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# LEGAL BRIEFS

CASES & COMMENTS ON WORKERS' COMPENSATION

December 2006

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## 10 Things To Remember for 2007

### Paying Apportioned Awards

There is a major battle working its way through the courts as to how to calculate and pay an apportioned award of permanent disability under LC 4664, where the applicant has a prior overlapping award of disability. Cases have worked their way through the appellate courts in a number of different venues throughout the state, and the results have been mixed. The issue boils down to an argument as to whether we subtract the percentage of prior disability and then pay the dollar value of the remaining PD, or whether the defendant should only get the dollar value of the prior disability which would then be subtracted from the current dollar value of the case, leaving the defendant to pay the difference (including life pension) where applicable.

The Supreme Court has now issued its intent to consider the question of how to calculate and pay an apportioned award of PD under LC 4664 in the *Welcher* and *Brodie* cases, but it will probably take some time to get the result. In

the mean time, we are being advised by local judges that, where permanent disability is to be apportioned either by agreement or by judicial order, you should calculate and pay the award under the old *Fuentes* formula by subtracting the percentage of the prior award and paying the dollar value of the remainder, but only as an interim solution until the Supreme Court publishes its decision on the issue. Therefore, in these cases you will have effectively paid your minimum liability, subject to making an additional payment or payments if the court comes up with a different rule.

### Applying The Proper Rating Schedule

Almost as hotly disputed as the apportionment question, this problem involves cases where the date of injury is before 1/1/2005. Depending on what discovery has been done before 2004, and possibly what benefits have been paid, either the old (generally more liberal) rating system will apply, or the new *AMA Guides* (usually more

Los Angeles  
5990 Sepulveda Blvd. Suite 600  
Van Nuys, CA 91411  
(818) 997-2100

Orange  
1700 West Katella Ave.  
Orange, CA 92867  
(714) 288-1700

Inland Empire  
268 West Hospitality Lane, Suite 210  
San Bernardino, CA 92408  
(909) 890-4386

conservative) schedule. Applicant's counsel, usually opting to try to stick to the old schedule, have come up with very creative arguments, some of which are working their way through the appellate process now. One such argument concludes that the mere payment of *any* temporary disability in 2004 mandates the use of the old schedule. Another argues against the constitutionality of applying a schedule that did not exist when the employee was injured .

For now, at least, we believe you are on safe ground by using the following rules: 1) If you were required to serve an LC 4061 notice during 2004, apply the old schedule. 2) If there was a treating doctor's report outlining permanent disability factors in 2004, use the old schedule. 3) If there was a comprehensive medical legal report, including an LC 4060 AOE/COE exam in 2004 use the old schedule. Absent any of these facts, argue for and use the new schedule *assuming you have confirmed doing so will help limit your claims costs.*

### **Paying Mileage And Transportation Costs**

No matter what the date of injury, for reasonable and necessary mileage driven between 7/1/2006 and 12/31/2006 for medical treatment, med/legal exams or depositions, mileage is payable at 44.5 cents per mile. However, as of 1/1/2007, the rate increases to 48.5 cents per mile for mileage driven during 2007.

When dealing with transportation liens, among other potential defenses (including necessity) remember to make sure the transportation company possesses the proper licensing for the communities in which it operates. See our in-depth discussion at our website [www.mcdermott-clawson.com](http://www.mcdermott-clawson.com), click on "Recent Developments" and select our July 2006 newsletter.

Los Angeles  
5990 Sepulveda Blvd. Suite 600  
Van Nuys, CA 91411  
(818) 997-2100

Orange  
1700 West Katella Ave.  
Orange, CA 92867  
(714) 288-1700

Inland Empire  
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San Bernardino, CA 92408  
(909) 890-4386

### **Paying Temporary Total Disability**

The maximum rate for TTD as of January 1, 2007 is increased to \$881.66 due to an increase in the state's average weekly wage. This also means that, for any older cases that have continuing TTD beyond two years from the date of injury, if the average weekly wage of the applicant was greater than \$1260 at time of injury, you are required to make an automatic increase in the TTD payments. The new maximum earnings will be \$1322.49.

For seasonal workers who cannot demonstrate earnings during the off-season, temporary disability is not payable during the period the applicant normally does not work. Although the WCAB held TD should be reduced to minimum in the case of *Signature Fruit v WCAB*, the Court of Appeals recently reversed the decision and held no TD was payable during this period.

