



PROTECTION FOR INJURED WORKERS UNDER THE FIVE-YEAR WINDOW NO FIVE-YEAR IF INSIDIOUS & PROGRESSIVE

By Scott A. O'Mara

Workers' Compensation cases are typically resolved through a trial with a Findings and Award by the Court; a Stipulations with Request for Award agreed to by the parties with an Award by the Court; and/or a Compromise and Release with an Award by the Court. In the case of both the first two procedures (a trial with a Findings and Award; and Stipulations with an Award), a section in the Labor Code grants the Workers' Compensation Appeals Board continuing jurisdiction over the Orders, Decisions and/or Awards, and also grants the power to allow a case to be reopened if the injured worker has an increase or decrease in permanent impairment if a petition to reopen is timely filed within five years of the worker's date of injury.

The section of the Labor Code which allows a case to be reopened due to a change in impairment is used at times by injured workers, but many workers unfortunately are unaware of their ability to reopen their case for this reason within the five-year window. The reason for this is that when an injured worker does not have representation, the employer, third-party administrator or adjuster handling the worker's case usually does not advise the worker of his/her entitlement to the five-year reopening right for a change in medical condition. It therefore becomes imperative for all workers who have a finding from the Court — either by a trial or a stipulated agreement between the parties — to be made aware of their reopening right for an increase in disability.

An example where this right would apply would be if a worker has a back injury which originally is settled, but then the back becomes more symptomatic over time because of that injury. Another example would occur when a worker has an injury case which has been settled, but the worker is taking medication prescribed for that injury, and ancillary problems — such as kidney problems, gastroesophageal reflux disease (GERD), or various other conditions — develop as a result of taking the medication. Thus, the five-year reopening right allows injured workers to receive increased compensation for any additional disability related solely or largely to their work injuries, plus their medical care.

Another factor associated with some cases is the finding that a disease — such as cancer — is *insidious and progressive*, meaning that the disease may exist initially without marked

symptoms, but over time it is likely to progress gradually to a much more serious condition which may even be life-threatening. When a case involves a disease which has been found by a doctor to be insidious and progressive, the Workers' Compensation Appeals Board has the power to reserve jurisdiction over the case, in which event the worker's reopening rights are not limited to the five-year window which normally applies.

The Courts, in looking at cases which involve insidious and progressive diseases, have focused on cancer and exposure to various carcinogenic substances (such as asbestos) which can lead to the development of cancer. What has not been recognized by the Courts is the fact that orthopedic conditions in certain cases could also qualify as being "insidious and progressive".

However, a current case which came onto the scene in October 2018 involves a worker with an orthopedic injury. He underwent a knee revision in 2001, and then a total knee replacement in 2013, followed by a third surgical process in 2014. As a result of this latest surgery, the worker developed an infectious disease process which has required multiple treatments, and his doctor eventually determined that the worker needed to be placed on long-term antibiotic therapy to control and manage the infection which has continued to be present.

The physician evaluating the worker under the Workers' Compensation system ultimately opined that the worker would require life-long antibiotic therapy as a result of the infection at the prosthesis site, and the symptoms of the infection required constant treatment which would have some impact on his activities of daily living. At the time of the worker's last evaluation, he was not suffering these symptoms, but they could arise from the continued antibiotics. This case eventually went to trial, with one issue being whether the worker's condition was insidious and progressive.

In the appeal process, the judge reviewed the decision again and indicated that the facts were such that the long-term antibiotic treatment reflected an insidious and progressive disease, and that reservation of jurisdiction beyond five years from the permanent disability award should therefore be granted. The Workers' Compensation Appeals Board subsequently found the chronic infection to be insidious and progressive, and granted the reservation of jurisdiction accordingly. This marked a significant departure from the Courts' traditional approach of distinguishing between diseases like cancer and hepatitis C (which are almost certain to progress) on the one hand, and orthopedic injuries on the other.

Two elements are significant for injured workers: (1) that they have five years from their date of injury to reopen their case for new and further disability; and (2) that certain medical conditions may be considered to be "insidious and progressive" — such as cancer and hepatitis C, as well as other conditions involving the long-term use of antibiotics — and allow workers extended reopening rights to access greater protection for their loss of earning capacity resulting from a work injury.

Workers should also give consideration to the medications they take for their work-related injuries because, as indicated above, these medications may cause other medical problems which are ultimately a consequence of their work injury and therefore fall under the umbrella of Workers' Compensation for the provision of future medical care, as well as potential additional compensation for any impairment which may result.

California workers need to be aware of the five-year window to reopen their cases if their medical condition has changed to potentially receive compensation for new and further disability. Furthermore, workers need to know that if they have a condition which may be deemed "insidious and progressive", that determination would allow them extended reopening rights beyond the normal five-year limitation.



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