

Dear Subscriber,

Decision in Brooks v. WCAB is Followed in Wiley v. WCAB

In *Wiley v. WCAB* (2008) [cite pending], the WCAB again ruled that industrial disability leave and enhanced industrial disability leave under Government Code sections 19869-19877.1 allowing for one-year of full pay following and industrial injury before payment begins at the temporary disability rate, is to be credited towards the two-year limit on temporary disability under Labor Code section 4656(c)(1).

In *Wiley*, the applicant was employed by the California Department of Corrections and Rehabilitation as a correction officer. On December 29, 2004, the applicant sustained injury to his left foot and psyche as the result of an inmate assault. Thereafter, from December 30, 2004 through December 30, 2005, the applicant received industrial disability leave under Government Code sections 19869-19877.1. From December 31, 2005 through December 30, 2006, the applicant received disability payment of temporary disability at the temporary disability rate until, at that time, receiving a notice that temporary disability was being terminated under the 104 week limit imposed by Labor Code section 4656(c)(1).

After trial on the issue, the applicant was found to be entitled to additional temporary disability, with the trial judge finding that the first year of industrial disability leave did not count as a credit towards the two year limit.

The WCAB reversed the trial judge, holding that the first year of industrial disability leave pay was, in effect, temporary disability and counted towards the 104 week limit.

The Fifth District Court of Appeal, in an unpublished decision, agreed with the WCAB and upheld the finding that the industrial disability leave pay was a form of temporary

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disability and did count towards the 104 week limit under the Labor Code. In so holding, the Court relied on the opinion in *Brooks v. WCAB* and noted:

The correctional officer in Brooks also claimed her entitlement to regular IDL was a "salary continuation benefit" rather than a payment for temporary disability, even though that benefit only provided her with two-thirds of her regular salary during her initial year while temporarily disabled. As in Brooks, we again conclude there is no reason to override the express legislative directive set forth in Government Code section 19870, subdivision (a) to treat IDL as anything other than a part of workers' compensation TD. Wiley nevertheless asks this court to extend the WCAB's reasoning in *City of Oakland v. Workers. Comp. Appeals Bd.* (2007) 72 Cal.Comp.Cases 249 [writ den.] (City of Oakland) addressing peace officer disability leave of absence under section 4850 to the situation where a state employee first receives enhanced IDL. As we previously explained:

"Brooks draws support for the proposition that a salary continuation benefit does not constitute TD from *City of Oakland* [citation], where the WCAB concluded the 104-week limitation for payment of TD indemnity set forth in section 4656 does not include the period full salary and benefits are paid to certain public safety workers while disabled as provided under section 4850. The WCAB concluded in *City of Oakland*, "While salary continuation benefits paid pursuant to section 4850 may be considered compensation, they are clearly not temporary disability benefits and [are] not interchangeable with temporary disability benefits." (City of Oakland, supra, 72 Cal.Comp.Cases at p. 252.)

"While we note that the specific issue presented in *City of Oakland* is not before us and we therefore make no finding as to the propriety of that decision,[*fn6] the section 4850 salary continuation benefit significantly differs from IDL. For example IDL, like TD, is payable only during an industrially related temporary disability (Gov. Code, 19870, subd. (a)), while a public safety worker continues to receive his or her full salary and benefits regardless of whether an industrial disability causes temporary or permanent disability (§ 4850, subd. (a)). Most significantly for our purposes, the Legislature has expressly established in Government Code section 19870, subdivision (a) that IDL means TD, while no such comparable provision exists defining public safety worker disability leave as TD." (Brooks, supra, 161 Cal.App.4th at p. ____ [75 Cal.Rptr.3d at pp. 286-287].)

Dr. Jay Vogel Arrested on Allegations of Workers' Compensation Fraud

Dr. Jay Vogel, an orthopedic physician practicing medicine in the workers' compensation arena, was arrested on May 29, 2008 at his home in Newport Beach on approximately 40 counts of workers' compensation fraud.

Dr. Vogel is accused of issuing fraudulent billing from two clinic locations in northern California.

In addition to the arrest of Dr. Vogel, some 22 additional search warrants were issued in Los Angeles, San Bernardino, Orange and Riverside counties in southern California on locations related to ongoing investigations of Dr. Vogel.

easy reference.

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Senator Machado Votes "No" on Increased Funding to Fight Workers' Compensation Fraud

In a move that has puzzled many political and workers' compensation industry specialists, Senator Michael Machado voted to prevent an additional four million dollars from being spent on prosecuting workers' compensation fraud.

As the Chair of the Budget and Fiscal Review Subcommittee No. 4, and with no public comment or testimony, Senator Machado voted against increasing funding to the workers' compensation fraud division of the District Attorney's office. The Fraud Assessment Commission, Insurance Commissioner Steve Poizner and the Assembly budget committee had previously recommended the increased allocation to fight workers' compensation fraud.

FSK Publishing Honors

As many of our readers know, from time to time, the attorneys at Floyd, Skeren & Kelly obtain results that are worthy of public interest and recognition. This month, we have seen two such accomplishments.

Mr. John Langevin of the Floyd, Skeren & Kelly, Riverside office, successfully defeated a lien for MRI services after proving that there was no evidence to support the need for these services. Specifically, Mr. Langevin was able to establish that there were no medical reports requesting the MRI before or even after the services were rendered. Not being content with simply defeating the lien, Mr. Langevin also recovered fees under Labor Code section 5813 against the lien claimant. To read the Decision, [click here](#).

Ms. Christina Hindman of Floyd, Skeren & Kelly's San Diego office location prevailed at trial on an applicant's attempt to obtain temporary disability at a time outside of five years from the date of injury. Relying upon the opinions in *Fekkers v. WCAB* (66 Cal. Comp. Cas. 92) and *Nickelsberg v. WCAB* (56 Cal. Comp. Cas. 476), Ms. Hindman successfully argued that the applicant was not entitled to temporary disability that began after five years from the date of injury. In doing so, Ms. Hindman produced likely savings to her client of over a year of temporary disability and, as importantly, enforced the integrity of the *Nickelsberg* and *Fekkers* decisions. To read the Decision, [click here](#).

We congratulate Mr. Langevin and Ms. Hindman for their determined representation of their clients and for the excellent results they have achieved.

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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