

A framed poster on a wall. The poster features a black and white portrait of Winston Churchill on a U.S. 5-cent postage stamp. The stamp is mounted on a grey background with two pushpins at the top corners. Below the stamp, the text reads:

**TD Caps & Exceptions:
"A Riddle Wrapped in a
Mystery Inside an Enigma"**

By Donald Barthel & Gregory Fletcher
Bradford & Barthel, LLP

To the left of the poster, there is a yellow square logo with a blue double-lined 'B' inside.

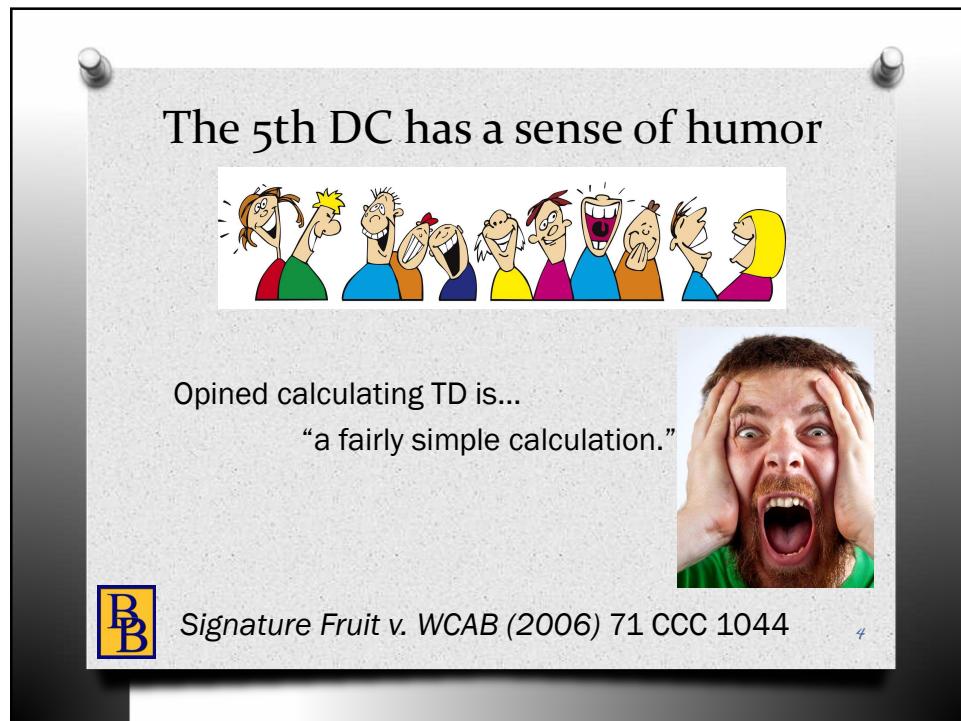
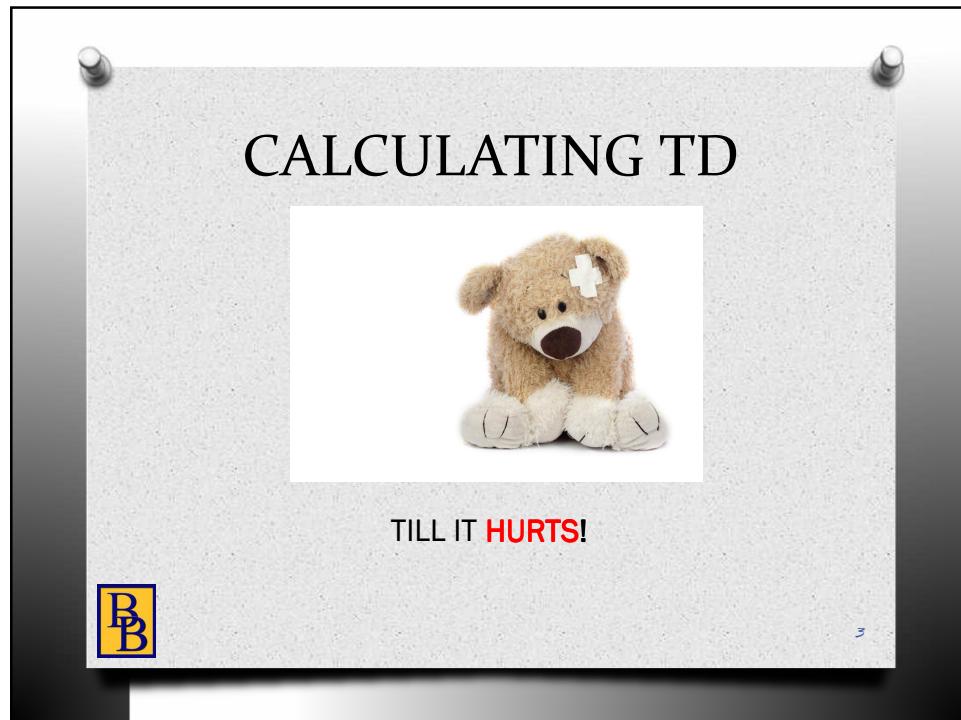
A framed poster on a wall. The poster has the text:

INTRODUCTION TO
TD

aka
"How to Suffer
SEVERE
HEADACHES"

To the right of the text is a photograph of a woman with dark hair, wearing a red top, smiling and holding up two fingers near her eyes. Behind her is a chalkboard with various scribbles and drawings.

To the left of the text, there is a yellow square logo with a blue double-lined 'B' inside.



Hey Justices...walk a mile in
my shoes



(apparently they've NEVER sat at a claims desk!)



