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California Supreme Court Schedules Fast Track Oral Argument on Apportionment

In an action hoped for by many observers of the California Workers' Compensation system, the California Supreme Court has scheduled fast track oral argument in the Dykes/Brodie et al. cases addressing the proper method by which to calculate apportionment. The High Court will hear oral argument on April 3, 2007.

Though there is no certainty that this will result in a fast opinion, many also believe this to be a sign that the Court intends to make resolution of this hotly contested issue a priority.

CASE LAW UPDATE:

Pendergrass v. Duggan Plumbing, State Compensation Insurance Fund

(2007) 72 Cal. Comp. Cases 95

The WCAB, in a split En Banc opinion (4-3), held that where the first compensable date of temporary disability occurred before January 1, 2005, the "Old Schedule" for rating permanent disability would apply. In so holding, the majority commissioners reasoned that duty to provide notice pursuant to Labor Code §4061 along with the last payment of temporary disability attaches at the time of the first compensable date of temporary disability. Thus, under newly enacted Labor Code §4660(d), where there is a compensable period of temporary disability beginning before January 1, 2005, the requirement to provide notice pursuant to Labor Code §4061 is effective, thus meeting one of the exceptions for preserving the "old schedule" pursuant

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to Labor Code §4660.

The majority opinion was sharply criticized by the minority opinion which noted that the language of Labor Code §4061(a) provides that the notice is only due "together with the last payment of temporary disability." Based upon the language of the Code, the minority would hold that it is the date of last compensable temporary disability that triggers the exception to use of the new permanent disability rating schedule.

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Babbitt v. Ow Jing dba National Market, Golden Eagle Insurance Co.

(2007) 72 Cal. Comp. Cases 70

The WCAB, En Banc, held that neither the date of injury nor the date of an award for future medical care are a bar to the proper transfer of ongoing care into a medical provider network. The WCAB reasoned that the medical provider network changes as implemented in SB 899 were procedural, rather than substantive, in nature as they only effected the location and process for obtaining medical care, not the nature of the care to be provided. As a result, the MPN changes could be applied to all dates of injury, provided that the defendant complied with all applicable MPN notice requirements and all MPN transfer exceptions had been addressed.

Sierra Bible Church, et al. v. WCAB (Clink)

(2007) 72 Cal. Comp. Cases 20

In an opinion not certified for publication, the Fifth District Court of Appeal reaffirmed that the burden of proof as to apportionment rests upon the defendant and, in this particular case, the AME's statement that the applicant had degenerative disc disease, that all individuals begin to develop degenerative disc disease around age 20, and that this degeneration is caused by many factors, was insufficient to support apportionment of 75% to non-industrial causes.

Puga v. WCAB, (2007)

(2007) 72 Cal. Comp. Cases 195

In an opinion not certified for publication, the Fifth District Court of Appeal held that a two-month employee who worked in a chicken house and fell approximately seven feet from a ladder while repairing a ceiling fan was barred from receiving benefits for psychiatric injury pursuant to Labor Code §3208.3 as she had not been employed for at least six months and the fall from the ladder did not constitute a "sudden and extraordinary" event of employment such as to fall within the exception to the bar placed by Labor Code §3208.3.

In so holding, the Court reasoned that the injury was not of the type to be unexpected because, according to the applicant's testimony, she would carry a ladder to a given location and climb up and down the ladder several times per day. Thus, the Court found, the injury was not "extraordinary" as a matter of law.

Trader Joe's Co. v. WCAB (Evets)

(2007) 72 Cal. Comp. Cases 204

In an opinion not certified for publication, the First District Court of Appeal held that a medical report issuing before January 1, 2005 which noted lost range of motion in the applicant's hand after sustaining a crush injury months prior was not sufficient to constitute a finding of permanent disability and mandate an award of permanent disability under the "old schedule" for rating permanent disability.

In so holding, the court noted that even though the lost range of motion is a manner by which permanent disability can be described under the American Medical Association's Guide to Rating Permanent Disability (AMA Guide), the AMA Guide provides many manners by which both temporary and permanent disability can be described and as there was no definitive finding or opinion that there was permanent disability, the report showing only lost range of motion at the time of the evaluation was insufficient to constitute a finding of permanent disability. Further, one of the reports following the applicant's injury noted that there was chronic loss of motion in one of the applicant's fingers and the Court also found this to be insufficient.

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