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CONNECTICUT WORKERS' COMP UPDATE

The law firm of **Strunk Dodge Aiken Zovas (SDAZ)** provides you with our Winter 2018 workers' compensation update. Please feel free to share this update with your colleagues. If someone inadvertently has been left off our email list and would like to receive future updates they can contact **Jason Dodge** at jdodge@ctworkcomp.com

CASE LAW ALERT!! MEDICAL MARIJUANA CASE PENDING AT SUPREME COURT HAS BEEN SETTLED! SEE *PETRINI V MARCUS DAIRY* BELOW IN RECENT CASE LAW SECTION.

STRUNK DODGE AIKEN ZOVAS NEWS

Attorneys from **SDAZ** attended the recent Hartford County Bar Association Barristers' Ball held at the new Delamar Hotel in Blue Back Square in West Hartford on February 3. Everyone attending enjoyed a delicious meal and dancing to the Heartbeat Dance Band. One of the highlights of the evening was the presentation of the 2018 HCBA Law School Scholarship. Two UConn law students received the honor of an award of $1000 towards school expenses. **Anne Zovas**, as chair of the scholarship committee, presented the awards. Also, donations were made to the Hartford County Bar Foundation during the evening.

Attorney **Jason Dodge** of SDAZ spoke at a seminar entitled "Is it Workers' Compensation Fraud or Abuse?" at the Chief State's Attorney office in Rocky Hill on November 15, 2017. Chief State's Attorney Kevin Kane made introductory remarks to the audience of municipal leaders and administrative staff. John DeMattia**,** Supervisory Assistant State's Attorney, Inspectors Steve Sartor and Keith McCurdy**,** and Mark Budzyna**,** FCLS, Special Services Unit Manager, CIRMA also made presentations. The seminar, which was sponsored by CIRMA, reviewed strategies on how to investigate and defend fraudulent workers' compensation claims.

The 2018 Workers' Compensation Retreat was held January 21-23, 2018 at the JW Marriott Marco Island Beach Resort in Marco Island, Fl. Attorney **Jason Dodge** of SDAZ was a presenter along with Commissioner Stephen Morelli regarding complex

workers' compensation claims in Connecticut. Dr. James Mazzara spoke regarding joint replacements and Dr. David Tung discussed issues regarding medications. Attorneys **Anne Zovas, Lucas Strunk** and **Richard Aiken** of SDAZ attended the conference as well.

Attorneys **Lucas Strunk** and **Jason Dodge** of SDAZ will be attending The College of Workers' Compensation Lawyers Induction dinner in Nashville, Tennessee on Saturday, March 3. The College of Workers' Compensation Lawyers has been established to honor those attorneys who have distinguished themselves in their practice in the field of workers' compensation. In addition to Attorneys Strunk and Dodge there are only seven other attorneys in Connecticut that have earned that distinction.

We do appreciate referrals for workers' compensation defense work. When referring new files to SDAZ for workers' compensation defense please send them to one of the partners' email: azovas@ctworkcomp.com, raiken@ctworkcomp.com, lstrunk@ctworkcomp.com, jdodge@ctworkcomp.com or by regular mail. We will respond acknowledging receipt of the file and provide you with our recommendations for defense strategy.

CONNECTICUT WORKERS' COMPENSATION COMMISSION NEWS

RETIREMENT NEWS: Commissioners Ernie Walker and Christine Engel will both be retiring from the Commission in 2018. We have been advised that there will be a separate retirement party for both commissioners although the dates and places have not been announced yet. Attorney **Lucas Strunk** is on the retirement party committee for Commissioner Walker. It will be difficult to replace these Commissioners; they provide a wealth of knowledge, hard work and civility to the Workers' Compensation Commission in Connecticut. We will keep you updated on their exact retirement dates and the retirement party plans. Best Wishes to both Commissioners for their retirement!

A Connecticut Bar Association Section meeting was held on Thursday November 9, 2017 at the Grassy Hill Country Club in Orange. New Workers' Compensation Commissioners Brenda Jannotta and Robert D'Andrea were introduced to the Section and spoke about their new position. Also, Attorney William Brown was presented the prestigious Pomeranz-O'Brien award for his many years of service to the Connecticut Workers' Compensation community. Attorney **Richard Aiken** of SDAZ presented checks to Foodshare and the Connecticut Food Bank totaling $11,443.32 as a charitable contribution from the Connecticut Bar Association from proceeds from the annual golf tournament.