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The Ins and Outs of Earnings

TD Goal: replace lost earnings while temporarily unable to work.

Indemnity payments are based on 2/3 of an injured worker's "average weekly earnings."

Simple, huh?



6

Threshold question:

- o “But for the injury, what would this individual now be earning?”

Requires:



7

Using Pre-Injury Earnings



starting point (& best predictor of future earnings)

=

past earnings

common response:

STEP 1: get a wage statement showing the 52 weeks of earnings prior to the injury,



STEP 2: ave of those numbers to predict future earnings
(2/3 of which is to be replaced by TD during recovery)

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Be Careful



1. change in earnings during the 52 week period

Can be due either due to hourly wage increases (or decreases)

OR

Some other factor which demonstrates that only a certain portion of a time period should be utilized in the averaging.



9

EXAMPLE

IW gets an hourly wage increase in week 26

=



10





o the hours worked are averaged over the 52 weeks, but multiplied by the last hourly rate

LIKEWISE a wage *decrease* (not uncommon these days)

=

evidence that AWE < 52 week average of all earnings

//

Using Earning Capacity (post-injury earnings)

Hypo:

- EE continues working after DOI
- Gets a raise (not to statutory max)
- Becomes TTD

Question 1: which earnings become the basis for calculating the TD benefit?

Question 2:

- (a) What if EE goes off work on DOI but was employed pursuant to a contract that guaranteed periodic wage increases on specific dates?
- (b) Does this affect the earnings calculation even though EE was subsequently not able to enjoy the raise because of his/her disability leave?

//



Argonaut vs. IAC (Montana) 196 227 CCC 130

At issue: what is LC §4453(c)—(The statute with four methods for calculating earnings):

Correct method is determined by:

- a) the number of days and hours worked prior to the injury, or
- b) whether there are two or more concurrent employments involved, or
- c) if the earnings are irregular, or

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Argonaut vs. IAC (Montana) 196 227 CCC 130

At issue: what is LC §4453(c)—The statute with four methods for calculating earnings:

Correct method is determined by:

- d. where “for any reason the foregoing methods of arriving at the average weekly earning cannot reasonably and fairly be applied, the average weekly earnings shall be taken at 100% of the sum which *reasonably represents the average earning capacity* of the injured employee...”

BB = *Are you sure?*

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What the statute says:

4453(c) "Between the limits specified...the [AWE]...shall be arrived at as follows:

- 1) Where the employment is for 30 or more hours a week and for five or more working days a week, the [AWE] shall be the number of working days a week times the daily earnings at the time of the injury.

**IF 30+ hours/week *plus* 5+ working days/week,
THEN, AWE = daily earnings x wkly working days**



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What the statute says:

- 2) Where the [EE] is working for two or more [ERs] at or about the time of the injury, the [AWE] shall be taken be taken as the aggregate of these earnings from all employments computed in terms of one week; but the earnings from employment other than the employment in which the injury occurred shall not be taken at a higher rate than the hourly rate paid at the time of the injury.



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What the statute says:

- 3) If the earnings are at an irregular rate, such as piecework, or on a commission basis, or are specified to be by week, month, or other period, then the [AWE] mentioned in...(a) shall be taken as the actual weekly earnings averaged for this period of time, not exceeding one year, as may conveniently be taken to determine an average weekly rate of pay.



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What the statute says:

- 4) Where the employment is for less than 30 hours per week, or where for any reason the foregoing methods of arriving at the [AWE] cannot reasonably and fairly be applied, the [AWE] shall be taken at 100% of the sum which reasonably represents the [AWE] capacity of the injured [EE] at the time of his or her injury, due consideration being given to his or her actual earnings from all sources and employments.



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Multiple Employments- 4453(c)(2)



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Applies if IW has more than
one job.

AWE = aggregate of all employment,

except

actual rate of earnings for all
employment "shall not be
taken at a higher rate
than the hourly rate
paid at the time
of the injury"



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Multiple Employments- 4453(c)(2)

EXAMPLE:

IW works for:

ER-A: 20 hrs/wk @ \$5/hr = \$100

ER-B: 20 hrs/wk @ \$10/hr= \$200

\$300 total
earnings



Injured at ER-A



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Question: What is IW's rate of earnings?

ANSWER: \$200



REASON: although total earnings = \$300,
actual rate of earnings for all employment
"shall not be taken at a higher rate than the
hourly rate paid at the time of the injury"



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Irregular Employments-- 4453(c)(3)

If IW's wages at the time of injury are at an **irregular rate**, then AWE are computed by taking an average "for this period of time, not exceeding one year, as may conveniently be taken to determine an average weekly rate of pay."



EXAMPLE: where IW is paid by "piecework", or on commission basis by the week, month, etc.



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CATCHALL Provision - LC 4453(c)(4)



IF employment < 30 hrs/week

OR

"where for any reason the foregoing methods of arriving at the average weekly earnings cannot be reasonably and fairly applied,"

THEN

AWE is determined by taking the sum "which reasonably represents the average weekly earning capacity of the employee at the time of his injury, due consideration being given to his actual earnings from all sources and employment."



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CATCHALL Provision - LC 4453(c)(4)

PURPOSE-

"The purpose of this provision is to equalize for compensation purposes the position of the full-time, regularly employed worker whose earning capacity is merely a multiple of his daily wage and that of the worker whose wage at the time of the injury may be aberrant or otherwise a distorted basis for estimating true earning power. It would hardly be consistent with that purpose to foreclose a worker from a maximum temporary or permanent award simply because a brief recession had forced him to work sporadically or at a low wage."



