

FRYEday Report

A Publication of Frye Claims Consultation & Administration



Tom Frye

... a TAX on YOU!

In our modern world, trust has become an “endangered” attribute, we can look for it in many places and in many people, but it is definitely hard to find.

Less than one third of Americans trust their government: 59% of doctors say they cheated on their tests: 75% of MBA's say they cheated on their tests. How does it feel knowing there is better than a 50% chance the physician performing your surgery cheated on his medical exams?

Although we seldom think about it, the inability to trust slows our actions and impedes our progress . . . and in effect serves as a tax on our time and therefore, our money. However there can be a trust dividend.

Think about just a couple of events which illustrate this point:

EVENT	Tax	Dividend
9/11	TSA - we now have to spend time slogging through the airport	In the past we could simply run and get our plane even if we arrived at the airport 15 minutes before the flight
Enron	Sarbanes/Oxely and the mountains of paperwork attendant to complying with its tenets	Freedom to operate and an absence of paperwork

In just these two examples we can see where there is an absence of trust – there is a tax and where there is, or was, trust there is a dividend.

Of course, these taxes and dividends apply to our everyday lives. Do we have children we can trust? – Boy! It is a dividend not to worry whether your child is where he said he would be and will return when he says he will. Or, is it a dividend to know your employer has your best interest at heart? You bet it is – it frees you from spending time and energy (taxes) in unnecessary places and affords you the dividend of freedom from worry and the space to be your best.

But what exactly is trust: Trust is confidence – confidence that what is said and/or done can be relied upon – unequivocally. Trust is a function of two things: character and competence – character is the price of entry and competence includes your capabilities, skills, results and history.

In our business, on many occasions, we are asked to enter into relationships which require us to trust: investigators, lawyers, doctors, subordinates and supervisors. If we select wisely we can provide a dividend for ourselves by using services provided by folks who have become our trusted advisors. Staff we can provide instructions to and step away while they accomplish our goals. However, if we select poorly we

obligate ourselves to micro-manage, to pay a tax in the form of our time and energy to insure we get what we need.

But how are we to develop these “trusted adviser”

relationships – What do they look like?

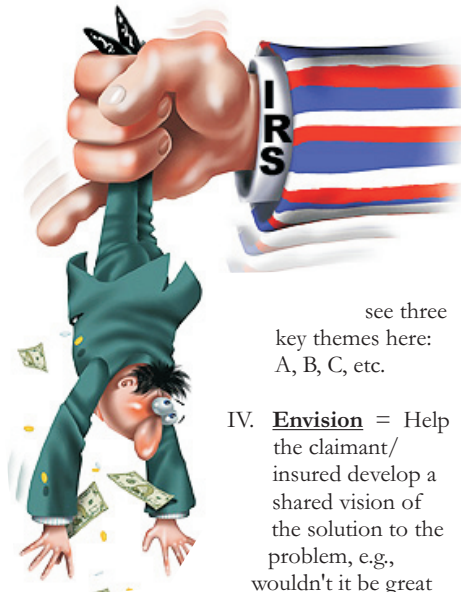
Well, first think about your most challenging claim and the investigator you need. Or think about a terrific result you achieved and who you wish to share it with, or think about your most urgent or critical matter and who you need to help you with it. The person you are thinking of would be your “trusted adviser.”

However, please realize you, too, should seek to become a trusted advisor in order to make your job tax-free . . . so allow me to provide some steps you can use to reach this lofty perch:

I. **Engage** = Use language of common interest

II. **Listen** = When the claimant/insured speaks say things like you hear them – and tell me more

III. **Frame** = Assist the claimant/insured by crystallizing their problem, e.g, I



see three key themes here: A, B, C, etc.

IV. **Envision** = Help the claimant/insured develop a shared vision of the solution to the problem, e.g, wouldn't it be great if _____?

V. **Commit** = Insure the claimant/insured is aware of what it will take to achieve your shared vision, i.e., what will it take to get from A to B.

The aforementioned steps are very specific but – in general – we MUST commit to being reliable, credible, attractive, responsive and empathetic. In other words, do what we say we are going to do when we say we are going to do it and do that consistently with a measure of rapport.

If we begin to understand the “Speed of Trust,” as articulated by Stephen Covey in his book of the same title. we realize this attribute is essential to the success of any professional. If we are to harness the power of the many we need to become a trusted adviser and find folks who can become *our* trusted advisers.



- WORKERS' COMP FORUM PAGE 2
- FRYE ALL STAR PAGE 4
- LIABILITY FORUM PAGE 3
- SPOTLIGHT ON HUMOR PAGE 4



WORKERS' COMPENSATION FORUM

WCAB Reverses Boughner Decision - Validates Adoption of 2005 PDRS

After holding the case for slightly over a year after granting reconsideration for further study, the ECAB has issued a unanimous en banc decision in the *Scott Boughner v Comp USA*, viewed by many as a significant challenge to the 2005 PDRS. The WCAB has reversed the WCJ's opinion finding that schedule to have been improperly adopted. In doing so the WCAB relied heavily on its own prior en banc decision in *Costa v Hardy Diagnostic*. However the WCAB also relied on other arguments, some of which may effectively end the discussion regarding the validity of the adoption of the 2005 PDRS.

