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TEMPORARY DISABILITY: CAN 104 REALLY BE MORE?

On April 19, 2004 SB 899 went into effect. One of its provisions is just beginning to have an effect on the typical caseload: The two year limitation on the payment of temporary disability is beginning to limit the benefits payable on some cases. Although the statutory language and intent of the limitation provision seems clear enough at first blush, there are hidden and (as yet) untested traps in the statutory language.

Labor Code §4656(c)(1) provides that “aggregate disability payments for a single injury occurring on or after the effective date of (the new statute), causing temporary disability, shall not extend for more than 104 compensable weeks within a period of two years from the date of commencement of temporary disability payment.” There are, therefore, two calendar limitations on TD payments: The two years within which TD can be paid, and the maximum number of weeks for which payment can be made.

One major problem concerns the date on which you are allowed to begin the count for the two year limitation. According to the statutory

language, you can only begin counting from the “commencement” of temporary disability payments. Does “commencement” refer to the date the first TD check is sent out, or the dates for which TD is first owed?

Notice that the statute uses two different terms that seem to have different plain meanings. “Compensable weeks” clearly refers to the dates for which TD is owed. “Commencement of temporary disability payment” would suggest that you should begin counting the two year period only as of the date the first check is sent out. Thus, if you have an applicant that (hopefully) has less than 104 weeks of compensable lost time, counting from the date the first check is mailed, once you are out 104 weeks from that date, no more TD is payable for that injury.

The philosophy and prevailing law has always placed the risk of delay on the employer. Thus, if for whatever reason, the first payment is delayed, when the TD check is finally sent out, the “retro” period is likely going to be held “outside the cap” of LC §4656(c)(1), and we will have to start marking off the 104 week period

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following the issuance of the first check, in order to determine the cutoff date, no matter how many weeks that first check covered. Ironically, this would seem to mean that, even where the first payment is sent timely per the controlling statutes, there will be some retrospective component (a three day waiting period and the standard practice of paying one week back and one week ahead).

Thus, in the case where an employee is certified as disabled for *more* than 104 weeks, in every case the cutoff date will arguably be at least slightly beyond 104 weeks after the first compensable day of disability, and the employee will be entitled to slightly more than 104 weeks of compensation, and in cases that are unsuccessfully disputed, potentially a great deal more.

While the employer may test the waters on this issue by arguing that the statute limits applicants to a maximum of *total* payments for TD of 104 weeks within two years from the onset of TTD, the argument may not be successful in light of the different language the legislature used to describe the two different limitations. One possible strategy to consider is the issuance of one TD check (assuming there is medical certification) even where acceptance of a claim is going to be delayed. Pursuant to LC 4909, provision of the benefit cannot be used as an admission of liability. Although there has not yet been any judicial test of the new TD limitation statute, early issuance of a check for some TD *may* be deemed to start the clock running on the two-year limitation.

This brings up yet another problem area: Just what constitutes the first payment? Does EDD payment count? How about salary continuation?

What about a temporary *partial* disability payment?

Again, there has as yet been no judicial interpretation, but here are some thoughts:

As to EDD payments, the Labor Code uses the term “aggregate disability payments.” The term is used in a subsection of LC §4656 that is captioned “Maximum period for temporary disability payments.” Thus, EDD payment may not start the clock running. If EDD paid during a period of delay, (and the period involved is compensable), the carrier has the obligation to reimburse EDD, and this may be deemed “outside the cap” of LC §4656 (c)(1).

Salary continuation, according to prior cases, will mean there is no liability for TD because there is no loss of wages. *Herrera v. W.C.A.B.* (Goleta Lemon Assn.) (1969) 71 Cal. 2d 254, 257-259, 78 Cal. Rptr. 497, 455 P.2d 425, 34 Cal. Comp. Cases 382; *Cone v. Zack's Pasta Kitchen* (1988) 53 Cal. Comp. Cases 251, 256 (Appeals Board En Banc decision). However, for the same reason it is not clear whether such payments start the clock running on the 104 week TD limitation.

Borrowing (out of context) a principle that has been applied by the WCAB to similar questions in a different context, the safest way to try to prevent salary payments from being deemed “outside the cap” is to have a written determination by the employer, in advance, that such payments are intended to represent TTD payment for such time as the employee is unable to work and certified as disabled.

As to temporary partial disability, or wage loss, LC §4656 (c)(1) also applies, as the limitation statute does not distinguish any more between temporary total and temporary partial disability. Temporary partial disability payments

now have the same limitation as TTD. Either type of disability payment qualifies to start the clock running.

A client posed a question regarding the application of the *exceptions* to the 104 week/two year limit provided by LC §4656(c)(2). That statute lists a variety of conditions which, if applicable to the employee, extend the TD limit to 240 weeks within a period of 5 years from the date of injury (*not* the date of commencement of TD payment). The question posed was whether these exceptions would apply even where the condition (such as Hepatitis B) was not the subject of the industrial claim. The statute, it seems, does not have any language limiting its application to enumerated conditions that are *industrial*.

We believe the intent of this provision was that the special condition would have to be at least a concurrent cause of the temporary disability before the exception can apply. The fact that the statute refers to employees suffering the noted conditions (but does not say “industrially related conditions”) should not be a blank check for those cases where there is no causal connection between the special condition and TTD status. On the other hand, if the non-industrial condition is contributing to the TD status, it is possible that the exception will be held to apply and the two year limit will vanish. This is because TD is not apportionable, and concurrent causes of TD may often be a combination of industrial and non-industrial conditions. You can anticipate future appellate law on this issue.

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FROM THE BOARD

On March 17th, 2006 Judge LeCover (Grover Beach) issued a Finding and Award against SCIF which accepted the Applicant’s challenge to the new PD rating schedule, and which made an award of PD based on future economic loss as established by the testimony of Applicant’s vocational expert.

Under the *AMA Guide* and the new PDRS, the Applicant in *Navarro v. Arbor View Retirement* had a 0 per cent rating for the residuals of her admitted back injury. The judge accepted the testimony of a vocational expert, noting that the scheduled rating of zero meant the applicant had not suffered any impairment in her ability to

compete in the labor market. Although this is an old definition of permanent disability, the judge noted that the injury did cause some additional problems for an individual who already had limited abilities to earn as a result of non-industrial limitations. The judge then awarded 15% permanent disability. Since this was a trial level decision, it cannot be binding authority for other judges in other cases. However, there is a strong push by CAAA to continue to test the waters on this issue as work-around to the lower PD recoveries often seen under the new rating system.

FOCUS ON



[Howard Stevens](#)

Howard joined the firm in March, 1998 as a then twenty year veteran of California Workers' Compensation defense practice. A product of UC

Berkeley and UCLA, he graduated *cum laude* from Western State College of Law and entered the legal profession with a background in the entertainment industry and Workers' Compensation claims. He previously ran his own defense firm in the Santa Ana area and has served as Judge Pro Tem at the Workers' Compensation Appeals Board,

Howard spent seven years as an instructor for the Insurance Educational Association, teaching basic and advanced claims handling, subrogation, and Labor Code and Case Law. He has on several occasions been used as a resource for background information by the news media on controversial or newsworthy subjects regarding California Work Comp. He has authored articles for Risk Management magazine, the *San Francisco Recorder*, and *Los Angeles Lawyer*. For several years he worked with an anti-fraud task force, assisting two major California carriers and the Los Angeles District Attorneys' office regarding Workers' Comp fraud, resulting in several successful prosecutions.

Howard lives in Lake Forest, has been very active with the Boy Scouts of America, and has won several awards for distinguished community service. He is a private pilot and also enjoys skiing and scuba diving.

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