Argonaut Ins. Co. v. IAC (Montana) 27 CCC 130, 132-133 (1962) [25](#)

Calculating TD via 4453(d) via the Catchall

Montana (1962)
CA S. Ct, 27 CCC 130



When employment is for less than 30 hours/wk

OR

when a formula

"cannot reasonably & fairly be applied"...

WCAB "must make its own estimate of weekly
earning capacity at the time of the injury."

[26](#)



What should be considered?

- o "[A]ll facts relevant and helpful to making the estimate must be considered."

Includes...

- a. ability to work
- b. age
- c. health
- d. willingness and opportunities to work
- e. skill & education
- f. general condition of the labor market
- g. "employment opportunities for persons similarly situated"



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CATCHALL 4453(c)(4)

EXAMPLE



Gonzales v. WCAB

(1998, 64 CCC 255)

HELD: EE's who are TD are not entitled to TD beyond the date when EE had, prior to his/her injury, indicated he/she was going to retire



REASON: there is no wage loss following the retirement date

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CATCHALL 4453(c)(4)

EXAMPLE...



FACTS:

- o IW injured during 270-day work release program from jail following drunk driving conviction
- o no earnings during work release
- o pre-conviction = max wage earnings

HELD: 4453(c)(4) "catchall provision" applied

REASONING: other methods for calculating AWE could not reasonably or fairly be applied in accordance with the statutory language

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Seasonal Employee



- o Needed: prediction based on past employment history of the rate of pay and period of future employment



Westside Produce Co v WCAB (Avila)
(1978) 43 CCC 653

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Seasonal Employment

DEBATE: whether it was proper to average the *annual* earnings and pay 2/3 of that calculation, or to treat the job as though it were temporary employment, and cut the TTD benefit when the “season” ends?

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Signature Fruit vs. WCAB
(OCHOA) (2006) 71 CCC 1044



- IW worked only during the season
- no off-season earnings
- season = July 29 to September 9
- in season rate TD rate = \$365.59

 ISSUE: Does IW get TD (at min. td rate) during off-season? 32

**SEASONAL EARNINGS RATE
ISSUE**



*Signature Fruit Company v W.C.A.B.
(Ochoa) (5th DCA) (2006)*

Holding: during the off season, where EE has no off-season history of earnings and no evidence he would have been working absent the industrial injury:

- a) no TTD is payable (despite statutory TTD minimum)
- b) TTD payments “in season” = average earnings “in season.”

BB

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OCHOA Holding:



- o “If she did (*remain disabled for all of 2004*) the WCAB's award would result in her receiving well over 200 percent of her regular annual income for a time when there is *no question that she would not have been working*. In enacting workers' compensation reform, we do not believe the Legislature intended this result.”
- o Rejects WCAB's *en banc* decision in *Jimenez v San Joaquin Valley Labor*, 67 CCC 74
- o While the calculation of earnings was required to be set according to Labor Code § 4453, the actual payment of TTD requires we consider EE's ability to compete in the open labor market.

BB

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Thus, under 4653:

- ① TD during a seasonal EE's in-season period of regular employment

=

2/3s of EE's in-season AWE (subject to 4453 mins/maxs)

- ② Where EE has no off-season earnings (does not compete in the open labor market during a portion of the year), EE is not entitled to TD during that off season.



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"A system that rewards a seasonal employee for sustaining an industrial injury likely would create an economic incentive for employees to exaggerate their level of disability and encourage them to malinger on temporary disability. We cannot condone this type of windfall to an injured employee where the Legislature has specifically mandated that an employee's ability to compete in the open labor market must be considered in calculating temporary disability."



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Distinction between "SEASONAL" EEs (i.e. agricultural ees in Central Valley who only work during specific harvest season or canning season)

VS

School Teachers



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FACTS:

- teacher doesn't work year round
- paid yearly salary

RESULT: TD based on the annual wage divided by the number of days in that year (multiplied by 7):

$$\text{Salary} \div 352 \times 7 = \text{AWE}$$

*Torrance USD v WCAB (Buck)
(1997) 63 CCC 112*

*Laytonville USD v WCAB (Lockette)
(1997) 62 CCC 1301*

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Grossmont Hospital v. WCAB (Kyllonen)

(1997) 62 CCC 1649

H: per LC 4453(d), the rate of TD must be uniform throughout the period of TD

HOWEVER...



WCAB & Courts have held it is appropriate to have multiple TD rates for truly seasonal EEs



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MULTIPLE RATES for SEASONAL EEs

*Jimenez v. San Joaquin Valley Labor
(2002) 67 CCC 74 En Banc*



HELD:

EE should not obtain a windfall and should obtain TD at rates that accurately reflect his loss in wages during the period in question



40

ARE UNEMPLOYMENT BENEFITS INCLUDED IN TD CALCULATION?

No!

(probably)

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*Fernandez v. WCAB
(2003, 68 CCC 1205)*

FACTS: IW had different in-season and off-season TD rates based on her *actual* earnings

- IW argued for a greater earnings capacity based, *inter alia*, on unemployment benefits
- WCJ relied solely on actual wages to calculate TD
- WCAB affirmed, "[u]nemployment benefits could not be used in calculating Applicant's earnings."

But see *Vargas v. Stanislaus Food Products*
(2002) 4 WCAB Rptr. 10,272

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Goytia vs. WCAB

(1970) 35 CCC 27

En Banc

HOLDING: it's not only permissible—but required—that post injury earnings be considered as part of the process of determining earning capacity as a basis for indemnity payments.



Example: earning capacity may be clearly anticipated as of DOI where there is a union contract in place providing for guaranteed pay increases on specified dates after the start of TD.



