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August 2016 Workers' Compensation Law Update

New Format Coming– Eventually

We will soon be sending our newsletter in a different way, rather than directly from Jane Stone to you by email. If, for some reason, you don't get a newsletter at the end of September and you miss it, please let us know!

The Buzz on Zika – A New Occupational Disease?

The 2016 Rio Olympic Games brought the Zika virus to the forefront of national worry. The tropical disease can cause brain damage and birth defects to infants of mothers infected in the womb, and new studies suggest that Zika may cause brain damage in infected adults as well. As Zika creeps its way into the United States from the tropical climates to our south, employers and carriers will likely be presented with claims from injured workers alleging they contracted the disease in the course and scope of employment. These claims will likely be very fact specific and require a challenging causation analysis showing if, when and how the claimant contracted the disease while working.

Texas is the Envy of the Country: Closed Formulary Reduces Costs, Opioid Use

An analysis by the Texas Department of Insurance shows that Texas' use of the closed formulary for prescription drugs in the workers' compensations system is having a positive impact on both Carrier's wallets and on injured workers. Reporting on the study, www.workerscompensation.com noted that total drug costs fell by 15%, N-drug costs fell by 80%, and prescriptions for N-drug opioids fell 81%. The combination of lower costs and better care through less addictive prescriptions shows the closed-formulary is working in Texas. For more information, visit [here](#). In regard to states which legalized marijuana, reports are that although opioid use is down, accidental poisonings of children are on the rise.

Recent Court Opinions

No Way Around it: Evidence of Impairment is Limited on Judicial Review is Limited to that Presented to Division

The long-running litigation related to injured worker Daniel Samudio's correct impairment rating continues following the Texas Supreme Court's decision in *American Zurich Ins. Co. v. Samudio*, 370 S.W.3d 363 (Tex. 2012) (*Samudio I*). TEXAS LABOR CODE § 410.306(c), provides, "Except as provided by Section 410.307, evidence of extent of impairment shall be limited to that presented to the division. The court or jury, in its determination of the extent of impairment, shall adopt one of the impairment ratings under Subchapter G, Chapter 408." In *Samudio I*, the Court held that if on

judicial review a trial court finds that no valid impairment rating was presented to the Division in the underlying contested case, the trial court may remand the claim to the Division to determine a valid rating. *Samudio I*, at 368. The case was remanded to the trial court following *Samudio I*.

On remand, Mr. Samudio filed a motion for summary judgment on the issue of the correct impairment rating. Attached to the motion was an affidavit and medical report supporting the 20% impairment rating awarded by the Division in the contested case. The Carrier objected that this evidence of impairment was not admissible because it was not presented to the Division. The trial court overruled the objection, admitted the evidence, and granted summary judgment for Samudio. The Houston Court of Appeals reversed and rendered explaining, “the evidence that Samudio presented at summary judgment is precisely the type of evidence that the statute forbids, and therefore, the trial court could not consider it.” *American Zurich Ins. Co. v. Samudio*, No. 01-15-00478-CV, 2016 WL 4485818 *6 (Tex. App.–Houston [1st Dist.] Aug. 25, 2016) (*Samudio II*). The court held that the Carrier had established as a matter of law that the 20% impairment rating was invalid. *Id.*

A LIBs Case You May Have Missed – what is loss of use?

At a contested case hearing, the Hearing Officer determined the claimant was not entitled to LIBs based on the total loss of use of both feet at or above the ankle. The Appeals Panel affirmed. The claimant appealed to District Court, which reversed the decision and awarded LIBs. The Carrier appealed, and the Court of Appeals affirmed. The Supreme Court determined that the record did not identify what parts of the claimant’s lower extremities were involved or whether there was any physical damage to them. The evidence was insufficient to establish that her lower extremity problems were the result of damage or harm to the physical structure of both her feet at or above the ankle rather than a product of an injury to the nerve roots in her back. Thus, the statutory requirements for LIBs were not met, the judgment of the court of appeals was reversed, and judgment denying the claimant’s claim for LIBs was rendered. *Dallas Nat’l Ins. Co. v. De La Cruz*, ___ S.W.3d ___, No. 13-0814, 2015 WL 5097573 (Tex. Aug. 28, 2015).

Recent Appeals Panel Decisions

The Good Samaritan: No Good Deed Goes Unpunished – APD No. 160953

The Hearing Officer determined that the claimant, a truck driver, who stopped to assist a motorist injured in an accident that did not involve the claimant sustained a compensable injury when his knee later began to swell. The road on which he had been traveling was still blocked by the accident, so after he rendered his aid, the claimant turned around and followed an alternate route to his office. The Appeals Panel disagreed with the Hearing Officer’s determination that the claimant had remained in the course and scope of his employment when he stopped to assist the motorist. Although such aid rendered in the event of an emergency could arise during the course and scope of employment if the employment is not deserted and the claimant’s actions are reasonable for advancing the employer’s work interests, there was no evidence in this case that the claimant was performing any action that he thought necessary for the employer’s business interests. His

assistance of the motorist did not serve to clear the road, and an alternate route was available to him to proceed with his work duties.