As of October 1, 2017 new compensation rate information has been issued by the commission. The maximum rates of injuries have **not increased**, in fact, they have **decreased** (see workers' compensation at a glance chart below). In view of this, for claimants/dependents that were receiving COLA's their rates will not increase. A legal

argument could potentially be made that COLA's should actually decrease, however, the commission in the past when the maximum rates have decreased has recommended that COLA rates remain the same without any decrease.

Section 31-294c of the Connecticut General Statutes, as amended by Public Act 17-141, now allows employers to designate for their employees a specific location where those employees must file any claims they may make for workers' compensation benefits. As of September 29, 2017 Chairman Mastropietro has posted a memo regarding how employers can designate a specific location for filing workers' compensation claims in Connecticut. Please contact SDAZ if you have any questions regarding how to designate a specific location for service of new claims.

The IRS has announced the business standard mileage rate for 2018 is 54.5 cents (up from the 53.5 cents per mile for 2017). Therefore, mileage reimbursement claims beginning January 1, 2018 under Connecticut General Statutes Section 31-312 should be at the rate of 54.5 cents per mile.

The commission does have a website where you can look up such information as to whether a hearing is assigned, list of all claims for an employee, status of a form 36, and interested parties. This is quite a useful site and is a different website than the commission's main site. It can be found at:

http://stg-pars.wcc.ct.gov/ClaimLookup.aspx

On January 3, 2018 the Commission issued the **2018 WCC Hospital and Ambulatory Surgical Center Fee Schedule, MEMORANDUM NO. 2018-01,** which states:

Pursuant to General Statutes § 31-294d(d) (as amended June 11, 2014) the following will be in effect for the pecuniary liability of the employer for services rendered by a hospital and ambulatory surgical center:

1. The hospital inpatient rate shall be 174% of the Medicare rate payable to that facility.

2. The hospital outpatient and hospital-based ambulatory surgical center rate shall be 210% of the Medicare rate payable to that facility.

3. The non-hospital based ambulatory surgical center rate shall be 195% of the hospital-based outpatient Medicare rate payable in the same CBSA (Core Based Statistical Area).

Where there is no Medicare rate for the services in an outpatient hospital setting, the parties shall negotiate the reimbursement rate. If negotiation is not successful, the parties may request a hearing with the Commission; however, treatment shall proceed

pending same.

RECENT CASE LAW

CASE LAW ALERT: **PETRINI V MARCUS DAIRY, INC., appeal pending, S.C. 19973**

SDAZ has received information that this "medical marijuana" case that is now on appeal to the Connecticut Supreme Court will be settling. The trial commissioner and the CRB had concluded that "medical marijuana" was reasonable and necessary treatment; the employer has appealed but the case appears to be headed for settlement after mediation took place. On appeal the employer had taken the position that "medical marijuana" was not reasonable and necessary treatment and was palliative, that such treatment was not allowed by the FDA, and that General Statutes Section 21a-408o exempted workers' compensation carriers from payment for the palliative use of marijuana. Settlement documents have not been approved as of this date but the case will likely settle. We had hoped that the Supreme Court would provide guidance as to what liability employers and workers' compensation carriers have for "medical marijuana." We will keep you updated on this important issue which involves state rights and potential federal preemption. If the case does settle then the "law of the land" per the CRB decision is that medical marijuana can be ordered in Connecticut Workers' Compensation claims.

CLEMENTS V. ARAMARK CORP., appeal pending, No. AC 39488.

This case was recently argued before the Appellate Court on January 24, 2018. The Compensation Review Board affirmed the dismissal of injuries that occurred at work when the claimant fell and hit her head due to an underlying cardiac condition. On appeal the claimant contends that her injuries should be compensable regardless of the cause of her fall. This case will be an important decision regarding compensability of falls at work that may be due to underlying non-occupational conditions. We expect a decision from the Appellate Court in late Spring 2018. We will keep you updated on this significant decision.

