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Current Case Law Review 2007/2008

Join us for a discussion where we will review current decisions from the WCAB and Court of Appeal. We will also review cases interpreting use of the AMA Guides vs. the Permanent Disability Rating Schedule, Temporary Disability Two Year Limit, Medical Treatment/ACOEM, and other pertinent workers' compensation issues.



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INJURY TO THE PSYCHE

Verga v. WCAB

(2008) 159 Cal. App.4th 174; 73 CCC 63

The applicant filed an Application for Adjudication of Claim alleging that she suffered an injury to her psyche in 2000 as a result of abusive behavior by her supervisor while employed as a Staff Representative for United Airlines. The matter was tried on December 13, 2006 at which the applicant and a number of her co-workers testified. Following the hearing, the Workers' Compensation Judge found that the applicant did not sustain an injury to her psyche arising out of and occurring in the course of employment. The Judge noted that there was conflicting evidence regarding what had happened during the applicant's employment and found that the applicant's testimony was not as credible as that of other employees. The Workers' Compensation Judge found that the applicant was hard to get along with and caused the job to be difficult and stressful. He concluded that the applicant's false perceptions of her working environment did not constitute actual events of employment. Therefore, the applicant failed to establish an "actual event of employment" that was the predominant cause of her injury within the meaning of Labor Code §3208.3.

The applicant filed a Petition for Reconsideration and the WCAB denied the petition.

The applicant then filed a Petition for Writ of Review.

The 3rd District Court of Appeal framed the issue as "whether the disdainful reactions of a supervisor and co-workers to an employee's mistreatment of them constitute 'actual events of employment' for which the employee can obtain workers' compensation benefits for the psychological stress that the employee experiences because of those disdainful reactions to her inappropriate conduct." The Court noted that the answer to that question requires an interpretation of Labor Code §3208.3(b)(1) which states: "In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury."

The Court of Appeal noted that substantial evidence supported the WCAB's factual findings that the applicant's supervisor and co-workers did not persecute or harass her. Instead, it was the applicant who cause the stressful work environment by being rude, inflexible, easily upset and demeaning toward other employees. The fact that the applicant subjectively misperceived as harassment the disdainful reaction of her co-workers did not entitle her to workers' compensation benefits for psychiatric injury.

The Court further pointed out that the evidence presented at the trial established that the applicant had a very low frustration level and abused her co-workers when they did not meet her expectations. Although her co-workers reacted with disdain in their efforts to change the applicant's behavior, their actions were relatively benign. The Workers' Compensation Judge had found that the applicant was the aggressor and she created the negative work atmosphere that she asserted caused her psychological injuries. The applicant's supervisors had attempted to counsel her regarding her rudeness and inflexibility, but she chose to ignore their advice and continue to belittle her co-workers. The Court found that the WCAB was correct in concluding that the disdainful reactions of co-workers to the applicant's abusive conduct were neither "actual events of employment" nor the "predominant cause" of her psychological injuries within the meaning of Labor Code §3208.3(b)(1). Therefore, the WCAB's order denying compensation as affirmed.

(Please note that the defendants in this action were represented by Ohnmar M. Shin of Mullen & Filippi's Sacramento office.)

TEMPORARY DISABILITY

104-Week Payment Limit

Vega v. Straub Distributing Company

(2007 – Panel decision) 2007 Cal. Work Comp PD LEXIS 159.

Applicant sustained an injury to his back while employed by the defendant as a truck driver/loader-unloader. The defendant denied liability on the basis of AOE/COE. Because of the denial, the defendant did not provide any temporary disability benefits and the applicant began receiving benefits paid by the Employment Development Department. The EDD benefits were paid from October 27, 2004 through October 26, 2005.

The matter went to trial on January 24, 2006 on multiple issues, including injury AOE/COE, and temporary disability. Findings and Award were issued on April 14, 2006 in which it was found that applicant's injury was AOE/COE and that applicant was entitled to temporary disability beginning on October 25, 2004. Defendant petitioned for reconsideration which was denied by the WCAB. The defendant then petitioned for writ of review which was denied by both the Court of Appeal and the California Supreme Court.

After exhausting its appellate options, defendant began providing benefits, including the initial payment of temporary disability indemnity on March 1, 2007. These payments included retroactive temporary disability for the period October 25, 2004 through October 25, 2006 and included reimbursement to the Employment Development Department. After making payments equaling 104 weeks of temporary disability indemnity, the defendants ceased any further TD payments. The applicant filed a Declaration of Readiness to Proceed and the matter proceeded to trial on August 17, 2007 on the issue of whether the defendant was obligated to continue making temporary disability payments. The WCJ issued Findings and Award dated August 28, 2007 in which it was found that the period of two years, as referenced by Labor Code §4656(c)(1), began on March 1, 2007 when the defendant made its initial indemnity payment. Therefore, the applicant is entitled to continuing temporary disability indemnity for a period of 104 weeks from that date. The defendant filed a Petition for Reconsideration, contending that the date that EDD commenced providing benefits should be the starting date for the 104 weeks of temporary disability indemnity payments. The WCAB rejected this argument.

The Board first differentiated the EDD payments from any type of “salary continuation plan” described by Labor Code §4650(g). They reasoned that treating State Disability benefits as temporary disability indemnity for purposes of the Labor Code §4656 (c)(1) time limitation would negate the financial incentives that encourage a defendant to promptly provide benefits. If a defendant were able to rely upon the State to initiate the disability payment process and thereby invoke the 104-week limitation, a defendant would have no incentive to promptly provide disability benefits to an employee. Instead, a defendant could delay benefits while allowing the State to accept the burden of benefit provision. Therefore, the defendant’s Petition for Reconsideration as denied and the WCJ’s Findings and Award were affirmed.

TEMPORARY DISABILITY

104-Week Payment Limit

Vasquez v. City of Pasadena

(2007 – Panel decision) 2007 Cal. Work Comp P.D. LEXIS 158.

Applicant sustained an industrial injury to his right shoulder and neck while employed by the defendant as a maintenance worker on December 7, 2004. He suffered a second industrial injury involving his right shoulder on December 20, 2004. The employee continued to work between the date of the first and second injury. He then went on temporary disability beginning on December 21, 2004. Defendant paid temporary disability indemnity for the period December 21, 2004 to December 30, 2006, terminating the benefit payments on that date, asserting the 104-week limitation contained in Labor Code §4656(c)(1). Applicant filed a Declaration of Readiness to Proceed requesting a hearing on the issue of his continued entitlement to receive temporary disability indemnity payments. The issue was tried on May 30, 2007.

At the time of the trial, the parties stipulated that there were two separate specific injuries to the right shoulder, one on December 7, 2004 and the other on December 20, 2004. The parties further stipulated that the applicant is currently temporarily totally disabled. The WCJ issued his Findings and Award on December 22, 2007 in which he stated that the evidence indicates that both injuries caused applicant's disability and the applicant is entitled to 104 weeks of temporary disability for each injury. The defendants petitioned for reconsideration.

The Board Panel granted the Petition and rescinded the Findings and Award.

In its discussion, the Board first confirmed that an injured worker is entitled to receive 104 compensable weeks of temporary disability indemnity within a period of two years beginning on the date on which temporary disability indemnity is first paid (Hawkins v. Amberwood Products (2007) (72 CCC 807). In this case, the Board noted that the applicant's first injury did not cause any period of temporary disability. The evidence did not show that the two injuries caused successive periods of temporary disability. Rather, the injuries were to the same body part and caused temporary disability beginning on the same date. Therefore, the Board found that Labor Code §4656(c)(1) provided for 104 compensable weeks of temporary disability indemnity running concurrently for both injuries on the date on which temporary disability indemnity was first paid.

TEMPORARY DISABILITY

104-Week Payment Limit

Van Ness v. Fireman's Fund Insurance Company
(2007 – Order Denying Reconsideration) 35 CWCR 295

Applicant sustained an injury to his right foot on October 20, 2004. During the course of treatment, the applicant's toe became infected and required amputation. After the amputation, the applicant required crutches to walk and developed shoulder problems.

The defendant began temporary disability payments on October 22, 2004 and stopped October 19, 2006 – two years from the date of injury. The applicant claimed that additional temporary disability was due because the shoulder injury was a compensable consequence of the toe amputation and, thus, was an exception to the two-year temporary disability cap.

