Winter 2012

The LITIGATOR

VOLUME XI OFFICIAL PUBLICATION OF THE CAPITOL CITY TRIAL LAWYERS ASSOCIATION ISSUE 4

Inside This Issue

I Believe

By: Michael W. Jones
President, CCTLA

I anxiously awaited the election results before preparing this, my last message to you. I did not wait in order that I could take your time providing you with the results you already know. So many of you, and especially members on the CCTLA Board of Directors, have supported, fought, and advocated for candidates and causes because you "believe." What I came to realize is you "believe" in our system of justice and that belief is what drives your political involvement.

Time after time during this past year of campaigning and advocating, I was reminded of a quote that I consider one of, if not my single, personal influencing quote. The quote is from Martin Luther King Jr.—

> *"The ultimate measure of a man is not where he stands in moments of comfort and convenience but where he stands at times of challenge and controversy."*

As trial lawyers, we are constantly faced with court budget cuts, trial delays, lack of courts, strong-arm tactics and indeed, attacks of corporations, insurance companies and their organizations on America's civil justice system. The system that provides our clients with the ability to hold wrongdoers accountable is our legal system. After all the politics and my waiting for the election results, we continue to stand today as trial lawyers at times of challenge and controversy. We fight because we "believe."

Our political process is dominated by big Pharma, oil, insurance and other large corporations to the extent that we, as trial lawyers of and for the people, cannot depend upon the political system to hold corporations accountable. We "believe" and fight our battles where we have a fair chance—in our legal system.

In the trial of Tom Robinson, Atticus Finch argued, "In this country, our courts are the great leveler. All men are created equal. I'm no idealist to believe firmly in the integrity of our courts and our jury system. That's no ideal to me. That's a living, working reality." Like Atticus, I know each of you "believe."

The battles will continue. The attacks will not go away. Over 100 years ago, Clarence Darrow was challenged and fought limits on damages. As a legislator, he tried to revoke such limits and was able to at least increase the limits by having them doubled.

As the Chamber and corporations continue to thwart and weaken the rights of Americans and limit the access to justice, I am proud to share the beliefs of each of you.

Continued on page 18

Allan's CORNER

By: Allan J. Owen

Here are some recent cases I found while reading the *Daily Journal*. Please remember that some of these cases are summarized before the official reports are published and may be reconsidered or de-certified for publication, so be sure to check and find official citations before using them as authority. I apologize for missing some of the full *Daily Journal* cites.

Insurance Coverage. In Axis Surplus Insurance Company v. Reinoso, 2012 DJDAR 10793, defendant Reinoso co-owned rental properties with husband. Husband had been criminally prosecuted regarding habitability issues at various rental properties. Husband and wife took title to a new apartment complex as "husband and wife, as community property." Approximately five months after they took it over, there was a notice of code enforcement corrections issued. Tenants sued, husband and wife tendered defense to their insurer; insurer represented under a reservation of rights and settled the claims then sued the insureds, seeking to recover defense costs and settlement contribution—about $2,400,000. Wife claimed to be innocent insured entitled to coverage; Trial Court ruled against her, Appellate Court affirmed.

Evidence. In People v. Dunas, 2012 DJDAR ____, the court upholds the trial court's admitting computer animation evidence used by an expert witness to illustrate his theory in a criminal murder prosecution. The expert is Carly Ward, who we see in our civil cases frequently, along with her son, Parris, who creates the computer graphics. This case has a very interesting and great discussion of the distinction between animation and simulations. An animation is merely used to illustrate expert testimony while simulations contain conclusions based on computer models. An animation is demonstrative evidence offered to help a jury understand expert testimony whereas a computer simulation is itself substantive evidence.

Power Press Exception. In LeFiell v. Superior Court, 2012 DJDAR____, the court holds that the power press exception under Labor Code §4558 allows only the injured employee to sue unless the employee is killed, in which case, the dependents may sue. The court rules that a loss-of-consortium claim is not authorized under the language of Labor Code §4558. This is a Supreme Court decision overturning the appellate court; another very conservative decision from the California Supreme Court. This means the spouse with the loss-of-consortium claim gets nothing since that injury is not compensable in Workers' Comp.

Declaratory Relief Action - Jury Trial. In Entin v. Superior

Continued on page 18

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Recent U.S. Tax Court Decision Highlights Issues Regarding the Tax Treatment of Damages for Stress-Induced Physical Ailments

By: Jeremy Babener and Neil Kimmelfield, Lane Powell PC

Previously published as "Tax Treatment of Damages for Stress-Induced Physical Ailments," *Practical Tax Strategies* (Vol. 89, No. 3). Copyright © 2012 Lane Powell PC.

In two cases decided in 2010, the U.S. Tax Court indicated that damages compensating for stress-induced physical ailments may be tax-free where (1) the taxpayer can demonstrate that the damages were actually received on account of those ailments, and (2), the physical nature of the ailments was verified by a physician, preferably based on objective medical evidence rather than the taxpayer's subjective report of symptoms.

