

Quarterly Review

Second Quarter 2001

A Legal Update for the Claims Professional

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"Judicial Creep"

Earnings at "Time of Injury" Could Mean Post-Injury, Say the Courts Not Limited to Union Contracts, Erosive Decisions Muddle Indemnity Calculation

By *Lawrence Kirk*, Central Coast office

Pismo Beach. — Henrietta, a non-union nurse's aide, is earning \$200 a week as a full-time permanent employee at Clamdigger Hospital when she goes off work in 1998 following a specific back injury. The carrier pays TTD at the statutory rate of \$133.33 per week. Henrietta returns to work and in 1999 the hospital is sold to Otter Corp., which immediately gives her a raise to \$300 per week. A week later, she has a flareup and goes off work again. The carrier resumes TD at \$133.33 per week.

Henrietta's attorney promptly files a penalty petition for failure to pay TD at \$200 per week, insisting that case law now requires TD to be calculated on earnings *as of each new period of disability*. The irate carrier contends that the one solid, immutable principle of California workers' compensation is that disability indemnity is calculated based on *earnings at the date of the injury*. A slam dunk for the carrier?

Catch of the Day

Worker's Rebuttal Puts Claim in Tank

Oxnard. — In a case handled by *Lawrence Kirk* of our *Central Coast* office, a laundry worker was ordered to *take nothing* on her \$75,000 carpal-tunnel claim when a plant supervisor identified her by dental braces as a hostess at a Red Lobster restaurant on a day she was claiming TTD. The applicant rebutted this by a bill showing that four days prior to the date in question the braces had been removed—and replaced by a retainer. ■

Would the Last One Out Bring the Shoes...

Depression Over Deposed Despot Dictates Dismissal

Sacramento. — A hospital pharmacy assistant seeking \$206,000 in psychiatric-injury benefits left court *empty-handed*, after *Ted E. Richards* of our *Central*

Distorting the Law

Researching this issue uncovers a process which can best be characterized as "*judicial creep*": one well-meaning case decision opens a small hole in a statute under certain limited circumstances, and successive decisions broaden the loophole inch-by-inch (not always logically) to eventually distort the law into a shape never envisioned by the Legislature.

On its face, Labor Code Section 4453 renders post-injury earnings irrelevant. Average weekly earnings for purposes of indemnity calculation must be taken as of "*the time of the injury*" for workers employed either full-time (Sec 4453 (c)(1)) or concurrently (Sec 4453(c)(2)). Earnings of workers paid by commission or at an irregular rate or by the "week, month or other period" can be averaged for up to one year (Sec 4453(c)(3)). (*Quaere*:

See *Earnings* — Page 2

Winning Briefs

Central Valley office presented persuasive medical opinion relating her suicidal depression to a post-traumatic stress disorder caused by fleeing the Philippines with Ferdinand and Imelda Marcos. ■

Open Up That Golden Gate...

"Bay Bridge Phobia" Found Nonindustrial

Sacramento. — *Tuen Y. Wong* of our *Central Valley* office won a *total defense victory* in a truck driver's claim that heart attacks caused by a job-induced phobia of driving over the San Francisco-Oakland Bay Bridge left him 100% permanently totally disabled. The WCALJ relied on evidence that the phobia was preexisting and had not prevented the employee from vacation travels over high bridges in earthquake zones. ■

Grancell, Lebovitz, Stander,
Marx and Barnes

Quarterly Review

This newsletter is prepared for the benefit of our clients as a general review of recent developments in workers' compensation, subrogation, civil and labor law. These articles should not be construed as legal advice or opinion, and are not meant as a substitute for the advice of counsel in individual cases.

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Is an hour an “other period”?) Even where the broader concept of *earning capacity* is used—for part-time workers, or the catchall “where for any reason the foregoing methods...cannot reasonably and fairly be applied”—average weekly earning capacity must be established *as of the time of injury*, “due consideration being given to his or her actual earnings from all sources and employments.” Sec 4453(c)(4).