DAVID GARTHWAIT V. AT&T, 6172 CRB-5-17-2 (February 2, 2018)

The CRB affirmed a Finding and Dismissal issued by Commissioner Goldberg. The claimant suffered an acute disc herniation at L4-5 on November 5, 2008, which injury was accepted by the respondents. The claimant underwent surgery for the disc herniation. Later, in 2014, the claimant developed symptoms at the L5-S1 level for which he underwent surgery. The respondents denied responsibility for problems at the L5-S1 level and maintained that the claimant suffered from a preexisting degenerative disc disease and that any symptoms or problems were not triggered or aggravated by the 2008 work injury. The claimant insisted that the L5-S1 level had been accepted by virtue of payment for medical expenses and because the claimant's first surgery also involved the L5-S1 level. The trial commissioner, relying upon testimony and opinion from Dr. Mushaweh, the respondents' evaluator, dismissed the claim for compensability

of the L5-S1 level as well as lost time and medical bills associated with the claimant's surgery. The commissioner found that the initial surgery only involved the L4-5 level. The commissioner also found no basis to support a claim for penalties for undue delay. The CRB affirmed, rejecting the claimant's argument that because the voluntary agreement listed the "back" as an accepted injury, and because the respondents had paid some medical expenses related to the denied L5-S1 level the respondents had accepted liability and should be precluded from denying the L5-S1 level condition and surgery. The case was defended by **Attorney Anne Zovas of SDAZ**.

WETMORE V. PAUL FROSOLONE AND SEASONAL SERVICES OF CONNECTICUT LLC, 6176 CRB-5-17-2 (February 7, 2018)

The issue in this case was whether the medical care exception to the one year notice of claim requirement was met in accordance with General Statutes Section 31-294c; under that exception if the employer furnishes medical treatment within one year of the accidental injury then the claimant does not have to file a written notice of claim. Here the claimant was a landscaper who was paid under the table by the employer. The claimant's index finger was cut off while using a lawnmower. The employer brought the claimant to the hospital immediately after the accident. The employer then went back to the accident scene at the direction of the medical staff in order to find the finger. The employer found the finger and brought it back to the hospital. The claimant stated that the employer also gave him a check in an envelope to pay the bills for the hospital although the claimant never looked in the envelope. The Board affirmed the commissioner's finding that the medical exception had been met and the claimant was entitled to benefits. The CRB concluded that this was a factual issue and it was within the commissioner's discretion and apply a "global test" based on the "totality of the circumstances." The Board concluded that actual payment of bills is not necessary in order to furnish medical treatment.

PERALTA-GONZALEZ V. FIRST STUDENT, 6160 CRB-7-16-12 (November 16, 2017)

The CRB determined that the commissioner had erred in the amount of credit that was allowed for permanency pursuant to General Statutes Section 31-349; Section 31-349 allows a credit for prior permanency that was either "payable or paid." In this case the claimant was paid 18.5% of the leg without a voluntary agreement based on compromise of ratings of 20% and 17%. Thereafter, the claimant had a total knee replacement and there was an agreed upon increased rating to 55%. The commissioner allowed a credit of 20% based on theory that the prior compromise was based, in part, on a rating of 20%. The Board disagreed and concluded that the 20% rating was not "payable"; the Board's opinion appears to suggest that the credit is the 18.5% that was actually paid. The CRB distinguished this decision from prior decision in **Ouelette v. New England Masonry Company, 5424 CRB-7-09-2 (January 14, 2010),** where the Board allowed a credit for the higher rating that was compromised in a stipulation to date even though the actual payment was lower than the credit given.

GUSTAVO DAVILA V. MIMI DRAGONE, INC., DRAGONE & SONS, L.L.C. AND SECOND INJURY FUND, 6152 CRB-4-16-11 (November 28, 2017)

The issue in this case was whether the claimant provided timely notice in accordance with General Statutes Section 31-294c(a) in order for Commission to have jurisdiction to award benefits. The claimant sustained an injury while working for Thomas Dragone as the sole principal for Dragone and Sons, L.L.C. The claimant filed a Form 30c against Mimi Dragone within one year from date of injury. The claimant had ongoing contacts with Thomas Dragone but at no time did he attempt to determine the correct alleged employer that had been cited. He testified that there was confusion with regard to which Dragone family member or entity employed the claimant on his date of injury. The claimant attempted to argue that a deficient notice served on the Commission, but not the employer, constitutes notice to confer jurisdiction. The claimant failed to present persuasive evidence that as of the date of the Form 30c that Thomas Dragone had a sufficient interest in the ownership or management of Mimi Dragone, Inc. as to impute constructive notice. The Trial Commissioner found that there was no actual or constructive notice and dismissed for lack of jurisdiction; the CRB affirmed the decision.

