



**DUNCAN V. WCAB (XYZZX), COURT OF APPEAL, SIXTH APPELLATE DISTRICT (11/25/09) 179 CAL. APP. 4TH 1009 (H034040)**

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In a decision unfavorable to employers, the 6<sup>th</sup> District Court of Appeal has overturned the WCAB and held that when an injured worker's total permanent disability payment, or life pension payment is calculated, that payment is subject to a Cost of Living Adjustment ("COLA") starting from January 1, 2004, and every January 1, thereafter, regardless of the date of injury. Per the statute, this applies to all injuries occurring on or after January 1, 2003.

The Applicant in this case had an industrial injury on 1/20/2004 which resolved by Stipulations and Award for 69.5% permanent disability. A claim was then made against the Subsequent Injuries Benefit Trust Fund (SIBTF) following the settlement with the employer due to his pre-existing disability due to Hepatitis B and HIV positive status. It was Stipulated between the Applicant and SIBTF that the industrial and non industrial disabilities rendered the Applicant 100% permanently and totally disabled (PTD). The Applicant sought an increase in his weekly PTD benefit by the annual changes in the state average weekly wage (SAWW) starting from his date of injury, or on 1/20/04, per Labor Code 4659(c). SIBTF argued that the COLA increase should not go into affect until the actual payments became due, which in this case (a 100% case) would begin once the Applicant reached a permanent and stationary status. Amicus for CAAA presented a third option, that the COLA increase should take effect beginning on 1/1/2004 regardless of the date of injury, and that all future awards would be calculated with the increase going back to this date.

The WCAB had found that the COLA increase would take affect for TPD indemnity or life pension payments on the first January 1 following the date of injury, and that those payments would be increased annually no matter when the first payment is received. The Court of Appeal disagreed and turned to the language of the statute, and looked at legislative intent.

Labor Code Section 4659(c) states that:

"For injuries occurring on or after January 1, 2003, and employee who becomes entitled to receive a life pension or total permanent disability indemnity ...shall have that payment increased annually commencing on January 1, 2004, and each January 1 thereafter, by an amount equal to the percentage increase in the 'state average weekly wage' as compared to the prior year."

The Court of Appeal, in looking at the plain meaning of the statute, held that the COLA increase would then take affect as of January 1, 2004, no matter what the date of injury or when the life pension or PTD benefit would commence. This decision will clearly have a significant impact on claims that are in life pension range (70%-100%), as they will cause

a substantial increase in the amount of the benefits employers will be required to pay to an Applicant.

A Petition for Rehearing was denied 12/17/09. A further Appeal is expected in this case. It is interesting to note that although the interpretation of the actual language of the statute in LC 4659(c) appears to be logical, the Court of Appeal quotes language in its opinion which one would think would have supported an opposite conclusion. Specifically, the decision quotes the following: “There is a well ‘settled principle of statutory interpretation that language of a statute should not be given literal meaning if doing so would result in absurd consequences which the legislature would not intend.” (Younger v. Superior Court (1978) 21 Cal. 3d 102, 113). If you look at the consequences of the Court of Appeals Decision, applying the COLA increase from 1/1/04 to an injury that occur years later, can actually result in a higher PTD benefit than an Applicant’s earnings would allow at the time they had their injury because of the annual increases being applied from 1/1/04. This will certainly be a focus of Petitioner’s challenge.