Note to Hearing Officers: “No Fishin’ Allowed” – APD No. 160787

Following the CCH, and after the record had closed, the Hearing Officer determined that he did not have enough evidence to make a finding on disability. He re-opened the record and instructed the ombudsman to obtain any records she could from the claimant’s treating doctor. The Hearing Officer did not inform the insurance carrier that he was taking such actions until the requested documents, which were not part of either party’s exhibits, were received and admitted as Hearing Officer exhibits. He then relied on those documents to arrive at a determination in the claimant’s favor on disability. The Appeals Panel reversed on that issue, stating that the Hearing Officer’s actions were an abuse of discretion and essentially a “fishing expedition,” the result of which was procedurally unfair to the carrier.

New DWC Rules and Procedures

Maximum Attorney Fees Rate MIGHT Increase. The proposed rule would establish a new maximum rate of \$200/hour for attorneys and \$65/hour for legal assistants. The proposed change serves as the Division’s recognition that the cost of goods and services has increased significantly in the last quarter-century. However, the Division’s hourly rate for legal services, which it adopted in 1991, has not been updated until now. The low rates were beginning to discourage attorneys from taking workers’ compensation cases when other, higher paying work is available. The increased rate will provide injured workers with greater access to quality representation which is important to the health of the system. The proposed new attorney fee rules will be found at DWC Rules 152.3, 152.4, and 152.6.

DD Requests to be Attached to the DD Orders . . . Finally. Over the last few years, the DWC has more than once reminded (admonished?) system participants to exchange the DWC 32 with the opposing party when a DD request is made to the Division so that all are informed of what information is being asked of the DD. The reminders were ineffective. Frequently, Carriers would receive an order for a DD exam on extent of injury, for example, without having received the DWC 32. In the absence of the DWC 32, the Carriers were left without an understanding of what was the injury the DD was asked to address. To resolve the “failure to exchange” problem, the Division has elected a practical solution. Effective September 1, 2016, the Division will attach the DWC 32 to the DD Order. Despite this practical solution, system participants are reminded that DWC 32s must still be exchanged with all parties.

DWC News

How Long Will We Have Proceedings in Austin Central?

Last month we informed you of Commissioner Brannan’s decision to authorize contested case hearings to be held in the Metro Center Building, a.k.a., “Austin Central.” The expansion of hearings sites was initiated as a “quick fix” to the surplus of recent work comp claims in the Austin area and the Division’s inability to set disputes within the statutorily-mandated 60-day deadline for

want of docket space. Officially, Austin has just one Hearing Officer, and the field office has only one hearing room. Originally this temporary solution was to have extended only into September, but because the high volume of cases has continued without abatement, the project has been extended through at least December. How much longer this “temporary” remedy remains temporary is anyone’s guess.

New Hearing Officer Hired

Rabiat Ngbwa has been hired as the newest Hearing Officer in the Division of Workers’ Compensation. Most recently, Ms. Ngbwa served as a reviewing attorney at the Texas Workforce Commission, where she was a Hearing Officer. Between her stints at the TWC, Ms. Ngbwa worked as a consultant at the Equal Employment Opportunity Commission and then as an attorney with Synergy Legal Professionals. She received her B.A. from Texas Lutheran University in 1997 and her J.D. from Houston College of Law in 2003. She is also certified in both human resources and mediation. Ms. Ngbwa will be the third traveling Hearing Officer in the Division’s central office.

Support the Kids – Join Kids’ Chance of Texas for its Inaugural Reception

Preparations for the Inaugural Reception for Kids’ Chance of Texas are being completed and we are excited! SLS Partner Jane Stone is in charge of the event which will be held October 22, 2016 at The Bullock Texas State History Museum in Austin from 6 to 8 p.m. Governor Greg Abbott, TDI Commissioner David Mattax, DWC Commissioner Ryan Brannan, and our first scholarship recipients (we already have two!) are among the invited speakers. There will be food, drink, a presentation and a silent auction. If you would like to attend, please send your name, mailing address, and email address directly to jstone@slsaustin.com and we will send you an invitation. Individual tickets are \$150. If you cannot attend but would like to make a donation, you can go to www.kidschanceoftexas.org for PayPal, or send a check to P. O. Box 30111, Austin, Texas 78755.

Workers’ Comp Bar Takes On Austin

On Thursday, August 11 and Friday August 12, 2016, the workers’ comp bar descended on Austin for the Workers’ Compensation Section’s Annual Conference for a two-day event of continuing legal education, networking, and camaraderie. In addition to several other informative presentations, attendees were regaled with knowledge about the Division’s rule-making authority by our own Jane Stone, and provided with a thorough update on the designated doctor system by our DD guru, Erika Copeland. The social events this year included a bowling tournament presented by the Workers’ Compensation Section. Led by David “The Kingpin” Swanson, SLS tied for first place in the tournament.