid upon an unsuccessful petition to terminate an award. In one case, SCIF authorized the disputed treatment after an AME agreed with the treating doctor. In another case, the applicant's attorney persuaded the WCAB to order the disputed treatment. The Court of Appeal interpreted the intent of LC 4607 to go beyond its literal terms, allowing the attorney fees even though no formal petitions to terminate the prior awards had been filed and, in one case, even where the defendant voluntarily capitulated after the AME opinion.

Bearing in mind that applicant's attorneys are routinely being awarded \$250.00 per hour for their services, raising treatment disputes after an F&A may become very expensive, indeed.

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