The “But-For” Test

The first major case to consider post-injury earnings appears to be *Goytia v. WCAB*, 35 Cal. Comp. Cases 27 (1970), *subseq. op.* 37 Cal. Comp. Cases 104 (1972). There, since an employee injured during seasonal work had intended at the time of injury to improve herself, the California Supreme Court required the Board to consider an increased earning capacity which had come into being after the injury. This reasoning was expanded to a “but-for” test in *Pascoe v. WCAB*, 40 Cal. Comp. Cases 191 (1975): Where, but for the injury, the worker would have completed her RN studies, the Board was held to have erroneously found earnings at less than what they would have been had she actually become an RN.

The “but-for” principle was significantly extended by the leading case of *Thrifty Drug Stores, Inc. v. WCAB (Kaye)*, 44 Cal. Comp. Cases 809 (1979). In *Kaye*, the Board was upheld in increasing the injured worker’s TD rate based on “specific, demonstrable evidence” of a collective bargaining agreement providing for periodic raises which the employee had been prevented by the injury from receiving. *Kaye* was then misapplied to non-union situations by *Toccalino v. WCAB*, 47 Cal. Comp. Cases 145 (1982) (Board should not “blindly look” to the date of actual injury when the employee re-

mained on the job and received wage increases) and *Lujan v. WCAB*, 50 Cal. Comp. Cases 693 (1985) (post-injury earnings must be considered if necessary for “a fair determination” of earning capacity, even for a permanent, full-time employee).

“Reasonably Anticipated” Raises

In more recent developments, a standard for the applicability of post-injury earnings was apparently set in *Grossmont Hospital v. WCAB (Kyllonen)*, 62 Cal. Comp. Cases 1649 (1997). There, the Court of Appeal interpreted *Kaye, supra*, so as to allow the Board to take into account periodic raises which were “in existence or reasonably anticipated” at the date of the injury. Applying this standard, the Board in *Kaiser Foundation Hospital v. WCAB (Mercer)*, 65 Cal. Comp. Cases 567 (2000) (writ denied) upheld a WCALJ’s finding that the TD rate beyond the two-

year anniversary from the 1994 injury should be the \$490 maximum when TD resumed in 1997, based on nursing association-negotiated interim raises under a process in place at the time of injury.

“The Board may take into account periodic raises which were ‘in existence or reasonably anticipated’ as of the [time of] injury.”

So let’s apply all this to Henrietta’s penalty claim: despite judicial creep, the carrier has a strong argument. Since a dramatic raise of \$100 a week was not scheduled or reasonably anticipated at the time of the injury, and since Henrietta was not prevented by the injury from earning the raise, her actual earnings at the time of injury do not unreasonably or unfairly reflect her true earning power. Since *Kyllonen* requires a *one-time earnings calculation only*, shouldn’t Henrietta’s 1998 average weekly earnings be used to calculate the TD rate for later disability periods?

Despite the plain meaning of the statute, it’s no slam dunk. Nothing, it seems, is immutable. ■



E-Mails

Melting Down Melton

Dear Editor:

The report in your First Quarter 2001 issue of *Melton v. Industrial Indem. Co.*, 2001 Daily Journal D.A.R. 569 (January 18, 2001) (portions certified for nonpublication) might lead readers to believe that *all current* workers’ compensation policies were held to cover an employer’s liability for Labor Code Section 132a work-injury discrimination. However, the Court in *Melton* was dealing with a nonexclusionary 1984 policy quite different than the revised standard form policy issued today by most carriers, which contains specific provisions making it quite clear that there is no coverage for the conduct prohibited by Section 132a. Moreover, where there is no potential for coverage under a policy, there is no duty to defend. *La Jolla Beach and Tennis Club v. Industrial Indem. Co.*, 9 Cal. 4th 27 (1994).

The California Supreme Court has now ordered *Melton* to be entirely depublished. Speaking as one whose name was peripherally mentioned in it, I believe the decision was meant to be limited to the policy it considered. ■

QUOTE OF THE QUARTER
 “Self-discipline is the highest form of intelligence.”
 —John Chaney, Temple basketball coach

–Neil R. Pieth, Home Office Legal Director, Fremont Compensation Insurance Group

ADVENTURES IN FANTASYLAND

Psychiatric Injuries

WCAB Provides Four-Level Framework for "Personnel Action" Defense Complex Analysis Requires WCALJ, Counsel to Deal With Factual, Legal and Medical Determinations

By *Dennis M. Kemp, Greater San Diego office*

Van Nuys. —Rick, a business machines salesman, took a vacation/leave of absence to the Philippines after filing claims of orthopedic and psychiatric injury, the latter based on supervisors' "discriminatory" criticism. Upon his return, he found that his territory had been reassigned and that he was being offered a new territory requiring a two-hour drive. Declining the offer, he never returned to work.