The applicant sought an expedited hearing and the WCJ issued a Findings and Award in which he stated that the two conditions (the foot injury and shoulder injury) are interrelated. Even though the foot injury had reached maximum medical improvement, the applicant remained temporarily disabled due to the shoulder injury and that the shoulder injury was a compensable consequence of the toe amputation. Therefore, additional temporary disability was warranted due to the “amputation exception” to the two-year temporary disability cap.

The defendant petitioned for reconsideration, arguing that the applicant's continued temporary disability was due to the shoulder injury alone. A Board Panel rejected the defense argument and agreed with the Workers' Compensation Judge. The Board noted that the applicant's current temporary disability was due to the toe condition, not solely to the shoulder condition which would not have been accepted from the 104-week temporary disability payment cap. The Board noted that although the statute does provide different temporary disability payment limitations for different kinds of injuries, it does not authorize apportionment of temporary disability. Because it was undisputed that the applicant had an amputation which caused temporary disability and that using crutches while recovering from the toe surgery resulted in additional injury to the shoulder and additional temporary disability, the Workers' Compensation Judge was correct in determining that the applicant was entitled to continued temporary disability payments because his ongoing temporary disability was the result of his toe amputation and the compensable consequences thereof.

TEMPORARY DISABILITY

104-Week Payment Limit

Foster v. WCAB

(2008) ___ Cal.App.4th ___; 2008 Cal.App. LEXIS 556

Applicant sustained two separate industrial injuries while employed by the defendant. The first injury occurred on February 23, 2005 when an electrical panel fell on his right shoulder. Following that injury he was examined by a physician and returned to work on a light duty assignment. On April 13, 2005, the applicant sustained a second injury when a rake arm hit him, causing him to fall and hit his right shoulder and head. The applicant sustained injury to his neck, right elbow and right shoulder. The applicant was unable to work after April 13, 2005. Both the February and April injuries contributed to the applicant becoming temporarily disabled.

The defendant's insurer began providing temporary disability indemnity benefits on April 26, 2005 for the period beginning on April 14, 2005.

The applicant underwent surgery on his right shoulder in September, 2005. He was then evaluated by an Agreed Medical Examiner who stated in March, 2007 report that the applicant's right shoulder and right elbow had reached maximum medical improvement by September, 2006. The AME indicated that the applicant's neck condition would not reach maximum medical improvement until after surgery or a decision not to have surgery.

The defendant's insurer stopped paying the applicant temporary disability benefits after April 14, 2007 based on Labor Code Section 4656(c)(1) limiting temporary disability benefits to 104 compensable weeks within a period of two years from the date of the commencement of temporary disability payments.

Following a hearing on the issue, the Workers' Compensation Judge determined that the applicant was entitled to two periods of temporary disability benefits. The Workers' Compensation Judge awarded the applicant temporary disability benefits for his first injury from April 14, 2005 until September 25, 2006 when his right shoulder and right elbow reached maximum medical improvement. The applicant was awarded an additional period of temporary disability benefits for the second injury beginning on September 26, 2006 after the temporary disability for the first injury ended. The Workers' Compensation Judge reasoned that the applicant was entitled to consecutive periods of indemnity because he could not receive temporary disability payments concurrently for his two injuries.

Defendant filed a Petition for Reconsideration, which was granted by the WCAB. The Board concluded that the applicant was entitled to two periods of disability indemnity pursuant to Labor Code §4656(c)(1) because he suffered two injuries. However, the WCAB concluded that the Workers' Compensation Judge erred in determining that the period of temporary disability indemnity for the second injury ran after the period attributable to the first injury ended.

The applicant filed a Petition for Writ of Review, which was granted by the 3rd District Court of Appeal.

The Court noted that the WCAB correctly applied Labor Code §4656(c). The Board determined that the applicant became unable to work on April 14, 2005 as a result of both his first injury and second injury. The applicant was entitled to recover temporary disability indemnity for both injuries from April 14, 2005 and, because the temporary disability was caused by both injuries, the limitation period provided by Labor Code §4656(c)(1) started for both injuries on April 26, 2005, the date when defendant's insurer began making temporary disability payments. Therefore, the Court concluded where independent injuries result in concurrent periods of temporary disability, the 104-week limitation likewise runs concurrently. The Court affirmed the WCAB's order granting reconsideration and the Board's decision after reconsideration.

[Please note that the defendant in this action was represented by Karen T. Dutton of Mullen & Filippi's Sacramento office.]

**INJURED ON DUTY PAY EQUALS
TEMPORARY DISABILITY**

Norwood v. City of Los Angeles

(2007 – Decision After Reconsideration) 35 CWCR 272

Applicant was employed by the City of Los Angeles as a maintenance worker. He sustained injury to his neck and shoulder on March 17, 2005. The defendant City accepted the claim and, in lieu of temporary disability, paid the applicant “injured on duty (IOD)” pay for one year beginning April 24, 2005. After one year of IOD pay, the defendant paid the applicant one year of temporary disability and ceased making any further payments, citing Labor Code §4656(c)(1).

The applicant requested an expedited hearing claiming entitlement to additional temporary disability payments. In the Findings & Award dated July 11, 2007, the Workers' Compensation Judge found that the IOD benefits paid by the City were not temporary disability within the meaning of Labor Code §4656(c)(1) and awarded additional temporary disability for the period April 26, 2007 to the present and continuing.

The defendant filed a Petition for Reconsideration and the Board granted the petition. The WCAB noted that Section 4.104 of Article 7 of the Los Angeles Administrative Code provides that any employee of the city who sustains “illness or injury proximately caused by, arising out of and in the course” of his or her employment shall receive, from the date the employee is certified off duty for temporary total disability, an amount equal to the employee’s regular take-home pay “as workers’ compensation in satisfaction of the city’s obligation under Division 4 of the Labor Code . . . and not as salary or wages for services rendered.” The Board said that the intent of the Administrative Code provision was to provide a higher rate of temporary disability to employees injured in the course of their employment for a period of one year following the injury. The Board found that there was no good reason to discourage employers from adopting provisions that provide a higher rate of temporary disability for injured workers by not counting those payments as part of the 104-week limitation of Labor Code §4656(c)(1).

Therefore, the WCAB Panel rescinded the Workers' Compensation Judge’s findings and award and returned the case to the trial level for an award consistent with the Board’s decision.

**INJURED ON DUTY PAY IS
TEMPORARY DISABILITY FOR PURPOSES OF THE 2 YEAR CAP**

Brooks v. WCAB

(2008) __ Cal.App.4th __; 5th Dist. Court of Appeal Case No. F053350

On October 25, 2004, the applicant sustained an injury to her right shoulder and psyche arising out of and in the course of her employment as a Correctional Officer with the California Department of Corrections and Rehabilitation. The applicant was provided with one year of industrial disability leave (IDL) benefits after which she received one year of temporary disability benefits. On October 26, 2006, despite the fact that the applicant remained temporarily disabled, her temporary disability indemnity payments stopped.

The applicant sought a hearing on the issue, contending she was entitled to an additional one year of temporary disability indemnity because the two-year limitation on those benefits contained in Labor Code §4656(c)(1) did not begin running until October 27, 2005 when her initial one year of IDL payments ceased. The Workers' Compensation Judge disagreed with the applicant, finding that IDL is the functional equivalent of temporary disability and that the two-year cap of Labor Code §4656(c)(1) limited the applicant to 104 weeks of combined IDL and temporary disability indemnity.

The applicant filed a Petition for Reconsideration, claiming that IDL is not the equivalent of temporary disability because "IDL payments are made under different rules, to a limited class of employees, at different rates, and for different periods." In the Report and Recommendation to the WCAB, the Workers' Compensation Judge relied on the statutory definition under Government Code §19870(a) which provides that IDL "means temporary disability as defined in" the Labor Code's workers' compensation provisions. The WCAB adopted the Workers' Compensation Judge's reasoning and denied the Petition for Reconsideration.

The applicant then filed a Petition for Writ of Review. The 5th District Court of Appeal noted the applicant's contention that the state's IDL and temporary disability programs are mutually exclusive and independent benefits payable to temporarily disabled state employees. The Court analyzed the language of both the Industrial Leave Statute (Government Code §§19869-19877.1) and the Workers' Compensation Temporary Disability Statute (Labor Code §4656) as well as the Workers' Compensation Reform statutes enacted under SB 899. The Court specifically noted that Government Code §19870(a) expressly provides that IDL

“means temporary disability”. The Court held that because IDL is statutorily defined as the equivalent of temporary disability, then the two-year limitation under Labor Code §4656(c)(1) necessarily must apply to both IDL and to temporary disability indemnity.