The decision gives us some additional insight into what has taken so long to get this opinion out. After initial briefing, the WCAB sought input from the Administrative Director on the challenge to the adoption of the schedule, and then accepted serial rebuttal arguments from applicant and defendant. Along the way the WCAB also had challenges to considering some of the rebuttal briefs. All of this legal maneuvering undoubtedly increased the time it has taken the WCAB to be able to actually focus on the issues presented in the 58-page trial decision.

In its Decision after Reconsideration, the WCAB commented on a point-to-point basis to the WCJ's opinion finding the AD acted in an arbitrary and capricious manner in adopting the schedule by not considering all available empirical data on wage loss. The WCAB rejected the trial judge's analysis on several occasions as being inconsistent with the WCAB's findings in *Costa* even though the evidence she relied upon was the same as that reviewed by the WCAB. The trial judge has, in part, relied on the testimony of Dr. Robert Reville, who participated in the 2003 Rand study, as support for her determination that the AD's adoption of the 2005 PDRS was "arbitrary and capricious" and therefore an abuse of discretion. However, as the WCAB pointed out, Dr. Reville's testimony made no such showing and in fact supported much of the construct of

the PDRS FEC factors that the AD developed. Dr. Reville's testimony clearly supported the use of the 1.1 to 1.4 range as being within the mathematical results obtained by Rand.

Much of the WCAB's other commentary addressed the issue of a "crosswalk" between the old and new PDRS and the AD's decision to not perform a crosswalk study. March Gerlach, an insurance consultant to the California Applicant's Attorney's Association testified that such a crosswalk was necessary to complete the schedule. Dr. Reville indicated the crosswalk "might" have provided useful information but also agreed with AD Andrea Hoch, that it could not have been completed in time to meet the statutory deadline.



challenge was limited to the information considered or present to the Regulatory agency prior to the adoption of the regulation. Much of the information considered by the WCJ, including the testimony of Mr. Gerlach and Dr. Reville, was generated after the regulation (the PDRS is adopted as an administrative director regulation) was adopted. Similarly, a good deal of the data relied upon by Mr. Gerlach consisted of studies performed after the schedule was adopted. The WCAB concluded that much of this information, as a matter of law, cannot be considered in determining if the regulation was validly adopted.

"Here, in the trial level proceedings, the AD's complete rulemaking file (see Gov. Code, § 11347.3) was not offered in evidence, nor was judicial notice taken of it. Although the WCJ did consider the 2003 RAND Study, the balance of the AD's rulemaking record – including the initial statement of reason, the final statement of reasons, and public comments (see Gov. Code, § 11347.3) – was not before the WCJ (and it is not now before us, although, on reconsideration, we have additionally taken judicial notice of the 2004 RAND Study.) In general, in the absence of an agency's rulemaking record, the presumption of the validity of a challenged regulation stands unrebutted and is controlling on review. (*Stoneham v. Rusben* (1984) 156 Cal.App.3d 302, 308.) Moreover, although some of the evidence admitted at trial existed before the AD made her decision to adopt the 2005 PDRS, no showing was made that, even with the exercise of reasonable diligence, this evidence could not have been submitted to the AD before her decision was made, so that it could be considered and included in the rulemaking file. Therefore, no basis has been established to consider this extra-record evidence."

Much of the evidence presented both in *Boughner* and *Costa*, was evidence developed after the AD had adopted the PDRS and not the record in support of the regulations. In effect the trials have focused on rebutting the AD's testimony of what she considered in developing the rating schedule and whether she did it correctly. If the authorities cited by the WCAB are correct, the ability to have the schedule ruled invalid will be limited to information considered by the AD only and after developed evidence will not be allowed into the equation.

This final issue, that could be considered in challenging the adoption of the regulation, was not considered by the WCAB in *Costa*. However, it makes it very difficult to challenge the adoption of the PDRS from this point forward if only the information considered by the AD can be put into the equation to invalidate the PDRS. While it is likely this case will be taken up to the next level by applicant, the limitation on the scope of information that can be considered may deal a severe blow to the chance for success on appeal. Since the existing record, including the testimony of AD hoc in adopting the schedule, makes it clear that the basis for the FEC factor in the schedule was the Rand study, in rendering the applicant's arguments on that issue to essentially quibbling about whether the methodology was the best application of the Rand Study. Unfortunately, for the challenges to the schedule, the law does not require the AD to provide the perfect solution, the one favored by one side or the other but only a solution that meets the statutory criterion. The evidence seems to suggest strongly that the AD clearly did so.

While this decision puts to rest, for a while, the concept of challenging the schedule in its entirety, it does not tell us yet what we do with case-by-case challenges to the FEC factor through the kind of testimony the WCAB ruled was admissible in *Costa I & II*. Hopefully, the WCAB will provide the industry some guidance with some published authority in the near future of the Court of Appeals.