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Kaiser Foundation Hospital/Santa Rosa Medical Center v WCAB

(2000) 65 CCC 567

HOLDING: anticipated and guaranteed pay increases related back to earning capacity as of the date of injury or start of TTD.

- o “If the employee's actual earnings do not reasonably and fairly reflect his or her true earning power, average weekly earnings may be determined on the basis of his or her earning capacity at the time of the injury.” Labor Code § 4453(c)(4).



44

Lujan vs. WCAB

(1985) 50 CCC 693

- o HELD: AWE are req'd to reflect post injury earnings, which exceeded actual earnings at time of injury.



45



Thrifty Drug Stores, Inc. vs. WCAB (Kaye)



(1979) 44 CCC 809

HELD: AWE were adjusted to reflect wage increases that would have been received under a union contract had applicant not been injured.

This remains valid to calculate earning capacity for wage increases or decreases during the period of TD that could be "reasonably anticipated" at time of the injury.



Grossmont Hospital vs. WCAB (Kyllonen)

(1997) 62 CCC 1649

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Hofmeister & Indemnity Rate

- o Labor Code §4661.5
 - o Temporary total disability;
 - o payment made two years after injury

"...when any [TTD] payment is made two years or more from the [doi], the amount of this payment shall be computed in accordance with the [TD] [AWE]...in effect on the date each [TTD] payment is made unless computing payment on this basis produces a lower payment because of a reduction in the minimum average weekly earnings..."

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4661.5 says...



- o when TD is paid two or more years from the DOI, such payment shall be at the statutory rate on the date of "payment." (specifically, those in effect on the date the check is mailed)

Hofmeister v. WCAB et. al.

(1984) 49 CCC 438



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NOTE

DON'T
FORGET

4661.5 has nothing to do with:

- a. earnings, nor
- b. the calculation of earning capacity

It only refers to the legislated rates

(minimum and maximum)

in effect two+ years post injury



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- o Almost immediately after passage of SB 899 (4/19/04), the §4656(c) became the subject of vigorous dispute and rancor



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Introducing...SB 899 2 YEAR CAP Labor Code §4656(c):

- o Aggregate disability payments for a single injury occurring on or after the effective date of this subdivision, causing temporary disability shall not extend for more than 104 compensable weeks within a period of two years from the date of commencement of temporary disability payment.



51

Labor Code §4656(c), con't

- o Notwithstanding paragraph (1), for an employee who suffers from the following injuries or conditions, aggregate disability payments for a single injury occurring on or after the effective date of this subdivision, causing temporary disability shall not extend for more than 240 compensable weeks within a period of five years from the date of the injury.



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Labor Code §4656(c), con't

- o Acute and chronic hepatitis B
- o Acute and chronic hepatitis C
- o Amputations
- o Severe burns
- o Human immunodeficiency virus (HIV)
- o High-velocity eye injuries
- o Chemical burns to the eyes
- o Pulmonary fibrosis
- o Chronic lung disease



53



What is the "Date of Commencement"

- o 104-week TD cap begins *from the date of commencement of temporary disability payment* (italics added).

EXAMPLE: if EE is injured on 1/1/05 and begins receiving TD that same day, the date of commencement is 1/1/05.

- o if EE remains TD for only one day, for the next 104 weeks, or for some period of time within that range...TD may be discontinued 104 weeks later (1/1/07).

54



What happens, however, if there is a delay in the payment of TD?

EXAMPLE:

same EE

TD effective 1/1/05

timely delayed and denied

aoe/coe & TD trial

F&A issues on 1/1/07 (104 weeks after the injury)

holding: injured AOE/COE

TD from 1/1/05 and continuing



55



- o Can defense issue a check retroactively for the last 104 weeks and discontinue TD [citing LC §4656(c)(1)'s prohibition from extending TD "for more than 104 compensable weeks"]?



56



The Hawkins Effect

HOLDING:

NO!

REASON: *Hawkins, En Banc*
(72 CCC 805) (6/13/07)





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Hawkins

o “The plain language [of §4656(c)(1)] requires that the 2 year limitation starts when defendant commences payment. That must mean the date on which defendant made its first payment. That is the date on which payment commences.”





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Meeks Building Center, WCAB (Najir)
(2012) 77 CCC 615, Ct of Appeal, 3rd Dist

FACTS:

- o CT - 6/07
- o 9/07: PQME appointment
 - o received \$64.71 TD for lost wages
- o 3/09: declared TD
- o 9/09: ER term'd TD
 - o argued LC 4656 capped TD at 104 weeks from first payment (QME exam date)



CT of Appeal HELD:



9/07 payment did NOT trigger 104 week cap

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Meeks Building Center, WCAB (Najir)
(2012) 77 CCC 615, Ct of Appeal, 3rd Dist

REASON:

- o purpose of TD: provide wage replacement while EE is healing/incapable of working
- o \$67.71 purpose: scheduling conflict (work vs PQME appointment)
 - o a med-legal benefit (not truly "temporary disability")



60

“Cut it Out” Versus “Cut it Off”

- o Labor Code §4656(c)(2) extends the 104-week TD cap to 240 weeks where the applicant "suffers" from certain specified "injuries or conditions," namely:
 - o Acute and chronic hepatitis B
 - o Acute and chronic hepatitis C
 - o **Amputations**
 - o Severe burns
 - o Human immunodeficiency virus (HIV)
 - o High-velocity eye injuries
 - o Chemical burns to the eyes
 - o Pulmonary fibrosis
 - o Chronic lung disease