In the Tax Court's July 11, 2012, decision in Blackwood v. Commissioner, T.C. Memo 2012-190, the taxpayer did not satisfy this standard, highlighting the difficulty of establishing that damages compensating for stress-induced physical ailments are excludable from income.

Section 104(a)(2) of the Internal Revenue Code provides that damages received on account of personal physical injuries or physical sickness are generally excluded from income. However, section 104(a) expressly states that "emotional distress" is not a physical injury or physical sickness. Thus, damages compensating for emotional distress are generally taxable.

What about damages received on account of physical ailments induced by stress?

The legislative history of 1996 amendments to section 104(a)(2) states that "emotional distress" includes "physical symptoms (e.g., insomnia, headaches, stomach disorders) which may result from such emotional distress." Courts have suggested, in non-binding "dicta," that other stress-induced physical ailments, including periodic impotency, fatigue, urinary incontinence and elevated blood sugar levels, also may be considered symptoms of emotional distress. See Lindsey, Jr. v. Commissioner, 422 F.3d 684 (8th Cir. 2005); Moulton v. Commissioner, T.C. Memo 2009-38.

This limited guidance does not establish a clear dividing line between such symptoms and actual physical injuries or sickness, and leaves open the possibility that damages attributable to other stress-induced physical ailments may be excluded from income under section 104(a)(2). In 2010, the Tax Court twice held that section 104(a)(2) applied to damages received on account of severe stress-induced physical ailments.

In Domeny v. Commissioner, T.C. Memo 2010-9, the Tax Court found that (1) the taxpayer, who had multiple sclerosis, "show[ed] that her work environment exacerbated her physical illness" and (2), the damages she received were intended to compensate her for "her acute physical illness caused by her hostile and stressful work environment." Based on those findings, the court held that section 104(a)(2) applied and that the damages she received on account of her physical ailments were tax-free.

The fact that the exacerbation of the taxpayer's physical ailments was due to stress, rather than an obviously physical cause, did not lead the Tax Court to view the resulting damages as received on account of emotional distress. Notably, in the underlying dispute, the taxpayer's physical ailment was medically verified by her doctor, who determined that she was too ill to work.

The doctor's diagnosis apparently was based on the taxpayer's report of "[v]ertigo, shooting pain in both legs, difficulty walking due to numbness in both feet, a burning sensation behind her eyes,

and extreme fatigue."

In Parkinson v. Commissioner, T.C. Memo 2010-142, the Tax Court held that section 104(a)(2) applied to damages that the taxpayer received on account of heart attacks and cardiovascular damage that he suffered due to intentional infliction of emotional distress in his workplace. Interestingly, in concluding that the taxpayer's physical ailments were not "symptoms" of emotional distress, the Tax Court emphasized that, in medical parlance, a "symptom" is "subjective evidence of disease or of a patient's condition, i.e., such evidence as perceived by the patient." The court viewed the taxpayer's ailments, by contrast, as actual "physical injury or sickness rather than mere subjective sensations or symptoms of emotional distress."

The Tax Court's narrow reading of the term "symptom" in Parkinson could have far-reaching implications. Based on that reading, it is possible that section 104(a)(2) generally applies to damages for physical ailments caused by emotional distress as long as (1) the ailments are objectively verified by a physician based on signs of illness other than the taxpayer's subjective report of symptoms, and (2), the taxpayer can demonstrate that the damages were paid on account of those physical ailments. Domeny further suggests that section 104(a)(2) may apply to damages paid on account of a diagnosed physical illness, even if the diagnosis is based entirely on symptoms reported by the taxpayer, if the illness is "acute."

In the recent Blackwood decision, the Tax Court held that a settlement payment received by the taxpayer as a result of her wrongful termination was taxable even though the termination allegedly exacerbated the taxpayer's depression, causing her to suffer insomnia, migraines, nausea, and pain in her back, shoulder and neck.

In reaching its decision, the court emphasized that neither the taxpayer's letter to her employer threatening suit, nor the subsequent settlement agreement, identified any of the taxpayer's physical ailments, except by referencing her "depressive symptoms." The court also emphasized that the taxpayer did not show "the level of physical injury or physical sickness in Domeny," or that the taxpayer's "physical symptoms of depression were severe enough to rise to the level of a physical injury or physical sickness."

The Blackwood decision is a reminder that when a taxpayer seeking damages for stress-induced ailments does not (1) obtain a medical diagnosis during the underlying dispute and (2), emphasize diagnosed physical ailments in communications with the defendant, the taxpayer will have difficulty establishing that any resulting damages were received on account of physical injuries or physical sickness.

It remains to be seen whether taxpayers who do obtain, and use, medical diagnoses in their pursuit of damages will receive tax-free treatment when their stress-induced physical ailments are less acute than Multiple Sclerosis or heart disease.

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This is intended to be a source of general information, not an opinion or legal advice on any specific situation, and does not create an attorney-client relationship with our readers. Prior to joining Lane Powell, Jeremy Babener worked as a Tax Policy Fellow in the U.S. Treasury Department's Office of Tax Policy, focusing on partnership tax issues, including noncompensatory partnership options and debt equity exchanges. He can be reached at 503-778-2140, or babenerj@lanepowell.com. Neil Kimmelfield is chair of Lane Powell's Taxation practice Group. He can be reached at 503-778-2196, or kimmelfieldn@lanepowell.com.

