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Dear Subscriber,

In a Published Decision, the Sixth District Court of Appeal Narrows the Circumstances Where a LeBoeuf Argument Can be Used.

In Hertz v. WCAB (Published) [cite pending], the Sixth District Court of Appeal held that an award of 100% permanent disability to an applicant due to vocational rehabilitation non-feasibility was improper where a portion of the reason that the applicant was not feasible for retraining was due to the applicant's inability to read or write in Spanish or English and his limited education.

The applicant sustained injuries in course of his employment with Hertz as a car washer. As a result of his injuries, it was ultimately found at trial that the medical reporting alone rated 'around' 60% permanent disability. A full rating was not obtained as a result of the fact that the trial judge further found that under the LeBoeuf case, the applicant was non-feasible for vocational rehabilitation based on expert reporting and testimony. In the reporting and testimony, the doctors and vocational rehabilitation expert opined that the combination of the applicant's lack of education, reading and writing skills, coupled with his physical injuries made it impossible for the applicant to be retrained into an appropriate employment position that would accommodate his physical restrictions. Based upon the testimony and reporting, the WCJ concluded that the applicant was 100% permanently disabled.

The WCAB denied defendant's petition for reconsideration and the matter was then taken to the Court of Appeal.

In reversing the WCAB, the Sixth District Court of Appeal noted that the applicant's industrial injuries, those directly caused by the applicant's employment, resulted in permanent disability of less than 100%.

It was not unless the applicant's non-industrial

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circumstances, those of minimal education and reading and writing skills, were considered that a 100% finding could be found. The Court thus held that the defendant was only liable for that disability actually caused by the applicant's employment and the functional illiteracy of the applicant was not employment related. As a result, the Court found that defendant was not liable for that portion of disability relating to the non-industrial educational issues and limited to liability for the permanent disability found by way of the medical reporting under the 1997 rating schedule. The matter was remanded for full rating and decision consistent with the holding of the Court.

First District Court of Appeal Holds that Vocational Rehabilitation Maintenance Allowance is Not a Wage Replacement Benefit, No Credit to Defendant for Applicant's Wages Earned

In *Galvao v. WCAB (unpublished)* [cite pending], the First District Court of Appeal held that where an applicant is working during the time of a dispute relating to vocational rehabilitation benefits, the defendant is not entitled to take credit for the applicant's wages against the accrued vocational rehabilitation maintenance allowance.

The applicant sustained an industrial injury during 2002 while employed at Kinko's. Thereafter, the applicant was found permanent and stationary in September of 2003. After being found permanent and stationary, the applicant obtained other less physically strenuous employment. After the permanent and stationary finding, a dispute arose as to whether the applicant was entitled to vocational rehabilitation services. Ultimately, the parties appeared before the Vocational Rehabilitation Unit for resolution of the dispute and the Vocational Rehabilitation Unit issued a Determination that the applicant was entitled to Vocational Rehabilitation services and to Vocational Rehabilitation Maintenance Allowance at the temporary disability rate from the date of being permanent and stationary through the date services were commenced.

On appeal from the determination, the WCJ upheld the vocational rehabilitation determination.

On petition for reconsideration, the WCAB upheld the WCJ, though allowed the defendant to take credit against the VRTD in the amount of wages earned by the applicant during the liability period for VRTD.

The applicant appealed to the First District Court of Appeals who modified the decision of the WCAB, holding that the defendant is not entitled to credit for the applicant's wages

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during the time that VRTD was ordered. In so holding, the First District cited the recent cases of Medrano and Gamble which also found that wages are not allowed as credit against VRTD. In discussing the credit issue further, the Court noted that the purpose of VRMA is not to replace lost wages but, rather, to assist an injured worker financially while attending a retraining program. Thus, the Court concluded, because VRMA is not a wage loss benefit, credit for wages earned is not applicable.

Note, this case is not published and, thus, not controlling authority on this issue.

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Sincerely,

The FSK Newsletter Team

Jason C. Hilfrink

(Chief Legal Editor)

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