61



Exception (c), **amputations**, has received much judicial attention



- o judicial activism throughout California:
- o WCJs awarded TD beyond the 104-week cap in cases for HIGHLY SUSPECT "amputations" (AKA "Surgery")



62



- o This guy claimed to find "amputations" where others (on the defense side) saw:
 - o Lumbar fusion, laminotomy, decompression and bone graft [see *Cruz v. Mercedes-Benz*, SFO 501425 (4/7/07)]
 - o Partial cervical disc removal and ilium graft
 - o Removal of a distal clavicle
 - o Removal of a spleen

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It actually got so crazy



- o HOW CRAZY WAS IT!?!?!
- o ... recent review of all available judge-level decisions defining "amputation" for purposes of Labor Code §4656(c)(2) revealed that all but one judge used a non-traditional, overly-expansive definition of "amputation" to justify expanding the TD cap to 240 weeks.

 64

WCAB hears defense prayers...



Cruz v. Mercedes-Benz

En Banc

(SFO 0501425) (9/5/07)



65

Cruz v. Mercedes-Benz

"In reading statutes, we are mindful that words must be given their plain and commonsense meaning."

Did the WCAB *really* import

"commonsense"

Into CA Workers' Compensation?



66



- o WCAB rejected WCJ's definition of amputation...
- o "removal by surgery of a part of body".

BB

67



- o WCAB defines "amputations":

"the severance or removal of a limb, part of a limb, or other body appendage" represents the "ordinary usage" of the term. "To the extent that some definitions refer to organs, appear to encompass all body parts, or include an equivocal 'etc.', we reject them..."

BB

68

Cruz' Caplane Concurrence...



- o Argued §4656's 2-year/104-week cap on TD is "unreasonable and unjust."



69

Commissioner Caplane's concerns



were heard throughout California.



70



Arnold to the Rescue

- Governor signed into law AB 338.
- Impacts only DOIs o/a 1/1/08:
 - Disability payments "shall not extend for more than 104 compensable weeks within a period of five years from the date of injury."

BB

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Good news for everyone! Multiple Effects

1. keeps the 104-week TD cap
2. allows EE to collect those benefits over a 5-year period
3. avoids the problem where IW receives disability for a short period of time, goes back to work and later is determined to again be disabling
4. protects ER who, in good faith, disputes TD and eventually is required to pay disability retroactively (retroactive payment fall inside the 104 week cap)

BB

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THE TRIGGERS

4656(c)(1): (DOIs 4/19/04-12/31/07)

Trigger for start of "104 weeks w/in a two year period"

=

first PAYMENT

(i.e., DAY 1 of the 2-year period is the date the first disability payment check issues to IW)

See *Hawkins v. SCIF*
En Banc
(2007) 72 CCC 807

73



THE TRIGGERS

4656(c)(2): (DOIs o/a 1/1/08)

Trigger for start of "104 weeks w/in a two year period"

=

DOI

(date of first payment/check = irrelevant)

- Allows for payment for "broken periods" over a half decade
- NOTE: not "TD payments"
 - these are "Disability Payments"

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City of Guadalupe v. WCAB & Ortega

(2016 writ denied) 81 CCC—2016 Cal. Wrk.
Comp. LEXIS 77



Facts:

- o police officer
- o admitted back/psyche
- o on paid administrative leave = 40+ wks
- o TTD after job ended



75

City of Guadalupe

Issue: Does ER get credit for the paid administrative leave against 104 wk cap?

WCJ says "NO CREDIT"
WCAB says "NO CREDIT"

Why?



76

City of Guadalupe

Reasoning:

- paid admin leave = "working"
- wages earned via "modified" work= wages, not TD



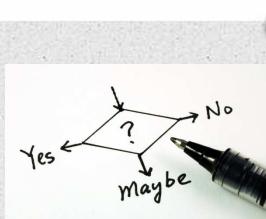
in this case, "modified" work = do no work!



77

City of Guadalupe

Does this make sense?



Point:

- IW was provided certain benefits when hired, including pd admin leave as part of the employment K, the costs associated with this benefit were—presumably—covered by a reduction of other benefits (such as pay)

Counterpoint:

- HE AIN'T WORKING!
- ER gets NO BENEFIT!
- ER must pay someone else to do the work!



78

City of Guadalupe

Other potential applications...

Sabbaticals



paid vacation



79

City of Guadalupe

Words (may) have meaning...

On Admin Paid "Leave"?

City of Guadalupe applies



On Administrative Paid "Disability"?

Different result?



80

4656(c)(2): (DOIs o/a 1/1/08)

"TD Payments"

vs.

"Disability Payments"

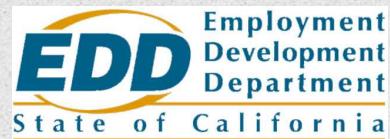


81

YOU DO!



82



Given this verbiage ("disability payments")

IF EDD is *reimbursed* for periods/weeks during which IW is TD, those periods/weeks count as part of the 104 weeks!

Yousef v SCP, 2011 Cal.Wrk.Comp PD LEXIS 409

Rebola v Zurich, 2011 Cal.Wrk.Comp PD LEXIS 293

Gamboa Moreno v Oak River, 2010 Cal.Wrk.Comp LEXIS 175

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More



- o The weeks of "disability" count against the cap whether they are:
 - a. TTD, or
 - b. TPD



Harris-Boyd v. Northwest Airlines

(Board Panel Decision)

2010 Cal Wrk Comp PD LEXIS 89



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How to Defend Yourself

- o Remember: AB 338 only impacts DOI's on or after 1/1/08. Thus, the potential problem of retroactive TD "outside of the cap" remains a problem for all injuries occurring between 4/19/04 and 12/31/07
- o Consider when deciding whether to litigate AOE/COE and TD issues in 4/18/04 – 12/31/07 cases



85

How to Defend Yourself

- o Never accede to applicants' non-traditional definition of the 104 week exceptions listed at Labor Code §4656 (c)(2)(A)-(I). While the WCJ may be impressed, the WCAB and Courts of Appeal have demonstrated their collective ability to see through this... um...

