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OPEN THE WINDOW AND ALLOW SAFETY MEMBERS TIME TO HEAL

BY: SCOTT A. O'MARA

The Workers' Compensation system provides benefits relative to job-related injuries impacting California workers. One of these benefits is called *temporary disability*, which is money available to workers following an industrial injury when the effects of the injury *temporarily* preclude the worker from being able to perform his or her job duties while being treated and still recovering from such injury. The intent of temporary disability is to give injured workers access to income they would otherwise lose because of their inability to return to work during their healing period.

The California legislative body has identified unique risks associated with the essential duties performed by California safety workers. Labor Code §§4850 and 4800.5 have been enacted to provide compensation at a full salary level during these workers' healing period. This benefit justifiably has been extended to probation officers, full-time lifeguards, district attorney investigators and numerous other safety personnel.

Labor Code §§4850 and 4800.5 entitle the identified injured safety workers to receive up to one year of their full salary tax-free — *in lieu of temporary disability payments* — if they are off work due to a job-related injury which precludes them from being able to perform their substantial duties.

Temporary disability benefits are what is paid to non-safety workers — those workers not eligible to receive Labor Code §4850 or §4800.5 benefits — and these payments typically are equivalent to two-thirds (.667) of the injured worker's average weekly wage. However, these benefits do have a defined maximum amount, which presently is \$1,074.64 for injuries occurring prior to 1/1/15. For injuries occurring on or after that date, the maximum amount for temporary disability payments will increase to \$1,103.29.

In 2004, Labor Code §4656 was amended to add subsection (c). This new statute stated that for industrial injuries occurring on or after 4/19/04, the maximum period for receiving temporary

disability benefits was to be 104 weeks within a period of two years from the date when payment of these benefits commenced.

In January 2008, Labor Code §4656(c) was amended to reflect that temporary disability benefits cannot be paid for more than 104 weeks *within a five-year period from the date of injury*. Of note is the fact that this statute also provides for exceptions to the 104-week period for certain defined significant injuries, such as acute and chronic hepatitis B; acute and chronic hepatitis C; amputations; severe burns; HIV; high-velocity eye injuries; chemical burns to the eyes; pulmonary fibrosis; and chronic lung disease. For these injuries, injured workers can receive *up to 240 weeks of temporary disability payments* — instead of 104 weeks — within the newly-defined five-year period from the date of injury. It is significant that the legislative amendment to Labor Code §4656(c) in January 2008 recognized these serious injury exceptions.

Labor Code §§4850 and 4800.5 correctly recognize the unique harm and damage sustained by California safety workers relative to their various on-the-job exposures and the injuries they sustain, and the fact that the economic consequences of these injuries are significant, not only to the workers themselves and their families, but to California citizens as well. A primary concern is allowing injured safety workers a sufficient recovery period so they can return to their full duties after sustaining serious injuries, thereby saving employers the time and expense which would be necessary to hire and train replacement workers. This concern has been somewhat mitigated by the window of opportunity which Labor Code §§4850 and 4800.5 have afforded injured safety workers to recover and return to their careers.

As the California Workers' Compensation system continues to evolve, attention needs to be focused on any missteps which impact and detract from the goal of allowing injured safety workers an adequate healing period so they can return to work and function at the high level needed.

As stated above, safety workers eligible for Labor Code §4850 and §4800.5 benefits are entitled to receive up to one year of their full salary tax-free if they are off work due to a job-related injury which precludes them from being able to perform their substantial duties. In addition, it is important that these workers, if necessary, after utilizing a full year of §4850/§4800.5 benefits, be allowed the opportunity to receive the temporary disability payments (albeit at a lesser rate than their full salary) necessary to allow them to fully recover from their injuries and return to their jobs.

When the changes in the California Workers' Compensation system occurred in 2004 and 2008 relative to the periods of time temporary disability benefits may be received, the windows for recovery were limited, but yet there was an allowance that safety workers could receive up to one

year of Labor Code §4850/4800.5 benefits *and* up to two years of temporary disability benefits — thus providing for a total recovery time of up to three years.

However, a series of cases have since evolved which have removed some options available to California safety workers and their employers, and Assembly Bill 2378 — which was proposed on 2/21/14 and offered legislative corrections approved by both the Assembly and the Senate — was unfortunately vetoed by Gov. Brown on 9/29/14. ***THIS NEEDS TO BE CHANGED.***

On 1/30/13, the First Appellate District, Division 4, upon reviewing the *County of Alameda* case, reduced the combined two-year window of temporary disability benefits and one year of §4850/4800.5 benefits for injured safety workers to one year of each benefit.

On 7/28/14, another unfavorable decision was rendered in the Order Denying Petition for Reconsideration in the *James v. City of Santa Rosa* case, limiting opportunities for safety workers to have a complete and full period of healing. This decision found that benefits pursuant to Labor Code §4850 (*and probably Labor Code §4800.5 as well*) — which pay an injured safety worker's full salary while off duty as a result of an industrial injury — are limited to 365 days within a one year window. In the past, injured workers could receive 365 days of §4850/4800.5 benefits and 365 days of temporary disability benefits without being restricted to a one-year window of payment.

In *James v. City of Santa Rosa*, a safety officer had worked part-time modified duty, and had received Labor Code §4850 benefits during the time she was not working modified duty. The employer's position was that even though she had not received one full year of §4850 benefits, she was only eligible to receive these benefits during the defined 365-day window period, and the fact that she worked modified duty and did not receive her full salary during that window of time *did not extend her eligibility to receive the remainder of her full one-year of §4850 benefits outside the 365-day window.*

The one-year window created by the *James* decision in essence states that once you begin drawing §4850/4800.5 or temporary disability benefits, you have strictly one calendar year window to draw those benefits. If during that one-year window — for example, from January 2014 to January 2015 — you return to modified duty at any point for any length of time in an attempt to ease back into your full duties while you are still healing, and you fail to heal completely by January 2015, you would not be eligible to receive any additional §4850/4800.5 benefits after the closing of the one-year window in January 2015.

The *James* decision is contrary to the concept that injured safety workers should be allowed the time necessary to heal completely from their work-related injuries before returning to their jobs, instead of being forced to return to work prematurely — which may delay or prevent their full

recovery — simply because the artificially-defined benefit period has run out. As a result, this decision will create situations where doctors and workers will need to make decisions as to the risks versus benefits for workers in returning to modified duty. If these workers do return to modified work and it increases their complaints — and the one year window of §4850/4800.5 or temporary disability benefits has closed — the workers will not be allowed the time necessary to heal completely and will be forced to return to their regular employment at the risk of sustaining further injury.

As mentioned above, Assembly Bill 2378 — which would have corrected the inadequacy of the 104-week limitation placed on §4850/4800.5 and temporary disability benefits — was vetoed by Gov. Brown on 9/29/14.

The basic intent of Workers' Compensation to allow a healing period for injured workers is an established principle, and the unique risk of harm and damage faced by safety officers has been identified. Therefore, the legislative branch needs to go back and re-examine the purpose of Assembly Bill 2378 and also take corrective action against the most recent artificial window of limitations placed on the healing process for injured workers so they are not restricted to a one-year window which in many cases prevents their full recovery and forces them to return to work prematurely or even seek an undesired retirement.



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