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THE EDGE

FIRM NEWS:

The "Liberal Construction" Mandate of Labor Code Section 3202 Does Not Apply to Factual Disputes

By Jennifer Sanden

Richard Weyuker obtained a take nothing following trial at the Stockton WCAB on March 12, 2015. The question at trial was whether or not the injured worker had been in her employer's vehicle when it was struck by another car. Applicant's witnesses included herself, the driver of the other vehicle, her supervisor, and a library branch manager. None of the witnesses were able to testify that they saw her in the vehicle at the time of impact but they did testify that she reported being in the vehicle shortly after the accident. Defendant's only witness was the deputy sheriff who responded to the accident scene not long after and prepared a traffic collision report. The deputy testified that applicant reported being in the library when the accident happened – a fact which applicant disputed.

Applicant filed a Petition for Reconsideration after receiving the disappointing decision from WCJ Whitcomb. One of the arguments raised in the Petition for Reconsideration was that Labor Code section 3202 supported "liberal construction to the facts to extend the benefits to the applicant."

Jennifer Sanden answered the Petition for Reconsideration. In doing so she cited *Lantz v. WCAB* (2014) 79 Cal.Comp.Cases 488 for the proposition that liberal interpretation as described in Labor Code section 3202 applies only to statutory construction and not to a review of the evidence.

The *Lantz* case explains how the legislature "adopted Labor Code section 3202.5 to prevent the policy of liberal statutory construction from being expanded into a requirement that the evidence be viewed in the light most favorable to the

NEWS, OPINIONS, AND LEGAL UPDATES

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applicant." The Court of Appeal explained how "Labor Code sections 3202 and 3202.5 (which requires that parties must sustain the burden of proof by a preponderance of the evidence) must be read together and, when so read, those provisions direct courts to distinguish carefully between (1) questions of statutory interpretation and (2) inquiries into what was proven by the evidence presented."

Another interesting argument raised by the *Lantz* court had to do with application of Labor Code section 3202 to the going and coming rule. Though not relevant or discussed in the Answer to Petition for Reconsideration, the analysis of the Court of Appeal on the going and coming issue is worth mentioning.

As the court in *Lantz* explained, Labor Code section 3202 provides that statutes are to be liberally construed "with the purpose of extending their benefits for the protection of persons injured in the course of their employment." The liberal construction mandate is predicated on the person being "injured in the course of their employment." The purpose of the going and coming rule is to determine whether or not the employee is, in fact, in the "course of their employment." Since the threshold issue of the injured worker being in the course of employment has not been met, the liberal construction statute (Labor Code §3202) would not apply. In other words, Labor Code section 3202 does not apply to going and coming issues.

PANEL QME RE-EVALUATION SCHEDULING AND REQUESTS FOR A REPLACEMENT QME PANEL

By Stephen Moore

The WCAB is again signaling a limit to a party's rights in the Panel QME process. In *Cienfuegos v Fountain Valley School District,* 2011 Cal. Wrk. Comp. P. D. Lexis 206, the Board ruled that the requirement that a Panel QME schedule an evaluation within 60 days of first contact only applied to requests for initial evaluation.

8 Cal. Code. Regs. §31.3 sets forth the timeline for requesting and scheduling a PQME evaluation under Labor Code §4062.1 and §4062.2. 8 Cal. Code. Regs. §31.3 (e) provides that if the party with the "legal right" to schedule, cannot obtain an appointment with the selected PQME within 60 or a maximum of 90 days of the appointment request, either party may report the unavailability of the PQME and request a replacement QME Panel pursuant to 8 Cal. Code. Regs. §31.5.

8 Cal. Code. Regs. §31.5 provides that the replacement of a QME or an entire Panel, at the Medical Director's discretion, shall be selected at random if "(2) A QME on the Panel issued cannot schedule an examination for the employee within 60 days of the "initial request" for an appointment."

The first issue is whether the "legal right" to an evaluation under 8 Cal. Code. Regs. §31.3 applies only to the first evaluation. Although not addressed in case law, the statute itself sets forth when a party has the right to schedule an evaluation - 10 days from issuance of the Panel for unrepresented claimants and 10 days from selection of the QME in represented cases. Defendant has the right after 10 days, if claimant has not acted on his scheduling right.

