

Quarterly Review

Fourth Quarter 2007

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A Legal Update for the Claims Professional

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Wilkinson Doctrine Combining Successive Injuries Into Higher Awards Hangs On, Despite Expected Voiding By SB 899

Underpinnings Removed, Its Continued Application Fails to Withstand Analysis

By Michael Misa, San Diego office

Coronado Island – Under the doctrine of *Wilkinson v. WCAB* (1977) 42 Cal. Comp. Cases 406, an employee who sustains successive injuries to the same part of the body which become

permanent and stationary at the same time gets one joint award combining both disabilities as if they were caused by one industrial injury, at the PD rate applicable to the last date of injury—usually resulting in a higher dollar recovery than separate awards would have brought. (See *Quarterly Review*, 4th Q. 1999, p. 4.)

liability in cases of combined disabilities to “that portion due to the later injury as though no prior disability or impairment had existed.” If both injuries became permanent and stationary at the same time, the reason-

ing went, there is no “prior disability” and hence no apportionment.

The Things We Did Last Summer...

“Unretrainable” Claimant Finds Award 92 Percent Short

Attorney	Branch Office	Claim/Exposure	Order/Award
Liliana Naficy-Royal	Bay Area	Unretrainable/100% PD	8% PD
Kathleen Roberts	San Jose	Ortho-Psych/\$575,000	Take Nothing
Lorraine Dickerhof	Orange County	Sanctions vs. Lien Rep	\$4,095
Kathleen Roberts	San Jose	Multiple/100% PD	Take Nothing
Tim Kinsey	Orange County	Back/\$50,000	Take Nothing
Joe Mendivel	Orange County	Multiple/\$200,000	Take Nothing
Jennifer Tsai	Los Angeles	Lien/\$6,420	No Recovery
Julie Kennedy	Bay Area	Old Schedule/\$31,950	New/\$11,050
Kathleen Siemont	Bay Area	VR/\$64,000	Take Nothing
Rich Ellis	Fresno/Bakersfield	Ortho-Psych/100% PD	\$326,000 Less
Kimberly Dyess	San Diego	Old Schedule/76% PD	New/44% PD
Lupe Carrasco	Riverside	Sexual Harassment/80% PD	Take Nothing

Repeal and Replacement

However, section 4750 was repealed in 2004 by SB 899 and replaced by new apportionment sections 4663 and 4664, which apply regardless of the date of injury. These provisions do not base apportionment on prior disability or impairment, but measure apportionment by a doctor’s finding of

The doctrine was seen as an exception to the basic apportionment provisions of Labor Code section 4750, which limited the employer’s

what approximate percentage of PD was caused by “the direct result of the injury” and what approximate percentage was caused by “other factors both before and subsequent to the industrial injury, including prior

See *Wilkinson* – Page 2

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Quarterly Review

This newsletter is prepared for the benefit of our clients as a general review of recent developments in workers' compensation, subrogation, civil and labor law. These articles should not be construed as legal advice or opinion, and are not meant as a substitute for the advice of counsel in individual cases.

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Wilkinson— Continued From Page 1

industrial injuries." The employer is only liable for "the percentage of PD directly caused by the [new] injury." The employer community has thus been expecting decisions that SB 899 consigned *Wilkinson* to history. Whether disability from a prior injury became permanent and stationary at the same time as disability from a subsequent injury now plainly appears to be immaterial. The new laws would seem to require the absolute segregation of PD on the money charts to each of successive injuries, resulting in a lower overall payout than that from a combined PD rating. Yet, to date, that hasn't happened.

Unpersuasive Analysis

The sole reported case which even attempts an analysis of the issue is *City of Santa Clara v. WCAB (Navarette)* (2005) 70 Cal. Comp. Cases 1713 (writ denied). There, a WCAB panel denied reconsideration of a WCALJ's finding that two successive cumulative traumas to the knees, on the first of which a stipulated 29% PD award had been reopened, had combined to cause an overall PD of 80% without apportionment. Concluded the judge, without deep analysis:

"Nothing in SB 899 or Labor Code s 4664(b) reverses or renders inoperative the holding of the *Wilkinson* case.... With the repeal of section 4750, Defendants argue, the Board may no longer combine permanent disabilities in any cases. In my view, Defendants have the argument backwards....If anything, the repeal of section

4750 gives more freedom to combine disabilities from multiple injuries."