NONSENSE



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How to Defend Yourself

- o Carefully draft your stipulations! If required to enter into an agreement stipulating to continuing TD, be certain to include language to the effect that the agreement "does not extend defendant's obligations beyond those mandated by Labor Code §4656."



87

CONCURRENT INJURIES!?!!!?

TD paid for two (or more) simultaneous injuries runs

CONCURRENTLY

IW is only entitled to 104 weeks of TD

Cathy Casazza v WCAB
(2007) 72 CCC 1657



88

Casazza

FACTS: IW filed:
specific (neck)
&
CT through to specific date (neck)

HOLDING:
TD for both claims ran concurrently
IW not entitled to 208 weeks of TTD

BB

89



BUT...

- o IF doc explained how each condition resulted in separate periods of disability, completely unrelated and w/out overlap, each may receive 104 weeks

See Vasquez v WCAB
(2008, 73 CCC 727)

BB

90

BAD NEWS...

if one of the concurrent injuries occurred pre-4/19/04,

AND

that injury contributed to IW's TTD status,

THEN TD can be paid on the prior injury
(not subject to the 2-year cap)

Van Der Haeghen Construction v WCAB (Din)

(2008) 73 CCC 723



91

Does Terminating an Employee "Terminate" Your TD Defenses?



YOU'RE FIRED!

92

Familiarity Breeds Contempt



Does this story sound familiar?

- o case accepted
- o IW returns to modified position
- o you discontinue TD

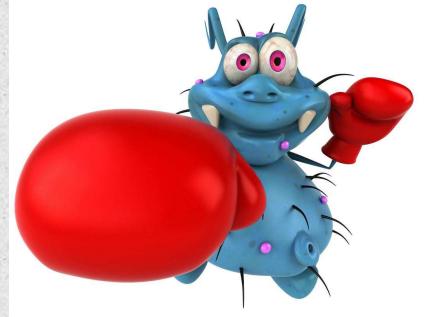


STORY TIME

93

...that is, until you receive AA's
“nasty gram”, advising:

- o IW has been terminated
- o you owe TD retroactively and continuing!



94

WHAT would YOU do?



95

Does this story sound familiar?



SMILE

LIFE

IS

GREAT!



96

What's TD All About?

- o **What does the case law say?**
- o "The essential purpose of [TD]...is to help replace the wages the employee would have earned, but for the injury, during his/her period(s) of temporary disability"



Signature Fruit Co. v WCAB, (Ochoa) (2006) 142 Cal.App. 4th 790, 801



17

What *does* the case law say?



- o An employer's obligation to pay TD is cut off when the replacement income is no longer needed, such as when IW has returned to work



Huston v. WCAB (1979) 95 Cal. App.3d 856, 868]

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o What does the case law say?

- o If IW is released to modified duty and ER offers him/her a job within his/her work restrictions, IW is no longer entitled to TD, even if IW doesn't accept the modified duty**

Vittone v. WCAB (2001) 66 Cal. Comp. Cases 435
(writ den.)

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EXAMPLE:

Seale v. WCAB
(1974) 39 CCC 676, 677 (writ den.)

FACTS:

- o IW who did not return to modified duty**
- o reason: union on strike**



would not cross the picket line

100

HOLDING?

not entitled to TD



o REASONING: IW's action "was voluntary and for reasons other than physical inability to work."

B

101

**But Termination is an
"Employer Thing"!**



o case law is clear:

- o IWs who refuse to accept properly tailored modified duty can be denied TD
- o usually involves a situation in which the employee—and the employee alone—makes a unilateral decision to stymie ER's good faith efforts to return IW to work.

B

102

But what happens when it is the employer who takes the action...

such as terminating IW,



making it impossible for IW to take advantage of modified duty?



103

ER THING v EE THING!

...isn't the scenario somehow different where the lack of availability of modified duty is due to an "employer thing" (aka terminating IW)

VS

"employee thing" (aka refusing to cross a picket line, etc.)?



104



o a termination for "participation in unlawful activities" of an IW who had accepted an offer of modified duty..."was a 'for cause' termination justifying the termination of [IW's] right to vocational rehabilitation" [Anzelde v. WCAB, (1996) 61 CCC 1458 (written.)].

o this reasoning has been extended to TD.

B

105



THINK ABOUT IT!

While CAAA may claim termination is an "employer thing,"

1. Is ER free to keep EE who participates in illegal activities?
2. Should w.c. penalize ERs for good faith firings of IWs?

DON'T FORGET

And don't forget...it is IW's burden to prove that his/her wage loss is due to his/her industrial injury. If modified duty was or would otherwise be available but for IW's bad behavior requiring his/her termination, has IW met his/her burden of proof?

106

Exam Time



- o So you've received the "nasty gram"!
- o What do you need to know to assess your liability?



107

If ER, prior to the termination, accommodated
IW's restrictions

+

termination was "for good cause"

=

defense



verdict!



108

BUT...

...what if IW was terminated for cause before modified duty is offered or accepted?

