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WORKERS' COMPENSATION NEWSLETTER

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CHRONIC TRAUMATIC ENCEPHALOPATHY AND THE WORKERS' COMPENSATION SYSTEM

By Ashley R. Nijinski, LFLM Anaheim

Recently, workers' compensation sports cases have seen an influx of claims for brain injuries from prior professional athletes. Some of these claims involve applicants who already settled their claims by way of Compromise and Release years ago or who are including such in their initial filing.

The science surrounding Chronic Traumatic Encephalopathy is relatively new and at this point, the future of Chronic Traumatic Encephalopathy in relation to a workers' compensation claim is unknown. Speculation would lead practitioners to believe that this disease will ultimately be treated like asbestos claims and allow for a latency period, since symptoms of trauma to the brain only manifest years down the line.

What is Chronic Traumatic Encephalopathy?

Chronic Traumatic Encephalopathy, more commonly referred to as CTE, is a neurodegenerative brain disease, which can be caused by repetitive trauma to the head. The repeated head injuries cause a protein to form clumps in the brain, which slowly spreads, killing brain cells. Chronic Traumatic Encephalopathy was originally known as **dementia pugilistica**, which originated in the 1920s and 1930s and was utilized to describe mental and motor deficient findings in boxers who had suffered repeated head injuries. Eventually, scientists were able to identify a set of cerebral changes, including changes to the cerebral cortex, diencephalon, and medial temporal lobe. These changes occurred with repeat head traumas, which became known as Chronic Traumatic Encephalopathy. (Rogers, Kara. "Chronic Traumatic Encephalopathy." Encyclopædia Britannica, Encyclopædia Britannica, Inc., 17 Jan. 2019, www.britannica.com/science/chronic-traumatic-encephalopathy)

Diagnosing Chronic Traumatic Encephalopathy

A primary issue with CTE claims and the possible creation of a latency period is that CTE cannot be definitively diagnosed without direct tissue examination after death. Boston University indicates that MRIs, CTs, or other brain imaging methods cannot conclusively diagnose Chronic Traumatic Encephalopathy. The lack of available equipment to unequivocally diagnose the disease is part of the reason we may see the Workers' Compensation Appeals Board create a latency period, which will allow the applicant to pursue the claim years later, or possibly the applicant's dependent(s) to pursue a death claim. (Frequently Asked Questions about CTE,

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VOUCHERS AND THE UN-WRITTEN BURDEN FOR DEFENDANTS

By Donald E. Applegate, LFLM San Francisco

The purpose of SB 863, passed in 2012, was to streamline the transfer of benefits to injured workers and remove the possibility of unnecessary litigation. As we have seen over the last six and a half years, the law, as interpreted by the WCAB, has certainly had the intended effect of passing additional benefits on to applicants. However, it has also created new avenues for litigation.

Applicants' entitlement to a Supplemental Job Displacement Voucher ("SJDV") was one issue that was thought to be simplified but instead has brought about a good deal of litigation. The recent WCAB opinion in *Fndkyan v. Opus One Labs* dealt with an applicant's entitlement to the voucher. In order to determine whether an applicant is entitled to the voucher for an injury occurring on or after January 1, 2013, we turn to Labor Code Section 4658.7.

For Section 4658.7(b)(1) to apply, a medical-legal evaluator must provide a report wherein they determine the applicant is permanent and stationary, and has permanent partial disability. Defendant is obligated to provide the voucher unless the employer offers regular, modified, or alternative work within 60 days of receipt of a report by a "primary treating physician, agreed medical evaluator, or qualified medical evaluator, in the form created by the administrative director pursuant to subdivision (h). . . ."

Subdivision (h) states that the aforementioned form is a "mandatory attachment" to a medical report that informs defendant of "work capacities and of activity restrictions resulting from the injury that are relevant to potential regular work, modified work, or alternative work" (Labor Code Section 4658.7(h)(2)). California Code of Regulations Section 10133.31(b) identifies this form as the Physician's Return to Work & Voucher Report ("Physician's RTW Form").

