

Dear Subscriber,

The Second District Court of Appeal Issues Published Opinion on a Finding of Permanent Disability!

The Second District Court of Appeal, in *Gentyle Group, Inc. v. WCAB* (2008), certified for publication, held that a permanent and stationary report is not necessary to substantiate the existence of permanent disability.

In *Gentyle Group*, the applicant claimed two industrial injuries occurring on December 5, 2001 and August 2, 2002 through March 14, 2003. Following the dates of injury, the applicant underwent three surgical procedures on October 28, 2003, April 27, 2004 and, it appears, in October 2004. In a September 14, 2004 report, the applicant's treating physician stated "[i]t is my opinion that permanent disability exists with respect to the patient's bilateral shoulder and bilateral upper extremity injuries, however, I will further determine the extent of permanent disability after further evaluations of the patient's condition." The treating physician also stated in several 2004 reports that the applicant "will more than likely require vocational rehabilitation, but this will be determined after further evaluation." and "I conclude that it is medically probable that the patient's disability is solely attributable to the [industrial injuries], however, these issues will be further addressed at the time of the permanent and stationary evaluation." Additional applicant QME reporting was obtained also noting that permanent disability was expected and that the applicant would likely be found a qualified injured worker.

The applicant was ultimately found permanent and stationary by way of a report dated October 19, 2005 wherein work restrictions were provided.

At trial, it was found that the applicant was entitled to the 1997 rating schedule for determining her permanent disability as a comprehensive medical legal evaluation was conducted prior to January 1, 2005. The WCAB upheld the decision and the defendant appealed.

In upholding the WCAB, the Second District Court of Appeal reviewed the language of Labor Code Section 4660 and first reasoned that a comprehensive medical-legal report must

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also contain evidence of permanent disability prior to January 1, 2005. However, in analyzing the facts of this claim, the Court further reasoned that the reporting of the applicant's treating physician and the Applicant's QME could be sufficient to establish the existence of permanent disability prior to January 1, 2005 and remanded the matter back to the trial level for a determination of this issue.

The Court clearly held that a permanent and stationary finding is not the only manner by which permanent disability may be established.

In an Unpublished Opinion, Fifth District Holds the WCAB Was Enforcing a Prior Award to Allow Award of Treatment to Injured Worker

In *Target Stores v. WCAB* (2008), the Fifth District Court of Appeal, in an unpublished opinion, held that where the defendant had been providing medical treatment to a body part that was not included in a stipulated award for eleven years, could not then terminated treatment on the basis that it was not listed as a body part on the stipulated award.

The applicant in *Target Stores* entered into a stipulated award approved on June 3, 1994 indicating a need for medical treatment. The body parts indicated on the stipulated award were the applicant's right elbow and arm and provided a rating using the spine numerical indicator. Further, the stipulated award stated that it was based upon the findings of AME Dr. Chittenden who indicated the applicant had pain in her elbow and right arm which occasionally spread into her neck. Dr. Chittenden further found swelling and diffuse tenderness in the applicant's neck.

From the time of the stipulated award forward, the applicant continued to receive treatment that included treatment for her neck. Beginning in 2002, defendant advised that it would no longer authorize treatment for the applicant's neck as it was not part of her award. A petition to amend the stipulated award for clerical error was filed thereafter and the matter later proceeded to trial.

At trial, the WCJ found that the WCAB lacked jurisdiction to amend the award, but held that finding treatment to the applicant's neck proper was enforcing the award based upon Dr. Chittenden's finding of injury to the neck. The WCJ further ruled, in the alternative, that the medical reporting, coupled with the provision of treatment for some 11 years supported ongoing treatment based upon an estoppel theory.

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On appeal, the Fifth District Court of Appeals upheld the WCAB finding that the WCAB was enforcing a prior award and thus did not lose jurisdiction over the matter. The Court reasoned that because the award was based upon an AME report finding injury to the applicant's neck and the rating printed on the award used the numeric symbol for the spine, the WCJ's finding that the failure to include the neck was a clerical error was supported by substantial evidence.

Based upon this, the Court of Appeal further held that the payment of benefits for neck treatment did not constitute an admission of liability in violation of the Labor Code mandate, but rather the award and facts surrounding the award supported the treatment provision.

Court of Appeal, in a Published Opinion Holds that Negative Reaction of Co-workers in not and Actual Event of Employment to Sustain Claim for Psychiatric Injury.

In a published opinion, the Third District Court of Appeal held, in *Verga v. WCAB* (2008), that an employee who experienced the disdain of co-workers during a company meeting did not sustain industrial injury to her psyche because the incident was not an "actual event of employment" as required under the Labor Code.

In *Verga*, the applicant claimed injury to her psyche in 2000 as a result of a staff meeting wherein an effort was made to set goals for the coming year and to address problems that had arisen in the office. At the beginning of the meeting, the applicant's supervisor initiated discussion by asking the employees to provide their definition of respect. According to several defense witnesses, when they began to give their definition, the applicant obtained a dictionary and began yelling at them about what the definition of respect was. At that point, according to defense witnesses, the supervisor stopped the discussion and allowed the employees in the meeting to discuss their concerns with the office. The employees did so commenting upon difficulties with Verga and two other staff members. Verga was allowed the opportunity to respond.

Verga recounted that the meeting could be described as a five hour trial where she was not allowed to defend herself and, rather, co-workers were taking turns hurling insults and "take jabs" at her and make negative comments. She further testified to being in tears and unable to respond by the end of the meeting.

The matter proceeded to trial with multiple defense witnesses testifying consistent with the defense account of events and further testifying that the applicant was

demanding, rigid and difficult to get along with. Further evidence was presented in the form of medical reporting that the applicant had a long history of such problems at other places of employment. Multiple employees also testified that the atmosphere in the office was "doom and gloom", like "walking on eggshells" and one testified that he "should be the one out on a stress claim"; because of the way the applicant had treated him.

After trial, the WCJ found that the applicant did not sustain injury AOE/COE noting that the applicant's testimony was not as credible as her former coworkers and that she caused the job to be difficult and stressful. It was further found that the applicant's false perception of the work environment did not constitute "actual events of employment" as the predominant cause of her psyche complaints pursuant to Labor Code Section 3208.3.

In a Report and Recommendation on Petition for Reconsideration, the WCJ further noted that mental disability is only compensable when arising out of actual events of employment and not misperceptions of persecution and harassment. The disability, opined the WCJ, did not arise from actual events of employment where the injury was claimed to be the result of disdain from her coworkers when the applicant brought the disdain of her coworkers upon herself.

The WCAB and the Third District Court of Appeals upheld the WCJ. The Court of Appeal reasoned that substantial evidence supported the finding of the WCJ that the applicant was not, in fact, persecuted or harassed by coworkers and that the applicant caused the conflict and misperceived the responses of her coworkers.

After conducting a review of relevant case law, the Court of Appeal continued, noting that subsequent to the passage of 3208.3, the law can be interpreted to require objective evidence of harassment or persecution to be entitled to benefits for psyche injury. In this case, the Court did not find objective evidence and, to extent it existed, the Court held that the predominant cause of her injury was her own behavior in the workplace, not the mere disdain of coworkers. From the perspective of broad policy concerns, the Court further noted that were the injury to be found compensable, it would allow for any employee to harass others then, when they receive and unfavorable response, claim injury.

[Editor's Note: It is expected by industry insiders that this decision will be appealed further.]

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