



LAW OFFICES
of
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CASES & COMMENTS ON WORKERS' COMPENSATION

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IS THERE YET ANOTHER REFORM BILL IN YOUR FUTURE?

It has now been four years since that fateful day in April 2004 when Governor Schwarzenegger signed SB 899 into law. Since then a multitude of new terms have entered the vernacular of workers compensation: MMI, voucher, MPN, AMA, "new schedule" and many more.

Just as quickly as we have learned the new terms, might they disappear? Opponents of SB 899 continue their efforts to roll back or repeal it. The developments we hear about the most occur at the Board or appellate level, but opponents of SB 899 continue to haunt the halls of the capitol in Sacramento. There are a multitude of bills that may or may not ever get to the Governor's desk and there is the looming gubernatorial election in 2010, which may bring a new Governor who is more inclined to roll back portions of SB 899. The activity in Sacramento and the new Governor will determine whether or not we continue to use our newly learned vernacular or find ourselves relearning the old language or even an entirely new set of terms.

Certainly one of the most controversial aspects of SB 899 is the change in how apportionment is addressed. For the most part the applicant's attorneys have been unsuccessful at the trial and appellate level, resulting in more frequent awards with apportionment.

Legislative efforts are being made to undo the work of the courts. Senator Carol Midgen has introduced SB 1115. Senator Midgen was a guest speaker at a reception during the last C.A.A.A. convention. Her bill contains an apparently innocuous amendment to Labor Code Section 4663 apportionment stating as follows: "Race, religious creed, color, national origin, age, gender, marital status, sex, or genetic predisposition shall not be considered a cause or other factor of disability with regard to any determination made under this section".

This would seem to be something we could all agree upon, right? Not so fast. If a doctor apportions orthopedic disability to a degenerative condition, is this discrimination based on "age"?

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If a psychiatrist apportions disability to the effects of a recent divorce, is this discrimination based on “marital status”?

Creative lawyering by the applicant’s attorneys could result in broad interpretations of this section, thereby eliminating apportionment in many cases. Remember, the doctor cannot simply apportion to some other cause. He or she must clearly explain the reasoning, including the “how and why” within reasonable medical probability.

Senator Midgen is also active on another front. Employees are presently allowed to pre-designate a treating physician. The provision permitting this expires on December 31, 2009. SB 1338 would eliminate the repeal date for the pre-designation and allow employees to continue pre-designating.

Supplemental job displacement benefits are another area where there is legislative activity. Thus far there does not seem to be any movement to restore vocational rehabilitation benefits. There are bills, however, which would amend the requirements and timing for providing the supplemental job displacement benefits. SB 1189, authored by Senator Gil Cedillo aims to do just that.

The Cedillo bill would require the issuance of the supplemental job displacement voucher no later than 74 days after the applicant reaches P&S status. If the actual PD percentage has not been determined, then the voucher must be based on a “reasonable estimate” of the expected PD. The bill would extend from 30 to 60 days the amount of time an employer has to return the applicant to work, after the cessation of TD benefits, and avoid liability for the voucher.

This bill seems to make claims handling even more complicated. Much like the current law

regarding PD advances, an estimate of final PD would have to be made without benefit of the medical reporting. If the estimate is too low, then additional voucher funds must be issued. This hardly seems to simplify or clarify the requirements for providing this benefit.

Another bill intended to double PD benefits, SB 1717, has been introduced. This bill, authored by Senator Don Perata (who has authored two previously vetoed PD increase bills) would double the number of weeks of PD for each percentage. The bill would also eliminate the 15% increase and decrease when an injured worker returns or can not return to work. As the Governor has previously vetoed similar bills, it seems unlikely that this will become law.

Additional bills percolating in the Legislature involve proposals to reinstitute rate regulation. Many of these bills may be amended by the Legislature or vetoed by the Governor.

Which brings us to the applicants and their attorneys’ biggest hope: the election of a new Governor. Governor Schwarzenegger will be out of office as a result of term limits in 2010. Although we still have a presidential election to get through, the cast of characters to succeed the Governor is already growing.

