State: Calif.
3rd DCA Set to Hear Arguments in Dispute Over PTD Determination: Top [2018-09-07]

California's 3rd District Court of Appeal will hear arguments later this month about whether the opinion of an agreed medical evaluator is sufficient to support a finding that a worker with an impairment rating of less than 100% is nonetheless permanently and totally disabled.

State Compensation Insurance Fund and the California Department of Corrections and Rehabilitation argue that the Workers' Compensation Appeals Board erred when it determined Dean Fitzpatrick suffered a permanent and total disability as a result of a cumulative injury to his heart and psyche.

The California Chamber of Commerce argued in an amicus brief that the potential financial harm to employers would be "astronomical" if the WCAB decision is allowed to stand.

The California Applicants' Attorneys Association says in an amicus brief that the WCAB decision was both correct and based on substantial medical evidence, and should not be overturned.

Dean Fitzpatrick was a correctional officer who suffered an accepted cumulative trauma injury to his heart and psyche. He apparently suffered from Prinzmetal's angina that caused anxiety and depression, according to State Fund's petition for review.

A panel qualified medical evaluator determined that Fitzpatrick reached maximum medical improvement for his heart condition on Jan. 16, 2016, but his MMI status was disputed for the psychological condition. An AME who examined Fitzpatrick three times concluded that he had reached maximum medical improvement for the psyche condition on June 13, 2015, and that Fitzpatrick was permanently disabled on "strict psychiatric grounds."

The QME assigned a 97% impairment rating for the heart condition. The AME provided a Global Assessment of Functioning score of 45, which translated to an impairment rating of 71%. When the ratings were combined, Fitzpatrick was left with a 99% permanent disability rating.

Following a trial last year, a workers' compensation judge in June found that Fitzpatrick was 100% disabled, pursuant to Labor Code Section 4662(b). The WCAB denied State Fund's petition for reconsideration in September.

The carrier said in its petition to the 3rd DCA that the WCAB has interpreted the Labor Code section as "providing an unfettered path to 100% permanent disability based on its subjective assessment 'in accordance with the fact.'"

The carrier said there are two recognized paths to a total and permanent disability rating. Labor Code Section 4662 creates a conclusive presumption that certain injuries result in 100% disability, and also says in other cases that PTD "shall be determined in accordance with the fact."

Labor Code Section 4660 establishes the Permanent Disability Rating Schedule. The PDRS, which is based on the fifth edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment, can be rebutted by a worker showing he suffered a greater loss of future earnings capacity than is reflected in the scheduled rating.

"Therefore, if an injured worker seeks to rebut the PDRS, he or she must first demonstrate that a work-related injury precludes him or her from taking advantage of vocational rehabilitation and participating in the labor force by presenting evidence from a vocational expert to establish that due to the effects of their injuries, their loss of future earnings capacity is greater than reflected in the scheduled rating," according to State Fund. "Although such evidence was provided in this case, it was explicitly dismissed by the WCJ and not considered by the board in rendering its decision."

The carrier argues that the judge and the WCAB relied on an "invented expansion" of Labor Code Section 4662(b) in arriving at the conclusion that Fitzpatrick was 100% disabled.

State Fund argues that the legislative intent of the provision in 4662 allowing PTD determinations in accordance with the fact was to limit the conclusive presumptions to the enumerated conditions, which includes the loss of both hands or eyes, and injuries causing mental incapacity or paralysis.

"For over 100 years, no judicial body has ever interpreted Section 4662 as creating a second pathway to total disability because the Legislature did not intend the phrase 'in accordance with the fact' to be interpreted so broadly," the carrier said. "The legislative history establishes that the plain meaning of the phrase 'in accordance with the fact' as set forth in Section 4662(b) merely means there is no presumption of total disability in any case other than the conditions listed in Section 4662(a)."

The California Chamber of Commerce agreed with State Fund's statutory analysis and said Labor Code Section 4662 was not the proper way for the WCAB to conclude that Fitzpatrick was totally disabled.

Fitzpatrick didn't have the specified conditions under 4662(a), the chamber argues. By jumping straight to finding that Fitzpatrick was totally disabled in accordance with the facts of the case, the WCAB ignored the requirements in Labor Code 4660, according to the chamber.

The chamber also claimed that the board didn't require Fitzpatrick to present substantial evidence to rebut the presumption that his 99% rating was correct.

"In doing so, the board presented future litigants with an improper advantage wherein employees would be found total and permanently disabled without proper rebuttal evidence being required and forcing employers to accept a total permanent disability rating when the employee is actually only partially disabled," the chamber said.

The chamber also said that while the difference between a 99% disability rating and a total disability rating may appear minor, the financial implication is not.

"While the permanent disability established here was 99%, the 1% difference would mean that the employer is liable for an additional $1.3 million," the chamber said.

The California Applicants' Attorneys Association said in its amicus brief that employers are trying to shift the appellate court's attention to rebutting the PDRS and Labor Code Section 4660, when such issues are not

relevant.

CAAA argues that the phrase “all other cases” in Labor Code 4662(b) makes the statute applicable to all other cases, and was not an attempt to restrict the conclusive presumption of total disability to the four specified conditions as State Fund argued.

“If the Legislature sought to limit all findings of permanent and total disability to only those defined by Labor Code 4662(a) or rebuttals to the PDRS via Ogilvie, this could have easily been done,” CAAA said. “Both SB 899 and SB 863 provided sweeping changes to the workers’ compensation scheme including the 2005 PDRS, yet the plain, unaltered language of Section 4662 states unambiguously that an injured worker may prove permanent and total disability in accordance with the facts."

CAAA said the argument that the WCAB has created an unfettered path to arrive at PTD is false.

“Injured workers still have to prove the facts upon which a finding of permanent and total disability could be made, and absolutely nothing in Labor Code 4662 in any way hinders a defendant’s ability to submit medical evidence, rebut exert testimony, provide their own vocational experts, or enter the full gamut of discovery that could be employed to argue against a finding of permanent total disability,” CAAA said.

The 3rd DCA is holding oral arguments at 9:30 a.m. Sept. 17.