Based upon this analysis, the Court affirmed the WCAB’s Order Denying Reconsideration.

[Please note that this decision, as well as similar decisions involving “Injured On Duty” pay appear to rely on specific language in the statutes which equate IDL and Injured on Duty pay to temporary disability benefits. Therefore, the two-year temporary disability cap contained in Labor Code §4656(c)(1) applies. There is a different outcome involving continuation of pay provided to Public Safety Officers under Labor Code §4850. Cases interpreting this statute have found that Labor Code §4850 benefits are an additional benefit to compensate Public Safety Officers for the extremely dangerous job they perform. Because of the different nature of the benefit, it is not subject to the two-year temporary disability cap.]

INJURED ON DUTY PAY

Lingbaoan v. State of California Dept. of Corrections

(2007 – Panel Decision) 2007 Cal. Work. Comp PD LEXIS 149

The applicant sustained an accepted cumulative trauma injury through April 20, 2005 while employed as a Correctional Officer. Following the injury temporary disability was paid in the form of industrial disability leave (IDL) starting on June 1, 2005. The defendant provided IDL benefits for a period of one year and then paid temporary disability benefits for an additional one year. At the conclusion of temporary disability payments, the defendant petitioned for an order to terminate temporary disability benefits. The petition was granted.

The applicant filed a Petition for Reconsideration.

In denying the applicant's Petition for Reconsideration, the Board noted that Government Code §19871(a) provides that certain state employees are entitled to receive industrial disability leave "in lieu of temporary disability". Therefore, because the defendant paid IDL benefits in lieu of temporary disability, the 104-week limitation on temporary disability contained in Labor Code §4656(c)(1) began to run on the first date when IDL benefits were paid. Therefore, the Board granted reconsideration and returned the matter to the Workers' Compensation Judge for a finding and award consistent with the determination that the defendant may terminate temporary disability 104 weeks after it first paid IDL.

AMA GUIDE IMPAIRMENT RATING

Cortez v. Zurich North America

(2008 – Order Denying Reconsideration) 36 CWCR 41

Applicant sustained an injury to his right wrist on June 29, 2004 when he fell from a ladder. When his disability reached maximum medical improvement, it was evaluated by an Agreed Medical Evaluator. The doctor described the factors of permanent disability in his report dated August 13, 2007. The doctor diagnosed carpal tunnel instability and provided an impairment rating using the AMA Guides. In addition, the doctor included an additional impairment rating due to loss of grip strength.

The case proceeded to trial and, based on the AME report, the Workers' Compensation Judge awarded the applicant 25% permanent disability based upon a combined rating of the wrist instability (8% permanent disability) and the loss of grip strength (19% permanent disability).

The defendant filed a Petition for Reconsideration, arguing that it was error to rate the loss of grip strength and the wrist instability separately.

Generally, grip strength is not to be used in determining impairment if other, more objective measures are available. However, under certain circumstances the use of grip strength is permissible. According to Section 16.8(a) of the AMA Guides, “if the examiner believes the individual’s loss of strength represents an impairing factor that has not been considered adequately by other methods in Guides, the loss of strength may be rated separately.”

In denying reconsideration, the Board adopted the Workers' Compensation Judge’s Report on Reconsideration, in which the Workers' Compensation Judge noted that the AME had explained his reasoning for including the grip strength impairment in his report. The AME noted that “there is an additional pathomechanical problem with muscle atrophy and weakness relating to the industrial injury, and therefore there should be an additional grip loss added to the functional impairment according to the AMA Guides.” The Workers' Compensation Judge determined that the AME had adequately explained the reasoning behind the use of grip strength impairment. Therefore, he recommended against reconsideration. The Board Panel adopted the Workers' Compensation Judge’s reasoning and denied reconsideration.

PERMANENT DISABILITY

Old Schedule versus New Schedule

Genlyte Group, LLC v. WCAB

(2008) 73 CCC 6; 158 Cal.App.4th 705

Applicant was employed by Genlyte (insured for workers' compensation by St. Paul Traveler's) as an Assembler. She sustained specific injuries to her shoulders, upper extremities and right hand on December 5, 2001. She sustained cumulative trauma to these same body parts from August 2, 2002 through March 14, 2003.

The applicant underwent bilateral shoulder surgery and carpal tunnel surgery performed by her primary treating physician, Dr. Rahman. In a report dated September 14, 2004, Dr. Rahman stated "It is my opinion that permanent disability exists with respect to the patient's bilateral shoulder and bilateral upper extremity injuries, however, I will further determine the extent of permanent disability after further evaluations of the patient's condition." Dr. Rahman made similar findings in reports dated October 13, 2004 and October 27, 2004, and November 10, 2004. In addition, Dr. Rahman's reports noted that "I conclude that it is medically probable that the patient's disability is solely attributable to the injury of 12/5/01 and continuous trauma injury of 8/2/02 – 3/14/03, however, these issues will be further addressed at the time of the permanent and stationary evaluation."

In a report dated October 19, 2005, Dr. Rahman indicated that the applicant had reached permanent and stationary status and described work preclusions of no very heavy lifting or strenuous overhead working activities for the shoulders and no repetitive pushing and pulling and forceful gripping and grasping for the upper extremities. Dr. Rahman reported that the applicant was unable to return to her job as an Assembler and that vocational rehabilitation was required. In addition to describing work preclusions, Dr. Rahman also provided impairment ratings under the AMA Guides.

The defendant obtained a QME evaluation from Dr. Brent Miller. In his report dated April 12, 2004, Dr. Miller found that "the patient is not permanent and stationary and remains temporarily totally disabled pending her additional surgery." The patient will be a qualified injured worker, and will not return to assembly activity as this will only serve to aggravate and further accelerate her upper extremity overuse syndrome." Dr. Miller also reported "At the present time, the presence of permanent impairment is expected, but rating is uncertain." Dr.

Miller subsequently found the applicant to have reached permanent and stationary status in his report dated August 22, 2005. Dr. Miller described the applicant's impairment solely using the AMA Guides.

The case proceeded to trial where the reports of both the primary treating physician and QME were received into evidence, as well as the applicant's testimony. The Workers' Compensation Judge applied the 1997 Permanent Disability Rating Schedule, found the applicant had sustained 38% permanent disability and awarded \$30,940 in permanent disability indemnity. (The defendant argued that the applicant's injury should have been rated under the new schedule which would have resulted in permanent disability of either 6% or 12%.)

The defendant filed a Petition for Reconsideration, contending that the 2005 Permanent Disability Rating Schedule should have been used to rate the applicant's disability. The defendant argued that while both the primary treating physician and QME medical reports generated in 2002 indicated that permanent disability was to be expected, they did not state that the applicant was permanent and stationary.

In her Report on Reconsideration, the Workers' Compensation Judge took the position that "the existence of a comprehensive medical-legal report dated prior to January 1, 2005 satisfied the requirement of Section 4660(d)" and that there was no authority for the defendant's position that the applicant had to have been found "permanent and stationary" prior to January 1, 2005 in order to apply the 1997 PDRS. The WCAB adopted the Workers' Compensation Judge's decision and Report on Reconsideration, and denied reconsideration. The defendant's filed a Petition for Writ of Review. That writ was granted and the Second District Court of Appeal issued its opinion dated January 3, 2008.

Following a discussion of SB 899 and the legislative intent behind the Workers' Compensation Reform legislation, the Court held that an injured workers condition need not be permanent and stationary for the treating physician or comprehensive medical-legal report to indicate the existence of permanent disability. The Court noted that while the applicant's condition was not yet permanent and stationary at the time of either Dr. Miller's April 12, 2004 medical-report or Dr. Rahman's 2004 treating physician reports, both reports indicated the existence of permanent disability. The Court determined that such language was sufficient to satisfy Labor Code §4660(d)'s exception to the application of the new rating schedule.

The Court rejected defendant's argument that the terms "permanent disability" and "permanent and stationary status" are used interchangeably. The Court noted a number of instances in the Labor Code where the Legislature clearly used the terms "permanent and stationary status" when it so intended. For example, Labor Code §4658(d)(2) [providing for increase or decrease of permanent disability indemnity depending on whether an employer offers the employee regular, modified or alternate work "within 60 days of a disability becoming permanent and stationary", and Labor Code §4061(a)(2) [specifying the required notice upon the last payment of temporary disability indemnity when the amount of permanent disability indemnity payable cannot be determined "because the employee's medical condition is not yet permanent and stationary"].