The WCAB concluded for the most part the evidence relied upon by the WCJ was the same as or similar to the evidence considered by the WCAB in *Costa v Hardy Diagnostics*, and that many of the conclusions of the WCJ has been based on her disagreements with the WCAB's review of the same information. Substantially on that basis the Board found the trial decision to be lacking in any new information or analysis than had already been reviewed.

An additional issue, however was raised by the current Administrative Director in responding, at the WCAB's request, to the challenge to the rating schedule. The AD pointed out in order to challenge the validity of an administrative regulation, the



LIABILITY FORUM Underinsured Motorist Coverage - Exhaustion Rule

Lowell R. Wedemeyer v. Safeco Insurance Company of America, (March 13, 2008), Court of Appeal, Second District

FACTS AND ALLEGATIONS

The triggering of an obligation to pay by an underinsured motorist carrier becomes more complicated when there are multiple policies available to the tortfeasor. This case of first impression discusses if underinsured motorist coverage is triggered when the tortfeasor's auto liability limits are paid, or only when the limits of all available coverage are paid.

Lowell Wedemeyer was insured by Safeco Insurance Company with underinsured motorist limits of \$500,000 per person and per accident. On May 28, 2003, he was hit from behind by a vehicle driven by Bradley Dean Groscoast. Groscoast was insured by Coast National Insurance Company in the amount of \$15,000. Wedemeyer sued Groscoast. Coast tendered the \$15,000 in exchange for a general release. Groscoast was employed by Skyline Management Group. Skyline was insured by Hartford Insurance

Company under a general liability policy. The policy included hired and non-owned auto liability coverage of \$1 million. Hartford refused to admit coverage under its policy for the accident. Wedemeyer therefore demanded Safeco pay him \$485,000, the difference between his underinsured motorist limits and the \$15,000 offered by Coast. Safeco refused, insisting the policy limits of Hartford be exhausted. Wedemeyer eventually settled with Groscoast in exchange for the \$15,000 Coast policy limits and \$500,000 under the Hartford policy.

Wedemeyer sued Safeco for breach of contract and breach of the covenant of good faith and fair dealing. Safeco moved for judgment on the pleadings on the basis that all policies covering the driver had to be exhausted before underinsured motorist coverage was triggered. The trial court granted the motion.

On appeal to the Court of Appeals, the judgment was reversed. The Court stated underinsured motorist coverage requires exhaustion of the tortfeasor's policy limits and proof of payment to the underinsured motorist carrier.

Wedemeyer argued the exhaustion required him only to exhaust automobile liability policies and not other policies that provided coverage. Skyline's Hartford policy was not a motor vehicle liability policy. It was a general liability policy which included hired auto and non-owned automobile liability coverage in the sum of \$1 million. The Court agreed the Hartford policy did not fall within the definition of a motor vehicle bodily injury policy. Thus, Safeco's obligation was triggered upon payment of the Coast policy.

As to the amount recovered from Hartford, the Court states an insurer making payment under the underinsured motorist provisions of the policy is entitled to reimbursement or a credit from the insured for that payment. Thus, when the Coast policy was exhausted, Safeco was liable for the difference between the underinsured motorist limit and the Coast limits. As to the amount received from the Hartford policy, Wedemeyer was required to reimburse Safeco for

the amount received from the Hartford policy.

RESULT

The court concluded once a motor vehicle or automobile bodily injury liability policy has been exhausted, underinsured motorist coverage is triggered. Thus, the claim for relief was stated. The court erred in granting a judgment on the pleadings. The judgment was reversed.

COMMENTS

The area of law concerning exhaustion of limit is unclear and requires further clarification by either the courts or the Legislature. This is the first case we know of to adopt this interpretation.



California Brothers Arrested for Fraud

Two brothers in Woodland Hills, California have been arrested and charged with felony insurance fraud, conspiracy and perjury. According to the California Department of Insurance, Masood D. Pymanee, 32, and Mahboob D. Pymanee, 30, were arrested and booked on \$264,000 and \$299,000 bail respectively at the Los Angeles County Police Department Valley Jail in Van Nuys, CA.

In May 2007, CDI Fraud Division investigators received a tip Masood was allegedly soliciting assistance in the disposal of his 2006 Mercedes Benz SL500. An undercover CDI investigator met with Masood, who allegedly informed him he wanted to stage the theft of his vehicle to scam his insurance company out of an estimated \$90,000. He allegedly voluntarily turned over his vehicle to the undercover investigator, who he believed would assist him with his scam, CDI said.



brother by providing a recorded statement to the insurance company that he saw his brother secure his Mercedes Benz at the location from which he claimed it was stolen.

The investigation also revealed Masood allegedly submitted a fraudulent claim to another auto insurer for more than \$6,000 in damages to his 2004 Honda Civic. He allegedly claimed his parked vehicle incurred damages in June 2006.

The damages to his vehicle were allegedly sustained in April 2006, but were not covered because the individual driving the vehicle was excluded on Pymanee's insurance policy.

The Los Angeles County District Attorney's Office is prosecuting this case.



A few days after the "theft," Masood reported his vehicle stolen. Mahboob allegedly assisted his

Quote of the Quarter

"I attribute my success to this: I never gave or took an excuse."

~ Florence Nightingale

