



LAW OFFICES
of
McDERMOTT & CLAWSON, LLP

LEGAL BRIEFS NEWSLETTER

CASES & COMMENTS ON WORKERS' COMPENSATION

September 2007

www.mcdermott-clawson.com

September 2007

104 WEEK LIMIT? MAYBE, OR MAYBE NOT!

The courts have been busy of late, continuing to re-define the meaning of the reforms. This is especially true with respect to the issue of TTD and the 104 week cap. There has been some consensus in principle on both sides of the fence that the 104 week limitation on payment of TTD may be too harsh in its present form. While the legislature has been struggling with an acceptable modification, California Applicant Attorneys have sought to carve out case law exceptions to the 104 week limit. Following are some of the key holdings you need to know in order to properly resolve the TTD issues in your cases and get the files closed.

SPINE SURGERY ISN'T AN AMPUTATION

One of the more creative arguments advanced is that an operation which removes some *internal*/body component (such as removal of

a desiccated spinal disk) is an "amputation" qualifying the case for one of the statutory exceptions from the limit pursuant to LC 4656 (c) (1).

Two WCAB Judges bought the argument. Presiding Judge Thomas E. Clarke at the Salinas Workers' Compensation Appeals Board wrote a trial level opinion in *Molly Kirkpatrick v. Dominican Santa Cruz Hospital* (1/19/2007), SAL 0107786, stating that the removal of portions of the C7 disk constituted an amputation, thus qualifying Kirkpatrick for TTD beyond the 104 week limit.

In a similar case, mechanic Paul Cruz brought his case to trial before Judge Jacqueline Duncan at the San Francisco WCAB. Judge Duncan ruled that because a fusion was performed wherein doctors removed a portion of the vertebrae and a portion of hip bone to

Los Angeles
16530 Ventura Boulevard, Suite 209
Encino, CA 91436
(818) 997-2100

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

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

provide material for the fusion, the procedure was also an “amputation” qualifying Cruz for TTD beyond 104 weeks.

The Cruz case came up before the WCAB Commissioners on Petition for Reconsideration, and an *en banc* opinion issued Sept. 5, 2007 finding that such medical procedures do not constitute an amputation under the plain meaning of LC 4656 (c) (1). The WCAB pointed out that the usual and customary meaning of the term “amputation” nearly always refers to a limb, or a part of a limb, including digits. The term encompasses removal (traumatic or medical) of external rather than internal body parts.

This opinion now binds all trial judges in the interpretation of the amputation exception to the 104 week cap. The case title is *Cruz v. Mercedes-Benz of San Francisco*, SFO 0501425. The official citation is not yet available.

104 WEEKS ISN'T ALWAYS 104 WEEKS

Those of you who have been following our newsletter for a while may recall an article we published in June 2006 predicting that, pursuant to the exact terminology in LC 4656, the 104 week limitation would only be counted from the date the first check was placed in the mail, without credit for any retroactive component of that check, or for any reimbursement to EDD. In other words, the risk of delay in provision of TTD would be placed on the defendant. Such is now the law.

Los Angeles
16530 Ventura Boulevard, Suite 209
Encino, CA 91436
(818) 997-2100

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

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

In the case of *Valerie Hawkins v. Amberwood Products* (2007), 72 CCC 807, the WCAB issued a published *en banc* decision holding that the 104 weeks begins on the date the first TTD check is issued, not the date for which it is first owed. EDD paid benefits from 7/26/04 to 3/31/05 for which State Compensation Insurance Fund reimbursed them. State Compensation Insurance Fund made its first payment of temporary disability on 5/03/05. The Fund argued that its liability for TD ended 7/25/06, while the applicant argued the 104 weeks did not run until 5/2/07. The WCAB noted that: “Because section 4656(c)(1)'s limitation of 104 weeks within two years does not begin to run until "the date of commencement of temporary disability payment," there is a strong inducement to promptly start paying temporary disability indemnity. Prompt payment helps ensure that the injured employee and his or her dependents receive some replacement of the employee's lost wages and a means of subsistence during the period of temporary disability.” Implied in this reasoning is the additional incentive that, if not promptly provided when due, the ultimate liability for TTD will be much more than 104 weeks.

