

Trovillion, Inveiss & Demakis

Trovillion, Inveiss & Demakis, APC has grown in reputation as one of Southern California's premier law firms specializing in representation of employers, insurance carriers and third party administrators in workers' compensation litigation.

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Launch of New Website

Last month, TID was pleased to announce the launch of their newly designed website.

Please visit us at www.TIDlaw.com for all the latest firm information and services.

Baby Shower

In June, the San Diego office hosted a baby shower for associate Jamie Stone-Gutteridge. Jamie and her husband Adam will be welcoming a babyboy in August.



Employer Obligation to Advance Permanent Disability When TD Cap Reached

A recent *en banc* decision has addressed the issue of potential interruption of benefits between the ending of temporary disability benefits due to the 104 week maximum and the start of permanent disability advances. In *Warren Brower v. David Jones Construction; State Compensation Insurance Fund* (2014) 79 Cal. Comp. Cases (*en banc*), the WCAB held the employer must pay permanent disability indemnity once the 104 temporary disability cap has been reached, even if the applicant is not yet permanent and stationary. The amount of permanent disability advances must be based on a "reasonable estimate" of the ultimate level of permanent disability. The court's decision is based on an interpretation of Labor Code Section 4650(b)(1).

The WCAB noted that there can be an interruption of benefits between the end of TD, due to the cap, and the beginning of PD if the injured worker is not yet permanent and stationary. The WCAB believed that the Legislature intended a continuous flow of benefits beginning with TD through PD.

The decision is silent on the interplay between Labor Code Section 4650(b)(1) and Section 4650(b)(2), which allows the employer to delay commencement of PD if the employee has returned to work or been offered work at certain wage thresholds. While the WCAB does mention the legislative changes to Section 4650(b)(2), since the applicant in *Brower* never returned to work, there is a lack of discussion on whether the employer can delay payment of PD under Section 4650(b)(2), even though this would result in an interruption of benefits.

Making added difficulties for the practitioner, the decision does not

outline the process to calculate a "reasonable estimate" of PD. It would seem as though the WCAB wants claims examiners to become doctors for the purpose of assigning whole person impairment per the AMA Guides 5th Edition. If the applicant has been paid 104 weeks of TD, it is a reasonable presumption that some sort of medical record has been established. The medical record may be enough to determine any ROM limitations, DRE classifications, GAF estimations, etc. If the defendant should happen to overestimate and over advance permanent disability they could potentially be unable to receive credit for the over advanced PD.

The question of the reasonableness of estimating PD may create potential windfalls for the applicant as well as extra litigation. For instance, applicant attorneys may file DOR's on this issue of whether defendant's estimate of PD was reasonable. This may potentially place the Workers' Compensation Judge in the position of having to *create* a whole person impairment without a fully developed medical and a permanent impairment rating from a physician. The applicant may also file penalty petitions for alleged failure to advance sufficient PD.

The *en banc* decision further held that permanent total disability benefit is owed retroactive to the date the benefit is first owed, even if PTD is found on a later date. Thus, defendant must pay any difference of permanent partial disability and PTD retroactive to the date first owing. If that initial date is in a previous calendar year, then the applicant is entitled to the annual cost of living adjustment per Labor Code Section 4659.

From a practice standpoint when the applicant has exhausted the 104 week cap of TD, is not yet permanent and stationary and has not returned to employment and/or been offered employment, the employer needs to continue benefits to the applicant in the form of permanent disability benefits and must make a reasonable estimate of the PD.

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