2012 Wrap Up

DISPUTE AVOIDANCE

By: Betsy S. Kimball
Certified Specialist, Appellate Law & Legal Malpractice Law

Betsy S. Kimball is a certified specialist in appellate law and legal malpractice law, State Bar of California Board of Legal Specialization, and part of Boyd & Kimball, LLP, in Sacramento, phone: (916) 927-0700.

Bar News: The MCLE compliance audit program. After issuing a few warnings, the Bar has made changes to its MCLE compliance audit program. The changes are in the number of lawyers being audited and in how the Bar responds to non-compliance. Many of us will be impacted.

The auditees are chosen from among the lawyers in each year's compliance group. For 2013, the compliance group is A-G. If you are in this group, you may be audited in 2013. If audited, you do not want to be found to be non-compliant. In 2011—before the Bar stepped up its auditing—635 lawyers were audited (about 1% of the N-Z compliance group). Ninety-eight were found to be non-compliant. Of those, 27 were referred to the Office of Trial Counsel for the initiation of disciplinary charges.

From these 2011 numbers, it appears that for most of the non-compliant attorneys, the problem was one of recordkeeping—the attorneys had done the required MCLE but were unable to produce all of the required documentation when audited. The other 27 lawyers, however, are looking at big trouble. They were unable to convince the Bar that they did their MCLE, and—this is their real problem—the Bar believes they lied on their compliance certifications. Lying to the Bar is a matter of moral turpitude, and moral turpitude is a "suspendable offense."

Word was out that the first attorney (of the 27) to be disciplined had practiced more than 40 years with no record of discipline. He or she received a 30-day actual suspension. In the months to come, we will be reading about the discipline imposed upon non-compliant lawyers in the back pages of the *California Lawyer.*

In 2012, the Bar audited about 5% of the H-M compliance group. In 2013, the Bar plans to double the number of lawyers audited (to 10% of the A-G compliance group). That is more than 6,000 lawyers.

It is my goal never to see any CCTLA member's name in those dreaded back pages of the *California Lawyer.* So get your MCLE done. Make sure you have all of the proper documentation before you report, and back-up your documentation to a site other than your office. If you change jobs, take your documentation with you. Do not rely on your office staff to do any of this for you. The Bar's reaction to "my assistant lost the paper" is akin to the "dog ate my homework." But no one is laughing.

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2012 case of the year? One of the more significant lawyer-law cases to be decided in 2012 is Cole v. Patricia A. Meyer & Associates (2012) 206 Cal. App.4th 1095. Mr. Cole filed a malicious prosecution and defamation against three sets of attorney-defendants: the Meyer defendants, the Boucher defendants and Robert P. Ottilie. All defendants were the attorneys of record for the plaintiffs in a prior shareholder action against Cole and others.

The defendants filed an anti-SLAPP motion. The Boucher defendants and Ottilie argued that they should avoid malicious prosecution liability because they did not actually work on the underlying case. For example, Ottilie argued that his role was solely to assist with trial (which never occurred) and billed no time to the case. The Court of Appeal rejected these arguments. The court's discussion of litigation attorneys' obligations both to their clients and to the courts is well worth reading.

Cole cites to a case that comes to mind every time I read a list-serve request for help in covering a court appearance or deposition: Streit v. Covington & Crowe (2000) 82 Cal.App.4th 441. One lawyer, Gatlin, helped out a friend by covering a motion for summary judgment hearing. When both lawyers later were sued for malpractice, Gatlin argued that he had only made a "special appearance" in the case and that he had no attorney-client relationship with the plaintiff. The Court of Appeal disagreed. Again, this is a case worth reading.

The lesson from Cole is that, if you are listed as an attorney of record, you had better ensure that the case is being properly handled, even if you are not the one doing the actual handling. Also, make sure that any attorney with whom you associate on a case carries adequate malpractice insurance to indemnify the client if malpractice occurs. I have handled legal malpractice cases in which one attorney had insurance and the other did not, with exactly the result you would expect: the insured attorney got stuck with the loss. As to Streit, are the days of asking for help from a colleague or helping a friend over? No, but be aware of the risk. The number of legal malpractice claims is up, so take care.

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This article is intended as a source of general information, not an opinion or legal advice, and is solely the product of the author.

"Pillah" Talk©

with Gene Stonebarger

California Lawyers Magazine Attorney of the Year

An ongoing series of interview with pillars in the legal community

By: Joe Marman

GENE STONEBARGER

Gene Stonebarger received the California Lawyers Magazine Attorney of the Year award in March for consumer protection for taking on a case against retail stores to prevent them from collecting unnecessary personal information from consumers purchasing products with credit cards.