### **Paying Life Pensions And 100% Awards**

As with TTD, these also increase as of 1/1/2007. Weekly payments for life pensions and 100% awards will have to be increased by 4.96%

### **Making Return To Work Offers**

Offers to return to regular, alternate or modified work pursuant to Labor Code 4658(d) must be made on a mandatory form newly published by the Administrative Director. Form DWC-AD 10133.53 is a three page document that is required to be used in order to make the offer valid and to potentially allow future PD payments to be decreased by 15%. To get the form, go to: [http://www.dir.ca.gov/DWC/DWCPropRegs/ReturnToWork\\_regulations/ReturnToWork\\_regulations.htm](http://www.dir.ca.gov/DWC/DWCPropRegs/ReturnToWork_regulations/ReturnToWork_regulations.htm)

### **Limiting TD Payments To 104 Weeks**

This is another area that is subject to litigation looking for exceptions to the rule that, for injuries on or after 4/19/2004 temporary disability payments are limited to 104 compensable weeks within a period of two years from the date of commencement of payments. LC 4656(c)(1). Applicant's attorneys are arguing for judicially created exceptions where treatment has been disputed and thus, arguably, TTD extended beyond that which would have occurred had treatment been immediately and appropriately provided.

So far we have not found any published decisions of the WCAB or the Courts of Appeal on this subject. Watch for an attempt at legislative or regulatory exceptions to this rule. For now, however, we advocate sticking to the close letter of the statute in all cases. For a discussion of how to calculate the time limit, click to our website [www.mcdermott-clawson.com](http://www.mcdermott-clawson.com), click on "Recent Developments" and see our June 2006 newsletter.

### **Making The MPN Stick**

Another hotbed of litigation, the MPN is under coordinated attack by the California Applicant's Attorneys Association members. Looking for chinks in the armor, a variety of arguments are being raised to entreat judges to rule that the employee may treat outside of the MPN, thus opening the door for Dr. Disability and his entourage. Typically, these arguments devolve around technical flaws in the provision of notices and information to the injured worker. So far, when the facts warrant, the arguments have prevailed.

We believe the courts are going to continue to require that every "i" be dotted and every "t"

crossed. Defendants will have to make sure every notice is worded exactly as the statutes and rules require, and that every time limit be met in the provision of information. Claims personnel will have to be prepared to appear at expedited hearings as witnesses to prove the defense argument that all time limits were kept and all notices met the requirements of the rules.

### **Disputing The Need For Back Surgery**

Do we use Utilization Review, or do we invoke LC 4062(b) when we want a review of a doctor's request for authority to perform spinal surgery? Either or both, according to judicial wisdom. The goal is to use whatever will get the job done the quickest. *Brasher v Nationwide* OAK 0296709 (significant Panel Decision 9/8/06)

### **Paying Interpreters at Medical Treatment Appointment**

There is still a courtroom by courtroom dispute as to whether interpreter fees are payable for routine treatment and physical therapy sessions. The 5th District Court in *Paramount Farms v. WCAB*, F049544, 10/5/06, said the WCAB appeared to have found interpreting services for treatment reimbursable under Rule 9795.3, (a)(2). The 5<sup>th</sup> Appellate Court overturned the WCAB and stated, in an unpublished opinion, that such fees for a treatment session are not payable unless there is a narrative report for that session. In *Alfonso Pineda v. Employers Direct Insurance Co.*, LBO 0353598, Workers' Compensation Judge Pamela Pulley ruled against Interpreters which had billed the insurer for five treatment visits. The Judge relied on a strict interpretation of California Code of Regulations section 9795.3, which does not include interpreters fees for routine treatment visits as being payable. Several trial decisions in 2005, however, found in favor

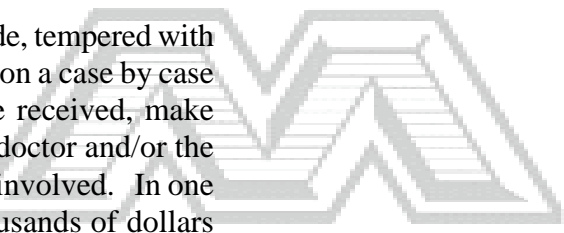
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5990 Sepulveda Blvd. Suite 600  
Van Nuys, CA 91411  
(818) 997-2100

Orange  
1700 West Katella Ave.  
Orange, CA 92867  
(714) 288-1700

Inland Empire  
268 West Hospitality Lane, Suite 210  
San Bernardino, CA 92408  
(909) 890-4386

of the interpreters.

We suggest adherence to the code, tempered with a liberal dose of common sense on a case by case basis. If interpreters' liens are received, make sure you have verified that the doctor and/or the staff do not speak the language involved. In one case we received a lien for thousands of dollars for Spanish interpreters with a doctor who was educated at a medical school in Mexico City and spoke fluent Spanish



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[Howard Stevens](#) (Orange office), Editor.

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We wish you joy and peace this  
Holiday Season, and a very Happy  
New Year!

*Los Angeles*  
5990 Sepulveda Blvd. Suite 600  
Van Nuys, CA 91411  
(818) 997-2100

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(714) 288-1700

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(909) 890-4386