Therefore, the Court remanded the matter to the WCAB to determine whether Dr. Miller's April 12, 2004 medical-legal report or Dr. Rahman's 2004 treating physician reports are substantial evidence "indicating the existence of permanent disability" under Labor Code §4660(d).

PERMANENT DISABILITY

Old Schedule versus New Schedule

Virginia Surety, Inc. v. WCAB (Wragg)

(1/31/08 Unpublished); 2nd Dist. Court of Appeal; WCC 33112008 CA

The applicant sustained an accepted injury to his back on June 16, 2003. The defendant commenced payment of temporary disability benefits on June 17, 2003. The applicant underwent surgery on September 27, 2004 and his treating physician prepared a report dated December 22, 2004 stating “It is my medical opinion, based upon my education, training and experience, along with a comprehensive review of this patient’s condition by way of review of all available information, that this patient’s condition has not, as yet, reached a permanent and stationary status, that the patient will be left with some measure of permanent residual disability and limited functional capacity resulting from said industrial injury. Obviously, the extent of such disability cannot be determined, however, will be addressed once the patient’s condition reaches a permanent and stationary status.”

The matter was tried on April 13, 2006 on the issue of which rating schedule to use. On December 15, 2006, the Workers' Compensation Judge issued his Findings & Award including that the applicant’s disability should be rated under the 1997 PDRS.

Defendant filed a Petition for Reconsideration, arguing that the Workers' Compensation Judge should have applied the 2005 PDRS. The board denied reconsideration following which the defendant filed a Petition for Writ of Review. Initially, the Court of Appeal, Second Appellate District, denied the writ. However, the defendant filed a Petition for Review with the Supreme Court and the Supreme Court granted the writ and directed the Second District Court of Appeal to vacate its previous order and decide the case.

The Court applied the reasoning in Genlite v. WCAB (2008) 73 CCC 6; 158 Cal.App.4th 705, and held that because the applicant’s treating physician’s report expressed the opinion in December, 2004 that the applicant “will be left with some measure of permanent residual disability and limited functional capacity resulting from said industrial injury the 1997 PDRS applies.” The Court found that the treating physician’s report fell within the exceptions contained in Labor Code Section 4660(d)(2). Therefore, the decision of the WCAB was affirmed.

PERMANENT DISABILITY

Old Schedule versus New Schedule

Vera v. WCAB (SCIF) (2007) 72 CCC 1115

The applicant sustained an injury to his neck, back and right shoulder on March 14, 2003 while employed by the defendant as a laborer. The State Compensation Insurance Fund accepted the claim and paid temporary disability benefits to the applicant from March 17, 2003 to February 1, 2005.

The defendant then began making permanent disability advances from February 2, 2005 through September 27, 2005.

On April 26, 2004 (only 7 days after the Legislature enacted SB 899) applicant's primary treating physician issued a report stating that the applicant's condition "is not permanent and stationary at this time, and pursuant to Labor Code §4658(d)(4) it is my opinion that the applicant does currently have the existence of permanent disability."

The parties stipulated that under the old schedule the applicant's disability would rate 59%, while under the new schedule the applicant's disability would rate 26%. The issue was tried and the Workers' Compensation Judge ruled that the old schedule applied.

Defendant filed a Petition for Reconsideration and the WCAB granted the petition. The Board found that the April 2004 primary treating physician's report was not substantial evidence as to the existence of permanent disability since the report itself points out that the doctor's conclusion was on a "preliminary basis" and stated that the applicant "does currently have the existence of permanent disability." Based on this language, the Board found that the applicant's disability was not yet permanent and stationary. The Board stated "We interpret the statute to mean that the old schedule will apply when, before the effective date of the new schedule, i.e., January 1, 2005, there has been a treating physician's report indicating the status of the employee's ratable disability is permanent and stationary."

PERMANENT DISABILITY

Old Schedule versus New Schedule

Tanimura & Antle v. WCAB
(2007) 157 Cal.App.4th 1489

Applicant sustained a specific injury to his left hand on September 1, 2004. He received temporary disability payments from the defendant from September 2, 2004 through March 8, 2006.

The applicant underwent an Agreed Medical Evaluation on January 13, 2006 in which the AME found that the applicant was permanent and stationary as of that date.

While the parties could not agree on whether the 1997 or 2005 PDRS should apply, they did agree that under the old schedule the applicant would receive 30% permanent disability while under the new schedule his rating would be 9%.

The case went to trial on July 13, 2006 following which the Workers' Compensation Judge found that the 2005 PDRS applied. The judge explained in his Opinion on Decision that "Based upon the clear meaning of Labor Code Section 4660(d), the 2005 Permanent Disability Rating Schedule is to apply to claims arising before January 1, 2005, unless they meet certain exceptions. In this case, there is no comprehensive medical-legal report prepared prior to January 1, 2005, nor a report by a treating physician indicating the existence of permanent disability or any evidence that the employer was required to issue a Labor Code Section 4061 notice to the injured worker prior to January 1, 2005. Therefore, the new schedule applies to this case.

The applicant filed a Petition for Reconsideration. The Board granted the Petition and on November 21, 2006, issued a decision reversing the Workers' Compensation Judge. The Board held that the 1997 PDRS would apply because "as soon as temporary disability payments commence, the duty to give the Section 4061(a) notice comes into existence. We distinguish here between when the duty arises and when the duty is required to be executed. Here, the duty arose when the first payment of temporary disability was made."

The defendant filed a Petition for Writ of Review which was granted by the Court of Appeal, Sixth Appellate District. The Court reversed the WCAB and determined that the 2005 PDRS was applicable.

The Court relied on the reasoning in Costco Wholesale Corporation v. WCAB (2007) 151 Cal.App.4th 148, in which the Court of Appeal held that the duty to give the Labor Code Section 4061(a) notice arises with the final payment of temporary disability indemnity rather than at the time of initiation of such payments. Therefore the Court of Appeal vacated the decision of the WCAB and remanded the case, with instruction to apply the 2005 PDRS.

PERMANENT DISABILITY

Old Schedule versus New Schedule

Tenent-Doctor's Medical Center v. WCAB

(3/24/08 Unpublished); 1st Dist. Court of Appeal; WCC 33292008 CA

In May, 2003, the applicant sustained an injury to her hand and wrist while employed by the defendants as an Admitting Clerk. She received temporary disability benefits from May, 2003 through June, 2005.

On October 9, 2004, the applicant was evaluated by a Qualified Medical Examiner who reported that at the time of his evaluation the applicant still had pain in her thumb, wrist and elbow. She was diagnosed with deQuervain's tendonitis and right lateral epicondylitis. Surgery was recommended. The QME noted "absent surgery, she could be considered permanent and stationary. If she elects to go ahead with surgery, she would become permanent and stationary 4-6 months post-op." The doctor also described "some loss of grip strength that is not likely in excess of 15% long-term" and "a 50% loss of pre-injury capacity for repetitive gripping and for repetitive finger manipulation right hand."

In a subsequent report dated May 21, 2005, the QME noted that surgery had been performed on January 12, 2005 and that the applicant could now be considered permanent and stationary. The doctor described her disability as "equivalent to my previous recommendations of 50% loss of pre-injury capacity for repetitive gripping, and 50% loss of pre-injury capacity for repetitive finger manipulation." He also noted "a loss of grip strength right hand of approximately 15-20%. She is less than 6 months post-operative at the time of her evaluation and therefore my previous estimate of 15% grip loss is probably still accurate."

The case went to trial in December, 2006 to determine which permanent disability rating schedule should apply. The Workers' Compensation Judge applied the 1997 Permanent Disability Rating Schedule, concluding that the QME report of October 9, 2004 was a "comprehensive medical-legal report" under Labor Code Section 4660(d).

The defendant filed a Petition for Reconsideration. The petition was denied by the WCAB. In its Report, the Board concluded that the October 9, 2004 QME report indicated the existence of permanent disability.

The defendants filed a Petition for Writ of Review which was summarily denied. Subsequent to the writ denial, the Fourth District Court of Appeal published its decision in Vera v. WCAB (2007) 154 Cal.App.4th 996. Because of that decision, the California Supreme Court granted the defendant's Petition for Review and returned the matter to the Fourth District Court of Appeal for a decision.