However, the issue is whether 8 Cal. Code. Regs. §31.5 applies only to this initial legal right to schedule, since there is no requirement of the legal right in §31.5. Specifically, as noted above, 8 Cal. Code. Regs. §31.5 provides that a replacement QME or QME Panel shall be issued by the Medical Director if the QME cannot schedule an evaluation within 60 days of the **initial request for an appointment**.

In addressing this issue, the WCAB decided in *Cienfuegos* that the 60 day scheduling timeline applies only to the first scheduling of an evaluation. However, the WCAB offered little analysis and held only that a reevaluation is not an "initial request." In *Cienfuegos*, the delay for re-evaluation was 6 months.

Interestingly, although the WCAB has indicated 8 Cal. Code. Regs. §31.5 does not apply to re-evaluations, the Medical Unit has been issuing Replacement QME Panels for failure of the QME to schedule within either the 60 or 90 days on re-evaluations. Since the legislative intent was to expedite the resolution of claims, it appears the WCAB decision is contrary to the Medical Director's intent in setting the timelines. Further, the Medical Director has been applying these timelines to requests for re-evaluation. Consequently, it appears this conflict is ripe for appeal in the proper case.

Cienfuegos is a Panel Decision, so it is not binding. Since the Medical Unit has shown its intent to issue Replacement Panels for re-evaluations, in the appropriate case, you may retain a viable option to request a new QME Panel which may open the door for AME discussions in a litigated case.

If you have suggestions for an article, or feedback about anything that you read here, please be sure and let us know at our website, www.cbwmlaw.com .

COPY SERVICE FEE SCHEDULE

By Laura K. Lachman

On July 1, 2015 the new copy service fee schedule will go into effect and will apply to all services provided on and after July 1, 2015 regardless of the date of injury. It will cover all copy and related services for records relevant to an injured worker's claim, except for those services under which there is a contract between the employer and the copy service provider. The rules governing the new copy service schedule can be found beginning with Regulation section 9980.

Allowable services under the new fee schedule include the records in the employer's or claims administrator's possession that have been requested by an injured worker or his/her attorney if they were not provided within the time frames set forth in Labor Code section 5307.9 (30 days) or if any subsequently received medical reports were not properly served within in the time frames of Regulation section 10608 (within 10 calendar days of receipt of the report.)

If the claims administrator fails to provide written notice to the injured worker for records that it is seeking by subpoena pursuant to Labor Code section 4055.2, then duplicate records may be obtained under the fee schedule using a different copy service. (Labor Code §4055.2 requires any party who subpoenas records to send a copy of the subpoena to all parties of record in the proceeding.)

Only a registered professional photocopier is allowed to be paid for obtaining records. A copy service is not allowed to be paid for summarizing, tabulation or indexing documents. A copy service cannot charge for records from the Workers' Compensation Insurance Rating Bureau and EDD, which can be obtained without a subpoena at a lower cost.

Duplicate record requests made by the same party and served by the same source are not allowed unless accompanied by a declaration that sets forth good cause for seeking duplicate records. Good cause under this section includes new counsel seeking duplicate records for review.

The fee schedule authorizes the following charges for services:

- $180 flat fee for a set of records, from a single custodian of records, up to 500 pages which includes but is not limited to, mileage, postage, pickup and delivery, phone calls, page numbering, witness fees, check fees, service of the subpoena, shipping and handling and subpoena preparation.

    - $0.10 per page for copies above 500 pages
    - $5.00 for each additional set of records in electronic format ordered within 30 days of the subpoena, or $30 if ordered after 30 days.
- $75 for cancelled subpoena requests before any records are produced, or for a Certificate of No Records.
- $20 for records obtained from EDD
- $30 for record obtained from the Workers' Compensation Insurance Rating Bureau
- X-rays and scans are paid at $10.26 per sheet and $3 per CD or X-ray or Scan.

Under the new rules, bills from copy service providers must specify the services provided and include the tax identification number and professional registration number, county of registration, date of billing, the case information including employee name, claim number and case number (if applicable), source of information/type of records, date of service, description of service and the number of pages produced. Section 9981 of the Regulations provides for billing codes that may be used, however, they are not required. Any disagreement regarding the amount charged by a copy service for services rendered on or after July 1, 2015 will be resolved through the Independent Bill Review (IBR) process.