PREMATURE TERMINATION OF TD

Similar reasoning has apparently been applied to wrongfully terminating TTD payments prior to the running of the 104 weeks and prior to the applicant reaching maximum medical improvement. In the case of *Corona v. KPMG, LLP* (2007), SJO 0259203,

a trial judge reportedly held that the defendant cut off TTD payments prematurely based on an untested legal theory.*

DELAY IN MEDICAL AUTHORIZATION

Another theory being promulgated by a highly organized applicant's bar is that the legal theory of estoppel should be applicable to defendants who have arguably undertaken action or inaction which contributes to the delay in the applicant reaching maximum medical improvement. Such delays may occur when there is a dispute over the provision of medical treatment recommended by the primary treating physician which is ultimately resolved in favor of provision of that treatment. The argument in such cases is that defendants are "estopped" (prevented) from asserting the 104 week limitation to the extent that the defendant caused the delay in provision of treatment. It has been reported that this theory was upheld in a trial level decision in *Casazza v. Petaluma School District* (2006) SRO 0132058 although we know of no binding case law on this subject yet.

This situation is not to be confused, however, with a delay in medical treatment results not occasioned by defendant's conduct. In *Medeiros v WCAB* (2007), 72 CCC 857 (writ denied), the applicant raised an estoppel theory. The Applicant had back surgery on 11/11/2004 and another on 6/30/2005. Defendant provided TD indemnity from 4/19/2004 until 4/18/2006, then terminated TD payments pursuant to the two-year

limitation. On 7/19/2006, the matter proceeded to a trial on the issue of Applicant's entitlement to TD indemnity beyond 104 weeks. The parties stipulated that Applicant's condition was not P&S, and that he was a candidate for additional surgery. The doctrine of equitable estoppel did not apply because Defendant did not attempt to induce any conduct on the part of Applicant based on a false premise.*

NO CREDIT FOR SALARY

We already know that the case holdings prevent taking credit for State Disability payments from EDD. We now also have cases that hold that salary continuation pursuant to Labor Code 4850 may not be used in computing the 104 weeks. The cases are *Aisthorpe v. City of Oakland* and *Watson v. City of Oakland* (2007), 72 CCC 249 (writ denied).*

In another case, the defendant attempted to take credit for one year of salary continuation paid to a city police officer under terms of the city charter. The defendant paid one additional year of TTD and then terminated benefits. The WCAB opinion denying reconsideration pointed to the *Aisthorpe* decision cited above, and to an Attorney General opinion differentiating Labor Code 4850 benefits from TTD. The WCAB held that salary continuation under the city charter was a benefit of like kind to LC 4850, and therefore should not be counted in the 104 weeks. The defendants applied to the Court of Appeal for a Writ, which was denied. 2007 Cal. Work Comp. PD Lexis 3 (WCAB

Los Angeles
16530 Ventura Boulevard, Suite 209
Encino, CA 91436
(818) 997-2100

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

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

opinion); *City & County of San Francisco v. WCAB* (2007), 72 CCC 1013 (writ denied).*

Article by Howard Stevens, Orange Office

*Editor's note: We normally do not have access to trial level opinions unless they involve cases within our own firm; therefore, our reporting of these cases is limited to information received via reliable sources. Decisions of trial level judges do not bind other judges, even at the same Board. However, they do give some indication of what judges may do at trial on cases with similar issues. Reports concerning writ denied cases are published in the California Compensation Cases and may be cited at trial level but are not binding authority on a trial judge.

Need Assistance with Training?

McDermott & Clawson, LLP is happy to assist with the training needs of your organization. Our education committee has extensive experience in providing seminars and discussions on Workers' Compensation topics of concern to adjusters and employers. We have worked with numerous carriers, third party administrators, and brokers to provide educational assistance, and would be happy to discuss your needs. Call or email [Howard Stevens](#) at (714) 288- 1700 or feel free to speak with any of our attorneys for further information.

Legal Briefs is a publication of [McDermott & Clawson, LLP](#) [Howard Stevens](#) (Orange office), Editor

Legal Briefs is provided free of charge as a service to our valued clients to provide general assistance in the day to day review of claims and cases. Comments and recommendations provided are not necessarily meant to apply to any specific case currently under review, as many cases present unique facts and circumstances which should be reviewed by legal counsel when litigation is involved. Please feel free to call our [Education Committee](#) with questions or comments. Contact [Howard Stevens](#) in the Orange office, 714 288-1700, or any of our [managing attorneys](#) for more information.

Los Angeles
16530 Ventura Boulevard, Suite 209
Encino, CA 91436
(818) 997-2100

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

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