After trial, the WCALJ awarded disability and medical treatment, relying on Rick's QME report and concluding without analysis that the psychiatric injury "was not the result of a good faith personnel action," contrary to the opinion of the employer's QME.

Granting the employer's petition for reconsid-

eration, the WCAB in an *en banc* decision *re-scinded the award* and returned the matter to the trial level, finding that the record lacked the "*multilevel analysis*" necessary to determine compensability when the defense of substantial causation by a *lawful, nondiscriminatory, good faith personnel action* is asserted under Labor Code Section 3208.3(h).

The Board set forth a *four-level inquiry*: (1) Does the injury involve actual events of employment (a factual determination); (2) If so, does competent medical evidence establish that these events were more than 50% of the causes of the injury; (3) Were any of these events personnel actions, and, if so, were they lawful, nondiscriminatory, and in good faith (a factual/legal determination); and (4) If so, does com-

petent medical evidence establish whether these personnel actions were a "substantial [35-40%] cause" of the injury?

Comment: To prepare for trial on a Section 3208.3(h) defense, the claims administrator must now discover via deposition, document review and witness interviews what employment events the worker is claiming to be a cause of the injury, identify those that can be proven to be lawful, good faith, nondiscriminatory personnel actions, and furnish the psychiatric QME with the tools necessary for an airtight medical opinion on the extent of the actions' contribution. ■

Rolda v. Pitney Bowes, Inc., 29 CWCR 46 (March 2001).



Sending Accounting Avoids 5814, Audit Penalties—If Not the Magnifying Glass

And: No TD Where Light Duty Would Be Available But For Injured Worker's Legitimate Termination; Post-C & R Lien Claims May be Barred By Laches

Q: I'm sick and tired of sending benefit printouts to applicants' attorneys on demand. Every time I do it, I get hit with a flyspecking multiple-penalty petition. Show me where it says I have to send an accounting—and, if I refuse, what's the worst that could happen?

—*Harried in Huntington Beach.*

A: A claims administrator is required to send an accounting in connection with a notice of ending of TD, PD, VRMA, salary continuation, and death benefits. 8 *Cal. Code Regs.* Secs 9812(d), (h)(2). There is an Audit Unit penalty of \$100 for each failure to do this. Sec 10111.1(a)(7)[ii]. Moreover, in *County of Los Angeles/Fire Dept. v. WCAB (Dulan)*, 66 Cal. Comp. Cases 380 (2001) (writ denied), the WCAB upheld a trial judge's decision awarding a 10% penalty under Labor Code Section 5814 for unreasonable delay in providing an accounting of benefits. ■

—*Robert J. Chimits, Orange County office.*

Q: While I'm providing temporary light duty to Sniffing Susie after she tries to fly her forklift off the roof, I learn that the mandatory drug screen came up positive for cocaine—so I terminate her under company rules. Now Susie is demanding TTD because I'm "refusing to offer her work" within the treating doctor's restrictions. Must I pay through the nose?

—*Snorting in Sausalito.*

A: While in general an employer must either provide work within temporary partial disability restrictions or pay TTD, this rule does not apply when light duty is available but the worker has taken actions that have given the employer good cause to terminate the employment relationship. *Butterball Turkey Co. v. WCAB (Esquivel)*, 65 Cal. Comp. Cases 61 (1999) (writ denied); *Anzelde v. WCAB*, 61 Cal. Comp. Cases 1458 (1996) (writ denied). ■

—*Joseph H. Leonard, Greater San Francisco office.*

Q: I C & R a case and after its approval pay all the liens. Seven years later a new lien claimant, Lazarus Medical, now arises to assert a \$20,000 treatment lien for pre-C & R services of which I hadn't a clue. Isn't a settlement supposed to buy my peace?

