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February 2016 Workers' Compensation Law Update

Snob job in El Paso

This month our newest attorney, Robert Greenlaw, was evaluating a “Letter of Causation” from a well-known chiropractor in El Paso when he spotted something fishy. The doctor opined that a work accident caused lumbar disc pathology that showed up on an MRI, but some of the language in the letter just didn’t read as though it was actually written by the doctor.

Rob investigated and discovered that the doctor had lifted a large block of text – *verbatim* – from a discussion of radicular pain on Wikipedia. He also found that the doctor had lifted another large block of text – *verbatim* – from a discussion of low back pain on a website at www.medic8.com. Significantly, that website includes this warning on its home page:

You should not use the information on this website as a substitute for professional medical advice from your doctor and should always visit a doctor in the first instance of any medical concerns.

The website at www.medic8.com appears to be designed to help patients find doctors for cosmetic surgery and other elective procedures. It is maintained by Medic8, Ltd., a company headquartered in Scotland.

“Oklahoma Opt-Out” ruled unconstitutional

Oklahoma’s system of allowing businesses to opt out of the state workers’ compensation program (the “Oklahoma Opt-Out”) is unconstitutional, the Oklahoma Workers’ Compensation Commission said on February 26.

Under the Oklahoma statute, an employer may opt out of the workers’ compensation system but retain exclusive remedy protections if they provide workers with an alternate benefits plan. Some have said the system allows Oklahoma employers to “have their cake and eat it too.”

According to the Commission, the opt-out provision established a dual system in which injured workers are not treated equally. The Commission’s decision is appealable to the Oklahoma Supreme Court.

Pill mill doc gets 30 years to life

This month a California judge sentenced Dr. Hsiu-Ying “Lisa” Tseng to 30 years to life in prison for the murders of three of her patients who fatally overdosed. Tseng is among a small but growing number of doctors charged with murder for prescribing painkillers that killed patients. She is reported to be the first doctor in the United States to be convicted of murder by over-prescribing drugs.

Commissioner Brannan reappointed for one-year term

Governor Greg Abbott has reappointed Ryan Brannan as Commissioner of Workers’ Compensation for a term to expire February 1, 2017. Mr. Brannan was originally appointed by Governor Rick Perry in 2014.

Mystery Lawyer from Stone Loughin & Swanson is headed to The Big Easy

One of our attorneys will be a featured speaker in a panel discussion of compound drug usage at the Workers’ Compensation Midwinter Seminar and Conference in New Orleans on March 12. The conference is sponsored by the Labor and Employment Law Section of the American Bar Association. Our lawyer will be speaking from 3:45 to 4:45. Coincidentally, she’ll be holding down a barstool at Pat O’ Brien’s from 4:45 to 6:45. Or later. The first to respond with the name of the attorney will win a gift card of choice in an appropriately nominal amount .

Inaugural Workers’ Compensation Summit—change is afoot

The first Workers’ Compensation Summit has been scheduled for early May. The date and location of the summit has not been (and will not be) publicly announced until after the summit concludes.

In the summit, which will be moderated by Robert Wilson, CEO of Workers’ Compensation.com, approximately 45 invited system leaders of all stripes will brainstorm on emerging topics in the workers’ compensation system. According to Wilson, the findings of the summit will be published shortly after it concludes.

Division amends TIBs rate rule

The Division has amended Rule 129.3, regarding Amount of Temporary Income Benefits, to increase the hourly wage that determines whether a worker is paid TIBs at the rate of 70% or 75% of the Average Weekly Wage for the first 26 weeks of benefits. The rule implements the amendment to Labor Code section 408.103 which became effective September 1, 2015 and which raised the threshold from \$8.50/hour to \$10.00/hour for claims with a date of injury of September 1, 2015 or later.

Houston court rejects definition of imbecility used by the Division for years

This month a Houston court of appeals rejected the Division's definition of the term "imbecility" for purposes of determining entitlement to Lifetime Income Benefits.

The case involved Francisco Chamul, a brick mason who fell from a scaffold onto a concrete slab ten feet below, suffering multiple skull fractures and consequential brain injury. According to a designated doctor he now functions at the level of an 11 or 12 year-old and will require a caretaker for the rest of his life. He applied for LIBs.

Under Labor Code §408.161, LIBs are payable for an injury to the brain resulting in incurable "insanity or imbecility." However, the statute does not define the term "imbecile."

A Division hearing officer found that Chamul was not entitled to LIBs. The hearing officer cited prior decisions of the Appeals Panel which rely on a definition of the term "imbecile" in the 1991 edition of *Webster's Ninth New Collegiate Dictionary*. That dictionary defines "imbecile" as a "mentally deficient person, especially a feebleminded person having a mental age of three to seven years and requiring supervision in the performance of routine daily tasks or caring for himself." The hearing officer determined that Chamul had not been shown to exhibit the mental age range in question (a mental age of three to seven years).

The court of appeals reversed and remanded to the Division for further proceedings. It noted that the Legislature added imbecility as a criterion for LIBs in 1917 and that dictionaries written at that time included more generalized definitions of the term "imbecile" and did not limit the term to the mental age range of three to seven years. According to the court, the 1991 dictionary on which the Division relied is "not an appropriate source to discern the meaning of a term incorporated into a statute more than 70 years earlier."

Chamul v. Amerisure Mutual Ins. Co.