

**Dear Subscriber,**

**Update:**

As many of our loyal readers may have noticed, we did not distribute our Newsletter in March. Though we apologize for not providing our readers with the updated developments in workers' compensation law, we are also pleased to announce that during that time, all of our resources were devoted to preparing the internet version of Judge David W. O'Brien's California Workers' Compensation Claims and Benefits.

In this often chaotic, and always exciting, time of change in workers' compensation law, Judge David W. O'Brien's California Workers' Compensation Claims and Benefits will very soon be online with constant updating for our subscribers. Of course, we at FS&K Publishing will be continuing to provide monthly news by way of our Newsletter for all of our readers. Each of these Newsletters will soon be also archived on the website for Judge David W. O'Brien's California Workers' Compensation Claims and Benefits.

Without further delay, please enjoy our "catch-up" addition of workers' compensation news.

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**Jeffrey Scott Springer: 1961 - 2008**

It is with great sorrow that Floyd, Skeren & Kelly, LLP announces the passing of Mr. Jeffrey Scott Springer, an attorney with Floyd, Skeren & Kelly for 18 years. Mr. Springer was 47 when he passed away and had been battling cancer for four years.

Mr. Springer, a certified workers' compensation specialist, was known for his dogged stubbornness in handling cases and was also known to never back down from even the most

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daunting of challenges, seeking the most difficult cases and leaving no stone unturned. Mr. Springer was the third attorney hired at Floyd, Skeren & Kelly, about three years after launching their law firm in Calabasas in 1987. For 18 years, Mr. Springer handled cases at the Van Nuys, Ventura and Santa Monica Workers' Compensation Appeals Board (WCAB) offices as the law firm expanded to 13 locations in California and Nevada.

Mr. John Floyd said, "He was a cornerstone in our firm and he set the bar for all attorneys that I hired after that."

Mr. Floyd further recalls that, "It was often that I would be walking through the WCAB and one of the applicant attorneys would come up to me and ask for a favor: 'Can you please transfer this file out of his inventory?'" Mr. Floyd said, "I would always just smile."

During his final months, Mr. Springer struggled to maintain a case load even as he battled cancer. As a testament to Mr. Springer's determination and love for his career, two months before he died, he asked if he could continue working cases for the firm if he stopped taking morphine to control his pain. Mr. Springer obtained his Juris Doctorate Degree from Pepperdine University in Malibu. He grew up in the Los Angeles suburb of West Hills and is survived by a mother and siblings.

easy reference.

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## **The Forth District Court of Appeal holds that an inadvertently misfiled Petition for Reconsideration was timely**

In an unpublished case, County of Orange vs. WCAB (2008) [site pending], the Forth District Court of Appeal held that where a Petition for Reconsideration was inadvertently filed with the second floor district office of the WCAB, instead of the ninth floor office location for the Reconsideration Unit, the Petition for Reconsideration was timely received by the WCAB, if at the wrong floor of the proper building address.

In County of Orange vs. WCAB, a Findings and Award (F&A) issued on December 1, 2006. The defendant filed a Petition for Reconsideration which was not received at the WCAB's Reconsideration Unit on the ninth floor of the San Francisco office until January 8, 2007, some 39 days after service by mail of the F&A. However, County of Orange presented evidence that they had contacted the WCAB in San Francisco and were advised to serve the document on

the second floor district office address. Further evidence was provided that the Petition for Reconsideration was, in fact, timely filed upon that address.

After a Petition for Writ of Review was filed by County of Orange with the Forth District Court of Appeal, the Reconsideration Unit of the WCAB filed a letter response with the Forth District Court of Appeal requesting that the Forth District Court of Appeal remand the matter back to the WCAB to consider the case on its merits. In support of their request, the WCAB took the position that because the defendant was provided with misinformation by a state employee, the Petition for Reconsideration should be deemed timely. Based upon the request of the WCAB, the Forth District Court of Appeal remanded the matter back to the WCAB for a Hearing on the merits.