Defendants in *Fndkyan*, as well as many defense attorneys and claims administrators, read this section of the Labor Code and determined that defendant was not obligated to make a return to work offer or issue the voucher unless the Qualified Medical Evaluator ("QME") provided the Physician's RTW Form. The Workers' Compensation Judge agreed. Applicant's attorney and, most importantly, the WCAB thought otherwise.

The facts of the case are undisputed. The QME issued a report which the defendant received. The QME did not provide a Physician's RTW Form. In his report, the QME determined applicant was permanent and stationary and provided permanent disability impairment ratings. The QME also gave applicant work restrictions for multiple body parts. The case later settled via Compromise and Release. Applicant's entitlement to the voucher was not resolved in the Compromise and Release.

After the Order Approving was issued, applicant made a demand for the voucher, which was denied by defendant. The matter proceeded to Trial and the Workers' Compensation Judge ruled that applicant was not entitled to a voucher because there was no evidence that defendant had been provided with the Physician's RTW Form. Applicant filed a Petition for Reconsideration. Notably, defendant did not file an answer.

In the Petition, applicant argued that defendant had the burden to obtain the Physician's RTW Form; the QME's failure to provide the Physician RTW Form did not obviate defendant's obligation to make a return to work offer or, if they did not make an offer, provide the voucher. The WCAB agreed. The WCAB stated that the purpose of the form is to notify defendant of applicant's permanent and stationary status, permanent disability, and work restrictions. In this case, as in the vast majority of cases, the QME provided that information in his report.

To support their conclusion, the WCAB turned to a case outside of the workers' compensation realm. They cited *County of Kern v. T.C.E.F., Inc.* (2016) 246 Cal.App.4th 301, which dealt with the County's attempt to enjoin the operation of a medical marijuana dispensary. In that case, the Court of Appeals stated, "A general principal of statutory construction is that courts do not place form over substance where doing so defeats the objective of a statute, especially a statute designed to protect the public interest. (Citations omitted.)"

With that, the WCAB determined Labor Code Section 4658(b)(1) requires the defendant to obtain the Physician's RTW Form when the QME does not include it with their initial report. If defendant does not receive

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the form within 60 days of receipt of the report, the employer will have to make an offer of work based on the work restrictions found in the report. If no such offer is made, the voucher is owed.

It could be argued that this case is limited to this particular set of circumstances. In *Fndkyan*, defendant did not request the Physician's RTW Form after receiving the QME report. The decision did not address what happens if defendant subsequently requests the form but it is still not provided by the QME. QMEs often do not address what is asked of them in a cover letter. When this happens, defendant has to request a supplemental report. The QME then has 60 days to issue a supplemental report, the same amount of time defendant has to make a return to work offer. It is common to have cases where the QME did not respond to defendant's request for a supplemental report within the statutorily-mandated 60 days. Is defendant still required to make an offer based on the work restrictions found in the report?

Based on the WCAB's "form over substance" quotation, it appears the answer is yes – defendant will now have to make an offer of regular, modified, or alternative work based on the work restrictions (or lack thereof) provided in the QME's report. Stating that defendant has the burden to request the Physician's RTW Form seems irrelevant.

The Workers' Compensation Newsletter is published by Laughlin, Falbo, Levy & Moresi LLP. Contributors to this issue include Donald Applegate (San Francisco) & Ashley Nijinski (Anaheim).

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This will not have an effect on the many defendants that were already using the work restrictions provided in the Qualified Medical Evaluation report, regardless of whether the Physician's RTW Form was completed. However, for those that were refusing to provide the voucher simply because the doctor had not completed the form will no longer be able to do so.

An important takeaway from this case is the WCAB's "form over substance" argument. It brings to mind Labor Code Section 3202, which states that the Labor Code "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." This section was not discussed by the WCAB in their decision. As seen in this case, the WCAB will interpret the law in order to effectuate the transfer for benefits to an injured worker. Even a word as clear as "mandatory" can be thrown by the wayside as long as it is interpreted that the legislature had intended to provide benefits.

As a practice point, it is best practice to address the voucher in the Compromise and Release. While you cannot initial the SJDB (Supplemental Job Displacement Benefit) line in a Compromise and Release, you can add language in the document that states applicant is not a Qualified Injured Worker and, therefore, not entitled to the voucher. In this case, applicant was terminated for cause. The parties could have inserted language into the Compromise and Release that applicant was not entitled to a voucher. This approach may allow defendants to avoid uncertainty, unnecessary litigation and, most importantly, providing the voucher.