Rubber-Stamp Panels

Later WCAB panel decisions have continued to rubber-stamp *Wilkinson* in post-SB 899 situations without even considering the effect of SB 899, e.g., *University of the Pacific v. WCAB (Hern)* (2006) 71 Cal. Comp. Cases 312 (writ denied) (reopened 24-1/2% PD right upper extremity injury combined with subsequent CT to back and knees caused 90% PD—note: no body part was common to both injuries, departing from even the most expansive progeny of *Wilkinson*—*ed.*); *Zenith Ins. Co. v. WCAB (Marquez)* (2005) 71 Cal. Comp. Cases 118 (writ denied) (successive injuries becoming permanent and stationary at same time produced combined PD of 24-1/2%); *Roadway Express v. WCAB (Christeson)* (2006) 71 Cal. Comp. Cases 482 (writ denied) (1999, 2001 and 2003 injuries becoming permanent and stationary together caused combined 77% PD).

This undeveloped issue clearly deserves not more panel decisions but the attention of the full WCAB by an *en banc* decision, and then if necessary a thoughtful appellate review. A strong

case should be taken beyond a writ-denied postcard in order that the cost-saving intent of the Legislature may be properly implemented. Whether *Wilkinson* is truly dead or remains stubbornly alive must be deemed to be still-unsettled law. ■

QUOTE OF THE QUARTER

You Gotta Be Kidding...

"We hereby demand a panel of five Albanian-speaking psychiatrists in the Alhambra area."

—Letter from an applicant's attorney,
 Los Angeles

FEHA Places Burden of Proof on Employee, Not Employer, Says Supreme Court

By *Teresa Pagan, San Jose office*

San Francisco – In a 4 - 3 decision, the California Supreme Court recently held that in order to prevail as a "qualified individual" in a lawsuit for disability-discrimination relief under California's Fair Employment and Housing Act ("FEHA"), a plaintiff must demonstrate that (s)he was qualified for the position sought or held as being able to perform the essential duties of the position, with or without reasonable accommodation—just as the federal Americans with Disabilities Act (ADA) requires. It is not up to the employer to prove that it was allowed to discharge or not hire the employee because (s)he is unable to perform the essential duties of the job, even with reasonable accommodation. *Green v. State of California*, S137770 (August 23, 2007).

Yet even with the burden of proof now resolved in favor of employers, an employer should not assume that medically-directed work restrictions automatically allow the discharge of a job-injured employee. The interactive process mandated by the FEHA requires an employer to meet with the disabled employee and discuss potential work alternatives. If reasonable accommodations emerge which would enable the employee to perform the essential functions of the job, failure to offer these accommodations will add a jury-trial damages claim to the workers' compensation claim. ■

ADVENTURES IN FANTASYLAND

*Reading Between the Lines...***WCAB Interprets “Less Than Confident” Second Opinion as “Reluctant Agreement” With Spinal Surgery; Court of Appeal Scolds, Reverses**By *Larry Kirk, Central Coast office*

Sacramento—Kim, a teacher, got a stipulated award of 33% PD for a 2001 back injury. In 2004 her secondary treating physician requested authorization for a discectomy, based on an MRI and a discogram. Pursuant to Labor Code section 4062(b) objections filed by the carrier, neurosurgeon Dr. Robbins was agreed upon to provide a second opinion, the parties further expressly agreeing to abide by his conclusions.

In an April 2005 report Dr. Robbins concluded, “[I] feel less than confident that a discectomy... is going to help her.... I think that the outcome is likely to be poor given the length of time she has had this and also the inconsistencies between the test results and her complaints.” In a July 2005 supplemental report Dr. Robbins

stated, “I could not fault [Kim’s doctor] if at this point in time he attempted to go in and take the disc out, but I would question whether the patient’s symptoms...and the objective findings on scans are all correlative in nature.”

