THE WETC PSYCHOLOGY NEWSLETTER

Dr. Bruce Leckart

"Find the Truth, Tell the Story"

Westwood Evaluation & Treatment Center
11340 Olympic Blvd., Suite 303, Los Angeles, CA 90064
310-444-3154, DrLeckartWETC@gmail.com, www.DrLeckartWETC.com

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SB863 & the DSM-5: One door closes and another opens!

"Essentially, if the DSM-IV-TR is still in use, as per LC 3208.3, the number of psych cases and their attendant costs will be reduced by SB863. However, if the DSM-5 is approved for use the door opens for a major expansion of the number of psych claims in addition to the size of the awards and settlements."

As you all know, SB863 indicates that although an injured worker is entitled to treatment for sleep dysfunction and sexual dysfunction they are not to be compensated for any permanent disability in these areas. In addition, injured workers will not be compensated for psychiatric injuries that are a result of physical injuries unless those injuries are "catastrophic" or were the result of the worker being a victim or a witness of a violent crime. In a recent review of the laws of the other 49 states I have found that California is in the minority in not allowing compensation for psychiatric injuries occurring as a result of physical injuries. But that is neither here nor there. What is relevant is that pending attempts to void SB863 by a variety of methods (including claiming that it violates disability discrimination legislation such as California Government Code 11135) employers will be able to reduce their workers' compensation costs by eliminating permanent disability benefits due to the psychiatric consequences of all but a few physical injuries. This is good news if you are an employer or an insurance company but bad news if you happen to be a worker who gets physically injured and then develops a psychological disorder that reduces your ability to earn a living. It is also bad news for the applicant attorneys whose compensation is reduced as a result of smaller permanent disability awards or settlements. Thus, a door has been closed! At least temporarily.

Now for the newly opened door. That door seems like it might not only make up for the recent SB863 reduction in payouts for psychiatric injuries but will greatly increase those costs to employers and insurers. This good news for the applicant attorneys and the injured workers comes in the form of the DSM-5, the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition. The DSM-5 was published in May, 2013 and I have written about some of the issues concerning this manual in the last two months of my newsletter, i.e., June and July, 2013.

As I pointed out, Labor Code section 3208.3 requires the use of the DSM-III-R, which was published in 1987 and was subsequently replaced by the DSM-IV, which was published in 1994, and then by the DSM-IV-TR, which was published in 2000. Each of the latter two manuals have been sequentially used as a result of wording in 3208.3 that states that instead of using the DSM-III-R disorders can be diagnosed by using "psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine." The above quote is the kicker. When it came to the publication of the DSM-IV and the DSM-IV-TR these were immediately approved and accepted nationally by doctors in the field. However, since it's publication the DSM-5 has raised a substantial amount of controversy that, pending a determination or court ruling concerning the term "generally approved and accepted," has resulted in a situation in which there is no clear consensus among mental health professionals regarding its approval and acceptance. In fact, based on communications I have had with multiple professionals through social media

I have found that doctors from as far away as Australia have indicated that the DSM-5 threatens to destroy "evidence-based medicine" and take us back to the "dark ages."

Consistent with the negative comments about the DSM-5 I have pointed out many of the major problems with this new manual as it relates to the California workers' compensation system in my June and July, 2013 newsletters but it comes down to these factors:

1. The DSM-5 did away with the Five Axis Diagnostic Classification System. In doing so, the DSM-5 eliminated the Global Assessment of Function (GAF) Scale, which has been used for assessing permanent psychiatric disability according to the California workers' compensation laws.

2. Labor Code section 4660 requires the use of the Schedule for Rating Permanent Disabilities for assessing permanent psychiatric disabilities. However, although that document mentions the GAF Scale, the instructions for its use are (a) incomplete, (b) not the same as those found in the DSM-IV-TR, and, (c) cannot be used to rate all psychiatric disabilities! Accordingly, there seems to be no way of rating permanent psychiatric disability outside of the DSM-IV-TR.

3. The DSM-IV-TR allowed for the diagnosis of a mental disorder if the doctor found that the patient's clinical presentation "falls just short of meeting the full criteria for the diagnosis." However, the DSM-5 states that the "Diagnostic criteria are offered as guidelines," allowing the doctor's totally subjective feelings, thoughts and intuitions from the "clinical interview," or what is called the doctor's "clinical judgment" to override the diagnostic criteria.