WCAB says,

"a more rigorous inquiry regarding the genuineness of the offer of modified duty is necessary"

Quiett v. System Transport,

(5/15/08) OAK 0336115)]



109

If ER claims would have offered mod duty but for IW's termination for cause, WCJ must determine whether putative offer is...

- (a) genuine,
- (b) in good faith, and
- (c) w/in IW's work restrictions

Robertson v. WCAB

(2003) 112 Cal.App.4th 893



110

SUMMARY

Fight!



o IW has been fired and modified duty would have been available?
o Expect a fight (particularly in this economy).

A. Deny TD

BB

III

Fight!



B. Collect your evidence to prove

1. IW was terminated
2. Termination was "for cause"
3. Termination was in "good faith"
4. Mod duty was (or would have been) available
5. Mod duty was w/in IW's restrictions
6. Offer (or putative offer) of modified duty was "good faith"

BB

III

HOW DOES THIS IMPACT EDD?

How about a case brought to you...



...by your friends at Bradford & Barthel?



113

The TIRED, OLD facts...

accepted claim

treating

mod duty for 6 months

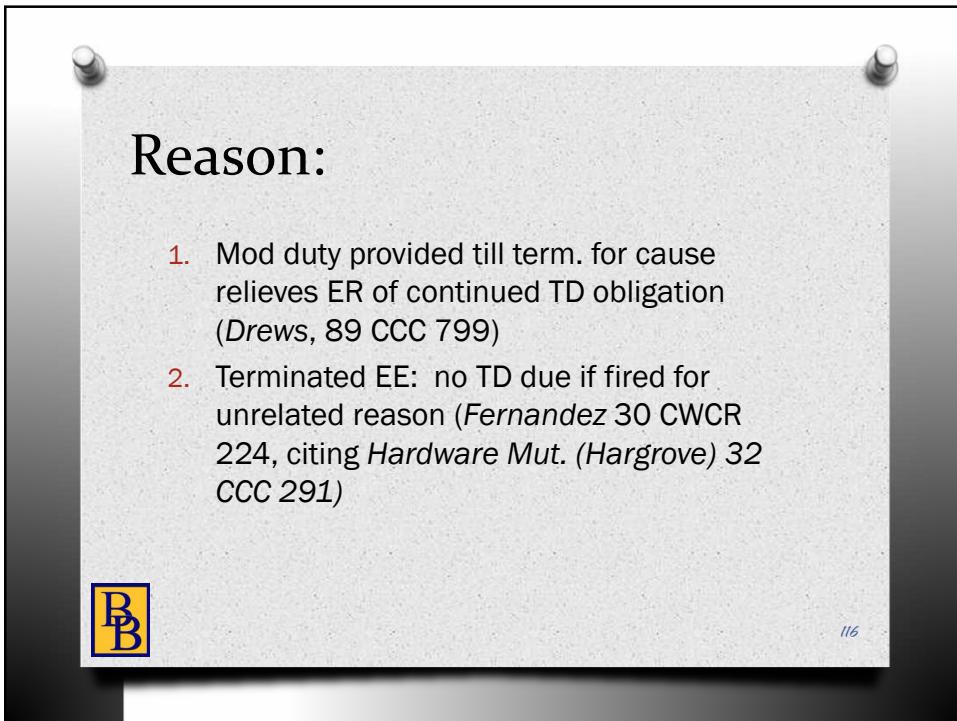
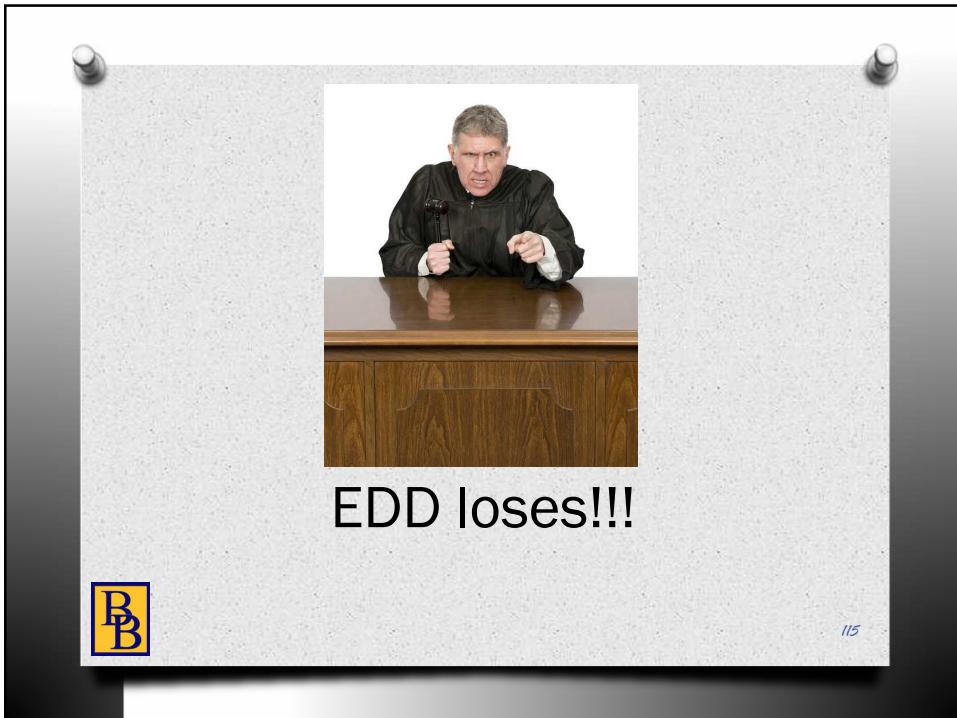
termed for cause