Finally, one wonders how the WCAB might have ruled had defendant filed an answer. This provides another important takeaway from this case: no matter how strong or weak you think your argument may be, always file an answer. You never know how a judge or the WCAB will rule. If they only get one side of the argument, there is always a chance the WCAB will choose that side. The consequences could not only affect the outcome of that particular case but they may resonate throughout an entire field of law. Sure, the WCAB may still rule in the opponent's favor, but why take a chance when the outcome could cause a burden imposed on a QME to be changed to a burden on defendants? ⌘

CHRONIC TRAUMATIC ENCEPHALOPATHY

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Boston University's Chronic Traumatic Encephalopathy (CTE) Center, https://www.bu.edu/cte/about/frequently-asked-questions)

In lieu of conclusive objective evidence, doctors are utilizing symptoms, brain scans and presumptions to determine the presence of Chronic Traumatic Encephalopathy. They are also relying on research conducted on deceased football players. One damaging study presented by The Journal of the American Medical Association examined the brains of 111 deceased NFL players. Of these 111 brains, 110 were determined to suffer from Chronic Traumatic Encephalopathy. (Joe Ward, Josh Williams & Sam Manchester, 110 N.F.L. Brains, N.Y. Times, July 25, 2017, at https://www.nytimes.com/interactive/2017/07/25/ sports/football/nfl-cte.html)

Chronic Traumatic Encephalopathy in the News

Chronic Traumatic Encephalopathy has made headlines in recent years and likely caused a rise in workers' compensation claims since the NFL settled a class action in 2015. The class participants argued the NFL knew about a link between brain injuries and long-term neurological problems and took measures to cover it up. This nearly one billion dollar settlement only extends monetarily to cover former players who died with CTE before the final approval date of the settlement. For those that were not deceased, the settlement allows for a Baseline Assessment Program, which would provide neuropsychological examinations for eligible retired NFL players and additional medical testing, counseling and/or treatment if they are diagnosed with moderate cognitive impairment. (N.F.L. Concussion Settlement: https://www.nflconcussionsettlement.com/)

Chronic Traumatic Encephalopathy Claims and the Workers' Compensation Appeals Board

Many prior applicants are filing to extend benefits to include new symptoms of Chronic Traumatic Encephalopathy. Most workers' compensation professionals are familiar with the case of *Dorsett v. Denver Broncos, Dallas Cowboys*, 2013 Cal. Wrk. Comp. P.D. LEXIS 359. In that case, it was found that Mr. Dorsett's claim was barred per res judicata since he had accepted a settlement for orthopedic injuries in 1991, despite being diagnosed with Chronic Traumatic Encephalopathy. Many workers' compensation professionals are utilizing this case in an attempt to bar new claims of brain injury. However, with the 2017 decisions of *Morales v. Universal Furniture/Amer. Home Assur. Co.* (9/25/17) ADJ634371 45 CWCR 262 and *Whitson v. Dept. of. Social Services-IHSS* (10/23/17) ADJ10658899, 45 CWCR 286, the interpretation of settled body parts is now strictly interpreted to what is resolved in paragraph 3 only of any Compromise and Release. The reasoning behind barring Anthony Dorsett's case was that there was language in the Compromise and Release barring additional claims. As such, these older claims barring the new claims will not be persuasive to any Workers' Compensation Judge.

This is further illustrated in the case of *Ferragamo vs. St. Louis (Los Angeles) Rams* (2017) 45 CWCR 175,

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CHRONIC TRAUMATIC ENCEPHALOPATHY

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involving an applicant who played quarterback for the Los Angeles Rams. This cumulative trauma claim resolved in 1988 via Compromise and Release and involved "multiple body parts, including but not limited to orthopedic, internal and ENT." The settlement also included a generic release of all future claims whether known or later arose. Many years later, Mr. Ferragamo was diagnosed with Chronic Traumatic Encephalopathy as a result of repetitive head trauma occurring during his NFL career. The applicant filed a new Application for Adjudication for a brain injury for the same CT period that was previously resolved. Applicant's attorney argued that the effects of a Chronic Traumatic Encephalopathy were latent and that it could not have been known at the time of the original 1988 Compromise and Release. Defendants asserted the additional claim of injury was previously resolved and was thus barred by res judicata because the Compromise and Release had language releasing the employer from additional claims.