ANTON V. COLORTONE CAMERA, ET AL., 6170 CRB-3-17-1 (Dec. 22, 2017).

The Trial Commissioner had concluded that medical bills owed to the claimant's authorized treating psychiatrist should not be paid because the medical provider had failed to adhere to billing guidelines as set forth by the Workers' Compensation Commission. The Compensation Review Board agreed that the treater had failed to comply with the guidelines which require providing timely medical reports and bills for authorized treatment, however, the CRB found that there was no statute or regulation which stated that nonpayment for otherwise reasonable and necessary medical treatment is the appropriate remedy for the submission of deficient or untimely reports or bills. The Board noted that while the provision of delayed or uninformative medical reports could conceivably impede the due process rights of the respondents, there were no findings of fact indicating that the respondents sustained actual prejudice. In footnote 3, the CRB noted that had the facts supported the conclusion that the respondents were prejudiced by lapses in reporting, they would find the balance of equities potentially supported a denial of some or all of the questioned medical bills. The Board held that the appropriate remedy for the situation was if the treater is unwilling to provide medical service to the claimant in a manner which complies with the reporting protocols, they should no longer be an authorized treater pursuant to Admin Reg. § 31-279-9 (g).

JOHN RAUSER V. PITNEY BOWES, INC., 6163 CRB-3-16-12 (October 20, 2017)

The CRB affirmed the trial commissioner's Finding & Dismissal that injuries sustained by the claimant as a result of an assault were not compensable. The claimant was in Spokane, Washington for a business trip and went to a local restaurant one evening with co-workers where food and alcohol were consumed. At some point the claimant and others departed the restaurant and went to another establishment where the claimant continued to imbibe alcohol. The claimant and a co-worker left the second

establishment and while walking towards the parking lot the claimant was assaulted by five unknown men. The trial commissioner found that the injuries sustained by the claimant as a result of the assault were not compensable, determining that any food or drink that was consumed at either of the two establishments after 8 p.m. were purely social in nature and unrelated to the business interests of the employer. This finding was based on testimony that the business associate with the highest rank in the employer's organizational hierarchy had instructed that the restaurant tab could be kept open until 8 p.m. or until $500.00 was spent, whichever occurred first. The trial commissioner concluded that the events occurring after 8 p.m. until the midnight hour were a substantial deviation from the claimant's employment. The CRB noted that after 8 p.m. on the evening in question, the claimant no longer enjoyed the express consent or implied acquiescence of his employer for his social pursuits. Whether an injury is found to have occurred in the course of employment requires consideration of whether the claimant was (a) within the period of employment; (b) at a place the employee may reasonably have been; and (c) fulfilling the duties of the employment or doing something incidental to it. The CRB held that it is a factual determination as to whether the activities in which the claimant is engaged at the time of the injury constitutes a substantial deviation from the employment, and such factual determinations will not be disturbed unless they are contrary to law, without evidence, or based on unreasonable or impermissible factual inferences.

MAGISTRI V. NEW ENGLAND FITNESS DISTRIBUTORS, 6169 CRB-2-17-1 (January 9, 2018)

Both the claimant and respondent in this matter appealed the trial commissioner's December 28, 2016 Finding and Award wherein the commissioner found the claimant was entitled to total disability benefits and medical treatment resulting from a July 13, 2015 motor vehicle accident. The commissioner denied the claimant's claim for interests and penalties for undue delay. There was a prior Finding and Award issued in regards to this matter on March 24, 2016 which focused on the compensability of the claimant's injuries and did not address the relief due to the claimant. The CRB ultimately affirmed the trial commissioner's March Finding, See **Magistri v. New England Fitness Distributors, 6089 CRB-2-16-4 (May 10, 2017).**

The focus of the December Finding was a determination as to the relief due to the claimant. The respondent's appealed the commissioner's December Finding arguing that the commissioner was collaterally estopped from ordering relief as the issue was previously litigated in the March Finding. The claimant's appeal stated that the December Finding should be modified so as to include penalties and interest for undue delay because no payments were made by the respondents following the March Finding. The CRB found both appeals to be without merit as the commissioner properly bifurcated the issues of compensability (March Finding) and the relief owed to claimant (December Finding). The CRB noted the respondents were under no obligation to issue payments following the March Finding because no decision was reached as to

relief due to the claimant, and therefore the claimant was not entitled to sanction the respondents for undue delay.

