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KEEP YOUR ARMORED VEST, KEEP YOUR BACK-UP WEAPON

BY: SCOTT O'MARA

The Workers' Compensation and Retirement systems overlap in many areas, and with this overlap there can be a direct impact on the workers' compensation case and resolution of the workers' compensation case and/or retirement case.

The concept of a back-up weapon and the armored vest is one of protection. The back-up weapon or armored vest is not one that the safety member will waive.

In the development of the workers compensation system, the primary goal has been a system that allows the injured worker, with a job-related injury, to receive medical care to cure or relieve the effects of the industrial injury. This is constitutionally mandated. There have been several changes in the legislation that has occurred; such as Utilization Review (UR) which allows the employer to second guess the treatment recommended by the treating doctor, and thus delay/deny the recommended treatment. This severely impacts the worker.

There is a back-up system called Labor Code §4605 which expands the medical opinion beyond the parameters of UR or Independent Medical Review (IMR) or Qualified Medical Evaluators (QME). This legislation, Labor Code §4605, states that the employee at his/her expense may obtain a consulting physician, or attending physician's opinion as to medical issues. The Labor Code states that any report prepared by the consulting or attending physician pursuant to Labor Code §4605, shall not be the sole basis for the award of medical care. It further states that a QME, or authorized treating physician, shall address and report procured pursuant to §4605 and shall indicate whether he/she agrees with the findings and opinions stated in the report.

Labor Code §4605 is a very significant back-up weapon for the worker in the event that there are only non-supporting medical opinions available by the QME or IMR doctors that lack the understanding and sophistication regarding the medical care that the worker seeks, or the relationship as to whether the condition is job-related.

Labor Code §4605 is a Section of the Labor Code that acknowledges the inadequacies of the workers' compensation system at times regarding doctors that lack the sophistication, training or experience in unique areas of medicine.

A current case that has been issued by a San Diego Judge held a decision that the brain cancer was work-related even though there was no presumption. The Judge was provided the opinion of a treating doctor pursuant to Labor Code §4605. This position had a broader specter of information and knowledge than the other physicians had. The employer challenged the decision and argued that the application of §4605 should not be utilized and that the evaluation should be limited to the IMR doctor.

On Appeal the WCAB concurred with the Judge's findings that the Labor Code §4605 doctor provided substantial evidence finding the condition of brain cancer indeed was work-related because of the unique knowledge, information and training that the doctor had pursuant to Labor Code §4605. The treating doctor, pursuant to Labor Code §4605, acknowledged why the injury was a factor in the cancers growth (the inflammatory process following the injury certainly may have expedited its presentation and growth).

The defendants took this doctor's deposition and the doctor reaffirmed that the head blow was a causative factor of the rapid growth of the tumor, and indeed was the compensable consequence of the original injury of brain cancer. Therefore, when cases are evaluated regarding causative factors, a consulting or attending physician's report indeed may be unique and of greater substantial evidence than the IME or QME. The employer attempted to appeal the Judge's finding to the WCAB. On 09/27/2023, the WCAB upheld the Judge's findings pursuant to Labor Code §4605 that the cancer is job-related.

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In review of several contracts that some Union/Associations have with the employer, I have noted that there has been a waiver of protection that Labor Code §4605 provides in some contracts. Again, §4605 is akin to a back-up weapon. There is no rationale to do that (to give up that back-up), it endangers the worker and removes the opportunity of using the back-up weapon of Labor Code §4605 to establish that a condition is job related. One of the documents drawn up by the employer (contracts) expressly states that Labor Code §4605 did not have authority. Other contracts that I have seen speaks indirectly, but curtails protection under §4605 in a very non-generic way, but in a manner that would allow the employer to come back and state that pursuant to the agreement, yet not specific, that the worker does not have the right to use this back-up weapon (Labor Code §4605) to obtain medical care.

Additional consideration is the lack of sophistication that the worker may have in waiving their right for re-employment. The Waiver Risk: https://law1199.com/wp-content/uploads/2019/10/2019-Issue-11.pdf.

The CalPERS, County retirement and the City retirement systems all have a secondary re-evaluation procedure for Workers that retire early because of an industrial disability retirement. This allows the retirement system to compel the Worker (that have a job-related injury, and was forced to leave their employment because of the complications due to the injury and their inability to perform the substantial duties of a job) to undergo a re-evaluation allowing the governmental entity to force a re-evaluation.

There is a practice that some employers use to manipulate the workers and remove the worker's ability to return back to work. This is done by getting the worker to sign a settlement document in the workers' compensation cases that state "the worker was waiving their right to return back to employment". That if the worker was to attempt to return back to work either forcibly, by the retirement system, or on their own unilateral decision that the worker has agreed to waive their rights to be rehired.

The workers' compensation settlement documents which set forth this waiver create a significant complication for the worker.

The caveat to the worker is the understanding that the Compromise and Release (C&R), or Stipulation, although it only speaks to the Workers' Compensation system, it can override and dictate removing the workers' right for returning and reinstatement with the employer.

With this specific language of a waiver in the C&R, or Stipulation, of re-employment where the worker agreed that the lump-sum settlement or Stipulation is also a waiver of any right to reinstatement or be rehired, and the worker agrees not to seek reinstatement with the employer or agrees to not reapply for employment with the employer, without that language, they would be able to return back to work based upon the employer having an available position and, only if there is no waiver.

In summary, there must be awareness on behalf of the Union/Association regarding the risk of harm to the member by giving up protection such as Labor Code §4605 as a BACK-UP WEAPON. The Union/Associations and the employee also need to be aware that the Waiver of Re-Employment is a loss of the ARMORED VEST. The worker could lose retirement benefits and not be able to return to work with the same employer because of the Waiver of Re-Employment. Do not take off your armored vest by agreeing to a Waiver of Re-Employment.

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