When the carrier denied authorization for the surgery based on these reports, Kim self-procured it through her private medical insurance and reopened the case to seek TD benefits. After trial, a WCALJ interpreted the supplemental report as “reluctantly agree[ing] that the surgery was reasonable and necessary,” found that it should have been authorized, and awarded continuing TD. Reconsideration was denied.

On review, the Court of Appeal *annulled the order*, condemning its inference of “a

grudging recommendation of surgery” as irrational and illogical. Reasoned the court: “The gist of both reports is the belief that surgery would not help the employee because her symptoms were not consistent with the deformity in her disc, and a doubt whether the deterioration was work-related.”

Comment: This case is a good illustration of how the second-opinion process is supposed to work. It is regrettable that yet a *third* opinion—one by an appellate court—was required to make it work properly. ■

Sacramento County Office of Education v. WCAB (Burnett) (2007) 72 Cal. Comp. Cases 954 (not certified for publication).

*A Tip of the Cap...***Salary Continuation Payments Don’t Count Against the Two-Year TD Limit, Says WCAB****And: Medical Evidence is Needed to Cut Off TD Pending an AME Report; How to Document the Undocumented Worker’s PD-Rate Decrease**

Q: I’m continuing Traumatized Trudy’s wages under a collective bargaining agreement in lieu of TD payments. Since Labor Code section 4650 seems to suggest that salary continuation is the equivalent of TD indemnity, can I count these weeks toward the two-year/104-week cap of section 4656(c)(1)?

—*Unclear in Santa Clara*

A: No. Section 4650 merely exempts a qualified salary continuation plan from the 10% late-payment increase. In *City and County of San Francisco v. WCAB (Bryant)* (2007) 72 Cal. Comp. Cases 1013 (writ denied), it was held that salary continuation benefits paid under a city charter provision are not subject to the two-year TD limitation period. Similar rulings have come down recently with respect to section 4850 salary-continuation benefits paid to safety officers.

—*Valerie Smith, San Jose office*

Q: Podiatrist Pete is keeping Housekeeper Harriet on TTD forever for a toe injury, so I object to his

latest report and terminate TD payments until we get an AME report. Why is Harriet’s lawyer screaming “penalty”?

—*Exasperated in Exeter*

“In the absence of medical evidence before the date of an AME evaluation that the injured worker is not TTD, the employer can have no genuine doubt as to its liability to continue benefits.”

A: TD indemnity is to be paid until a physician deems the condition to be permanent and stationary, the employee returns to work, or a physician clears the employee to return to work. Without any medical evidence, conflicting or otherwise, from which it can be concluded that an injured worker is not TTD, an employer can have no genuine doubt as to its liability to provide benefits pending an AME report. See *City of Oxnard v. WCAB (Cabral)* (2000) 66 Cal. Comp. Cases 161.

—*Doug Harelson, Bay Area office*

Q: I’m in a dilemma. I’d like to offer permanent modified work to Overstay Otto in order to gain the benefit of the new 15% PD decrease (*Lab Code* § 4658(d)(3)(A)), but he just admitted at his deposition that he’s here illegally. Since I’m prevented by federal law from putting him back in the factory, am I actually stuck under section 4658(d)(2) for the 15% increase?

—*Perplexed in Paradise*

A: No. In a case handled by our firm, the employer was counseled to issue an offer of modified/alternative work (Form DWC-AD 10133.53) accompanied by a letter to the undocumented worker’s attorney, stating that acceptance was contingent on the employee providing proof of ability to lawfully work in the U.S. A workers’ compensation judge ruled that the offer was legitimate, and that the employer should not suffer the loss of the 15% decrease because of the claimant’s immigration status. ■

—*Medy Beauchane, Chico/Redding office*

A N N O U N C E M E N T S

Our beloved colleague **Angel Barnes** of our *Orange County* office has been honored by appointment as a workers' compensation administrative law judge in Santa Ana and has left the firm after 25 years of devoted service. We thank Angel for her many valuable contributions and wish her much success and happiness.