The Court of Appeals noted that subsequent to the Vera decision, the Court of Appeal for the Second District issued its opinion in Genlyte Group, LLC v. WCAB (2008) 158 Cal.App.4th 705; 73 CCC 6. The Fourth District Court found the Genlyte reasoning persuasive and held that a medical-legal report issued before January 1, 2005 need not state that the claimant is permanent and stationary in order to trigger the old rating schedule. The report needs only to indicate that the claimant has suffered a permanent impairment of earning capacity, a permanent impairment of the normal use of a body part, or a permanent competitive handicap in the open market. Therefore, the Court affirmed the Workers' Compensation Judge's decision and the applicant's claim was rated using the 1997 Permanent Disability Rating Schedule.

PERMANENT DISABILITY

Old Schedule versus New Schedule

Zenith Ins. Co. v. WCAB

(2008) 159 Cal.App. 4th 483

Applicant, a swimming pool technician, injured his back on June 18, 2004. The applicant's treating physician issued a report dated October 12, 2004 in which he diagnosed a disc herniation at L2-3. Based upon his review of the medical history and records, the treating physician recommended that the applicant remain temporarily totally disabled and referred the applicant for evaluation by a neurosurgeon. In a subsequent report dated December 28, 2004, consisting of only 3 sentences, the treating physician stated that "I am a treating physician for the above-referenced applicant. There is a reasonable medical probability that permanent disability exists as a result of the injury or injuries for which I am treating this patient. I will describe that disability further in a subsequent report."

On December 15, 2005, the treating physician issued a report indicating that the applicant had undergone surgery on March 29, 2005 and that the applicant's condition had reached maximum medical improvement. The doctor also described factors of disability using the 1997 Permanent Disability Rating Schedule.

The defendant obtained a defense QME report in which the medical evaluator found that the applicant had reached maximum medical improvement as of November 15, 2005. The QME described the applicant's impairment using the AMA Guides.

The case proceeded to trial on the issue of the appropriate disability rating schedule. The Workers' Compensation Judge determined that the applicant was temporarily disabled from June 19, 2004 through December 2, 2005 and rated the applicant's disability using the 1997 PDRS.

The defendant filed a Petition for Reconsideration and the WCAB denied the petition. The defendant filed a Petition for Writ of Review which was granted by the Second District Court of Appeal.

In its opinion, the appellate court noted that one of the bases for the Workers' Compensation Judge's application of the 1997 PDRS was the opinion that because temporary disability indemnity payments began prior to January 1, 2005, the defendant became obligated to issue a Labor Code §4061(a) notice

before January 1, 2005. Therefore, one of the exceptions contained in Labor Code §4660(d) for the application of the old schedule applied. However, the Court, citing Pendergrass v. Duggan Plumbing (Pendergrass II) (2007) 72 CCC 456, held that the Labor Code §4061(a) notice requirement is not triggered until the final payment of temporary disability benefits.

The Court then examined whether any of the other exceptions contained in Labor Code §4660(d) applied. The Court noted that the treating physician's report of October 12, 2004 contained a fairly lengthy history and medical record review. This indicated the existence of permanent disability prior to January 1, 2005. However, the defendant had argued that under Vera v. WCAB (2007) 72 CCC 1115, a medical report prior to January 1, 2005 had to indicate that the applicant had reached permanent and stationary status in order for the 1997 PDRS to apply. The Court of Appeal rejected that position, relying on Genlyte Group, LLL v. WCAB (2008) 73 CCC 6; 158 Cal.App.4th 705. The Court noted that based on Genlyte, the old schedule may apply when a comprehensive medical report indicates that the applicant has sustained permanent disability, regardless of whether the condition has reached maximum medical improvement.

In light of that holding, the decision of the WCAB was annulled and the matter was remanded to the Board for a determination of whether the primary treating physician's report was substantial medical evidence. If so, the 1997 PDRS would apply.

CHALLENGE TO FEC MODIFIER

Costa v. State Compensation Insurance Fund

(2007) 35 CWCR 313 (*en banc*)

Applicant sustained a cumulative injury to his back through August 18, 2004. At the hearing on his claim for permanent disability compensation, the applicant asserted that the future earning capacity (FEC) Modifier in the 2005 permanent disability rating schedule was invalid. The applicant offered expert testimony that he had lost 50% of his earning capacity.

Following the hearing, the Workers' Compensation Judge found that the applicant had sustained permanent disability of 6%, rejected the applicant's expert's testimony and disallowed costs for the expert's reports and testimony.

The applicant Petitioned for Reconsideration and the WCAB, ruling *en banc*, held that applicant had not met his burden of proving that the 2005 Permanent Disability Rating Schedule was invalid, that Labor Code § 4660 does allow the parties to present rebuttal evidence to a permanent disability rating under the 2005 schedule, and that the costs of rebuttal evidence and testimony may be allowed under Labor Code §5811. The Board further ordered that the costs of applicant's expert in this case were to be informally adjusted by the parties.

State Compensation Insurance Fund Petitioned for Reconsideration, contending it was an error for the Board to hold that parties are allowed to present rebuttal evidence to a permanent disability rating, it was inappropriate to find defendant liable for the costs of expert testimony, and awarding the cost of expert testimony is not permitted by Labor Code §5811.

The Board again granted Reconsideration and unanimously concluded that Labor Code §4460 does allow the parties to present evidence to rebut a permanent disability rating made under the 2005 Permanent Disability Rating Schedule and that the costs of such evidence may be allowable. The Board stated that the standard for allowing such costs is whether they are reasonable and necessary.

The Board then returned the case to Workers' Compensation Appeals Judge for a determination as to whether the costs for applicant's expert were reasonable and necessary.

CHALLENGE TO FEC MODIFIER

Magana v. Wausau Business Ins. Co.

(2007 Decision After Reconsideration) 35 CWCR 242

The applicant sustained an injury to his left leg on February 7, 2005. His disability was evaluated on June 14, 2006 by a Panel Qualified Medical Evaluator. The QME's report described a 2% whole person impairment due to loss of ankle motion, as well as an additional 2% impairment due to scarring.

At the trial which took place on October 10, 2006, both applicant and defendant offered expert testimony regarding the applicant's loss of future earning capacity. The defendant's expert testified that the applicant's disability would not result in any future wage loss. The applicant's expert testified that the applicant had sustained a 27% loss of future earning capacity.

The Workers' Compensation Judge requested a recommended permanent disability rating based on the QME's report. On January 19, 2007, the Workers' Compensation Judge, adopting the recommended permanent disability rating, awarded the applicant 12% permanent disability.

The applicant filed a Petition for Reconsideration, contending that diminished future earning capacity is a valid measure of permanent disability and that the Workers' Compensation Judge erred in ignoring expert testimony to the effect that applicant's future earning capacity had been reduced by as much as 27%.

The applicant's Petition for Reconsideration was granted and the WCAB panel affirmed the Workers' Compensation Judge's decision.

The Board found that it was permissible for the parties to produce evidence challenging the Permanent Disability Rating Schedule's Future Earning Capacity modifier. They found that the testimony of the applicant's expert failed to demonstrate that the FEC was not fairly reflected in the Permanent Disability Rating Schedule.

The panel noted that Labor Code §4660(c) provides that the 2005 PDRS is prima facie evidence of the permanent disability to be attributed to an injury covered by the schedule and that a witness challenging the FEC modifier must adequately explain why the FEC modifier in the 2005 schedule is inadequate in a particular case.

APPORTIONMENT

Brault v. State of California Dept. of Justice

(2007 – Order Denying Reconsideration) 2007 Cal. Work. Comp. PD LEXIS 134

The applicant sustained an injury on January 6, 1995 and a subsequent injury on December 29, 1998. The initial injury resulted in an award of 18% permanent disability based upon the 1997 Permanent Disability Rating Schedule. An agreed medical evaluator described the applicant's impairment from the 1998 injury under the AMA Guides. Under the 2005 Permanent Disability Rating Schedule, the second injury resulted in permanent disability of 7%.

At trial, the defendant argued that the prior award of 18% should have been subtracted from the 7% permanent disability caused by the second injury. Instead, the Workers' Compensation Judge obtained a rating of the initial injury under the 2005 Permanent Disability Rating Schedule (1% permanent disability) and subtracted that from the rating for the subsequent injury.

The defendant filed a Petition for Reconsideration.

The WCAB denied reconsideration and adopted the reasoning of the Workers' Compensation Judge in his Report and Recommendation on Reconsideration. That report stated that "the disability existing as a result of the old injury is translated into the same impairment language used to assess disability caused by the present injury and subtracted from it."

The Board determined that the Workers' Compensation Judge had correctly apportioned disability between the two injuries and denied the defendant's petition.

