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## September 2015 Workers' Compensation Law Update

### OK, No More Putting Your Head in the Sand – The Entertainment Starts Tomorrow

The much awaited coding change from ICD 9 to ICD 10 is finally here. It is hard to say what impact it will have on adjusters and other system participants, but change of any kind has unintended consequences. And many of us are, frankly, resistant to change! One obvious difference is that diagnoses will now be even more specific, resulting in more care being taken in evaluating initial claims of injury. And evaluating extent of injury issues, and the relationship between disability and the accepted or disputed claimed diagnoses, will require an even higher level of expertise. ICD 10 codes can be accessed on the internet, and we will be keeping the sites busy. There are several sites, such as [www.icd10data.com/Convert](http://www.icd10data.com/Convert) that provide crosswalks between ICD 9 codes and ICD 10 codes and descriptions for the new codes.

Here are a couple of entertaining examples of the trend toward specificity: W51.XXA: Accidental striking against or bumped into by another person, V97.33XD: Sucked into jet engine, subsequent encounter, S10.87XA: Other superficial bite of other specified part of neck, initial encounter, R46.1: Bizarre personal appearance. Over time you may be lucky enough to see one of these in a comp case. After all, there are now well over 60,000 codes in ICD 10, compared to around 13,000 codes in ICD 9.

Essay Contest: We challenge you to write a short essay describing a possible workers' compensation scenario to which the new ICD 10 codes could be applied. Surely someone wants to take this on!

### The Word is Out: Attorney Robert Greenlaw Joins the Firm

We are happy to announce that we have added another experienced workers' compensation attorney to the firm. Robert has been licensed to practice law since 2003 and much of his experience has been working within state agencies, including the DWC, where he was a well-respected hearing officer for over 8 years. It will be a while before Robert is up and running, given that private practice is such a contrast to working for the government, but he is already proving to have an excellent legal mind and a desire for serving our clients' best interests. Join us in welcoming him!

## **New BRC Procedure**

A new BRC pilot program has been implemented in the Dallas field office wherein the parties are put into different rooms and the BRO shuttles between rooms to facilitate potential agreements as to the issues. Given that BRCs are typically allotted only 45 minutes, it will be interesting to see if this type of mediation, which is called “caucus based,” is more effective than what the parties have come to expect after 25 years of practice before the Division.

## **EDI Initiatives on Uniformity of Claim Numbers**

It has been the long-time practice of TPAs and insurance carriers to assign their own identifying number to workers’ compensation claims. This caused problems for DWC in its attempts to link medical bills to specific workers’ compensation claims. It is often the case that an insurance carrier will change its TPA during the course of a claim, and thus the identifying number would change in the EDI transmission. DWC has plans to require the same number to be used throughout the life of a claim in submitting EDI data, but system participants are balking, given the problems the mid-stream change will cause. But the agency is convinced that this will assist it in monitoring treatment and billing issues that may otherwise stay under the radar. Stand by for further developments.

## **Ambulance Fee Guideline Clock— DAYS ELAPSED: 607**

The DWC first decided that its Medical Fee Guideline does not apply to ambulance services, ground or air, on January 21, 2014. If there is no fee guideline for ambulance services, the DWC needs to adopt one and it has a statutory obligation to do so. The air ambulance fee disputes are piling up. The longer the DWC waits to adopt a fee guideline, the worse the problem will get. With this in mind, we announce the creation of the “Ambulance Fee Guideline Clock” counting the days since DWC decided its guideline doesn’t cover ambulance services. The clock will stop when an ambulance fee guideline is adopted.

## **Workers’ Compensation Weekly Benefit Rates Increase**

The new state AWW for dates of injury from October 1, 2015 through September 30, 2016 is \$895.08. The maximum and minimum weekly benefit rates based on the new wage are \$895 and \$134, respectively. The link for looking up rates for other dates of injury is [www.tdi.texas.gov/wc/employee/maxminbens.html](http://www.tdi.texas.gov/wc/employee/maxminbens.html). As a reward for reading this, the first person to respond and tell us what the state AWW was in 1995 will receive (if allowed by their employer) a \$50 gift card to a famous coffee house.

## Bad Docs

Arthur S. Hernandez, M.D. is forbidden to provide treatment to workers' compensation patients beginning March 16, 2016. Chiropractor Hank K. Miller has been removed from the Designated Doctor list and the MMI/IR certification list as of September 10, 2015. The removal appears to be permanent.

## Good Cases

A Cautionary Tale for Non-Subscribers – The Houston Court of Appeals recently affirmed a \$680,000 judgment in a negligence suit against Katy Springs & Manufacturing, Inc. Had the company acquired workers' compensation insurance for its employees, the suit would have been barred by the exclusive remedy provisions of the Labor Code. The accident involved what the opinion describes to be a company-made wire reel that lacked any safety features and which was recognized by several Katy Springs employees as being unsafe. *Katy Springs & Manufacturing, Inc. V. Joseph Favolora*, Houston Court of Appeals – 14<sup>th</sup> Dist. 2015 WL 5093232.

Big Brother is Watching – Dr. Howard Douglas is the co-founder and medical director of Western Medical Evaluators, Inc. (WME), a company that provided medical services in workers' compensation disputes to entities insured by Texas Mutual Insurance Company. WME contracted with designated doctors to perform designated doctor exams for workers' compensation claims. Dr. Douglas routinely billed the maximum compensation of four hours for every functional capacity evaluation (FCE) performed, even though Texas Mutual's investigation revealed that the average time for an FCE by a WME technician was only thirty-nine minutes. Dr. Douglas was convicted of defrauding Texas Mutual, a third degree felony, and the Court of Criminal Appeals affirmed. *Douglas v. State*, No. 03-13-00092-CR, 2105 WL 5097573 (Tex. App.– Dallas August 26, 2015).

Employers and Carriers Beware – Remember that in *In re XL Specialty Ins. Co.*, the Texas Supreme Court determined that in the statutory workers' compensation insurance policy context, the insurer is not the representative of the insured; rather, the insurer is the client and party to a pending workers' compensation matter and retains counsel on its own behalf. In a lawsuit involving a standard liability insurance policy, only the insured is a party to the case, and the insurer retains counsel on the insured's behalf. So, in workers' compensation cases, the communication between the insurer and the employer is not privileged, but in other cases involving employer liability coverage, such communications are privileged. We note that attempts at legislation to have the privilege apply in workers' compensation failed this past legislative session.