



LAW OFFICES
of
McDERMOTT & CLAWSON, LLP

LEGAL BRIEFS NEWSLETTER

CASES & COMMENTS ON WORKERS' COMPENSATION

November 2008

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THINGS TO KNOW FOR 2009

INDEMNITY RATES INCREASE

The maximum Temporary Total Disability (TTD) rate will increase as of January 1st to \$958.01. This is due to yet another increase in the State Average Weekly Wage (SAWW) which has increased 4.5%. The maximum TTD rate for 2008 has been \$916.33. In addition, the minimum TTD rate will increase from \$137.45 to \$143.70.

Not only temporary disability, but Life Pension and Total Permanent Disability indemnity payments will also be subject to 4.5% increases as of January 1st for cases with dates of injury on or after January 1st, 2003.

VOCATIONAL REHAB IS DEAD

Injured workers with dates of injury subsequent to January 1st, 2004 are not entitled to Vocational Rehabilitation Benefits, but what about those with earlier dates of injury? Labor Code 139.5, the enabling statute for the Rehabilitation benefit, contains a provision repealing the statute as of January 1st 2009. The effect of this provision may be open to some

dispute and litigation but it would seem that any injured worker that has not actually made a formal request for the benefit by January 1st, will not be entitled to pursue it. On the opposite end of the litigation spectrum are those folks who are actually *in* a program with a signed plan as of January 1, 2009. Those plans are likely enforceable by the WCAB as binding contracts.

In the "gray zone" are cases where entitlement has not yet been adjudicated or determined by agreement. Defendants will argue that the WCAB no longer has jurisdiction to consider Vocational Rehabilitation issues after January 1st, while applicant's attorneys will argue that, although repealed, LC 139.5 still remains as a "ghost statute," citing the language in *Godinez v. Buffets Inc.* (2004) 69 CCC 1311, which paraphrased Shakespeare in noting that "Like ghosts 'doomed for a certain term to walk to the night' (*Hamlet I, v*), these statutes have no material existence but linger until their work is done."

The Rehabilitation Unit now becomes the "Retraining and Return to Work Unit (RRTW). Its duties and responsibilities are defined in 8 California Code of Regulations 10116-10133.58.

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OCR FORMS ARE MANDATORY

The new Administrative Director Rules and forms dealing with implementation of the WCAB's "paperless" Electronic Adjudication Management System (EAMS) became final on Monday, November 17, 2008. These rules mandate that the Optical Character Recognition (OCR) forms must be used insofar as they have been published to replace the older "legacy" forms we have all used for many years.

In recognition that some users may experience a period of withdrawal, the Division of Workers' Compensation has granted a four week "transition period," allowing until December 12th, 2008 to banish the old forms completely. We have been advised that the Marina Del Rey office has told litigants that forms *will not* be provided to the parties on or after December 12th, so everyone is admonished to bring their own.

The forms, which have been updated as of November 17th, can be accessed at <http://www.dir.ca.gov/dwc/forms.html#EAMSForms>.

NEW PROCEDURAL RULES APPLY

The rules pertaining to EAMS are at http://www.dir.ca.gov/dwc/DWCPropRegs/EAMS_regulations/EAMS_regulations.htm. Of note is rule 10211. "The failure to comply with the rules of the court administrator shall be deemed a bad faith action or tactic that is frivolous or solely intended to cause unnecessary delay unless that failure results from mistake, inadvertence, surprise, or excusable neglect." In other words, ignore the new provisions at your peril.

The Court Administrator regulations are published at 8 California Code of Regulations §10150-10168. Of particular interest to those of you who wish to "walk through" documents where no application has yet been filed is the following: A) A case opening settlement document being submitted for a walk-through

shall be submitted no later than noon (12:00 p.m.) of the court day before any action on the walk-through, and shall be designated as a walk-through document. All documents in support of the settlement document shall be submitted at the walk-through with the assigned judge.

The Court Administrator regulations also set forth uniform rules for other district office procedures including conferences, hearings, and continuances as well as other administrative matters dealing with EAMS.

INPATIENT FEE SCHEDULE CHANGES

On November 3rd, 2008 the DWC posted an adjustment to the inpatient hospital section of the OMFS. These changes will actually take effect on December 1st. As we understand it, the changes are required for conformity with changes in the federal Medicare system.

Changes may be found at <http://www.dir.ca.gov/dwc/OMFS9904.htm>. Scroll down to the inpatient hospital section for all the complicated details.

Article by Howard Stevens, Orange Office

5710 FEES

The following was published in our May newsletter but, since the questions keep coming up, we thought it worth repeating. In November, 2007 Presiding Judge Susan Hamilton of the San Francisco regional office issued guidelines which provided a sliding scale of hourly rates, depending on years of experience of applicant's counsel. The low end, for attorneys of 1-3 years of experience, was \$175-\$200 per hour. For experienced attorneys with 15 years or more of experience, \$350 per hour was recommended. In Orange County, experienced lawyers are currently requesting and receiving up to \$300 per hour. Don't be surprised to see this increase again in 2009.

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THE QUESTION NOT ANSWERED

Our July, 2008 edition was devoted to a comprehensive discussion of the *Sandhagen* decision, which noted that questions regarding scope of medical treatment must be submitted to Utilization Review before a dispute can be declared which would then invoke procedures pursuant to LC 4062.2. The case, decided by the State Supreme Court, also clarified that only the injured worker (not the employer) could invoke the LC §4062.2 procedure once the Utilization Review report was generated.

The question not directly addressed by the *Sandhagen* court was, at what point does a dispute legally exist? Is it after the UR report which conflicts with the treating doctor's opinion, or is it after the objection is filed by the injured worker? The reason we think this may be important is the problem of those cases which have *already* been to an AME or panel QME, and where the treating doctor now makes a recommendation for some form of treatment directly contrary to the recommendations of the AME. At this point, may the carrier simply object to the treaters' recommendations and or directly force the issue back to the AME or QME?

Sandhagen did not directly address this problem, but our current advice is that any subsequent question regarding the recommendations of the treating physician must first be submitted to UR and then, if there is a conflict, the injured worker must timely invoke LC §4062.2 procedures. At this point, the parties are required to take the current dispute back to the AME or QME if at all possible. Although we have no reliable decisional case law directly on point, we think this is the safest course of action, and we think it complies with the language of the *Sandhagen* decision: "We conclude the Legislature intended to require employers to conduct utilization review when considering

requests for medical treatment, and not to permit employers to use section 4062 to dispute employees' treatment requests."

To read our analysis of the decision and to read other past copies of our newsletter, go to www.mcdermott-clawson.com and select "recent events."

NEED ASSISTANCE WITH TRAINING? GOT EAMS?

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, including compliance with EAMS and proper use of the OCR forms. 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](mailto:Howard.Stevens@mcdermott-clawson.com) at (714) 288- 1700 or feel free to speak with any of our attorneys for further information.

Legal Briefs is a publication of [McDermott & Clawson, LLP](http://www.mcdermott-clawson.com), [Howard Stevens](mailto:Howard.Stevens@mcdermott-clawson.com) (Orange office), Editor

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