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**Fifth District Court of Appeals Holds that Industrial Disability Leave Granted to Injured Correctional Officer is Considered Equivalent to Temporary Disability for Purposes of the Two Year Limitation Set Forth in Labor Code Section 4656(c)(1).**

In *Brooks v. WCAB* (2008) [cite pending], the Fifth District Court of Appeal, in a case certified for publication held that industrial disability leave benefits provided pursuant to Government Code sections 19869-19877.1 were considered as temporary disability for purposes of the two-year limitation on temporary disability payments.

In this case, a corrections officer sustained industrial injury to her right shoulder and psyche on October 25, 2004 and received one year of industrial disability leave pay under Government Code sections 19869-19877.1. After one year of industrial leave pay, the applicant received temporary total disability pay for an additional year before temporary disability payments were discontinued based upon the limitation set forth in Labor Code section 4656(c)(1).

Applicant brought the issue before the WCAB, ultimately for trial, arguing that the year of industrial disability leave could not be counted towards the two year limitation on temporary disability as "IDL [Industrial Disability Leave] payments are made under different rules, to a limited class of employees, at different rates, and for different periods."

The trial judge disagreed with the applicant, finding that IDL payments were the functional equivalent of temporary disability and as such were to be considered toward the 104 week limit on temporary disability. On applicant's petition for reconsideration, the WCAB adopted the reasoning of the WCJ and denied reconsideration.

The Fifth District Court of Appeals upheld the WCAB in this published opinion. In doing so, the Court conducted a

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review of the statutes addressing both IDL and temporary disability. After doing so, the Court succinctly stated, in part, that "[w]e agree that the statutory scheme is clear, but not with Brooks' conclusion that IDL and TD are distinct classes of benefits that do not overlap. Despite Brooks' arguments to the contrary, the Legislature has already answered her inquiry. *Located within the IDL provisions, Government Code section 19870, subdivision (a) expressly provides that IDL 'means temporary disability.'*" The Court continued addressing several other cases on the issue and ultimately supported the WCAB in holding that IDL is to be considered as temporary disability for purposes of calculating the period to which an applicant is entitled to temporary disability under the Labor Code.

### **The Third District Court of Appeal Holds That the Two Year (104 Week) Limitation on Temporary Disability Benefits Applies Concurrently Where An Applicant Sustains Two Separate Injuries.**

In *Foster v. WCAB* (2008) [cite pending], the Third District Court of Appeals considered the application of the Labor Code section 4656(c)(1) 104 compensable weeks limitation on payment of temporary disability to a situation where an applicant sustained two distinct dates of injury. In considering this scenario, the Court held that the temporary disability limitation would run concurrently for the dates of injury, not as consecutive periods of 104 weeks.

In *Foster*, the applicant sustained injuries on February 23, 2005 and April 13, 2005. Following the first injury, the applicant returned to light duty work before incurring the second injury, after which time the applicant was found temporarily totally disabled and began to receive benefits. Each of the injuries involved the applicant's right shoulder. The April 13, 2005 injury also included the applicant's neck and right elbow. The evidence further showed that both of the applicant's injuries contributed to the applicant's need for temporary disability.

The insurance carrier began temporary disability payments for the period beginning April 14, 2005, immediately following the second injury. The carrier ceased payment of temporary disability on April 14, 2007, pursuant to Labor Code section 4656(c)(1), providing for a limitation on temporary disability of two-years. During the time that temporary disability was paid, the applicant underwent a right shoulder surgery in September 2005. Ultimately, an Agreed Medical Evaluator concluded that the applicant was permanent and stationary as to his right shoulder and right elbow in September 2006 and was not permanent and

easy reference.

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stationary as to his neck until undergoing surgery, or deciding not to do so.

After trial on the issue of the proper period of payment of temporary disability, the Workers' Compensation Judge found that the applicant was entitled to two periods of temporary disability based upon the reasoning that there were two separate dates of injury. The WCJ awarded the applicant a first period of temporary disability from April 14, 2005 until September 25, 2006, and a second period from September 26, 2006, less credit for payments made.

On Reconsideration, the WCAB found that "[t]o 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."

The WCAB ultimately held that under the facts presented, temporary disability for both dates of injury was completely overlapping and, as such, expired on April 26, 2007, two years from the date of first payment of temporary disability.

In upholding the WCAB, the Third District Court of Appeals reasoned that because both injuries combined to create the need for temporary disability in this case, both periods began to run concurrently. The Court further reasoned that there was no provision that would suggest that under the facts presented, one period of temporary disability would be tolled until the other period ran. Ultimately, as a result of the above, the Court held that where two injuries combine to create the need for temporary disability, the two-year (104 weeks) limitation on temporary disability runs concurrently from the date of first payment of temporary disability indemnity.

*[Author's note: It is essential to be aware that the Court did NOT address situations where there are broken/staggered periods of temporary disability between dates of injury. It is expected that there will be numerous factual scenarios brought to the attention of the Courts of Appeal that could provide different outcomes in the application of Labor Code Section 4656(c)(1). In fact, the Court recognized this in quoting the WCAB, stating: "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." ]*

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**The FSK Newsletter Team**

Jason C. Hilfrink  
(Chief Legal Editor)

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