The issue was whether retail companies could collect ZIP codes and other consumer information when consumers purchased with credit cards in those retail stores. Gene lost at the trial court level and lost at the 4th District State Court of Appeal level, but he won in a unanimous decision at the California Supreme Court in the case of Pineda v. Williams-Sonoma Stores, Inc. 51 Cal. 4th 524 (2011). That case addressed violations of the Song-Beverly Credit Card Act, where Williams-Sonoma stores collected the ZIP codes and names of consumers, which were used to obtain the rest of the customers' addresses through third-party data brokers to create a massive customer database to specifically identify its customers and track spending habits to use for marketing purposes.

The Supreme Court ruled that the Legislature intended to give broad and robust privacy protection to consumers, rather than strict and narrow protection from personal data collection. Since that ruling, more than 150 other class action suits have been filed to protect consumers' interests in other related situations.

The retailers moved quickly in an attempt to have the Legislature amend the statute to undo the Supreme Court's decision in Pineda. Gene Stonebarger testified before the Assembly Banking Committee and the Assembly Judiciary Committee, in May of 2011, concerning the importance of the law and certain exceptions to the ZIP code collection practices of establishments. As a result, the Legislature did enact a narrow exception to the Pineda decision to allow gas stations to collect ZIP codes, but only for the purposes of preventing fraud and identity theft.

The case was significant, since the California Supreme Court accepts less than 5% of cases to review on appeal. After the Pineda case was accepted by the Supreme Court, there were two other class actions in which Gene served as counsel on the same issues that were accepted on "grant and hold" status by the Supreme Court until Pineda was decided, as well as several other cases pending in other lower appellate courts and trial courts.

After the victory in Pineda, the other cases were re-briefed and re-argued in the appellate courts. The defense attorneys naturally attempted to differentiate and distinguish their cases from the Supreme Court decision in Pineda.

Q. *I know you are focusing on class action suits. Since you are only 37 years old, how did you get your start in taking on such big cases?*

A. I actually grew up in Linden, a small farm town outside of Stockton. My family was in agriculture, and I went to UC Davis and majored in International Agriculture Development. I was lucky enough to get a full-ride scholarship from the Buck Foundation after high school, which paid for college, where I got interested in international trade law, and I intended to pursue a career in international trade relating to agriculture. I then went to University of San Diego law school, and learned that most of the international trade jobs are in Washington DC, where I did not want move.

Q. *How did your career get started?*

A. I got my first job in Modesto with the Damrell law firm which represented a lot of agricultural businesses. My first case was a class action on behalf of 500 farmers who were members of Tri Valley Growers, which was a large agricultural cooperative. The new CEO of the co-op instituted a plan to convert the farmers' money from retained earnings that served as a form of a savings account for the farmers into equity that could be spent by the company, and the cooperative went bankrupt.

The farmers sued the CEO, the board of directors and the accounting firm through a class action. The Damrell firm worked and co-counseled with the law office of Cotchett, Pitre, and McCarthy (out of Burlingame) on this case and other class actions.

In January 2004, I moved to downtown Sacramento with a partner to open a firm and continue to do class actions. I moved my office to Folsom in 2007 to be closer to my home, and I opened Stonebarger Law, APC, in January 2010.

Q. *These class action cases seem like they would require so much staff and organizational skills to keep track of all the plaintiffs and all the records. How do you do that?*

A. I have two other associate attorneys in my firm, and we have very good staff. We have about 60 class action cases going on at a given time. I typically like to co-counsel with law firms that are specialists in a certain niche area of law where they recognize a big issue of importance to a large group of people or the general public, but where I have the class action experience.

There are also third-party class action administrators who we hire, where the company is able to store the data, to give notice and to do other administrative tasks so we do not have to. They can send out large notifications to

the respective classes (often to hundreds of thousands of individuals). If it is only 100 claimants, we sometimes do that task of notification by ourselves. Sometimes, we can get the court to order that a defendant be required to pay the costs of class notification.

Q. *Do you typically file in state or federal court?*

A. We like to file in state court, but about half of our cases get removed to federal court which occurs under the Class Action Fairness Act of 2005, if there is greater than $5 million at issue, and minimum of diversity of citizenship issues.

Q. *What are the comparative benefits or disadvantages in federal court vs. state courts for class actions?*

A. Well, in federal court, the cases tend to move faster, and we can usually finish them in one to three years with no appeals. But in state court, they can drag on from between one to seven years. In state court, we can more easily get the court to rule that the defendant pay for the costs of notification to the potential class members. In federal court, plaintiffs usually must cover the costs of notification to the class members.

In federal court all the attorneys general in each state where there may be members of the class must also be notified of a settlement, so the respective AG has the opportunity to object to any proposed settlement. In federal court, we can take advantage of the electronic filing system, which makes it much more convenient and efficient to file pleadings, whereby service is automatic on all other parties and counsel that are connected to the case. So that saves time and money on serving all parties. Some state courts have electronic filing, but not too many.

Various federal courts have their own local rules or standing judge's rules where there are often specific fonts required as well as differing page limits.

In state court, some of my cases are coordinated through Judicial Council Coordinated Proceedings (JCCP), which has coordination procedures where the council appoints certain judges to handle the class actions. Sometimes our case is just assigned to the Law and Motion Division to apply for class certification.

