LFL&M LAUGHLIN, FALBO LEVY & MORESI LLP

WORKERS' COMPENSATION NEWSLETTER

255 California Street, Suite 700
San Francisco, CA 94111
T: (415) 781-6676
F: (415) 781-6823

One Capitol Mall, Suite 400
Sacramento, CA 95814
T: (916) 441-6045
F: (916) 441-7067

250 Hemsted Drive, Suite 310
Redding, CA 96002
T: (530) 222-0268
F: (530) 222-5705

200 S. Los Robles, Suite 500
Pasadena, CA 91101-2431
T: (626) 568-9700
F: (626) 568-3905

555 12th Street, Suite 1900
Oakland, CA 94607
T: (510) 628-0496
F: (510) 628-0499

1900 S. State College Blvd., Suite 505
Anaheim, CA 92806
T: (714) 385-9400
F: (714) 385-9055

1520 The Alameda, Suite 200
San Jose, CA 95126
T: (408) 286-8801
F: (408) 286-1935

600 B Street, Suite 2300
San Diego, CA 92101
T: (619) 233-9898
F: (619) 233-6862

575 E. Locust Street, Suite 311
Fresno, CA 93720
T: (559) 431-4900
F: (559) 431-4046

625 East Carnegie Drive, Suite 120
San Bernardino, CA 92408
T: (909) 890-2265
F: (909) 890-2377

2901 28th Street, Suite 200
Santa Monica, CA 90405
T: (310) 392-8101
F: (310) 392-8057

IN THIS ISSUE...

VOLUME 22, NO. 4 NOVEMBER 2018

ARE VOCATIONAL EXPERT OPINIONS RELEVANT FOR PD ASSESSMENT OF INJURIES ON OR AFTER JANUARY 1, 2013?

By Tracy Sturtevant, LFLM Oakland

The answer to this question is "perhaps." While it is clear that the standard for assessing PD was changed with the passage of Labor Code Section 4660.1, which applies to all injuries on or after January 1, 2013, how this statue is to be interpreted remains unclear.

Labor Code Section 4660.1 reads in part:

a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of injury.

b) For purposes of this section, the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition), as provided in the Guides, multiplied by an adjustment factor of 1.4

Everyone agrees that this statute eliminated "Diminished Future Earning Capacity" as a factor in determining Permanent Disability. In exchange, the level of PD was increased by using a 1.4 adjustment factor. The stated Legislative intent was that this change "eliminates the diminished future earnings capacity from the determination of permanent disability, and limits the definition of permanent disability to include **only a consideration of how age and occupation affects the overall classification of employment of the injured worker, rather than the individual injured worker's ability to compete in the open labor market or reduction of future earnings**." (emphasis added).

Employers and carriers interpret this language as an intent to eliminate the costly vocational expert reports, in effect overturning *LeBeouf*. The **quid-pro-quo** for the injured workers' ceding the right to challenge the schedule through vocational evidence is an automatic 1.4 increase in the rating for all injuries. No longer are vocational assessments of an applicant's diminished further earning capacity or inability to compete in the open labor market relevant, and there is therefore no need for vocational experts' analysis.

(CONTINUED ON PAGE 3)

SATURDAY IS THE 6TH WORKING DAY? REALLY?

Calculation of UR Decision Timeframes and the *Gomez* Decision

By: Jessica Neal, LFLM Anaheim

California Department of Corrections and Rehabilitation Parole and Community Services v. W.C.A.B. (Gomez, Jose) addressed a deceptively simple issue. What constitutes a "**working day**" for the purposes of utilization review? In *Gomez*, both the WCAB and the Court of Appeals determined that the day after Thanksgiving is in fact a **working day** and "counts" in determining the timeliness of a UR decision despite the fact that the day after Thanksgiving is a WCAB holiday. This is a significant opinion on statutory construction that should remind us that the words used in the Labor Code are terms of art that are precisely chosen to fit into a larger statutory scheme and should be interpreted as such. The term "**working day**" is one such term. Just because the WCAB is not working, it does not mean UR is not working.

In *Gomez*, the applicant sustained industrial injuries to his neck, back, left upper arm, left shoulder, and other body parts on 4/6/2001 while employed as a parole agent for Defendant California Department of Corrections and Rehabilitation, Parole and Community Services. He was later awarded workers' compensation benefits with future medical treatment. On 11/23/16, Defendant received via fax an RFA from Applicant's treating physician requesting authorization to perform a cervical spine injection. The next day was Thanksgiving Day. On the following Friday (12/2/2016), Defendant's UR requested additional information from the treating physician. Five days after making the request, on 12/7/2016, UR denied authorization for the recommended treatment.

Applicant asserted that the UR determination was untimely because the Friday after Thanksgiving was a "business" or "working" day for the purposes of the UR timeframes set forth in Labor Code Section 4610 and 8 Cal. Code Reg. Section 9792.9.1. The WCJ agreed and ordered Defendant to authorize the requested medical treatment. Reconsideration was denied by the WCAB. Defendant filed a Writ of Review that was ultimately denied by the Court of Appeals.