APPORTIONMENT

Benson v. The Permanente Medical Group

(2007) 72 CCC 1620 (*en banc*)

The applicant was employed by the defendant as a File Clerk beginning in April, 1992. On June 3, 2003, the applicant was reaching up over head, pulling out a plastic bin to file a chart, when she felt a pain in her neck. The following day she went to work but her neck hurt even more. She was initially diagnosed with a neck strain and was put on light duty. However, on July 15, 2003, she was placed on temporary total disability and did not return to work thereafter. In November, 2003 she filed an Application for Adjudication of Claim alleging a specific injury occurring on June 3, 2003. On October 19, 2004, she underwent a three-level fusion of the cervical spine.

The parties selected an Agreed Medical Examiner who, in his report of October 24, 2005, concluded that the applicant had actually sustained two separate injuries to her neck. He described a specific injury on June 3, 2003 and a cumulative trauma injury through June 3, 2003. The AME concluded that the applicant's injuries became permanent and stationary as of the date of his evaluation, September 26, 2005. Based upon the AME report, the applicant filed a claim for the cumulative trauma injury.

In his report, the AME stated that 50% of the applicant's permanent disability is apportioned to the cumulative trauma through June 3, 2003 and 50% is apportioned to the specific injury of June 3, 2003.

At the time of trial, the parties stipulated that the applicant's combined permanent disability was 62% after adjustment for age and occupation. However, at trial the defendant contended that the applicant should receive two separate awards of 31% permanent disability rather than a single award. The Workers' Compensation Judge concluded that separate awards were not required and issued an award of 62%.

Defendant filed a Petition for Reconsideration. The board granted the petition and, because of the significance of the issue, issued an *en banc* decision.

First, the Board addressed the principles of apportionment established by Wilkinson v. WCAB (1977) 19 Cal.3d 491, 42 CCC 406. The Board noted that under Wilkinson an injured worker could receive a single combined award of permanent disability in circumstances of multiple injuries to the same part of the body that became permanent and stationary at the same time. However, following the reforms enacted by SB 899, the previous statutory basis for apportionment, including Labor Code §4750 were repealed and §§4663 and 4664 were adopted. Citing Brodie v. WCAB (2007) 40 Cl.4th 1313, 72 CCC 565, the Board concluded that the continued application of the rule in Wilkinson is not consistent with the new regime of apportionment based on causation under new Labor Code §§4663 and 4664.

In applying this reasoning to the present case, the Board noted that the AME found applicant's disability was caused equally by both her specific trauma on June 3, 2003 and her cumulative injury through June 3, 2003. He found no evidence to justify apportionment to any non-industrial factors or pre-existing conditions. The parties stipulated that the applicant's current level of permanent disability was 62%. Therefore, based upon the AME's determination that each of the applicant's two injuries was equally responsible for her current level of permanent disability, she is entitled to receive a separate award of 31% permanent disability for each injury.

Therefore, the Board vacated and amended the Workers' Compensation Judge's January 22, 2007 Finding & Award so that the applicant received two separate awards of 31% permanent disability.

APPORTIONMENT

Age/Gender Bias

Kos v. Kimes-Morris Construction

(2007 – Panel decision) 2007 Cal. Work Comp P.D. LEXIS 147

The applicant sustained injury to her back and legs on September 18, 2002. In a September 1, 2006 Findings & Award, the Workers' Compensation Judge found that the applicant's injury resulted in 100% permanent disability, without apportionment.

The defendant filed a Petition for Reconsideration contending that the Workers' Compensation Judge had erred in failing to apportion for the applicant's pre-existing degenerative disc disease.

The WCAB granted the petition and in its July 9, 2007 decision found that the applicant's injury had caused 10% permanent disability (apportioning 90% to the applicant's degenerative disc disease).

The applicant filed a Petition for Reconsideration, contending that it was improper to apportion age-related degenerative disc disease.

The Board denied reconsideration. The Board based its decision on the Supreme Court's ruling in Brodie v. WCAB (2007) 40 Cal. 4th 1313; 72 CCC 565. In that case, the Supreme Court stated that the legislative intent of the SB 899 revision to Labor Code §4663 was to "eliminate the bar against apportionment based on pathology and asymptomatic causes." The Supreme Court went on to note that "The plain language of new Section 4663 demonstrates it was intended to reverse certain features of former Sections 4663 and 4750" to bar apportionment if "but for" the industrial injury, the non-industrial cause would not alone have given rise to disability. The Court stated that "the new approach to apportionment is to look at the current disability and parcel out its causative sources – non-industrial, prior industrial, current industrial – and decision the amount directly caused by the current industrial source." The WCAB Panel determined that "therefore, the Legislature intended that apportionment to causation under Section 4663 may be based on age-related degenerative conditions." Based on that reasoning, the applicant's Petition for Reconsideration was denied.

APPORTIONMENT

Age/Gender Bias

Vaira v. WCAB

(2007- Unpublished); 3rd Dist. Court of Appeal; 72 CCC 1586

Applicant was a 73-year old receptionist who sustained a back injury on January 27, 2003. She was evaluated by an Agreed Medical Examiner who, on May 23, 2005, concluded that the applicant suffered a compression fracture at T-12 and had become permanent and stationary as of February, 2004. In his report, he concluded that the applicant's age and a pre-existing osteopenia or osteoporosis of her spinal column contributed to her disability. The AME apportioned 40% of the applicant's disability to her pre-existing conditions and 60% to the industrial injury.

At the trial of the matter, the parties stipulated that the AME's report described an overall disability of 64% after adjusting for age and occupation, but before apportionment. On May 19, 2006, the Workers' Compensation Judge issued his Findings and Award in which he accepted the parties' stipulation of 64% permanent disability and adopted the AME's apportionment of 40% to pre-existing conditions.

The applicant filed a Petition for Reconsideration and the WCAB denied the petition.

Therefore, the applicant filed a Petition for Writ of Review. The applicant argued that it was error for the Workers' Compensation Judge and the WCAB to apportion part of her disability to her age and pre-existing osteoporosis. The applicant argued that an employer takes the employee as it finds her and a "lighting up, acceleration or aggravation of a pre-existing condition is not a valid basis for apportionment."

The Court of Appeal analyzed the revisions to the workers' compensation system brought about by SB 899, in particular the revisions to Labor Code §4663. The Court pointed out that subsection (c) states that "a physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, . . ."

The Court further pointed out that “the employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.” The Court concluded that under the current version of the apportionment statutes, apportionment to a prior condition that was lighted up, accelerated or aggravated by the current industrial injury is appropriate.

The applicant’s writ petition also argued that any reduction in disability benefits based on her age and osteoporosis amounts to both age and gender discrimination. The Court of Appeal noted that the AME’s report was somewhat unclear whether his apportionment determination was based, in part, on the applicant’s age. If so, the Court of Appeal stated that to the extent the AME “based his apportionment of 40% of disability on petitioner’s age, this would appear to violate [Government Code] Section 11135. The WCAB may not reduce petitioner’s benefits simply because she is older than another similarly situated worker.”

However, with regard to the issue of gender discrimination, the Court noted “that this case does not present a claim that the WCAB has apportioned disability to a condition peculiar to women while failing to give equal treatment to a condition peculiar to men that may also contribute to disability.” The Court also noted “To the extent osteoporosis or some other physical or mental condition that might contribute to a work-related disability arises or becomes more acute with age, we see no problem with apportioning disability to that condition. However, in such case, apportionment is not to age but to the disabling condition.”

Therefore, the Court of Appeal held that it is appropriate to apportion the applicant’s disability to a pre-existing medical condition (osteoporosis) but not to her age. Therefore, the matter was remanded to the WCAB for further proceedings to determine whether the AME had properly assessed the issue of apportionment.

NOTES TO:

APPORTIONMENT

Age & Gender Bias

The 3rd District Court of Appeal has recently heard oral arguments in another case alleging age and gender bias in apportionment to non-industrial conditions.

The case is Fitzpatrick v. WCAB (CO 55399). It involves a 64-year old school teacher whose back was injured when a disruptive student pulled her to the ground. The applicant received a permanent disability award that was reduced by more than 50% due to underlying osteopenia.

The applicant's attorney argued that the underlying osteopenia was a “silent condition” that may predispose someone to injury, but is not a cause of permanent disability.

Counsel for the defendant argued that apportionment was appropriate and noted that a verified disease or condition does not discriminate against the employee based on age or gender.