Q. *What does it take to pursue a class action case?*

A. Under Federal Rule 23, you must prove that the class is numerous, a commonality of issues of law or fact among the class members, that the class representative's claims are typical of the claims of the class members, adequacy of representation by the law firm taking on the case and the named plaintiff, and that the class action case proposed would be the superior way of handling the case compared to a multiplicity of lawsuits against the same defendant. You typically file the putative class action complaint and then file a motion for class certification according to which ever local rules would apply. In the Central District of California, there is a local rule that you must seek certification of class action status within 90 days of filing the complaint.

Q. *Are these cases expensive to pursue?*

A. Sometimes they can cost between $100,000 to $200,000 to pursue. They can get expensive for experts to prove damages or to show the relative costs to the consumers in comparison to the benefits illegally obtained by a defendant to craft a remedy, or even to prove the relative risk of harm to the general public to establish a "per violation" penalty to the defendant company.

Q. *How do you get the court to set your attorney's fees?*

A. Our fees are usually established by the "lodestar" method, where the fees are based on the number of hours expended, a multiplier for the risk involved, and in comparison to the benefit conferred on the public, or the class members.

Q. *Do you have any other interesting class action cases going on now?*

A. I have a case where we represent private commercial pilots of Continental Airlines where the pilots are called into military service, and we are attempting to prevent the loss of their retirement benefits and their job status. I got called to this case by Brian Lawler, who is a former military pilot and is also an attorney.

Q. *What do you do for fun on your days off?*

A. I have three beautiful children who keep me busy on my days off. Each year, I make wine with a small group of my college fraternity brothers from Davis. We save some of the blend from prior years to add to each new year's blend, so we call it a living barrel. I also like to snow ski and golf, but I find that I don't have the time to do that as often as I would like these days. My wife's parents live in Kauai and have two restaurants there, so we go there at least once a year to visit.

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L U N C H E O N

DATE: **Friday, November 30, 2012**
TIME: 12:00 Noon
PLACE: FIREHOUSE RESTAURANT
1112- 2nd Street, Old Sacramento

GUEST SPEAKER:

Michael S. Parr, M.D.

TOPIC:

"The Disease of Denial: Detecting and Preventing Alcohol and Drug Abuse in the Legal Community and Beyond"

Dr. Michael Parr is board-certified in addiction medicine, and has provided chemical dependency counseling for over 20 years. He is also involved in State Bar and other programs aimed at treating and ameliorating the effects of substance abuse. Dr. Parr prefers interactive discussions, and welcomes your questions and input. Questions may be submitted in advance to sdavids@dbbwlaw.com.

This CCTLA luncheon is open to ALL attorneys/staff/law clerks.

*This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1.0 hour of which will apply to **Prevention, Detection and Treatment of Substance Abuse**; certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.*

COST: CCTLA Members $30.00 / Non-Members $35.00. Please make checks payable to ***CCTLA*** and mail your payment to CCTLA, P. O. Box 541, Sacto. CA 95812-0541.

RESERVATIONS AND PAYMENTS should be made in advance (by phone or email (debbie@cctla.com)) **and must be received no later than Wednesday, November 21, 2012 to confirm your reservation (SPACE IS LIMITED).** Thank you! ~ *Because CCTLA is charged for no shows, we regret that you will be charged for your reservation unless canceled in advance.*

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LUNCHEON SELECTIONS: Thai Chicken Salad or Pecan Crusted Pork Tenderloin

The Dismal Workers' Compensation "Reforms" of SB 863 and How They Will Affect Your Personal Injury Cases

By: Kyle K. Tambornini

In the final week of the summer session, the Legislature passed SB 863 that was supported by the governor and many Democrats, yet substantially interferes with the ability of workers to obtain fair and necessary treatment for their disability. While the bill made many changes, this article will discuss the impacts of this legislation on Workers' Compensation "cross-over" cases and the increased and substantial difficulty facing personal injury clients who need treatment.

This bill is another rushed "deform" of the Workers Compensation system and will likely have substantial impact on the type of medical treatment an injured worker will receive. The reforms in 2004 have already impacted treatment for injured workers by limiting the number of visits they can receive from chiropractors and physical therapists, as well as instituting a utilization review (UR) requirement for all medical treatment. The utilization review process allows the insurance carrier to delay or deny treatment by submitting all treatment requests to an outside doctor for review. If the UR doctor denied the treatment, the applicant's attorney could request a hearing in front of a Workers' Compensation judge, who would decide whether the treatment was medically necessary.

If you do not have a good working relationship with the Workers' Compensation attorney, it is likely that the Utilization Review procedure will be completed before you are aware it even started.

SB 863 changed the UR process for denied medical treatment in that the applicant's attorney will no longer be able to request a hearing in front of a Workers' Compensation judge. Instead, the injured worker will be required to submit his treatment records to an "Independent Medical Reviewer" who will review the records and determine whether the disputed healthcare service was medically necessary based on specific medical needs of the employee and the standards of medical necessity as defined in subdivision (c) of Labor Code section 4610.5.

