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WE PROMISE AGGRESSIVE, COST-EFFECTIVE REPRESENTATION

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The Case of the Missing Comma

by Donald Barthel, Esq.

Effective January 1, 2005, California's newest Permanent Disability Rating Schedule (PDRS) began to be implemented. This PDRS is used to convert impairment (obtained via the AMA *Guides*) into PD. This conversion takes place by adjusting for diminished future earning capacity (FEC), occupation, and age.

As we all know, the 2005 PDRS/AMA *Guides* tend to result in significantly less PD than did the 1997 PDRS. Thus, huge battles are raging all over California as applicants push to have their cases rated via the old 1997 PDRS, while defendants push to apply the AMA *Guides*/2005 PDRS. As these battles continue, there is a recurring theme. Applicants argue there are three exceptions that permit a pre-1/1/05 date of injury to be evaluated using the 1997 PDRS; defendants assert that there are only two such exceptions.

At issue is the language found in Labor Code Section 4660(d), which provides that for purposes of injuries prior to January 1, 2005, the new AMA-based schedule is applicable "where there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by Section 4061 to the injured worker."

Bradford & Barthel, LLP, argues there are only two scenarios requiring that a pre-1/1/05 date of injury be rated using the old, more expensive 1997 PDRS:

1. If a comprehensive medical-legal or PTP report demonstrating the existence of PD issued prior to 1/1/05; and/or

2. If a Labor Code Section 4061 (End of TD) Notice was "required" prior to 1/1/05.

The aforementioned battle relates to the first exception. At B&B, we have argued successfully that this first exception applies only if the PTP report *or* comprehensive medical-legal report issued prior to 1/1/05 "demonstrates the existence of permanent disability." In particular, we argue that a comprehensive medical-legal report that issued prior to 1/1/05 that did not demonstrate the existence of permanent disability will not permit an applicant to escape the 2005 PDRS.

CAAA and some judges argue that the issuance of a "comprehensive medical-legal report" prior to 1/1/05 will place the applicant within the 1997 PDRS, *regardless* of whether that comprehensive medical-legal report demonstrated the existence of permanent disability. Indeed, some at CAAA have indicated that even a comprehensive medical-legal report issued prior to 1/1/05 declaring applicant TTD will, nevertheless, preclude using the AMA *Guides*/2005 PDRS. In short, applicant attorneys everywhere argue that only the pre-1/1/05 PTP report must demonstrate the existence of PD if it is to successfully keep applicant out of the AMA *Guides*.

How do we resolve this issue? It doesn't require advanced, legal analysis. Rather, we just need to remember what we learned in school about grammar to resolve this riddle! Indeed, it comes down to a comma.

The Case of the Missing Comma *continued on page 4*

To Work or Not to Work: The 15% Question

By Steven A. Schwartz, Esq.

When Does the 15% Increase or Decrease of Permanent Disability Apply?

It is effective now and applies to all dates of injury occurring on or after 1/1/05.

How is It Determined?

Basically, it comes down to whether the employer can provide regular, modified, or alternative work that will last at least 12 months after the employee is deemed permanent and stationary and maximum medical improvement is reached.

Within 60 days of becoming MMI, the employer must notify the injured worker as to whether work meeting the above criteria is available. If no such job is offered (and the employer has 50 or more employees), each indemnity payment remaining to be paid is increased by 15% [see Labor Code §4658(d)(2)].

If the job is offered, *regardless of whether the injured worker accepts or rejects it*, each disability payment remaining to be paid from the date the offer was made is decreased by 15% [see Labor Code §4658(d)(3)(A)]. *Note: there is no minimum number of employees required for this decrease to be triggered.*

If the offered work is terminated and any permanent disability payments remain due, each remaining PD payment is increased 15 percent. This does not apply to an employer employing fewer than 50 employees.

An employee who voluntarily terminates employment is not eligible for the 15% increase.

What if Modified Work Is Made Available Before MMI Status Is Achieved?

Until an employee is MMI, the permanent restrictions and the ability of an employer to accommodate them cannot be determined. Thus, even if the employee is performing modified work, no notice is required until P&S/MMI is achieved.

Are All Payments Affected?

No, only those PD payments that remain outstanding after the employer has notified the injured worker in a timely manner. Thus, on receipt of an MMI report, PDAs at the regular rate can commence. After the employer decides whether a job can be provided, the remaining payments are adjusted.

Strategy tip: There is an obvious economic advantage to delaying determination when it is unlikely that a permanent regular, modified, or alternative position will be available. During the 60-day inquiry, all permanent disability payments issue at the regular rate.

Is It 15% of the Amount of Each Check or an Increase of 15% Permanent Disability?

Does the $200 per week payment increase to $230 per week, or do I pay the original level of PD plus 15 more percentage points at the regular rate? The statute increases each weekly payment by 15%, payable for the established number of weeks for the percentage of PD. It does not increase (or decrease) the overall PD.

How Do I Indicate in the Settlement that the Increase/Decrease Applies?

