

Significant Decision

Where independent injuries result in concurrent periods of temporary disability, the 104-week limitation likewise runs concurrently.

Foster v. Workers' Comp. Appeals Bd.

(Filed 4/17/2008)

3rd Appellate District; Civil No. C056820

2008 Cal. App. LEXIS 556

Significance: Labor Code § 4656(c)(1) limits aggregate temporary disability payments for a single injury to “104 compensable weeks within a period of two years from the date of commencement of temporary disability payment.” In a case of first impression, the Court of Appeal determined how to appropriately apply § 4656(c)(1) to situations where multiple independent industrial injuries result in concurrent temporary disability.

Facts: Donald Foster was injured at work in two separate incidents in February and April 2005. Both injuries caused Foster’s temporary disability which began on April 14, 2005, the day after his second injury. The employer’s insurance carrier (Zurich) began temporary disability payments on April 26, 2005 and stopped payments after April 14, 2007 based on § 4656(c)(1).

The WCJ determined that Foster was entitled to two periods of temporary disability payments. In order to give Foster the greatest recovery possible, the WCJ awarded temporary disability from April 14, 2005 until September 25, 2006—when Foster’s first injury became permanent and stationary—and temporary disability benefits for the second injury starting on September 26, 2006. The WCJ reasoned that Foster was entitled to two consecutive periods of payments because he could not receive double payments for the overlapping temporary disability caused by both injuries.

On reconsideration, the WCAB agreed that Foster was entitled to two periods of temporary disability under § 4656(c)(1) because he suffered two injuries. But the WCAB disagreed that the period of temporary disability for the second injury should run after the period attributable to the first injury ended. Rather, to the extent that periods of temporary disability occur contemporaneously, the 104-week/2-year limitation is running for both injuries. Thus, Foster’s temporary disability resulting from both injuries began on April 14, 2005. The disability period for Foster’s first injury ran from April 14, 2005 through September 25, 2006, while the period for the second injury ran from April 14, 2005 until it was exhausted under the 104-week/2-year limit, completely overlapping the period for the first injury. But, since temporary disability payments did not begin until April 26, 2005, the WCAB awarded Foster additional temporary disability for the period April 15, 2007 to April 26, 2007.

Holding and Rationale: The Court of Appeal agreed with the WCAB that “[w]here independent injuries result in concurrent periods of temporary disability, the 104[-]week/two[-]year limitation likewise runs concurrently.” This conclusion was based on two concepts concerning the nature of judicial review of WCAB decisions.

First, the WCJ and WCAB found, as a question of fact, that both of Foster’s injuries caused his temporary disability. Such factual findings are conclusive as to the Court of Appeal. (See Labor Code § 5953.)

Second, as the constitutional agency charged with enforcement and interpretation of the workers’ compensation laws, the WCAB’s contemporaneous construction of that law, while not necessarily controlling, is entitled to great weight and courts will not depart from its construction unless it is clearly erroneous or unauthorized. (See *Pinkerton, Inc. v. Workers’ Comp. Appeals Bd.* (2001) 89 Cal. App. 4th 1019, 1029.) According to the Court of Appeal, the WCAB’s construction of § 4656(c)(1) in this case “is not clearly erroneous or unauthorized. In fact, its construction accords with the language, context, and evident legislative purpose of the statute.”

After all, SB 899—which added § 4656(c)(1)—was enacted as urgency legislation “[i]n order to provide relief to the state from the effects of the current workers’ compensation crisis at the earliest possible time[.]” (Stats. 2004, ch. 34, § 49.) It was “designed to alleviate a perceived crisis in skyrocketing workers’ compensation costs.” (*Brodie v. Workers’ Comp. Appeals Bd.* (2007) 40 Cal. 4th 1313, 1329.) According to the Court of Appeal, this makes it likely the Legislature intended the new limitations period in § 4656(c)(1) to be a significant narrowing of liability. “If we were to accept the interpretation of the WCJ, however, the employer’s responsibility, through its workers’ compensation insurance carrier, for temporary disability indemnity could be extended unpredictably for an undefined number of payments and years in situations where multiple independent injuries result in staggered or overlapping periods of temporary disability. We do not believe such consequence was intended by the Legislature.”

Comment: This case is yet another blow to the ongoing attempts to frustrate SB 899’s reforms. As such, a petition for review before the California Supreme Court would not be surprising. The Court of Appeal’s decision becomes final 30 days after filing and any petition for review would have to be filed within 10 days of the decision becoming final. For now, though, this decision establishes a sound legal precedent which is binding on the WCAB.