The WCJ pointed out that the phrase "**working day**" or "**business day**" is not defined in the workers' compensation statutes or regulations; however, Labor Code Section 4600.4 requires that UR services be available from 9 a.m. to 5:30 p.m. Pacific Standard Time of each **normal business day**, and states that the phrase "**normal business day**" has the same meaning as a "**business day**" under Civil Code Section 9. The Civil Code, in turn, defines a "**business day**" as every day other than Sundays and specified government holidays. Under this section, a Saturday is also not a holiday. (*Gans v. Smull* (Cal. App. 2d Dist. Aug. 29, 2003), 111 Cal. App. 4th 985.) Government Code Section 6700(a) contains a list of government holidays observed in California, but the Friday after Thanksgiving is not included on the list. The WCJ found these provisions controlling and, accordingly, concluded that the Friday after Thanksgiving is a normal working day for purposes of calculating the time for UR to respond to a Request for Authorization.

The WCJ further determined that state holidays identified in Government Code provisions cited by Defendant were personnel-related provisions applicable to state employees and did not apply to UR timeframes, and that Defendant's reliance on certain OSHA regulations was misplaced, as these regulations were specific to OSHA and inapplicable to workers' compensation issues. The WCAB denied reconsideration for the reasons stated in the WCJ's report, portions of which were adopted and incorporated by the WCAB. Like the WCJ, the WCAB concluded that the controlling provision is Labor Code Section 4600.4.

(CONTINUED ON PAGE 3)

UR DECISION TIMEFRAMES

(CONTINUED FROM PAGE 2)

The Court of Appeals determined that this was a question of law that depends on the application of the relevant statutory and regulatory language. The Court of Appeals found that while the day after Thanksgiving is a holiday for state employees (which includes the Workers' Compensation Appeals Board), Labor Code Section 4600.4 explicitly provides the method for determining whether a given day is to be regarded as a "**normal business day**" for purposes of UR decisions. As a result, the WCJ correctly relied on Labor Code Section 4600.4, Civil Code Sections 7 and 9, and Government Code Section 6700 in determining that the day after Thanksgiving is a "**normal business day**" in which UR must be available. Because UR must be available, the Court of Appeals reasoned that it therefore, must be "counted" when determining the timeframe in which a UR decision must be issued. The Court of Appeal stated that "[w]e cannot rely upon informal, non-statutory construction to change the statutory determination."

What is the take away from the *Gomez* decision? The method used to calculate "working days" is the same method used in Civil Code Sections 7 and 9 with reference to Government Code Section 6700, which does not necessarily include all days in which the WCAB is closed. It also includes Saturdays pursuant to the line of reasoning in this case. More generally, it teaches us an important lesson about statutory construction and interpretation - a word or phrase that we may think we understand when it comes to common or everyday usage, may have a different or more precise meaning when taken in the context of the workers' compensation statutory scheme. ⌘

The Workers' Compensation Newsletter is published by Laughlin, Falbo, Levy & Moresi LLP. Contributors to this issue include Tracy Sturtevant (Oakland) and Jessica Neal (Anaheim).

Should you have any questions or comments regarding the Laughlin, Falbo, Levy & Moresi newsletter, or would like to suggest a topic or recent case you think would be of interest, please contact:

Janet Zamecki (LFLM Oakland)
E: jzamecki@lflm.com T: (510) 628-0496

Omar Behnawa (LFLM San Diego)
E: obehnawa@lflm.com T: (619) 233-9898

Nat Cordellos (LFLM San Francisco)
E: ncordellos@lflm.com T: (415) 781-6676

Maryam Jalali (LFLM Anaheim)
E: mjalali@lflm.com T: (714) 385-9400

VOCATIONAL EXPERT OPINIONS

(CONTINUED FROM PAGE 1)

While this argument seems to carry great weight for those cases in which PD is less than 100%, it is more problematic when the claim is alleged to be 100% PD. Although the legislators expressed their intent that "inability to compete in the open labor market" would be irrelevant, that is not what is written into the statute. Applicant attorneys point to Labor Code Section 4660.1(g) which confirms that "nothing in this section shall preclude a finding of permanent disability in accordance with Section 4662." And, Labor Code Section 4662(b), which allows Permanent total disability to be determined "…in accordance with the fact," was not eliminated or amended.

The issue was addressed by a panel decision *Hanus v URS/AECOM Corporation* (2018 Cal. Wrk. Comp. PD Lexis, Anaheim District office, issued July 20, 2018). Defendant filed a Petition for Reconsideration from an award of 100% PD based on a medical opinion coupled with a vocational expert report which concluded that Mr. Hanus was unable to participate in vocational retraining and unable to compete in the open labor market. Not only did the commissioners on the panel allow the vocational experts report into evidence, they upheld the 100% PD award stating: "…the descriptions of

(CONTINUED ON PAGE 4)

VOCATIONAL EXPERT OPINIONS

(CONTINUED FROM PAGE 3)

the extent of applicant's impairments which are caused by his industrial injury in the medical reports of…as referenced and considered by the vocational expert…support the WCJ's finding that applicant is permanently totally disabled." There is nothing in the decision indicating that defendant also offered a vocational expert assessment into evidence. This case may be up on appeal. While it does provide insight into how at least three commissioners view this issue, it is for now only binding on the parties in that case.