* * *

Senator Carol Midgen of San Francisco has introduced legislation (SB 1115) that would amend Labor Code §4663 to prohibit doctors from considering age, race or genetic factors in apportioning an employee's permanent disability. The legislation is currently pending in the Senate Rules Committee.

The Governor's office has stated that Gov. Schwarzenegger has not taken a position on the bill.

LIMITATION ON CHIROPRACTIC TREATMENT

Facundo-Guerrero v. Argonaut Ins. Co.

(2007 Decision After Reconsideration) 35 CWCR 315

Applicant sustained an industrial injury to his back and left leg on February 24, 2005. The applicant was informed by the defendant that it participates in a Medical Provider Network (MPN) and that applicant must select a treating physician within the MPN. The applicant chose to be treated by a chiropractor who was a member of the MPN.

After receiving 24 chiropractic treatments, the applicant was informed that pursuant to Labor Code §4604.5(d)(1), he was not entitled to any further chiropractic treatment. The applicant requested an expedited hearing on the issues and the Workers' Compensation Judge issued a decision that the applicant was not entitled to any further chiropractic treatment. However, the treating chiropractor could continue to see the applicant to monitor his treatment because the chiropractor was serving as the primary treating physician.

The applicant filed a Petition for Reconsideration contending that the chiropractor should be able to continue treating the applicant because he was the primary treating physician, and contending that the 24-treatment limitation violated both the U.S. Constitution and the California Constitution.

A WCAB Panel sustained the Workers' Compensation Judge's award, finding that the applicant was not entitled to any additional chiropractic treatment although the chiropractor could continue to serve as primary treating physician. The Panel quoted Labor Code §4604.5(d)(1) to the effect that, notwithstanding the medical treatment guidelines, for injuries occurring on and after January 1, 2004 an employee is entitled to no more than 24 chiropractic visits for each industrial injury. Therefore, under the plain language of the statute, the applicant was not entitled any additional chiropractic visits. However, the Board also found that the chiropractor was the applicant's primary treating physician and was responsible for managing the applicant's treatment. Therefore, the applicant is entitled to additional visits with the chiropractor to enable the doctor to determine the applicant's eligibility for compensation.

Note that the applicant's Petition for Writ of Review was granted by the First District Court of Appeal and oral arguments were scheduled for March 10, 2008. The Court of Appeal has not yet issued its opinion.

LIENS

Medical Care Provide by Family Members

Hodgman v. WCAB

(2007) 155 Cal.App.4th 44

The applicant sustained a catastrophic industrial injury in motorcycle v. automobile collision on October 28, 1998. He was hospitalized in a coma for an extended period, underwent multiple surgeries and was left with severe cognitive and physical deficits which require him to reside in an assisted living facility. On November 22, 1998, the applicant's mother was appointed his guardian ad litem and trustee by the Workers' Compensation Judge. The applicant's mother and father were subsequently appointed as conservators of the person and estate by the Superior Court.

In early 1989, the applicant's treating physician advised his mother that she needed to become aware of the nature of the applicant's injury because she would be the primary person involved in making decisions concerning his medical care. His mother attended all medical appointments and medical team conferences, interacted with the medical providers regarding medical and behavioral issues, evaluated and checked on the level of attendant care and medications, inspected equipment and arranged for necessary repairs and maintenance. These activities were done at the request and under the direction of the applicant's treating physicians. The applicant's mother also undertook similar activities in her capacity as the applicant's conservator.

The applicant's mother kept logs of the time she spent on medically-related activities in connection with the workers' compensation proceeding and a separate log documenting activities she undertook as the applicant's conservator. In 1991, a dispute arose regarding the question of whether the applicant's mother, in her capacity as guardian, was entitled to be compensated for "medical treatment" such as nursing or housekeeping services and for the extraordinary amount of time she devoted to insuring that her son received appropriate medical care.

In February, 2000, the defendant and the applicant's mother entered into a Compromise and Release regarding payment for the claimed expenses. The Compromise and Release covered 6 months after December 31, 1999 and stated "for the next six months, it is agreed that the guardian ad litem will be entitled to \$25 per hour for reasonable and necessary services, which shall not be duplicative to other services." Pursuant to the order approving the Compromise and Release, the applicant's mother submitted monthly statements to the defendant, which

compensated her without objection for 5 years from 2000 to 2005. In 2005, the defendant abruptly quit paying.

On November 15, 2005 the applicant's mother filed a petition to enforce the Compromise and Release, for a penalty and for reasonable attorney fees. She contended that the Compromise and Release established that she is entitled to be compensated by the defendant for her services where necessary to secure appropriate medical care and equipment for the applicant and claimed that the defendant should pay a penalty for unreasonably refusing to do so. The defendant responded that the Compromise and Release was limited to a period of six months, with the hourly amount to be renegotiated, but that there was no agreement that the defendant was required to pay for any guardian ad litem time or expense.

Following a trial on the issues, the Workers' Compensation Judge issued a Findings and Award in which he noted that because the Superior Court has given the applicant's mother fully authority to manage all medical care, to provide for all personal needs and to manage all financial resources, the services for which the claimant is seeking reimbursement fall totally within the parameters of her conservatorship duties. Therefore, any payment should be made by the conservatorship estate.

The claimant filed a Petition for Reconsideration. The WCAB affirmed the Workers' Compensation Judge's decision.

The claimant filed a Petition for Writ of Review.

The 2nd District Court of Appeal in its opinion noted that an injured worker is entitled to all care reasonably required to cure or relieve the worker from the effects of the injury, citing Labor Code §4600. The Court further noted that the care which the claimant provides – monitoring and managing all of her son's health care needs – qualifies as medical care under Labor Code §4600. The Court noted that there were differences in the type of services provided by the claimant in her position as guardian ad litem compared with the duties performed as conservator. While the conservatorship authorizes the claimant to make health care decisions, it does not require her to perform health care activities such as deciding what her son should eat or double-checking a nurse's actions. Because the care for which the claimant requested compensation from the defendant does not fall under the duties of the conservator, she is entitled to compensation from the defendants for services performed in her capacity as guardian.

Therefore, the decision of the WCAB was annulled and the matter was remanded with instructions to determine the reasonable amount of compensation to be paid to the applicant's mother.

LIENS

Medical Care Provide by Family Members

Apparicio v. State Farm Ins. Co.

(2007 – Panel Decision) 2007 Cal. Work. Comp. PD LEXIS 130

Applicant claimed injury to her spine and lower extremities occurring on August 20, 1999 and to her right upper extremity, right shoulder and mid-back during the cumulative trauma period 1993 to January 4, 1999 while employed by the defendant as a Legal Assistant. On August 17, 2006 the parties entered into a Stipulation which included injury to the psyche, lumbar spine, right upper extremity and fibromyalgia. The applicant received a stipulated award of 100% permanent disability plus future medical treatment.

Because of the level of applicant's disability, she was unable to perform a number of activities of daily living, as well as household chores. Therefore, the applicant's husband provided attendant care services. The husband filed a lien requesting compensation for the attendance care services he provided for his wife. The lien issue was tried on September 15, 2006 and the Workers' Compensation Judge issued a Findings & Award dated December 6, 2006 disallowing the lien.

The applicant and her husband filed a Petition for Reconsideration.

On reconsideration, the WCAB found that the Workers' Compensation Judge applied the wrong legal standard in evaluating the husband's lien claim. While reviewing the medical reports, the Workers' Compensation Judge noted that defendant's Qualified Medical Examiner (in his report dated October 22, 2005) stated that “. . .her husband takes care of the household. This is adequate at the present time. However, if it comes to pass that he is no longer capable of taking care of the household, the patient will need help in maintaining the household for such items as housecleaning, laundry and perhaps grocery shopping. As pointed out at the present time, her husband can attend to these needs and this does not need to be provided on an industrial basis.” The applicant's treating physician noted that the husband was providing essentially the same services as described in the QME report. However, he noted that those services should be provided on an industrial basis.

In reviewing the matter, the WCAB noted that the trial judge noted that the physicians agree that the applicant needs attendant care services; however, he found there was no current need to award attendant care as part of the applicant's reasonable medical treatment because those services were voluntarily provided by

her husband. The Workers' Compensation Judge indicated that such an award of attendant care services would be appropriate in the future if and when the husband became unable to continue to provide them.