The determination of the "Independent Medical Review" organization shall be deemed to be the determination of the administrative director and shall be binding on all parties. The parties may only appeal the decision if it was based on fraud, discrimination, or an erroneous fact, or in excess of the administrative director's power (unlikely avenue). Furthermore, there will be no appeal to a Workers' Compensation judge.

It is also important to note that, all utilization review determinations shall remain effective for 12 months from the date of the decision unless a future recommendation is supported by documented change in the facts material to the basis of the Utilization Review decision.

There is a potentially important provision in the new bill, Labor Code section 4605, which allows an employee to obtain a medical report, at their own expense, from a consulting physicain or attending physician whom he or she desires. However, this report must be reviewed by a qualified medical evaluator or the treating physician who must state whether he or she agrees or disagrees with the findings and opinions in the report.

What this means for us, as personal injury attorneys, is, if a physician recommends an MRI, and utilization review denies the MRI, then, unless there is a change in circumstances, any request for an MRI in the next 12 months will be deemed automatically denied.

More importantly, what if a surgical request was made by the treating physician? Should the personal injury attorney immediately hire his/her own medical consultant, at their client's expense (Labor Code 4605), to examine the injured worker and comment on the need for the surgery? You will have a choice to allow the Workers' Compensation process to proceed and hope for the best or obtain a consult report and maybe choose not to go through the Independent Medical Review process.

However, if you do not have a good working relationship with the Workers' Compensation attorney, it is likely that the utilization review procedure will be completed before you are aware it even started.

This new utilization review process is effective for injuries after Jan. 1, 2013, and for

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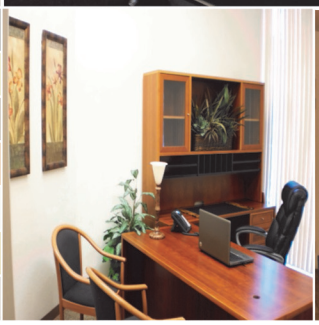

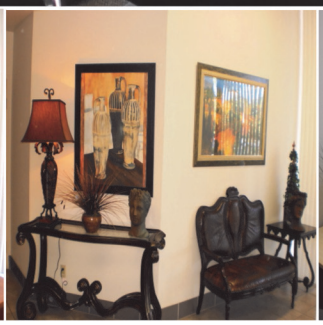

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all dates of injuries, effective July 1, 2013.

While there are numerous changes in this bill, there a couple of additional changes attorneys should be aware of:

• Chiropractors may no longer be a treating physician after 24 visits;

• There will be a separate fund available to seriously injured workers whose permanent disability benefits are disproportionately low in comparison to the earnings loss;

• Agreed Medical Evaluator's (AMEs) and QMEs no longer will be used to resolve or comment upon the current need for medical treatment. However they will be allowed to comment upon the need for future medical care;

• Medical treatment must be based upon the guidelines adopted by the administrative director pursuant to Labor Code section 5307.27 which requires medical treatment to be evidence-based, peer-reviewed, nationally recognized standards of care; and

• A potential increase in permanent disability benefits.

Therefore, I have the following recommendations:

1. Get to know the applicant's Worker's Compensation attorney and keep in close communication;

2. Consider hiring a medical doctor under Labor Code 4605 when your client's treating physician's start down a new medical path; and

3. If your client's care is denied by the Utilization and Review or Independent Medical Reviewer, consider whether you want to appeal the denial, as a decision by the IMR doctor is binding on all parties.

***

This article is intended as a source of general information, not an opinion or legal advice, and is solely the product of the author. Kyle K. Tambornini, a past president of CCTLA, is an attorney with Eason & Tambornini, 1819 K Street, Suite 200, Sacramento, CA 95811; (916) 438-1819; kyle@capcitylaw.com. He has more than 20 years experience handling applicants' Workers' Compensation cases, in addition to representing clients in third-party personal injury matters.

A Special Thank You to Our Generous Donors and Sponsors Who Made the 2012 Annual "From Wags to Riches" Fundraiser A Howling Successs!

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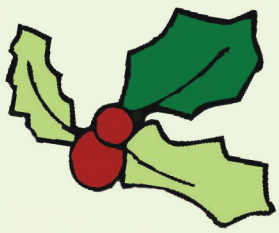
To all members of the
Capitol City Trial Lawyers Association
& those who make our jobs possible ...

CCTLA and President Michael W. Jones cordially invite you to attend the Annual Meeting / Holiday Reception and the Installation of the 2013 CCTLA Officers and Board

Thursday, December 6, 2012
5:30 to 7:30 p.m. at The Citizen Hotel
Terrace Room • 7th Floor
926 J Street, Sacramento

The Annual Meeting & Holiday Reception is free to honored guests, CCTLA members and one guest per invitee.

Reservations must be made no later than Friday, November 30, 2012 by contacting Debbie Keller at 916-451-2366 or debbie@cctla.com



During this holiday season, CCTLA once again is asking its membership to assist The Mustard Seed School for homeless children. CCTLA will again be contributing to Mustard Seed for the holidays, and a representative from Mustard Seed will attend this event to accept donations from the CCTLA membership.

CCTLA thanks you in advance for your support and donations.