The new copy service fee schedule should help not only reduce costs but also reduce the redundant and duplicate requests for record locations subpoenaed by applicant's attorney. The number of copy service liens that are filed with the Workers' Compensation Appeals Board will be limited as the amount charged and services rendered are now subject to IBR. Only contested liability issues not related to the reasonableness of the amount charged, will be subject to the jurisdiction of the Board under the lien process.

Although no duplicate requests are allowable under the fee schedule if written notice is first given to the injured worker, or his or her attorney, that records are being subpoenaed, we still recommend that any requests made by applicant's attorney for duplicate records be objected to in writing with a copy of the objection served on both applicant's attorney and the copy service.

PRACTICE TIPS

ONE IN A SERIES OF ARTICLES TO HELP WITH DAY TO DAY ISSUES FACING ADJUSTERS AND EMPLOYERS

YOU JUST RECEIVED A NEW APPLICATION – NOW WHAT?

You have just received an application and you weren't expecting it. Sometimes, a previously-unlitigated case becomes litigated and sometimes you receive the dreaded "blind" application. Now what?

The application itself gives you plenty of things to look out for (traps for the unwary) and sources of information that might help.

1 – Venue (page 1) – Applicant's attorney may request venue based on where his office is located, rather than where the applicant lives or where the injury occurred (Labor Code §5501.5 (a) (3)). You have 30 days from receipt of the Notice of Application to petition for automatic change of venue – otherwise you might be stuck in a "liberal" WCAB district office or hundreds of miles from where the witnesses are.

2 – Body parts (page 3) – You might have an admitted injury to one body part but the application might list four other body parts that you know nothing about. What do you do about this?

A. Pay attention! You have to read the application to know that there is trouble ahead.
B. Object to treatment to disputed body parts with or without utilization review. You may defer UR until after the dispute is resolved. (Labor Code §4610 (g) (7))
C. How do you get a QME on the new body parts? Labor Code section 4062 allows an objection to a medical determination of a treating physician. Section 4060 only permits compensability disputes where no part of body has been accepted. One interpretation requires you to wait until a treater mentions a disputed body part. If you and applicant's attorney agree that a new panel is needed to address a disputed body part you can jointly request one. (Rule 31.7 (b) (1)) You may be able to simply indicate on the panel request form that a dispute exists regarding a body part.

3 – Duty to serve – New Rule 9982 (eff. 7/1/15) precludes applicant's attorney from being able to charge you for ordering your records if you serve them promptly (30 days – see Labor Code §5307.9).

4 – Earnings (page 3) – If you have an admitted injury, what TD rate have you paid? What average weekly wage are you using and how did you determine them? Are your earnings different than what is being alleged? What evidence do you need to support your wage

calculations? Does applicant have multiple employments? Unreported income? Is there a pay increase issue?

5 – Occupation (page 2) – What has the employer told you that the occupation is? What is being alleged? Do you have a discrepancy that might cause a rating problem? What evidence do you need to support the occupation on which you base your rating? Do you have a possible dual occupation issue?

6 – Date of injury (page 2) – For a cumulative trauma claim, what is the correct date of injury? Do you know that last date of injurious exposure? Do you have employment during the entire CT period? If not, are there other employers to join? Do you have coverage during the entire CT period?

7 – Correct identification of parties/date of injury (page 2) – Frequently, applicant mis-identifies the identity of the carrier, the employer or the date of injury. If you try to file documents with the WCAB (thanks to the "wonders" of EAMS), and you haven't gotten the application amended first, the Board may kick your documents back. You will want to work with applicant's attorney to get the application corrected/amended.

8 - Applicant will have to list prior applications (page 4) – a source of discovery. Applicant is also supposed to list self-procured medical providers and payors (page 4).

9 – If applicant has received SDI or UI benefits from EDD he has to disclose this (page 4). You will then be on the lookout for a possible lien. You can request EDD's medicals if they have paid SDI. You can request the application for UI benefits since applicant must be ready, willing and able to work in order to receive UI.

In short – don't just assume that the application is going to be the same as the claim that you have been working on (if you have an already accepted injury). Read the application carefully and look out!