The Board rejected this reasoning. They noted that attendant care is part of the reasonable medical treatment to be provided an injured worker under Labor Code §4600 when its necessity is supported by expert and/or lay evidence. The fact that attendant care services are provided by a family member does not relieve a defendant from the obligation to pay for them. There is no reason why the applicant and her spouse should be penalized merely because necessary attendant care is provided by the husband instead of by someone else.

The Board then issued a supplemental Finding & Award finding that the applicant did and does require attendant care on an industrial basis and that the husband was entitled to compensation for the reasonable level of attendant care services and their reasonable value.

CREDIT FOR PRIOR INJURY AWARD

Gilliland v. Safeway, Inc.

(2007 – Decision after Reconsideration) 35 CWCR 271.

Applicant sustained a cervical spine injury on May 15, 1999. The defendant provided benefits, including over \$16,000.00 in permanent disability advances. The claim was settled on June 6, 2002 by Stipulation at 10% permanent disability. The Stipulation included language that the applicant had been fully compensated for all permanent disability owed and that the defendant was entitled to a credit of \$16,789.40 against future permanent disability.

The applicant subsequently sustained a low back injury on January 24, 2003. The applicant was found to have reached maximum medical improvement in report dated June 28, 2005. The report rated 32% permanent disability.

Despite the fact that the applicant had undergone back surgery and evidence that the injury had caused permanent disability, the defendant failed to make any permanent disability advances. They claimed that the applicant had already been compensated because of the credit for \$16,789.40 in her prior case.

The case was tried on February 7, 2007 and among the issues presented for trial was the defendant's right to credit. In the Findings and Award, the Workers' Compensation Judge awarded the applicant 32% permanent disability and allowed the defendant a credit in the amount of \$16,789.40 for the permanent disability overpayment.

The applicant petitioned for reconsideration which was granted by the WCAB. The Board found that it was improper to allow a credit for the permanent disability overpayment. The Board noted that the original Stipulation was for a 1999 neck injury and that the credit was for that injury. Had the applicant filed a Petition to Reopen the 1999 injury, the defendant would have had a credit against any new or further disability. However, the Board found that it was improper to allow a credit for a subsequent date of injury to a completely different body part.

LABOR CODE SECTION 132a

Hendrix v. Oakland Unified School District

(2007 – Panel Decision) 2007 Cal. Wrk. Comp. PD LEXIS 142; 35 CWCR 315

Applicant sustained an industrial injury to her left upper extremity while working for the School District as a Custodian on November 24, 2004. While off work, the applicant utilized all of her paid time off to supplement her temporary disability indemnity. After exhausting all of her accrued paid leave, the defendant's Human Resources division sent the applicant a letter stating, in part, "The payroll office has notified us that you have exhausted all paid leave. As of October 10, 2006, your employment status with the District will be terminated. You may exercise your 39-month [sic] regarding employment rights. This status will remain in effect until we are notified of a change in your status or exhaustion of the 39-month period, whichever occurs first."

On November 13, 2006, the applicant filed an Application for Additional Benefits, Penalties and Wages pursuant to Labor Code Section 132a. Following a hearing on May 1, 2007, the Workers' Compensation Judge issued her Findings and Order on July 23, 2007 in which she found that the defendant did not discriminate against the applicant because of her industrial injury and dismissed the claim for additional benefits, penalties and wages.

The applicant filed a Petition for Reconsideration.

In addressing the applicant's Petition for Reconsideration, the Board turned to Education Code Section 45192 which states in part,

"Governing boards of school districts shall provide by rules and regulations for industrial accident or illness leaves of absence for employees who are a part of the classified service The rules and regulations shall include the following provisions ... When all available leaves of absence, paid or unpaid, have been exhausted and if the employee is not medically able to assume the duties of the person's position, the person shall, if not placed in another position, be placed on a re-employment list for a period of 39 months. When available, during the 39th month period, the person shall be employed in a vacant position in the class of the person's previous assignment over all other available candidates except for a re-

employment list established because of lack of work or lack of funds, in which case the person shall be listed in accordance with appropriate seniority regulations ...”

The Board stated that the more specific provisions of Education Code Section 45192 would prevail over the general prohibition against discrimination contained in Labor Code Section 132a. The facts of this case indicate that there was no discrimination. The applicant had exhausted her leave benefits. In that situation, the defendant was obligated by the Education Code to change the applicant’s status by placing her on the 39-month re-employment list. While this change did affect the applicant’s status as an employee, it did not eliminate her right to continued employment with the defendant. The Board noted that, to the contrary, a person whose name is on the re-employment list shall be employed in a position over all other available candidates, except for individuals who were on a layoff list. Because there was no discrimination under Labor Code Section 132a, the Board ordered that the applicant’s Petition for Reconsideration be denied.

**COMPROMISE AND RELEASE EXTINGUISHES
APPLICANT'S CIVIL CASE**

Belletich v. Carley

(3/12/08 Unpublished); 2nd Dist. Court of Appeal – WCC 33252008 CA

Applicant/plaintiff was hired as an Assistant Manager at defendant's fast food franchise. After the employee had been in the position for several months, she was informed that she was not management material and was asked to either quit or be demoted to the position of cashier. The employee accepted the demotion. Approximately 3 weeks afterwards, the employee slipped and fell at work. The next day she filed a workers' compensation claim form.

Approximately 5 days after she fell, the employee was terminated based on a dispute regarding her failure to report to work. Almost one year after her termination, the employee filed a discrimination complaint against the employer with the Department of Fair Employment and Housing (DFEH), alleging that she was fired because of her age, sex and disability. The DFEH issued a Notice of Case Closure.

On February 10, 2006 the employee filed a civil action against the employer alleging five causes of action, including claims that she had been demoted and terminated because of her sex, age and disability in violation of the Fair Employment and Housing Act (FEHA).

Several months after filing the civil action, the applicant and her attorney attended a settlement conference in her workers' compensation claim. The case was settled at the MSC and the parties prepared an agreement on the Board's pre-printed "Compromise and Release" form. Inserted language in the Compromise and Release indicating that "This release contains adequate consideration to settle any and all claims for a job displacement voucher. This release settles all claims whether civil, administrative, federal or state, against defendants."

On November 1, 2006, the employer filed a Motion for Summary Judgment in the civil action. The defendant asserted that the release in the workers' compensation action included a release of all claims asserted in the employee's civil action and operated as a bar to the prosecution of those claims. On April 5, 2007, the trial court granted the defendant's Motion for Summary Judgment and entered a judgment in favor of the defendant's. The employee appealed.

In its decision, the 2nd District Court of Appeal stated that the language in the Compromise and Release was very specific. It included “all claims, including civil, administrative, federal and state.” The Court found that such broad language clearly indicated an intent to release all claims beyond those raised in the workers' compensation proceeding. Although the settlement language did not expressly identify the employee's civil lawsuit, it was specific enough in its reference to “civil” and “state” claims to cover the employee's civil lawsuit.

Further, the fact that the release language was incorporated into the handwritten notation on the Compromise and Release serves to clarify and establish that all state law civil claims, such as those in the employee's complaint, were within the scope of the workers' compensation settlement. Therefore, the judgment of the trial court was affirmed.

PUBLIC ENTITY IMMUNITY

Richardson-Tunnel v. School Ins. Program for Employees (SIPE)
(2008) 157 Cal.App.4th 1056; 72 CCC 1612.

The applicant, a school teacher, suffered an industrial back injury, went on disability leave and underwent disc replacement surgery. Four months following the surgery and while still on disability leave, she was married.

As part of their sub rosa investigation, the employer and its claims administrator hired an investigator to attend the wedding ceremony and the reception. The investigator took videotape of both the wedding ceremony and the following reception.

The employee filed a civil suit for damages, alleging a violation of her Constitutional right to privacy, violation of California Civil Code §1708.8, negligence and common law invasion of privacy (intrusion). The suit sought both compensatory and punitive damages, as well as treble damages pursuant to Civil Code §1708.8.

The school district and the claims administrator moved for judgment on the pleadings on the grounds that public entities were immune to liability pursuant to Government Code §821.6. That motion was granted and the employee appealed.

The Second District Court of Appeal affirmed the trial court's decision. The Court cited Government Code §821.6 which immunizes a public employee from liability for instituting or prosecuting judicial or administrative proceedings, even if the employee "acts maliciously and without probable cause." This immunity also protects the public entity that employs the offending employee.

The Court further determined that the conduct of the school district and the claims administrator was within the scope of the governmental immunity and that neither Civil Code §1708.8 nor the applicant's Constitutional right to privacy constitute an exception to governmental immunity.