4. The DSM-5 replaced the GAF Scale with a variety of self-rating scales, which have no validity or reliability with regard to assessing psychopathology. In fact, the DSM-5 actually states that the DSM-5's approach to assessing psychopathology depends "primarily on an individual's subjective reports along with the clinician's interpretation." This and other factors in the DSM-5 led one astute observer to remark "Yikes. There goes evidence-based medicine."

Essentially, if the DSM-IV-TR is still in use, as per LC 3208.3, the number of psych cases and their attendant costs will be reduced by SB863. However, if the DSM-5 is approved for use the door opens for a major expansion of the number of psych claims in addition to the size of the awards and settlements.

One of the major barriers to filing what has been called by the Department of Industrial Relations a "pure" psychiatric claim has been the DSM-IV-TR's diagnostic criteria. In the past, the DSM-IV-TR and its predecessors have required that those criteria be met in order to diagnose a disorder. However, if the DSM-5 is adopted all that is needed to diagnose a psychological disorder is the doctor's subjective impression or clinical interpretation that the patient has the disorder. Thus, even if there are less claims for permanent psychiatric disability arising from physical injuries, there will be more claims for "pure" psychiatric injuries because the bar for filing such claims has been reduced. In fact, I know of at least one applicant attorney who has said he intends to file "pure" psych claims for workers who have had a physical injury as a result of the lower bar created by the DSM-5. Those claims will be facilitated by some new disorders that have been added to the DSM-5. For example, on page 311 of the DSM-5 there is a brand new disorder called a Somatic Symptom Disorder (300.82) that is just sitting there and inviting claims.

Consider the following hypothetical case. John Jones broke his leg while working as a forklift operator and got depressed. Under SB863 he's allowed treatment for his depression but he will not get a permanent disability award for any permanent psychiatric disability due to his depression. However, on John's first meeting with his attorney he is asked, "John, did you have any headaches prior to the time you broke your leg?" (Headaches are just one of a very large number of physical complaints that can be used such as stomach aches, back pain, eye problems, etc, etc.) The attorney goes on and asks, "John, were those headaches present for six or more months before you broke your leg?" "John, do you believe that those headaches were a result of the stress and strain of your job?" If John says yes to those questions, it's "fat city." The attorney sends John to a psychologist or a psychiatrist who uses the DSM-5 to diagnosis the "newly discovered" Somatic Symptom Disorder (300.82).

Remember, that the doctor who uses the DSM-5 does not have to demonstrate that John meets the diagnostic criteria, but only that John has provided the doctor with his subjective report that allows the physician to use their clinical judgment about the credibility of that report. You want more? OK, according to the DSM-5, a Somatic Symptom Disorder is characterized by physical complaints that are "distressing" or that result in a significant disruption of daily life. "Or" is obviously an important word here since there does not have to be a demonstrable disruption, only a complaint of "distress." In addition, John must have "disproportionate and persistent thoughts" about those complaints, a high level of anxiety about those complaints, or spend a lot of time and energy "devoted" to those complaints. Those complaints must also "typically" be present for more than six months. Considering that the doctor can use their clinical judgment in arriving at their conclusions about the above-mentioned factors and their diagnosis, "Can the bar for a disorder not due to a physical injury be any lower?"

Now compare this to what was present before the DSM-5 came out. In the DSM-IV-TR, if John came in complaining about those headaches and provided exactly the same information to the doctor, the physician could conceivably specify Psychological Factors Affecting Medical Condition (316.00). However, in DSM-IV-TR terminology, that condition is not a mental disorder and does not qualify as meeting the criteria for a psychiatric injury as defined by LC 3208.3. Thus, what was not a compensable mental disorder in the DSM-IV-TR is now a real, defensible and costly psychiatric injury for the employers and insurance companies as well as a source of income for the injured worker and his or her attorney.

The bottom line here is that the system in California has some very real problems. We no longer have a way of assessing permanent psychiatric disability or a clearly mandated way of determining if someone has an industrially caused psychological disorder. The big question in my mind is who will step up and set this straight and when will that happen?

This is the fifty-fifth of a series of monthly newsletters aimed at providing information about psychological evaluations and treatment that may be of interest to attorneys and insurance adjusters working in the areas of workers' compensation and personal injury. If you have not received some or all of our past newsletters listed on the next page, and would like copies, send us an email requesting the newsletter(s) that you would like forwarded to you.