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NEW COURT RULINGS ON LABOR CODE §§4850 & 4605 AND ADMISSIBILITY OF DOCTORS' REPORTS

By Scott O'Mara

Labor Code $4850 provides payment to many safety officers who are employed on a regular full-time basis and sustain a job-related injury or illness. These safety officers — regardless of their length of service — shall have entitlement to a leave of absence while disabled without a loss of salary. Payments pursuant to this statute are made in lieu of temporary disability payments for a period "not exceeding one year, or until that earlier date as he or she is retired on permanent disability pension, and is actually receiving disability pension payments, or advanced disability pension payments". The key phrase is "without a loss of salary", meaning the worker, in a vast majority of cases, is paid at a substantially higher rate than the temporary disability rate.

People typically eligible for benefits pursuant to Labor Code §4850 are city police officers, sheriffs, certain other employees of sheriff's departments, certain personnel of district attorney's offices, county probation officers, peace officers pursuant to §830.1 or subdivision (b) of §830.33 of the Penal Code, airport law enforcement officers, harbor police, firefighters and lifeguards — in all cases, while employed on a regular full-time basis.

One week ago, the Third District Court of Appeal issued a decision taking issue with the calculation of benefits pursuant to Labor Code §4850. In *County of Nevada v. WCAB (David Lade)*, the Court determined that Deputy Lade was not entitled to include shift differential pay as part of his regular salary in the determination of his Labor Code §4850 benefits while he was on light/modified duty.

One month after his job-related injury, Lade return to a modified position in January 2012, working a day shift. He ultimately underwent surgery in March 2012 and again returned to a modified position in April 2012.

The judge in the Workers' Compensation matter felt that the shift differential pay Deputy Lade had received was part of his regular salary, and since Labor Code §4850 benefits are intended to provide injured peace officers covered by this statute with replacement of their full salary, Lade's shift differential pay should be included in the calculation of his Labor Code §4850 benefits. This position was then challenged by the employer, and the matter therefore went before the WCAB, which in May 2013 embraced the judge's decision.

However, the Third District Court of Appeal disagreed with this decision, opining that while injured safety workers are entitled to benefits pursuant to Labor Code §4850 with no loss of salary while they are on a leave of absence, they no longer are guaranteed to receive this benefit without loss of salary once they return to work, either in a full-duty or light-duty position.

The Third District Court of Appeal went on opine that pursuant to Labor Code §4850, the term "leave of absence" is a temporary separation from employment with the intent to return, not a separation from a regular duty assignment, as argued by Deputy Lade. Accordingly, the Court of Appeal found that Lade was *not* on a leave of absence when he returned to a light-duty assignment with the Sheriff's Department on a differential shift.

Pursuant to this decision, Labor Code §4850 entitlement to no loss of salary applies only when a safety officer is on a leave of absence and not when he or she returns to work. Lade's attorney has indicated he probably will ask the Third District Court of Appeal to rehear the case in the hopes of achieving a different ruling.

The *Lade* decision essentially undermines the concept that benefits pursuant to Labor Code §4850 are intended to protect injured safety officers from having to return to work prematurely, as employers now have the incentive to bring them back in modified positions they normally would not work to avoid having to pay their full salary and bonus pay.

Further clarification regarding the *Lade* case probably will occur in the future.

A very significant section of the Labor Code — §4605 — indicates an injured worker has the *right*, at his or her own expense, to see a consulting physician selected by the worker. The Labor Code further states that a report prepared by a consulting physician pursuant to this statute shall not be the full basis for an award of compensation, but shall be addressed by the authorized treating physician or Panel Qualified Medical Evaluator selected by the parties. The treating physician or PQME will then indicate whether they agree or disagree with the consulting physician's findings.

Many employers have what is called a medical provider network list, and some of the doctors on these lists have a catch-and-release approach with their patients. They want to see their patients and issue their reports in the least amount of time so they can handle more patients and be compensated accordingly to achieve a higher profit level. These physicians have economic connectivity to the employer and are not patient advocates. Therefore, in certain complex cases, by exercising the right to see a consulting physician pursuant to Labor Code §4605, an injured worker can obtain supplemental documentation which can be a factor in the determination made by a judge as to the worker's level of disability and/or whether his/her condition is job-related.

The case of *Valdez v. WCAB* touches on the right of the injured worker to consult with a doctor of his/her choice at his/her own expense pursuant to Labor Code §4605, and addresses the limitations which occurred with the recent enactment of SB 863, which amended §4605 to prohibit the use of consulting doctor reports as the sole basis for an award of compensation.

In reviewing the changes to Labor Code §4605, the Supreme Court in *Valdez* ruled: "This section shall not be used as the sole basis for an award of compensation". The Supreme Court then reviewed Labor Code §4616 — which addresses the establishment of medical provider networks and the requirements regarding same — and acknowledged that that statute was not amended. The Supreme Court also reviewed §4616.6, which states: "No

additional examinations shall be ordered by the appeals board and no other reports shall be admissible to resolve any controversy arising out of this article [Labor Code §4616]."

While the Supreme Court acknowledged that §4616 restricts the admission of medical reports, it expressly stated that "reports by non-network doctors are admissible and can be considered in resolving disputes about the compensability of workplace injuries" in view of the long-term right of California injured workers to obtain consulting reports at their own expense. The Supreme Court ultimately protected that right.

The meaning of the *Valdez* decision is that California injured workers, in certain cases, depending upon the complexity of the case, the nature and level of disability, and the medical care sought, can create a point of accountability for medical provider network doctors. Pursuant to Labor Code §4605, if these workers have the economic ability, they still have the right to consult with a doctor of their choice at their own expense, and the report generated thereby can be a factor the judge can utilize in arriving at his or her decision as to compensability relative to work injuries.

Employers are unhappy with the *Valdez* decision, and many of them argue that medical opinions derived pursuant to Labor Code §4605 cannot be the sole basis for an award. The theory is that medical opinions pursuant to §4605, in addition to other evidence such as the testimony of the worker, co-workers and others, as well as diagnostic studies, in and of themselves *can* be sufficient for the judge to make his or her determination.

There will be an issue as to the meaning of "sole basis". While the change in the verbiage of Labor Code §4605 creates limitations relative to using outside medical experts, it does not remove the admissibility of same.

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