A check box indicates whether this provision applies. *Strategy tip: Include language under the comment section to reflect the change in weekly rates.*

Steven A. Schwartz *is a Senior Partner in Bradford & Barthel's Sacramento Office.*

Bradford & Barthel Areas of Practice

Workers' Compensation Law
Bradford & Barthel, LLP has assembled an outstanding group of workers' compensation defense practitioners dedicated to delivering valuable, knowledgeable representation to clients statewide. We offer custom AMA *Guides* training and customized rating analysis.

Subrogation and General Civil Litigation
Extensive training and trial experience in corollary issues ensure that B&B always provides clients with a distinct tactical advantage, whether defending a workers' compensation, subrogation, or civil issue. Our attorneys have tremendous depth of experience in all facets of litigation, including:

L.C. §132a Discrimination
Serious & Willful Misconduct
Subrogation
Contract Disputes
Construction Defect cases
Personal Injury

Employment and Labor Law
We provide private and public employers with a full range of legal services for every workplace need. B&B combines experience, sensitivity, and accessibility to each of our clients, and we recognize that affordable, customized solutions are key. We offer Mandatory Supervisor Training.

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School Daze – New Training Requirements for Workers' Compensation Adjusters

By Christopher P. Stettler, Esq.

New Regs Are Here

Effective 2/22/06, California set forth new regulations outlining minimum standards for training, experience, and skill that workers' compensation adjusters (including adjusters working for medical billing entities) must possess. (See California Code of Regulations, Title 10, Chapter 5, Subchapter 3, Article 20.)

Who is Covered?

The regulations apply to all examiners, supervisors, and others responsible for determining the validity of a workers' compensation claim.

What Exactly is Required?

Beginning February 22, 2006, every insurer must ensure that all adjusters (including medical-only) who handle workers' compensation claims receive the mandated training. Training must include at least 160 hours (at least 120 of which must be conducted in a classroom). Medical-only adjusters must receive at least 80 hours of training (at least 50 of which must be in a classroom).

However, a person can adjust or review medical bills for up to 12 consecutive months during training while under the supervision of an instructor or experienced claims adjuster.

It Never Ends!

Once the initial training requirements have been met, claims adjusters must receive at least 30 hours of continuing education training every two years. Medical-only adjusters must receive at least 20 hours of training every two years. The regulations further define the curriculum that may qualify for training certification as well as who may provide the training.

B&B to the Rescue

Bradford & Barthel has highly experienced, qualified training instructors available to provide both the initial and ongoing training required. Our instructors (experienced attorneys who have practiced in workers' compensation-related matters for at least 8 out of the last 12 years) are available to provide annual certification by July 1 of each year.

Bradford & Barthel can come to you and work with management to classify all personnel according to the regulations, certify them for initial training requirements, and develop a plan to meet educational requirements every two years. We also offer our services to meet ongoing training requirements for education every two years with seminars on relevant workers' compensation issues.

Please see our website at http://www.bradfordbarthel.com/Training.htm for additional information regarding training and services offered, or call Don Barthel at (916) 986-1263.

***Christopher P. Stettler** is the Managing Partner of Bradford & Barthel's San Diego Office.*

***NOTE:** Just prior to publication, a three-member panel released Racquel Torres v. SDM Precision Products, LAO 832511 (7/24/06), ruling that "[t]he grammar of the third sentence at section 4660(d) does not require a "comprehensive medical-legal report that also indicates the existence of permanent disability, in order for the prior rating schedule to apply." We discuss 4660(d) on page 1 of this issue, **The Case of the Missing Comma**. In our next issue (September/October 2006), we will discuss why we think Racquel Torres v. SDM Precision Product was wrongly decided. - Editor*

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The Case of the Missing Comma *continued from page 1*

At the heart of CAAA's argument is the assertion that the phrase "indicating the existence of permanent disability" modifies only the phrase "report by a treating physician." More to the point, they argue that the phrase "indicating the existence of permanent disability" does not modify "comprehensive medical-legal report." Thus, if this argument were true, the "comprehensive medical-legal report" need not demonstrate the "existence of permanent disability" to keep the AMA *Guides* from being applied. This argument, if accepted, creates the third exception to the 2005 PDRS/AMA *Guides* for pre-1/1/05 dates of injury.

Your 5th grade grammar teacher would not have accepted CAAA's arguments. Neither should you! Grammatically, CAAA's argument would only be true *if* Labor Code 4660(d) had been drafted with an additional comma:

"…when there has been either no comprehensive medical-legal report, or no report by the treating physician indicating the existence of permanent disability…"

That comma, by separating the phrase "comprehensive medical-legal report" from the qualifying phrase "existence of permanent disability" would have the impact desired by CAAA. However, that comma was *not* included in Labor Code Section 4660(d). There is nothing to separate "comprehensive medical-legal report" from the phrase "indicating the existence of permanent disability" other than the phrase "report by a treating physician." In short, the requirement that a report indicate the "existence of permanent disability" modifies *both* of the phrases immediately preceding it: "report by a treating physician" *and* "comprehensive medical-legal report."

Given the California Legislature's failure to include the comma sought by CAAA, the argument for the three separate exceptions to the PDRS/AMA *Guides* simply must fall flat. Viva la AMA *Guides*! Viva la 2005 PDRS!

***Donald Barthel** is a Founding Partner of Bradford & Barthel, LLP.*

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