Allan's Corner

Continued from page 2

Court, 2012 DJDAR____, insured had a disability policy and claimed disability based on migraines. Insurer investigated and decided not totally disabled as defined under the policy. Insurer filed declaratory relief action. Insured requested a jury trial, and court denied it. Appellate Court reverses, finding that because the dec relief claim raises factual questions pertaining to contractual rights, the action is legal in nature and not equitable, even though the insurer continued to pay the insured during the pendency of the action. Under those circumstances, the insured is entitled to a jury trial.

Sanctions. In Diepenbrock v. Brown, 2012 DJDAR 11582, in a discovery dispute motion, court ruled against Plaintiff and ordered sanctions. Plaintiff and her attorney appeal, and Appellate Court reverses the sanctions order, finding that the position of the sanctioned party was supported by authority.

Release One, Release All Rule. In Leung v. Verdugo Hills Hospital, 2012 DJDAR 11751, the California Supreme Court reverses Appellate Court decision and abolishes the Common Law Release Rule in California. No longer will a settlement with one defendant release a non-settling defendant from liability for economic damages. Court holds that the non-settling defendant gets a set-off (with contribution if they have to overpay on economic damages) from the settling defendant.

Statute of Limitations. In John Me Doe v. Defendant Roe 1, 2012 DJDAR 11962, Plaintiff sued Catholic Church entities for childhood sexual abuse. Statute of limitations had expired, but Plaintiff received psychological counseling paid for by one church entity's insurers, and the insurer did not give notice of when the statute ran; therefore, the statute was tolled, making the complaint timely filed.

Damages. In Plotnik v. Meihaus, 2012 DJDAR 12394, the court holds that emotional distress damages can be recovered for intentional injury to an animal.

Government Tort Liability. In Faten v. Superior Court, 2012 DJDAR____, Plaintiff sued County of Los Angeles for failure to take into custody a dangerous pit bull that later bit Plaintiff. Trial Court agreed with Plaintiff that county had a mandatory duty; Court of Appeal reverses and directs the trial court to grant summary judgment to the county. Excellent discussion of what is required for finding a mandatory duty with respect to the Government Tort Liability Act.

Government Tort Claims. In Perez v. Golden Empire Transit District, Plaintiff's complaint alleged compliance with the claims presentation requirement. Unfortunately, it also alleged that Plaintiff was notified that failure to include the date of the incident rendered the claim defective. Complaint also alleged "plaintiff subsequently provided the date of the incident to (transit district's) representative, thus complying with the … Claims Statute." Trial Court sustained demurrer without leave to amend, finding this allegation conclusively demonstrated that Plaintiff failed to amend her claim. Appellate Court reversed, finding that one could infer from this paragraph that Plaintiff did indeed amend her claim, thus complying with the claims statute, and that the trial court and defense were attempting to construe the complaint against the plaintiff. If Plaintiff really did not amend her claim rather than just send a letter, there is probably going to be a motion for summary judgment granted down the road.

CCTLA President

Continued from page 2

I am honored to continue the fight of our forefathers, including the likes of John Adams, a trial lawyer who expressed that it would be far better for 99 guilty men to go free than one innocent man to be hanged. The likes of Alexander Hamilton, who with Adams, "believed" in the right to a jury trial. They "believed" it was absolutely essential to the preservation of our freedom.

In the *Federalist Papers*, Hamilton stated that friends and adversaries, if they agree in nothing else, concur at least in the value of trial by jury as a valuable safeguard to liberty. Hamilton went on to write, "For my own part, the more the operation of the institution has fallen under my observation, the more reason I have discovered for holding it in high estimation." Me too, Mr. Hamilton.

While our jury system has faults, it is the best way to assure that justice is done. Our adversaries know this. They continue to attack. They fail to understand trial lawyers. They fail to realize that each and every one of you know where to stand at moments of challenge and controversy. That each and every one of you know our legal system is no ideal but a reality. That Clarence Darrow once said, "The only real lawyers are trial lawyers. Trail lawyers try cases—to juries." That we stand in pretty damn good company with the likes of Adams, Hamilton, Darrow and even Atticus.

I thank you for the opportunity to serve as your president this past year. I "believe' in CCTLA. I "believe" in you.

CCTLA Once Again Supports Mustard Seed School and Spin

CCTLA provided helmets and entry fees for 50 underprivileged children from the Mustard Seed School and children from other school sites participating in this year's Mustard Seed Spin on the American River Parkway on Sept. 30. CCTLA donates a $1,500 sponsorship annually to the event that raises funds for the Mustard Seed School and outreach cycling safety programs during the school year. The event raised $34,000, with more than 500 children and adults participating. Used bicycles were donated, and a dozen new bikes were raffled.

