LAW1199.COM NEWSLETTER™

2023 ★ ISSUE #11

safetyofficerattorneys.com ★ www.law1199.com ★ SCOTT A. O'MARA, THOMAS I. HAMPTON
BETH A. WILLIAMS, DANIEL J. PALASCIANO & JOSEPH P. HEATHMAN

LEGISLATION, PASSAGE, VETOES AND EXPANSION OF MEDICAL EVIDENCE UNDER LABOR CODE §4605

BY: SCOTT A. O'MARA

I. PASSED LEGISLATION

Labor Code §3212.15 sets forth specific safety members that have entitlement to a presumption regarding post-traumatic stress disorder (PTSD). The code has an expiration date that has been extended to 01/01/2029. Previously the expiration of this Labor Code was 01/01/2025.

The new extension to 01/01/2029 is an important recognition of the safety members as set forth in Labor Code §3212.15 including firefighters and peace officers as set forth in Section 830.1 of, subsection (a), (b) and (c) of Section 830.2 of, Section 830.32 of, subsection (a) and (b) of Section 830.37 of, Section 830.5 of, and Section 830.55 of, the Penal Code, who are primarily engaged in active law enforcement activities.

The Code state specifically the term "injury" is used in the division includes post-traumatic stress disorder.

The injury so developing or manifesting itself in these situational employments are presumed to arise out of and in the course of employment. Post the worker retiring or seeking another job, the presumption is also extended allowing coverage of the departure from the service for a period of three months for each full year of required service, but not to exceed sixty months for any situations commencing with the last date actually worked in the specified capacity. The Code also goes back and differentiates between a cumulative trauma injury and a specific injury that is caused by an extraordinary employment condition.

The extension of this through 2029 is a necessity for the recognition of the demanding work situation that these groups are exposed too. It is not just the work situation, but the carryover from the exposures that they have had that have a continuation in their mind no matter where they are, whether that is with their friends, family, golfing, swimming, surfing, etc. Many times there are flashbacks as to what their exposure has been.

This expansion is a societal expression and recognition of the unique employment situations and provides opportunities for the members to continue to receive improvement and have compensation if they are removed from their work during this recovery period.

The legislation, Senate Bill 623 that has been signed by the Governor again is an important acknowledgement and protection for the safety members extending the presumption to 01/01/2029.

ASSEMBLY BILL 621

Assembly Bill 621 has been approved by the Governor on 10/8/2023. This Legislation modifies Labor Code §4707 expands family of members of the Public Employment Retirement System (PERS), who may seek special death benefits as allowed pursuant to Public Employment Retirement Law. What is significant is that these benefits under PERS for various workers families is compensation that is paid out from PERS, and at the same time the family members pursuant to the modifications of §4707 could receive concurrent workers' compensation benefits and the Public Employment Retirement System benefits. These dual benefits that these families may receive are expanded to include an additional segment of peace officers, firefighters and certain members of Unit 8 of the Public Employment Retirement System. The application is retroactive back to 1/1/2019, where injuries not previously claimed or resolved.

II. VETOED LEGISLATION

The Governor vetoed:

AB 1213 would have established that from Jan. 1, 2024 to Jan. 1, 2027, TD benefits to which an injured worker could have received between those dates of a utilization review denial and the date treatment is authorized shall not be included in the calculation of aggregate disability payments. The bill would have allowed extending the cap by up to 90 days in cases where an injured worker successfully appeals a UR determination denying or modifying a treatment request.

AB 1145, by Assemblymember Brian Maienschein, D-San Diego, would have added to the existing PTSD presumption nurses, psychiatric technicians and medical and social services specialists working for the Corrections and Rehabilitation, Developmental Services and State Hospitals departments.

AB 699, by Assemblymember Akilah Weber, D-San Diego, would have made conditions including skin cancer, hernias, heart trouble, cancer, post-traumatic stress disorder and biochemical exposure presumptive injuries for full-time members of the boating safety unit in the San Diego Fire Rescue Department.

SB 391, by Sen. Catherine Blakespear, D-Encinitas, would have added peace officers with the Fish and Wildlife and Parks and Recreation departments to the list of first responders already covered by a presumption that skin cancer is an occupational disease.

III. LABOR CODE §4605

Labor Code §4605 allows expansion of medical opinions beyond the parameters of Utilization Review and/or Independent Medical Review, and Qualified Medical Evaluators.

This Legislative enactment 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 of an Award of compensation. It also further states that a Qualified Medical Evaluator (QME) or authorized treating physician shall address any report procured pursuant to the Section and shall indicate whether he/she agrees or disagrees with the findings or opinions stated in this report and shall identify the basis for this opinion.

Labor Code §4605 is a appropriate tool for the worker to obtain a examination that is based upon current medical studies or doctors that have expertise in a unique field where the medical problems are standing.

Without usage of Labor Code §4605 if the worker has a treating doctor and/or a QME or an IMR doctor that lacks the understanding and sophistication, this could dramatically limit the care and treatment of benefits that the worker should have available.

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 then 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 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.

♦♦

LAW1199.COM NEWSLETTER™

THE LAW OFFICES OF

SCOTT A. O’MARA

2370 Fifth Ave.
San Diego, CA 92101-1611

4344 Latham St. – Ste. 250
Riverside, CA 92501-1766

1-800-LAW-1199
(1-800-529-1199)
951-276-1199
www.law1199.com

NOTICE: *Making a false or fraudulent Workers’ Compensation claim is a felony subject to up to 5 years in prison or a fine of up to $50,000 or double the value of the fraud, whichever is greater, or by both imprisonment and fine.*

♦♦