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Judge O'Brien's supplement to his acclaimed publication California Workers' Compensation Claims and Benefits, 12th Edition is now available for immediate purchase and shipping.

Over a year in the making, this supplement, along with the 12th edition, promises to ensure that the reader will be up to date on all major Court and WCAB opinions. As many know, this supplement was delayed several times due to the quickly evolving landscape of workers' compensation practice in California. After repeated calls for the release, Judge O'Brien has now given this latest supplement his seal of approval.

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**FSK NEWS WATCHLIST:**

Oral arguments were heard in the case of *Vaira v. WCAB* on November 20, 2007 in Sacramento. The case has drawn state and national attention with the involvement of AARP and the American Civil Liberties Union of Northern California arguing against non-industrial apportionment for osteoporosis on the basis that it is an age and gender related condition under Government Code Section 11135. The section prohibits state government agencies from discriminating based upon either age or gender (among other categories) and further prohibits the denial of benefits based upon these categories.

The *Vaira* case is thought to be the first ever California workers' compensation matter to draw the attention and involvement of the AARP.

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## **Another Rating Schedule Case Holds That AMA Guides Apply to a Pre-2005 Date of Injury.**

In *Tanimura & Antle v. WCAB (Lopez)*, the Sixth District Court of Appeal held, in an unpublished opinion, that the 2005 American Medical Association based permanent disability rating guides apply to a pre-2005 date of injury.

In *Lopez*, the applicant sustained an industrial injury to his left hand on September 1, 2004. Thereafter, he continued to receive temporary total disability payments until March 2006.

At trial, the WCJ found the 2005 rating schedule applied as there was no comprehensive medical report or report finding permanent disability prior to 01/01/05 and no notice of permanent disability due to the applicant prior to 01/01/05.

On reconsideration, the WCAB reversed the WCJ in a split decision finding that because temporary disability began prior to 01/01/05, the duty to ultimately provide notice was triggered before 01/01/05, thus preserving the 1997 rating schedule.

The Sixth District Court of Appeal reversed the WCAB, citing the numerous recent cases of *Vera v. Workers' Comp. Appeals Bd.*, 154 Cal.App.4th at pages 1003-1004; *Chang v. Workers' Comp. Appeals Bd.* (2007) 153 Cal.App.4th 750, 752; *Energetic Painting and Drywall, Inc. v. Workers' Comp. Appeals Bd.* (2007) 153 Cal.App.4th 633, 636-639; and *Zenith Ins. Co. v. Workers' Comp. Appeals Bd.* (2007) 153 Cal.App.4th 461, 465-466, holding contrary to the WCAB in this matter. The Court held that absent notice actually being due to the applicant prior to 01/01/05, the 2005 rating schedule applies.

## **WCAB Issues En Banc Opinion in Costa, Finding Expert Fees for Efforts to Rebut the 2005 Rating Schedule Payable by Defendant.**

In *Costa v. Hardy Diagnostic (SCIF)*, [Costa II], the WCAB in an En Banc decision, held that the costs of a vocational rehabilitation expert who testified on behalf of the applicant in an effort to rebut the 2005 rating schedule were allowable under Labor Code Section 5811 as an award for costs.

In allowing costs of expert testimony as to diminished future earning capacity to be reimbursed and paid by defendant, the WCAB noted that the witness must qualify as an expert,

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the testimony must provide a benefit to the applicant's efforts even if not successful, and that the reimbursement should be assessed similarly to medical-legal expense (i.e. reasonable and necessary costs).

The matter was remanded to the trial level for further proceedings.

## **Second District Court of Appeal Decides to Publish Commercial Traveler Opinion**

The Second District Court of Appeal decided to designate their opinion as a published opinion in *City of Los Angeles v. WCAB (DeLeon)* wherein the Court held that a Certified Public Accountant who fell and sustained an ultimately fatal head injury while attending an out of town conference did not sustain injury AOE/COE.

In DeLeon, the applicant was attending an accounting conference in New Jersey when he fell while returning from a lunch break, striking his head. The applicant died several days later. The applicant was an accountant for the City of Los Angeles (City) at the time of the injury. The City did not require that someone in the applicant's position be or maintain a Certified Public Accountant (CPA) status. The City did, however, pay a 5.5% bonus for those who were CPA's.

After trial, the WCJ found the applicant's death to be industrial reasoning that the CPA license was a benefit to the City and was encouraged by way of the 5.5% bonus paid to CPA's. The trial decision was upheld by a majority of WCAB commissioners.

On Appeal, the Second District held that the death was not industrial in nature. The Court reasoned that the CPA licensing was not required, not reimbursed and not directly encouraged by City, who provided in-house training for their accounting staff. The Court further reasoned that the special mission doctrine did not apply because there was no request, implied or express, for the applicant to maintain his CPA licensure.

With the recent change in the status of the opinion of the Court, this case is now citable as binding precedent.

Again, we thank you for your interest in FS&K Work Comp News and look forward to keeping you informed on the Workers' Compensation issues that most affect you.

Sincerely,

**The FSK Newsletter Team**

Jason C. Hilfrink  
(Chief Legal Editor)

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