A recent case decided by the Third District Court of Appeals, Dept. of Corrections and Rehabilitation & *SCIF v WCAB (Fitzpatrick)*, pertains to the question of using Labor Code Section 4662(b) to prove 100% Permanent Disability. Although addressing a pre-2013 injury (and in a footnote the court confirmed that they were not addressing the 2012 amendments to Labor Code Section 4660), language in *Fitzpatrick* is arguably applicable to injuries on or after January 1, 2013. The court clarified that use of Labor Code Section 4660 is mandatory; there is no basis for concluding that Labor Code 4662(b) creates a second independent path to permanent total disability.

However, in *Fitzpatrick*, the WCAB apparently ignored vocational evidence, which is referenced as being part of the defendant's argument on appeal. The judge apparently relied only on the medical experts. *Fitzpatrick* seems to suggest that vocational evidence may be relevant.

Another of the arguments raised by applicant attorneys relies on the *Almaraz-Guzman* cases, which arguably allow using factors which may not apply to the specific body part but are still within "the four corners" of the *Guides*. This argument points to language on page 8 of the *Guides* which defines disability as "**…an alteration of an individual's capacity to meet personal, social or occupational demands…because of an impairment**" (emphasis in the original). Reference is also made to language on page 9 which states "(a)n individual with a medical impairment can have no disability for some occupations, yet be very disabled for others." Taken together, the argument is that the *Guides* themselves allow "within the four corners" for vocational analysis of impairment to support a physician's opinion as the doctor does not have the expertise to determine the "…alteration of an individual's capacity to meet…occupational demands…;" that would be the purview of a vocational expert. This argument would apply to all levels of PD, not just the potential 100%.

The conundrum for defendants is what steps should be taken to limit delay and cost exposure to what are not inexpensive vocational assessments. Some judges take the position that for post-2012 injuries, vocational reports are no longer relevant; others allow them in on a case-by-case basis. The lesson to take from *Hanus* and *Fitzpatrick* seems to be that a defendant who doesn't rebut the opinion of an applicant vocational expert may do so at their peril. Labor Code Section 4660.1 has not, so far, reduced or eliminated this expense. ⌘

UPCOMING CONFERENCES

2018 National Workers' Compensation and Disability Conference & Expo

December 5 - December 7, 2018
Mandalay Bay - Las Vegas, Nevada

2019 PARMA Conference

Public Agency Risk Managment Association
February 10 - February 13, 2019
Disneyland Hotel - Anaheim, California
Marc Leibowitz (LFLM San Diego) & **Jesus Mendoza** (LFLM San Francisco) will be presenting.
*Come by to see LFLM at **Booth #232** or the **LFLM Sponsored Cyber PARMA***

2019 DWC Educational Conference

Division of Workers' Compensation
Los Angeles: February 11 - February 12
Oakland: February 29 - March 1

2019 Coalition of Workers' Compensation

July 17 - July 19, 2019
Disney's Grand Californian Hotel & Spa - Anaheim, California

Kids' Chance of California (KCOCA)

Educating Children of Injured Workers

KCOCA is a non-profit organization dedicated to providing need-based scholarships to the children of fatally or seriously injured workers in California. Now in its fifth year since inception, KCOCA has raised more than $480,000 and provided 19 students with scholarships for college and technical school. The organization maintains exhibit booths and speaking opportunities at the various industry conferences throughout California such as CWC, PARMA, DWC Los Angeles and Oakland, as well as CSIA.
If you are attending any of these conferences, swing by the KCOCA booth and say hello!
Pick up some information on how you can get involved in
improving the lives of the children of injured workers.
Make a donation, refer a scholarship or volunteer your time.
Visit kidschanceca.org or call (415) 561-6275.

DIVERSITY

The LFLM Diversity Committee, **Carroll Wheatley** (San Bernardino), **Nat Cordellos** (San Francisco), **Omar Behnawa** (San Diego) and **Erin Walker** (Oakland), is initiating another year of the LFLM Diversity Book Scholarships for law schools around the state. This Fall, LFLM has been proud to sponsor the Santa Clara School of Law Diversity Gala benefitting the Thurgood Marshall Civil Rights Scholarship Fund as well as sponsoring the Lambda Fall Spectacular benefitting the Jeffrey Poile LGBTQ Memorial Scholarship at University of the Pacific McGeorge School of Law. We encourage LFLM attorneys and clients to contact the LFLM Diversity Committee regarding events-of-interest in 2019 with respect to diversity & inclusion efforts within the legal profession to expand our efforts!