BROCUGLIO V. THOMPSONVILLE FIRE DISTRICT #2, 6165 CRB-1-16-12 (December 21, 2017)

The CRB affirmed a finding that the claimant/firefighter was entitled to benefits under General Statutes Section 7-433c for mitral valve injury to the heart. Section 7-433c claims for heart and hypertension for fireman/police are a "bonus" to these civil servants and not workers' compensation benefits although they are administered under the workers' compensation statutes. The respondents argued that an earlier untimely-filed claim for pericarditis barred the claimant from pursuing the later-diagnosed injury to the mitral valve. The Board concluded that the mitral valve injury was separate from the pericarditis claim and ordered that benefits be paid. The Board cited the recent Supreme Court case of **Holston v. New Haven Police Department, 323 Conn. 607 (2016)**, in support of their decision.

ANTHONY V. ARAMARK CORPORATION, 6168 CRB-2-17-1 (December 29, 2017)

The commissioner initially in a finding held that the medical treatment sought was related to a work accident and ordered benefits to be paid (meaning: the claimant won). The respondents thereafter appealed the decision and filed a motion to correct the decision; incredibly, the trial commissioner granted the motion to correct in behalf of the respondents and essentially dismissed the claim (meaning: the employer won). The respondents withdrew their appeal and the claimant then appealed. In a lengthy decision the Compensation Review Board concluded there was sufficient evidence in the record to support the commissioner's change of mind and the case was dismissed.

LAMPO V. ANGELO'S PIZZA EAST ROCK, LLC, 6134 CRB-3-16-10 (January 31, 2018)

The Board affirmed a commissioner's ruling that barred the workers' compensation carrier from raising issues before the commission regarding the validity of the workers' compensation policy. The designated agent for workers' compensation policies for the commission, the National Council of Compensation Insurance, Inc., (NCCI), had documentation of a policy in place on the date of the accident. The carrier contended that based on its interpretation of the statutes, the trial commissioner has the "equitable power to take evidence regarding the formation of the contract for insurance, and it was error for the trial commissioner not to do so." The Board disagreed and cited General Statutes Section 31-343 in support of the decision. Generally, contract disputes regarding the insurance policy will not be considered by the workers' compensation commission; this type of dispute needs to be addressed in a civil claim in Superior Court.

SEE BELOW OUR "WORK-COMP-AT-A-GLANCE" SUMMARY; PLEASE CONTACT US IF YOU WOULD LIKE TO RECEIVE A LAMINATED VERSION OF THIS THAT IS HANDY TO KEEP AT YOUR DESK

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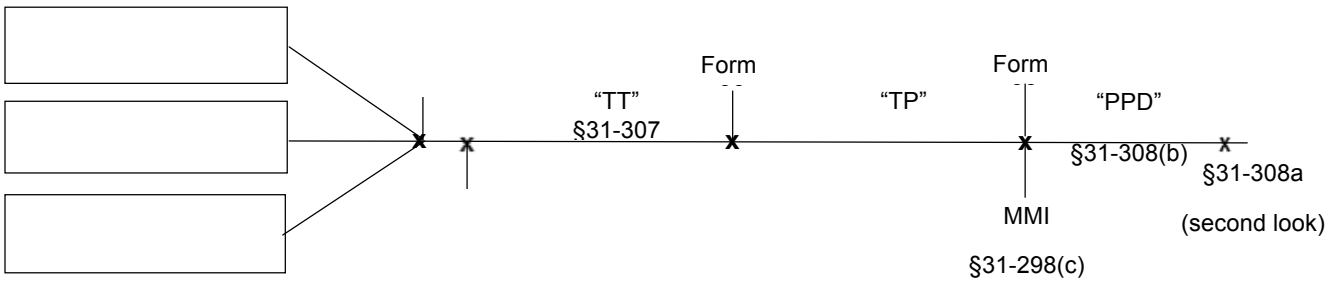
CONNECTICUT WORKERS' COMPENSATION (post 7/1/93) AT A GLANCE