Ultimately, the Workers' Compensation Appeals Board, by split panel, held that the res judicata doctrine did not bar the applicant's new claim for a brain injury. The Workers' Compensation Appeals Board reasoned that the applicant could not have "knowingly" released a condition based upon the non-existence of evidence known to either the medical or legal community. Citing *Casey vs. Proctor* (1963) 59 c2d 97 the WCAB indicated that a contract should be enforced where an injured worker knows or should have known about potential further complications. As such, the WCAB concluded that since Chronic Traumatic Encephalopathy was unknown to the medical community, the applicant could not have known.

In light of these recent decisions, applicant's attorneys could be encouraged to file claims from the 1980s, 1990s, or even earlier.

Settlement or Trial of a Chronic Traumatic Encephalopathy Claim?

Setting for Trial – Challenge the medical reporting for not being substantial medical evidence. There is contradicting research on proving the unequivocal existence of Chronic Traumatic Encephalopathy in applicants without testing after death. As such, when obtaining either Panel Qualified Medical Evaluator reports or Agreed Medical Evaluator reports, be sure to determine their exact studies, objective and subjective findings to determine the presence of Chronic Traumatic Encephalopathy either through an interrogatory or a cross-examination. Attempt to provide the doctor with research that indicates the diagnoses cannot be unequivocally determined until death, or ensure the doctor researched and accounted for this research.

Settlement – When settling any sports case, include 110-brain and CTE as a body part in paragraph 3 of the Compromise and Release. We want to avoid additional claims in the future and this is one way to bolster barring such in the future. In some cases, a prior Compromise and Release has resolved 110-brain within paragraph 3 and applicant attorneys are still filing a new Application for Adjudication for 110-brain and more specifically noting Chronic Traumatic Encephalopathy. Applicant attorneys are arguing that without medical reporting the claim is still not barred. As such, it would be good practice to include a waiver of final/any reporting in relation to neurology, so it can be established that the applicant chose to give up his right to pursue the claim and bar a future claim.

At this juncture, the future of Chronic Traumatic Encephalopathy in workers' compensation is uncertain. Considering the medical evidence, which commonly shows the presence of Chronic Traumatic Encephalopathy in prior professional athletes subject to repetitive head trauma, this injury will not be disappearing any time soon. Considering the history of asbestos litigation and the use of latency to identify the last year of injurious exposure, it is probable the Workers' Compensation Appeals Board will allow latencies for Chronic Traumatic Encephalopathy. ⌘

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UPCOMING CONFERENCES & EVENTS

2019 California Workers' Compensation & Risk Conference
September 3 - September 6, 2019
Dana Point, California
LFLM is the Conference Bag Sponsor and will have a booth at the conference. Demetra Johal (Managing Partner of the LFLM Glendale office) is presenting, "Work Comp Case Studies - What's On The Horizon?"

2019 Western Regional RIMS
September 9 - September 11, 2019
Las Vegas, Nevada
Omar Behnawa (LFLM San Diego) presenting: "Keeping Your Cool: Challenges of Secondary/ Concurrent Employment in Workers' Compensation Law"

2019 CAJPA
September 11 - September 13, 2019
Lake Tahoe
LFLM is sponsoring the Thursday Night Reception and will be representing at Booth P515.

2020 PARMA
February 25 - February 28, 2020
Monterey, California
Jesus Mendoza (LFLM San Francisco) presenting: "Latency Lost? Recent Developments in Rebutting the Cancer Presumption in Public Safety Cases"

2020 EWC
March 29 - March 30, 2020
Huntington Beach, California
LFLM is the Pit Stop Break Sponsor

LFLM ANNOUNCEMENT

Concord Office

While maintaining a sizeable Oakland office, we are proud to announce the addition of our Concord office housing several attorneys as well as our administrative staff. Jeff Lowe, Esq. is the Concord Managing Partner. The office is located at 1001 Galaxy Way, Suite 200.