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Uninsured Employer's Benefit Trust Fund May Not Be Subjected To An Award of Sanctions

In the published case of *Duncan v. WCAB (2008)* [cite pending], the Third District Court of Appeal held that the Uninsured Employer's Benefit Trust Fund (UEBTF) may not be sanctioned by the WCAB.

In *Duncan*, the applicant died while working as a truck driver for an illegally uninsured trucking company. Thereafter, as a result of the company's illegally uninsured status, the UEBTF was joined to the claim. Ultimately, the parties agreed to an award of \$145,000, less attorney fees, on June 19, 2006.

By September 13, 2006, the attorney fees had not been paid. When the fees still had not been paid by October 2006, applicant's counsel filed a petition for penalty, interest and for additional attorney fees for efforts to enforce the award.

The trial court ultimately awarded sanctions pursuant to Labor Code Section 5813 for the UEBTF's frivolous delay in making payment under the award. The trial court deferred other issues of penalty and attorney fees.

On Reconsideration, the WCAB held that sanctions, pursuant to Labor Code Section 5813, could be awarded against the UEBTF because they were not penalties. However, the WCAB remanded the matter back to the trial court for further evidence as to why there was a delay in payment of the original award.

On appeal, the Third District Court of Appeal reversed the WCAB decision and held that Labor Code Section 3716.2 was inapplicable to the UEBTF. Looking to the language of Section 3716.2 and prior case law, the Court reasoned that the mandate of the UEBTF was to provide only workers' compensation benefits and that the UEBTF is not subject to penalty. The Court further reasoned that "sanctions" are

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equivalent to penalties and, as such, a sanction under 5813 against the UEBTF was improper.

It is not known at this time whether the decision of the Third District Court of Appeal will be further appealed to the State Supreme Court.

Unpublished Opinion Holds That 1997 Permanent Disability Rating Schedule Applies

In *Virginia Surety Co. v. WCAB (Echelard) (2008)* [cite pending], the Fifth District Court of Appeal held that the 1997 Permanent Disability Rating Schedule (PDRS) applied to the permanent disability rating of a worker injured on October 29, 2004, and not found permanent and stationary until after January 1, 2005, based upon evidence of permanent disability prior to January 1, 2005.

In *Echelard*, the applicant was working as a construction worker on October 29, 2004 when he fell approximately 20 feet causing injury to his thoracic spine, right wrist and right elbow. The applicant underwent surgery as a result of the injury. Thereafter, in a report dated December 20, 2004, the applicant's treating doctor stated: 'I spent quite some time trying to discuss with Jason and his mother the significance of these injuries and the relatively guarded prognosis'... 'Considering the multiple injuries in [the right upper extremity] and potential instability of the coronoid, etc., I think an implant is much more desirable. I had a long discussion with Jason and his mother about implants and their longevity, potential problems in the long term, and so forth. Activity modifications and so forth for the rest of [his] life are encouraged.' Thereafter, the applicant's treating physician was deposed on July 24, 2007 and stated, as summarized by the Court, 'that his reference to a relatively guarded prognosis referred to Echelard's potential for some decrease or loss of motion and subsequent decrease and loss of function, and potentially the possibility of ongoing pain; and the fact that, with this type of injury, this far after the injury the results of surgical treatment would probably not be extremely good. Dr. Thomas also expressed his opinion he did not believe Echelard would heal completely.'

Considering both the December 2004 medical report and the July 24, 2007 deposition testimony clarifying the 2004 report, the WCAB found that the 1997 PDRS should apply because, when taken together, the testimony and medical report establish evidence of permanent disability prior to January 1, 2005.

On appeal, the Fifth District Court of Appeal upheld the

easy reference.

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WCAB decision finding that the clarification of the 2004 medical report in the doctor's 2007 deposition testimony provided sufficient evidence of permanent disability prior to January 1, 2005 to allow for application of the 1997 PDRS.

Though unpublished, this opinion is unique in that it allows for evidence obtained post January 1, 2005 (the doctor's testimony) to clarify pre-January 1, 2005 evidence as to the existence of pre-January 1, 2005 permanent disability.

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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