MEMBER VERDICTS & SETTLEMENTS

SETTLEMENT

CCTLA board member Rob Piering secured an $825,000 settlement on a civil rights violation for a 22-year-old immigrant male. The Plaintiff entered a convenience store and walked out with several scratch-off lottery tickets without paying. The store clerk notified the police, who pursued the plaintiff. A chase ensued and Plaintiff sped off in a stolen car. After several minutes, Plaintiff was able to evade his pursuers by driving against traffic and abandoning the stolen car in local neighborhood. As the plaintiff made his way home on foot, he was recognized by an off-duty sheriff's deputy who had been listening to the pursuit on his radio. Deputy stopped the plaintiff and drew his service revolver, ordering Plaintiff to freeze. Plaintiff stopped, said he was unarmed and then turned and ran away. As Plaintiff attempted to climb a fence that would lead him into a citizen's backyard, the deputy shot Plaintiff twice in the buttocks and once in the hamstring. Plaintiff was convicted of burglary for stealing the lottery tickets and a felony violation of vehicle code. As a result of nerve damage from the gunshot wounds, Plaintiff developed atrophy of the left lower leg and a noticeable limp. Plaintiff had prior felonies and a sparse work history.

VERDICT

CCTLA members John Beals and Rob Piering won a $525,000 verdict on a minor impact collision. In September, 2008, the plaintiff and defendant stopped at a red light on J Street, side by side. The light phased green, and Defendant attempted to turn right, hitting Plaintiff's car going approximately five to 10 miles per hour (undisputed. The property damage to Plaintiff's car was $1,200; Defendant's car, $800.

Plaintiff, 29 years old at time of the incident, was a belted front-seat passenger. Although there were no injuries or complaints of pain at scene, Plaintiff developed back pain a few days later and was seen by Mark Diaz, M.D. Her treating doctor referred her to physical therapy, and she also saw a chiropractor. A few months later, she was referred to Phil Orisek, M.D., for low back pain.

Orisek recommended conservative care, which she did at various times for the next three years. One of her physical therapists told her she was finished with her when she was pain free, and able to engage in all activities, so surgery avoided.

She returned to Orisek for single-level disc replacement in February, 2012. Med Fin financed surgery. Past medical bills were $191,000, but the jury reduced them to $122,000. Defense had Vicki Schweitzer, RN, testified for the defense that Orisek and the hospital charged excessive fees, which she claims should have been $52,000.

The jury stated they think everyone pads their bills, and as a result, determined reduction was proper. Orisek testified $45,000 for future meds for facet injections was necessary.

No past or future loss of earnings claim for the defense was made.

Verdict: $523,000

- Past Meds: $122,000
- Future Meds: $45,000
- Past General Damages: $180,000
- Future General Damages: $175,000

Plaintiff's CCP 998 offer was $125,000 (pre-surgery), which will bring verdict to close to $650,000. Defense offered $300,000 by way of a 998 offer 10 days before trial.

Defense counsel: Larry Hensley and Andrea Miller

Defense experts: Larry Herron, MD (from San Luis Obispo) and Vicki Schweitzer, RN.

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How Dismal Workers' Compensation "Reforms" Will Affect Personal Injury Cases

Capitol City Trial Lawyers Association
Post Office Box 541
Sacramento, CA 95812-0541

November, 2012

Friday, November 30
CCTLA Luncheon
Topic: "The Disease of Denial: Detecting and Preventing Alcohol and Drug Abuse in the Legal Community and Beyond"
Speaker: Michael S. Parr, M.D.
Noon, Firehouse Restaurant
CCTLA Members - $30 / Non-members $35

December, 2012

Thursday, December 6
CCTLA Annual Meeting & Holiday Reception
The Citizen Hotel - 5:30 to 7:30 p.m.

Tuesday, December 11
Q&A LUNCHEON
Noon, Vallejo's (1900 4th Street)
CCTLA members Only

January, 2013

Tuesday, January 15
CCTLA Seminar
Topic: "What's New in Tort & Trial: 2012 in Review"
Speakers: Craig Needham, Esq., Patrick Becherer, Esq., Michael Kelley, Esq. & Thornton Davidson, Esq
Location: Holiday Inn - 6 to 9:30 p.m.
CCTLA Members - $125 / Non-members - $175

Friday, January 25
CCTLA Luncheon
Topic: TBA - Speaker: TBA
Noon, Firehouse Restaurant
CCTLA Members - $30

February, 2013

Thursday, February 21
CCTLA Problem Solving Clinic
Topic: "Expedited Trials"
Speaker: Christopher Dolan
5:30-7:30 p.m., Arnold Law Firm
865 Howe Ave, 2nd Floor
CCTLA Members Only - $25

Friday, February 22
CCTLA Luncheon
Topic: TBA - Speaker: TBA
Noon, Firehouse Restaurant
CCTLA Members - $30

Contact Debbie Keller at CCTLA , 916/451-2366 or debbie@cctla.com for reservation or additional information about any of the the above activities.

CCTLA COMPREHENSIVE MENTORING PROGRAM
The CCTLA board has a program to assist new attorneys with their cases. If you would like to receive more information about this program or if you have a question with regard to one of your cases, please contact Jack Vetter at jvetter@vetterlawoffice.com / Linda Dankman at dankmanlaw@yahoo.com Glenn Guenard at gguenard@gblegal.com / Chris Whelan at Chris@WhelanLawOffices.com

CCTLA Calendar of Events