**The Second District Court of Appeal finds sufficient evidence of permanent disability before January 1, 2005 to preserve the 1997 Permanent Disability Rating Schedule.**

In an unpublished decision, Virginia Surety, Inc. vs. WCAB (2008) [site pending], the Second District Court of Appeal relied upon the holding in Genlyte in reviewing evidence to determine that sufficient evidence of permanent disability existed prior to January 1, 2005 to preserve the 1997 Permanent Disability Rating Schedule.

In holding that the 1997 Permanent Disability Rating Schedule applied in Virginia Surety, Inc. vs. WCAB, the Second District Court of Appeal reaffirmed the Opinion in the Genlyte case that an actual Permanent and Stationary (P&S) status did not need to exist prior to January 1, 2005 to preserve the 1997 Permanent Disability Rating Schedule, rather only proof of the existence of permanent disability prior to January 1, 2005. In the Petition for Writ of Review, the defendant argued that actual P&S status must exist before January 1, 2005.

The Court of Appeal noted a medical report authored by the applicant's Primary Treating Physician (PTP), Dr. Arthur Harris, on December 22, 2004 opining that the applicant "will be left with some measure of permanent residual disability and limited functional capacity resulting from said industrial injury". The Court of Appeal noted that this was, in this particular case, sufficient to establish the existence of permanent disability prior to January 1, 2005 and, as such, allowed for the application of the 1997 Permanent Disability Rating Schedule. Further, in so holding, the Court of Appeal specifically rejected the holding in Vera vs. WCAB (2007) that the applicant must actually be P&S prior to January 1,

2005. In rejecting the holding in Vera vs. WCAB, the Court of Appeal noted that nowhere within Labor Code §4660 did the Legislature indicate that the applicant must be P&S, rather the language utilized by the Legislature was more broadly worded allowing for an indication of the existence of permanent disability.

More simply stated, the Second District Court of Appeal agreed with the Opinion in Genlyte that a plain reading of Labor Code §4660 provided a broad understanding of the interpretation of the "existence of permanent disability"; allowing for evidence to be introduced of same existing prior to January 1, 2005, rather than requiring actual P&S status.

### **The Second District Court of Appeal applies the rational from Brodie and reverses the 100 percent Award.**

The Second District Court of Appeal, in the unpublished Opinion of Browning-Ferris Industries vs. WCAB (Salter) (2008) [site pending] held that the Opinion in Brodie applied to reduce a 100 percent Award to a 40 percent permanent disability Award.

In Salter, the applicant sustained an injury which resulted in a 1994 Stipulated Award at 60 percent permanent disability on an industrial basis. Thereafter, the applicant continued to work in the same capacity for approximately eight more years and ultimately filed two new claims to the body parts that were also involved in his prior Award. It must be noted the applicant did not file a Petition to Re-Open his prior claim. As a result of the new injuries, the applicant was found to be 100 percent permanently disabled with the parties stipulating to same before Trial, leaving, it appears, only the issue of apportionment for determination.

After the matter was submitted for Trial, the Workers' Compensation Judge (WCJ) provided monetary credit to the defendant for payment under the prior 1994 Stipulated Award and did not subtract the prior 60 percent from the 100 percent Award.

After a Petition for Reconsideration, the WCAB rescinded the Trial Decision and remanded the matter back for further proceedings. The WCJ reissued their ruling relying upon E&J Gallo Winery vs. WCAB. Thereafter, the WCAB denied the second Petition for Reconsideration and a Petition for Writ of Review was filed.

The Petition for Writ of Review was denied, however, the Second District Court of Appeals on its own Petition requested the California State Supreme Court to remanding

the matter back to the District Court of Appeal for a ruling. In reviewing the matter and issuing an Opinion, the Second District Court of Appeal held that the prior 60 percent permanent disability Award must be subtracted from the 100 percent permanent disability Award.

In holding that the 60 percent must be subtracted from the 100 percent permanent disability, the Court of Appeal relied upon the Opinion in Brodie that the percentage of permanent disability of any prior Awards must be subtracted from the percentage of permanent disability in any later Awards.

[Editors Note: The reader must be aware that this case did not involve a Petition to Re-Open the prior claims, rather only involved new claims for injury.]

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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