As Ms. Barnes' name can no longer be used as part of the firm name due to her appointment, the name of the firm has been changed from **Grancell, Lebovitz, Stander, Barnes and Reubens** to **Grancell, Lebovitz, Stander, Reubens and Thomas**, in recognition of the extraordinary achievements of **Joanne M. Thomas** on behalf of the firm.

After 10 years as shareholder/branch manager of our *Central Coast* office in Ventura, **Larry Kirk** has elected to relinquish his management duties and relocate to our *Los Angeles* office

in order to devote full time to his trial and appellate practice. **Aaron D. Hemmings** has rejoined the firm and has relocated to Ventura to assume the responsibilities of managing attorney.

Kathleen L. Roberts, shareholder/branch manager of our *San Jose* office, announces the association of **Evan E. Groff**. Mr. Groff, a graduate of Santa Clara University Law School, has a broad range of experience in workers' compensation practice.

Debbie Yeh Joe, a graduate of Loyola Law School, has joined the team of shareholder **Anthony J. Fink** in our *Los Angeles* office. Ms. Joe is a former judicial clerk to two judges of the United States District Court and was last associated with a statewide workers' compensation defense firm. ■

CIGA Liability – On a finding that SCIF as carrier on CT is jointly and severally liable for TD with CIGA, successor to insolvent carrier on prior specific injury, and despite AME opinion that the CT was responsible for only 25% of the TD, SCIF provided "other insurance" which excludes CIGA from liability and must reimburse CIGA for \$43,506 it paid for all TD on both injuries. *CIGA v. WCAB (Hernandez)* 72 Cal. Comp. Cases 910.

Lien Claims – Outpatient surgery center has burden of proving that it is properly licensed or accredited, and is required to possess both license and fictitious-name permit from Medical Board when it provides medical treatment as "clinic." *Stokes v. Patton State Hospital* (2007) 72 Cal. Comp. Cases 996.

PD Rating Schedule – 1997 schedule applies for higher rating where prior to January 1, 2005 (1) a treating physician reported postsurgical loss of spinal flexion and extension, which was deemed to indicate the existence of PD, (2) applicant had been on TTD for over one year and was thus presumed to be QIW and hence permanently disabled, and (3) applicant had been released to return to work, which triggered employer's duty to send PD notice. *Xerox Corp. v. WCAB (Blair)* (2007) 72 Cal. Comp. Cases 1044.

TD Limit – Surgical removal of bone or disc material does not qualify as an "amputation" so as to render inapplicable the statutory two-year TD limitation, as "amputation" means the traumatic severance or surgical removal of a limb, part of a limb, or other body appendage. *Cruz v. Mercedes-Benz of*

San Francisco, SFO 0501425 (opinion and decision after reconsideration, *en banc*, September 5, 2007), effectively nullifying trial decision in *Kirkpatrick v. Dominican Santa Cruz Hospital* (*Quarterly Review*, 2d Q. 2007, p. 3).

TD Limit – Where a toe amputation leads to a consequential shoulder injury due to the use of crutches, TD is extended to up to 240 weeks within five years from the date of injury under the "amputations" exception to the two-year TD limit, despite the toe disability having become permanent and stationary within two years. *Van Ness v. Hertzstein*, MON 0324743 (opinion and decision after reconsideration, July 25, 2007).

Lien Claims – Outpatient surgical center bills alone are not *prima facie* evidence of the reasonableness of the charges but must be reasonable on their face even where the defense does not offer rebuttal evidence, as lien claimants have the affirmative burden of proving by a preponderance of the evidence that their charges are reasonable. *Pfeffer v. Fisher Construction*, POM 0252332 (opinion and decision after reconsideration, May 7, 2007); *Jimenez v. Galaxy Shade Systems*, ANA 0377538 (opinion and decision after reconsideration, June 11, 2007), rejecting language in *Kunz v. Patterson Floor Coverings* (2002) which suggested to the contrary. ■

IN THE NEXT ISSUE

Homeowner's Comp: A Minefield of Conflicts

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