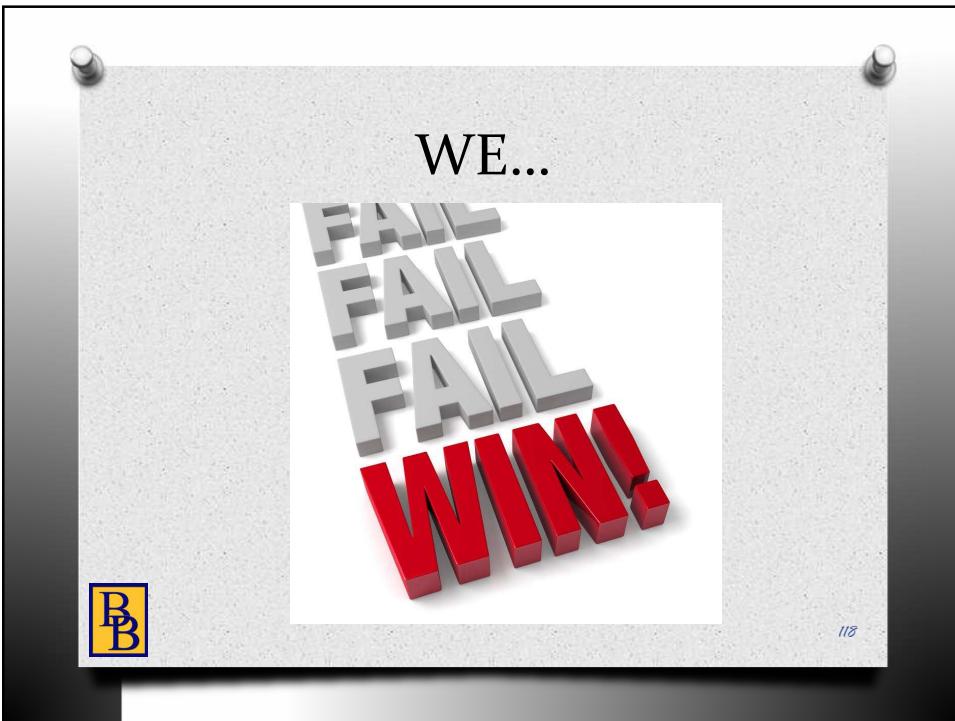
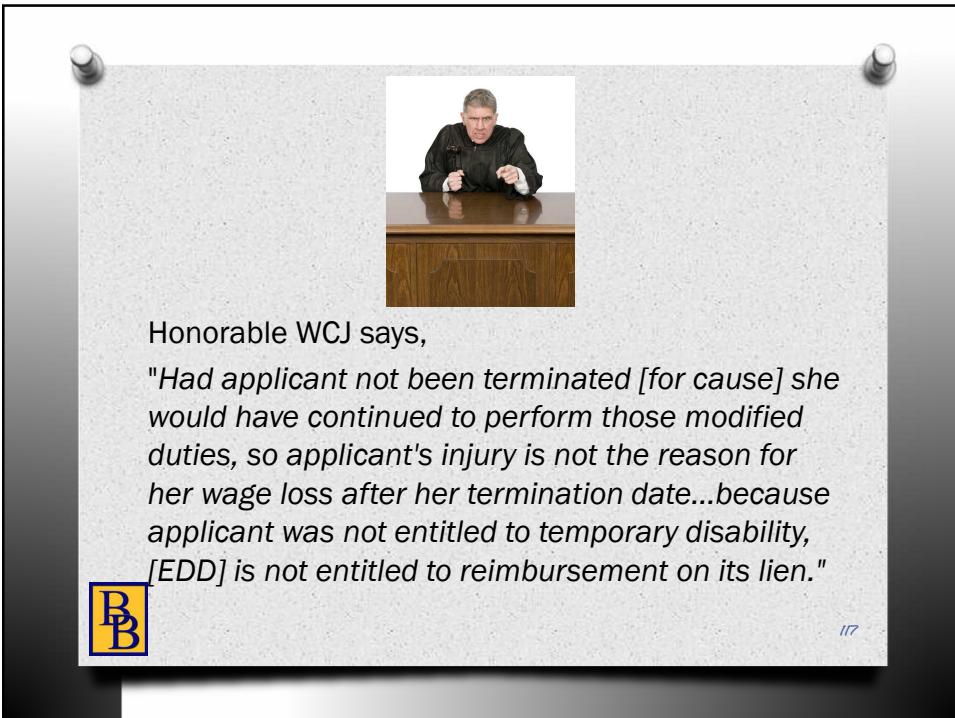
(insubordination/incompetence)

claims retro disability (\$88k), including



114







File your PETITION TO TERMINATE TD LIABILITY

8 CCR 10462: "A petition to terminate liability for continuing temporary disability indemnity under a findings and award, decision or order to the Appeals Board or a workers' compensation judge shall be filed within 10 days of the termination of the payments or other compensation. Failure to file such a petition within 10 days may affect the right to credit for an overpayment of temporary disability indemnity."

119



- o Got an outstanding order/award of continuing TD?
- o File a formal Petition to Terminate if:
 - a. Physician finds P&S/MMI, or
 - b. RTW modified position, or
 - c. 104 weeks have been paid!*

*DO NOT rely on this, BUT...

- o BPD says, "Upon payment of the 104th week, liability for any further TD is terminated by operation of law."

Roczey v. American Medical Response (BPD) 2009 Cal Wrk Comp LEXIS 601

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Stipulating to continuing TD...?



GET IT IN WRITING!
(a waiver of 8 CCR 10462, that is!) 121



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