Commission Website: http://wcc.state.ct.us



MAXIMUM/MINIMUM COMPENSATION RATES

	Maximum Temporary Total (§31-307) (wages all)	Maximum Permanent/ Temporary Partial (§31-	Minimum Temporary Total* (§31-307) (*20% of	Minimum Permanent/ Temporary Partial (§31-

		308) (APW)	maximum rate capped at 75% AWW)	308(b))
10/1/17*	$1,287.00	$1,023.00	$257.40	$50.00
10/1/16	$1,292.00	$1,063.00	$258.40	$50.00
10/1/15	$1,256.00	$998.00	$251.20	$50.00
10/1/14	$1,175.00	$991.00	$235.00	$50.00
10/1/13	$1,184.00	$985.00	$236.80	$50.00

*max rate for D/A 10/1/87-6/30/93 is $1535.

CONCURRENT EMPLOYMENT
§31-310

1. Must be employed with both employers on date of accident
2. Only wages for simultaneous weeks included
3. Out-of-state, federal, U.S. military, self-employment or casino employment does not qualify
4. Request reimbursement Second Injury Fund within 2 years of payment

COST OF LIVING ADJUSTMENTS (COLA)
§31-307a

1. Only after 5 years of temporary total
   or
2. Permanent total/death

3. Reimbursement from Second Injury Fund for COLA paid D/A 7/1/93 and before 10/1/97 (requested within 2 years of payment)

MILEAGE PER DATE OF INJURY
§31-312

1/1/2018	54.5 cents
1/1/2017	53.5 cents
1/1/2016	54 cents
1/1/2015	57.5 cents
1/1/2014	56 cents

DEATH BENEFITS
§31-306

- $4,000.00 burial fee (§31-306(a)(1))
- Benefits paid to surviving spouse until death or remarriage (§31-306(a)(3), §31-275(19))
- If no spouse, paid to the dependent children until age 18, or 22 if fulltime student, or for life if incapacitated from earning (§31-306(5))

FORMS

- **Form 36** (certified mail) (§31-296(b)):
  - Filed to seek discontinuation or reduction in benefits or to establish maximum medical improvement (MMI)
  - Filed to seek suspension of benefits for non-compliance with medical care

- Dependent-in-fact capped at 312 weeks, limited to extent of actual support (§31-306(6))

STATUTE OF NON-CLAIM

- **Accidental Injury**: One year (tolled if medical bill paid by employer or request for hearing within one year) (§31-294c)
- **Repetitive trauma**: One year from date of last injurious exposure
- **Occupational disease**: Three years from date when doctor tells claimant disease due to work

- **Form 43** (certified mail) (§31-294c):
  - Filed to contest claim, extent of disability, extent or nature of medical care or to seek suspension of benefits for failure to attend treatment or evaluation
  - Copy to physician in cases in which medical care questioned
  - Commission medical protocols can be basis for Form 43
- **Form 42**:
  - Sent to doctor for MMI and PPD rating(s)
- **Employee Medical & Work Status Form**:
  - Sent to doctor for outline of restrictions in detail

SCHEDULED LOSS OF PERMANENT IMPAIRMENT

BACK	374	BLADDER	233	HEART	520	SMELL	17		
MASTER ARM	208	SPEECH	163	BRAIN	520	TASTE	17		
NON-MASTER ARM	194	LUNG	117	MASTER THUMB	63	SPLEEN	13		
MASTER HAND	168	CERVICAL SPINE	117	NON-MASTER THUMB	54	GALL BLADDER	13		
NON-MASTER HAND	155	KIDNEY	117	FIRST FINGER	36	TOOTH	1		
LEG	155	RIB CAGE	69	SECOND FINGER	29	PELVIS	374		
FOOT	125	OVARY	35	THIRD FINGER	21	STOMACH	260		
HEARING		TESTIS	35	FOURTH FINGER	17	DRAINAGE DUCT EYE	17 each		
BINAURAL	104	MAMMARY	35	GREAT TOE	28	DRAINAGE DUCT EYE UNCORRECTED	33 each		
ONE EAR	35	NOSE	35	OTHER TOES	9	VAGINA	35-104		
ONE EYE	157	JAW	35	CAROTID ARTERY	520	PENIS	35-104		
PANCREAS	416	UTERUS	35-104	LIVER	347	COCCYX	35		