



CALIFORNIA CASE TRIGGERS BIG CHANGES ACROSS NATION AS DIVERSITY GROWS

A Researched Analysis 3iCorp.com

THE CALIFORNIA WCAB EN BANC DECISION THAT CHANGES THE WORKERS' COMPENSATION PLAYBOOK, WHILE FORCING LANGUAGE SERVICE PROVIDERS TO PLAY BY THE RULES.

As the 2010 census has shown, culture and language throughout the United States has been shifting away from an English-only environment at an increasing pace. Nearly 25 Million Americans are considered to have Limited English Proficiency (LEP), meaning they speak English less than "Very Well." Among the most affected groups, the Hispanic community has seen a 43% growth over the past decade¹, accounting for 74% of total population growth within the United States². This leaves over 8 Million Hispanics, many of whom actively participate in the labor market, unable to communicate effectively.

An intensive analysis of the most recent reports released by the Bureau of Labor Statistics shows that many of the greatest in-

creases in these numbers and percentages have occurred outside of the traditional border states of California, Arizona, Texas and Florida. With these factors in mind, Lawyers, Carriers and Claims Providers must be on alert for how increasing diversity will affect the Workers' Compensation and Legal communities in the United States.

On March 17, 2011, the California Worker's Compensation Appeals Board (WCAB) produced an En Banc decision on *Jose Guitron vs. Santa Fe Extruders and State Compensation Insurance Fund (SCIF)* (Case No.: ADJ 163338; LAO 0873468) that has created a tremendous amount of nervous chatter within the insurance community. This case amends the California Labor Code to state that, "... The employer is re-

quired to provide reasonably required interpreter services during medical treatment appointments for an injured worker who is unable to speak, understand, or communicate in English."³ In short, the decision states that any treatment related to the industrial injury may require the adjuster to provide the injured worker with an interpreter.

With this in mind, it is important to note that 3iCorp.com's independent review of trends in literacy and language proficiency have shown that the Hispanic community also composes the largest group scoring in the lowest category on literacy proficiency tests.⁴ Should a claimant not fully be able to read and comprehend the materials translated to their language,

Guitron points to the fact that these injured workers are deprived of necessary benefits should language services not be an integral part of their care and recovery.

A case such as this is “of broad concern to the Workers’ Compensation community, and that the issue has not, until now, been addressed in a precedential decision.”⁵ Language services had traditionally and informally been only used in the medical-legal arena. Adjusters have often authorized language services for litigated cases involving LEP injured workers for hearings, depositions and AME/QME medical-legal appointments, but not for general, medical treatment appointments. The *Guitron* ruling now requires adjusters to provide authorized language services to injured workers that state a need, or desire, for assistance in understanding the directions and instructions from all medical treatment providers (including doctors, physical therapists, chiropractors, acupuncturists, etc.) and formalizes “the rule (to) also include payment for interpreting services at depositions, hearings, conferences and arbitration.”⁶

The *Guitron* decision sets an immense precedent for future rulings on similar issues. While currently confined to California, with the national shifting of demographics in all nationalities and cultures, similar case rulings are likely to spread across the United States.

In reaching the decision in *Guitron*, the WCAB judges include language services as an amendment to Labor Code section 4600, which requires employers to provide the reasonable amount of medical treatment to “cure or relieve the injured worker from the effects of their industrial injury.” The WCAB judges reasoned that an injured worker is only able to recover from these injuries and illnesses if they can truly understand and follow the directions given to them by their medical service providers.

Employers, insurance carriers, claims providers and legal professionals have been initially concerned that this ruling seems to uncontrollably increase the cost associated with the application of language services. However, *Guitron* addresses the fact that if the injured worker cannot understand the

instructions of medical professionals, they are not likely to recover from their injury or illness, thus prolonging their duration of the claim by increasing litigation, lost time from work and other unnecessary increases associated with the cost of LEP claims.

Upon further analysis, although *Guitron* mandates a much broader use of language services than ever before, it also provides a number of stringent requirements for providers of language services. Giving stricter guidelines to protect carriers from abuse, the case points particularly to those that are assigned by applicant’s counsel in litigated cases.

Although conventional wisdom might have suggested that *Guitron* would provide a surge of business for language services firms, many Lienholders of language services are finding it increasingly difficult to have their bills paid or adjudicated in their favor. At a recent Northern California industry symposium, one WCAB Judge opined that the early indications from rulings since *Guitron* have shown that Lienholders are having increasing difficulty collecting, now having to prove all service-related detail in their bills.

Whereas prior bills and liens for language services may have been lacking in detail, *Guitron* sets forth the burden that, among other things, language services providers must prove:

1. that the services provided were reasonably required
2. that the services were actually provided
3. that the interpreter was qualified to provide the services
4. that the fees charged were reasonable (further broken down by element)
 - a. Hourly rate stated
 - b. Amount of time spent interpreting
 - c. Travel charges clearly listed and substantiated
 - d. Any other additional charges listed and substantiated

While the decision establishes the requirement for Employers, Carriers, and Claims Administrators to provide language services as part of medical treatment, it is,

unfortunately, mostly silent on the items of what constitutes “reasonableness” in provision of service or to give a true “market rate” value. However, the ruling does voice a strong preference towards “preauthorization” and “pre-negotiation” of both terms.

In response to the confusion, there is a movement afoot within California to consolidate and define all of the payment issues related to language services, as well as to rapidly adjudicate the overwhelming burden of language service liens that are currently clogging many WCAB regional offices. This proposition has caused a rift between many occupational language service providers and the insurance provider firms with contention as to what constitutes fair payment practices.

In response and preparation for the impending revisions to Workers’ Compensation guidelines, Employers, Carriers, and Claims Providers should establish a working relationship with reliable and trustworthy language services firms, establishing agreements for reimbursement rates, as well as authorization protocols.

Proactive carriers who recognize the significant impact of this case will have an advantage when the effects of this decision, and others like it to come, weave their way into future underwriting decisions. Legal professionals must have a full understanding of their LEP claimant’s rights to language services to ensure that the claimant is receiving adequate care and instruction from their medical providers to expedite the recovery process.

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¹ United States Census Bureau, *The Hispanic Population 2010*, May 2011, <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf> (January 31, 2012).

² Advertising Age, *Five Surprising Facts Marketers Should Know about the 2010 Census Stats*, April 2011 <http://adage.com/article/news/census-2010-surprising-facts-marketers/149692/> (January 31, 2012).

³ WorkersCompensation.com, California’s En Banc Division: *Guitron V. Santa Fe Extruders And SCIF*, March 2011, <http://www.workerscompensation.com/comnewsnetwork/news/ca-en-banc-guitron-santa-fe-scif.html>, August 30, 2011. P. 13

⁴ National Center for Education Statistics. U.S. Department of Education. *Adult literacy In America*. April 2002.

⁵ *Jose Guitron vs. Santa Fe Extruders; and State Compensation Insurance Fund*, (Calif. WCAB 2011.). p. 6.

⁶ *Jose Guitron vs. Santa Fe Extruders; and State Compensation Insurance Fund*, (Calif. WCAB 2011.). p. 8.