—*Perplexed in Pasadena.*

A: This one did. A lien claim filed after approval of a compromise and release is subject to denial by the WCAB under the equitable doctrine of *laches*, unless it can be shown that the claims administrator was aware of the treatment before the settlement and failed to make reasonable inquiries concerning the potential lien. *Kaiser Foundation Hospital v. WCAB (Valencia)*, 41 Cal. Comp. Cases 730 (1976) (writ denied). ■

—*Anthony J. Fink, Greater Los Angeles office.*

"In general, an employer must either provide work within temporary partial disability restrictions or pay TTD."

ANNOUNCEMENTS

Sam L. Lebovitz, a shareholder/team manager in our *Greater Los Angeles* office, announces the association of **Gwen A. Makowski**, a 1999 Juris Doctor honors graduate of University of La Verne College of Law.

R. Jeffrey Stander, a shareholder/team manager in our *Greater Los Angeles* office, announces the association of **Mark Wood**. Mr. Wood, a graduate of Wesleyan University with a Juris Doctor degree from McGeorge School of Law, University of the Pacific, has extensive litigation experience in workers' compensation and personal-injury law.

Lawrence Kirk, shareholder/manager of our *Central Coast* office in Ventura, announces that **Cheryl E. Tobor** has transferred to the office from our *Greater Los Angeles* office. Ms. Tobor is an 11-year associate of the firm and a 1987 graduate of Loyola University School of Law.

Timothy E. Kinsey, a shareholder/team manager in our *Greater Los Angeles* office, announces the association of **Christine I. Renten**. Ms. Renten received her bachelor's degree from the University of Southern California and her Juris Doctor degree from Southwestern University School of Law, and was formerly associated with the Los Angeles City Attorney's Office.

Robin Brown of our *Greater Los Angeles* office announces her change of name from **Robin McLaughlin**, following her recent marriage.

Lana M. Shearer of our *Central Valley* office announces her change of name from **Lana M. Brown**, following her recent marriage.

Presumption of Compensability

“Reasonable Certainty” of Injury Triggers Employer’s Claim-Form Duty, Rules WCAB; 90-Day Denial Period Runs From Breach

By **R. Jeffrey Stander**, *Greater Los Angeles office* and **David J. Chun**, *San Jose office*

San Francisco. – In a recent *en banc* decision, the WCAB has defined an employer’s breach of its duty to provide a claim form within one working day of receiving notice or knowledge of an injury (**Lab C** Sec 5401(b)) as failure to do so when it is *reasonably certain* either that the employee suffered an industrial injury or is claiming such injury. **Wagner v. Allied Signal Aerospace**, 3 WCAB Rptr 10,160 (2001). An “injury” giving rise to the duty is one resulting in lost time beyond the date of injury or in medical treatment beyond first aid. Sec 5401(a).

Upon breach of the duty, the 90-day period provided by Section 5402 to deny the claim or have it *presumed compensable* begins to run from the date of the breach—and not, as provided by Sections 5401-02, from the date of the employer’s later receipt of the signed claim form. This can lead to the harsh result of a claim being presumed compensable before the claims administrator even learns of it.

Wagner observed, however, that the “reasonable certainty” standard does not require an employer to guess or speculate about the employee’s unannounced intentions or nebulous comments, or to substantiate industrial causation by a medical-legal report.

But the decision highlights the danger in not, for example, providing a new claim form immediately on receipt of a medical report on a specific injury which for the first time opines a *cumulative trauma* as well.

Here’s a checklist to avoid the presumption trap:

- ↑ Be cognizant of any potential claim of injury from *all available sources*, such as co-workers, supervisors, dispensary records, medical reports, or communications from the employee or his family.
- ↑ If the employee requests a claim form, provide it within *one working day*.
- ↑ If in doubt, *consult your attorneys* without delay.

If the presumption does sneak in, it can still be rebutted by evidence demonstrably undiscoverable despite reasonable diligence within the 90-day statutory period. And all other applicable defenses are preserved, including nature, extent and duration of disability, special psychiatric-injury defenses, employment, and the statute of limitations. ■

IN THE NEXT ISSUE

How to Handle the Incarcerated Applicant

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