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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TID ATTORNEY UPDATE

TID is pleased to welcome attorney Cinda Ayres back to the firm. Cinda rejoined TID in June 2016. Cinda, an experienced workers' compensation litigator, originally started at the firm in 1997 and worked through 2013.

Everyone at TID is happy to have Cinda back. She is working out of the Orange County office and will handle matters venued at the Santa Ana, Anaheim, Long Beach, Riverside, San Bernardino and San Diego WCAB.

Please take a moment and welcome Cinda back. She can be reached by email at CAyres@TIDlaw.com

PSYCHIATRIC INJURIES - SUDDEN & EXTRAORDINARY EXCEPTION

Labor Code Section 3208.3(d) states that no compensation shall be paid for a psychiatric injury unless the employee has been employed by that employer for at least 6 months. An exception to the 6-month rule is if the psychiatric injury is caused by a "sudden and extraordinary employment condition." But what is considered "sudden and extraordinary?" The Legislature does not define it.

Travelers v. Dreher

In the recent case of *Travelers v. Dreher*, (2016) 246 Cal. App. 1101, the Court of Appeal discusses what events are sudden and extraordinary enough to trigger the exception to the 6-months of employment rule.

In *Dreher*, the applicant worked as a live-in maintenance supervisor for an apartment complex. He slipped and fell on a slippery walkway in the rain while passing from one building on the property to another. The applicant suffered numerous injuries. As a result of his injuries, the applicant had numerous surgeries. The applicant sought compensation for a psychiatric injury as a compensable consequence and the workers compensation administrative law judge (WCJ) found that the applicant suffered an injury out of and in the course of employment but his psyche claim was denied under Section 3208.3(d) because he had not worked for his employer for the required 6-months. The

applicant sought reconsideration based on the "sudden and extraordinary" exception and the WCAB found in his favor.

The Court of Appeal reversed the WCAB's decision, holding that the applicant's injury was not "sudden and extraordinary," and thus the applicant's claim was barred by the 6-month rule. The Court reasoned that "although [the applicant's] injury was more serious than might be expected, it did not constitute, nor was it caused by, a sudden and extraordinary employment event within the meaning of [the] section..." The fact that the applicant routinely walked between the buildings on concrete walkways at the work site and that he slipped and fell while walking on rain-slicked pavement meant that this injury was the kind of incident that could reasonably be expected to occur. The applicant's testimony that he was surprised by the slick surface of the walkway because the other walkways had a rough surface and his further testimony that the walkway was later resurfaced did not demonstrate that his injury was caused by an uncommon, unusual, or totally unexpected event.

Analyses like the one in *Dreher* are highly fact-specific. There are numerous cases that explain situations where the injury can be considered caused by a "sudden and extraordinary" event or not. The "sudden" threshold is an easy burden to meet.

Cases that Found the Exception Applied

In *Matea v. WCAB*, (2006) 144 Cal. App. 4th 1435, the Court of Appeal found a "sudden and extraordinary event" where the applicant was injured when a wall shelf holding up a large amount of lumber gave way without warning, which resulted in the fall of lumber onto the applicant's left leg. The Court held that an employment event is sudden and extraordinary if it is something other than a regular and routine employment event or condition, that is, that the event was uncommon, unusual, and occurred unexpectedly.

In *Aguirre v. Ekim Painting North, Inc.*, 2014 Cal.Wrk.Comp.P.D.LEXIS 448, the WCAB found for the exception when the applicant fell 2 stories from the roof of a building that he was preparing for painting. The applicant testified extensively at the workers compensation trial that such an occurrence had never happened to him before, nor

had he heard of it happening to any of his colleagues with other companies. The defendant presented no evidence that the applicant's injury was a routine or ordinary employment condition.

Cases that Denied the Exception

In *SCIF v. WCAB (Garcia)*, (2012) 77 CCC 307, the Court of Appeal found against the exception where the applicant fell from the top of a 24-foot ladder while picking avocados from a tall tree. All that the applicant testified as to the sudden and extraordinariness was that he had never fallen before and had not heard of anyone else at his place of employment that had fallen. The defendant offered no rebuttal evidence that such falls are an industry hazard or that insurance costs reflect that risk, but such proof is not the defendant's burden.

In *Bayanjargal v. WCAB*, (2006) 71 CCC 1829, the Applicant worked as a roofer for the defendant for 2 weeks before falling off of a ladder some 25 - 30 feet. The WCJ initially found the injury to be "sudden and extraordinary" but the WCAB reversed. The WCAB agreed that the slip and fall was sudden but not extraordinary. It is the risk of that event happening that makes workers compensation insurance very expensive to cover that occupation. Thus it was not objectively reasonable that a fall from a roof for a roofer was not a sudden and extraordinary event.

Practice Pointer

The common theme among all cases is the burden of proof that the applicant must meet in order to satisfy the exception. The applicant must show that it is more likely than not that the claimed traumatic event was uncommon, unusual, and occurred unexpectedly. While technically it is not their burden, it would be wise for any defendant to present rebutting evidence to show that the event is common in the industry in an effort to raise the threshold for what the courts would consider "extraordinary."

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