On the Democratic side, the early favorite appears to be Attorney General Jerry Brown (yes, *that* Jerry Brown!). He brings high name recognition, proven fundraising ability and the fact that Californians have elected him Governor twice before (his election would not be barred by the later-enacted term limits).

Also lining up is Lt. Governor (and former Insurance Commissioner) John Garamendi. He has run statewide on multiple occasions. Mayors Gavin Newsom (San Francisco) and Antonio

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Villaraigosa (Los Angeles) have hinted at running, although personal scandals may limit these mayors/candidates.

On the Republican side, Insurance Commissioner Steve Poizner is considered likely to make the race. Perennial statewide candidate Tom McClintock is seeking a Northern California congressional seat, making another run for Governor unlikely.

In the Schwarzenegger tradition, there are rumors of political outsiders making a run. Most often mentioned is former E-Bay C.E.O. Meg Whitman. She has recently begun creating a political profile by taking on a statewide leadership role in the McCain campaign.

None of these candidates, with the possible exception of Brown, have any significant track record on Workers' Compensation issues, thus it is difficult to predict how the change in Governors will affect SB 899 and the rest of the statutory scheme. Brown was our Governor three reforms ago and has not spoken much on the issue in recent years. The new Governor is also likely to face continued pressure to enact some form of statewide universal healthcare. There are proposals along the lines of "24 hour care" which would bring medical treatment for industrial and non-industrial conditions into the same system.

For the next two years, we would expect only minor legislative changes coupled with some regulatory change. A wholesale rollback of SB 899 will not occur under the current Governor and it does not seem as though it will be a top priority for the new governor, whoever that may be. Furthermore, any legislative changes under a new Governor likely would not impact cases for injury dates prior to January 1, 2012.

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Benson Update

A petition seeking a writ of review of the WCAB *en banc* decision in *Benson vs. WCAB* was filed by the applicant on January 28, 2008. The petition is pending but has not as yet been granted or denied. The WCAB declined to file an answer to the petition. Amicus (friend of the Court) briefs have been filed by the California Applicant's Attorneys Association (CAAA) in support of the applicant and by the California Workers' Compensation Institute (CWCI) in support of the respondent Southern California Permanente Medical Group.

At the time we "go to press" with this edition of *Legal Briefs* the decision of the WCAB is still binding on trial judges. For discussion of the importance of this case, go to www.mcdermott-clawson.com and select "recent developments" to locate December, 2007 in-depth article.

New Key Decision On The TTD Cap

The 3rd District Court of Appeal has ruled that the two-year limitation for total temporary disability benefits runs concurrently when there is more than one injury contributing to the disability.

In *Foster v. WCAB*, No. C056820, 4/17/08 (official cite not yet available), a workers' compensation judge ruled that Foster was entitled to two back-to-back temporary total disability benefits, one for each injury, "because he could not receive temporary disability payments concurrently for his two injuries."

The defendants successfully filed for reconsideration. The WCAB ruled, "Where independent injuries result in concurrent periods of temporary disability, the 104-week/2-year limitation likewise runs concurrently. To determine the impact of Section 4656 in a case involving multiple injuries, the evidence must be

examined to determine whether any periods of temporary disability are distinct and independent, staggered, or entirely overlapping.” Because the court had determined that both injuries caused temporary total disability, the WCAB ruled that Foster's temporary disability resulting from both injuries began on the same date.

The justices wrote: “Senate Bill No. 899 was enacted as urgency legislation 'in order to provide relief to the state from the effects of the current workers' compensation crisis at the earliest possible time.' It was 'designed to alleviate a perceived crisis in skyrocketing workers' compensation costs.”

"This makes it likely the Legislature intended the new limitations period in Section 4656(c)(1) to be a significant narrowing of liability. If we were to accept the interpretation of the workers' compensation judge, however, the employer's responsibility, through its workers' compensation insurance carrier, for temporary disability indemnity could be extended unpredictably for an undefined number of payments and years in situations where multiple independent injuries result in staggered or overlapping periods of temporary disability. We do not believe such consequence was intended by the Legislature."

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