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WORKERS' COMPENSATION

E&J Gallo Winery v. WCAB,
F047246, Cal. App. Ct. 5th Dist.
(December 21, 2005).

Court of Appeal's SB899 Apportionment Analysis Results In Almost 100% Increase In Permanent Disability Award.

This case is a victory for employees/applicants. The ruling revises the apportionment analysis increasing the benefits due to an applicant who has two separate injuries for one employer who is permissibly self-insured.

In 1999, Applicant had a prior stipulation with his employer at 20.5 % worth \$11,680. After a brief period on modified duty, he returned back to his usual and customary occupation. In 2002, Applicant injured his back again. A judge decided that Applicant now had a 73% permanent disability worth \$104,305. The WCJ subtracted the \$11,680 from the prior award and awarded Applicant \$92,625.

Applicant's employer appealed the ruling. The employer argued that the proper way to apportion the award should have been 73% less 20.5% for an award of 52.5%, which would be an award of \$48,662.50. This is the formula adopted by the Supreme Court in Fuentes v. WCAB, (1976) 16

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Cal.3d 367, using the repealed Labor Code § 4750, which is a formula that has been used for almost 30 years.

The Court of Appeal disagreed. It found that Fuentes is no longer controlling after the repeal of Labor Code § 4750. The court was primarily guided by the new Labor Code § 4664 which states that the employer shall only be liable for the percentage of PD directly caused by the injury and by the overriding principle that the workers' compensation law should be liberally construed to extend benefits. Thus, an employee who suffers two injuries with the same employer should be compensated the same amount as an employee who suffered one injury with the same employer. It also reasoned that the Fuentes calculation would preclude a finding of a 100% disability for any employee who had previously stipulated any injury under the new Labor Code § 4663. The employer would always be allowed to deduct the prior award.

Given this, the Court held that the WCJ's calculation was correct because it gave the injured employee more PD for injury caused by his sole employer. Therefore, the correct calculation of a PD award would be to determine the monetary value of the injured employee's overall disability given the current injury and subtract the monetary value of the prior award. In this case, Applicant had an overall PD of 73%. He gets a \$104,305 plus life pension. The employer then gets to deduct the \$11,680 paid out for the prior stipulation for total payout to Applicant of \$92,625 plus a life pension.

This case adversely affects employers especially with the recent increases in PD rates. This case was limited to self-insured employers who have an employee who has suffered multiple industrial injuries to the same body part. The Court suggested there might be a different result with two employers or one employer insured by multiple insurers. However, its overriding logic suggests otherwise—that an employee who suffered multi-

ple industrial injuries to the same body part should be compensated the same as an employee who suffered one injury. Plus, this would mean indemnity not only changes given date of injury but also if an employee was employed by one rather than two employers or if an employer changed insurers during one's employment. Given this, we expect that the case will be appealed to the Supreme Court and that the Supreme Court will grant review.

Also, it appears that this decision strongly discourages employers from bringing back or hiring workers with injuries that caused permanent disability. If the injured or disabled employee has a new injury, the employer is going to get hit with the higher rates and only gets a reduction for the amount of money paid out at the old rate. One could argue that this case might have the dramatic effect of reducing almost all of the savings from SB899 to virtually nil. This could not have been the intent of the legislature when they passed SB899.

EMPLOYMENT

County of San Luis Obispo v. WCAB,
05 C.D.O.S. 9180, Cal. App. Ct. 2nd Dist.
(September 29, 2005).

County Could Justifiably Dismiss Employee When His Medical Restrictions Were Inconsistent With Job Duties

Plaintiff-in-interest sustained industrial injuries from a violent patient while working as a mental health therapist for the County. Plaintiff returned to work without restrictions and was transferred to a different mental health facility. Soon after his transfer, the plaintiff underwent back surgery and obtained two medical recommendations that his work duties be modified to restrict him from restraining patients. Plaintiff was dismissed from his job after the County administrator concluded that restraining troubled teenagers was an essen-

tial work duty and the County would be liable if plaintiff did not act to restrain patients to prevent injury to others. The Court held that the County acted with reasonable business necessity and justifiably dismissed plaintiff for not fulfilling work duties required of him. Plaintiff did not prove his case when the record had no evidence that he was singled out for disadvantageous treatment by the County.

Gary Ross v. Ragingwire Communications, Inc.,
05 C.D.O.S. 8125, Cal. App. Ct. 3rd Dist.
(September 7, 2005).

*Employer Did Not Violate California Law By
Firing Employee For Use Of Medicinal
Marijuana*

In accordance with the California Compassionate Use Act of 1996, Plaintiff obtained a prescription for the medicinal use of marijuana for his chronic back pain. However, when plaintiff's employer learned that plaintiff had tested positive during a pre-employment drug test, it discharged him. The trial court dismissed his lawsuit for wrongful termination because he could not legally state a claim as an employer is entitled to dismiss an employee if they test positive for illegal drugs.

Dismissal upheld. California law does not prevent an employer from firing anyone who uses illegal drugs because they have a legitimate interest in preventing this behavior. Since the use of marijuana is illegal under federal law, a court has no legitimate duty to require an employer to accommodate an employee's use of marijuana. Contrary to plaintiff's claim, the Compassionate Use Act does not explicitly protect the employment rights of persons using medicinal marijuana – it simply permits a person to use this drug without incurring state criminal law sanctions.

On appeal, plaintiff argued that the trial court wrongfully dismissed his lawsuit because defendant fired him for conduct that did not violate California state criminal laws.

TORTS

Rinehart v. Boys & Girls Club of Chula Vista,
Cal. App. Ct. 4th Dist.
(October 13, 2005).

*Business Not Liable For Negligent Supervision Or
Premises Liability When Non-Members Threw
Rocks At Children On Playground*

Plaintiff, a member of the Boys & Girls Club, was injured while at play on the Club's playground. Unidentified non-members entered the property through holes in a chain link fence and threw rocks that hit plaintiff in the head. Plaintiff sued contending that the Club owed him a duty to provide adequate supervision and it breached this duty by not providing constant supervision on the playground. The Court dismissed plaintiff's lawsuit because he did not show that there were any previous incidents similar in nature or that his injuries were reasonably foreseeable. A property owner cannot be liable for unreasonably foreseeable, independent criminal acts of third parties upon its premises.

CIVIL LITIGATION

Shaoping Corder v. Lisa Corder,
05 C.D.O.S. 8611, Cal. App. Ct. 4th Dist.
(September 26, 2005).

*Evidence Of Decedent's Intent To Divorce Wife
Was Admissible To Reduce Portion Of Wrongful
Death Proceeds*

Plaintiffs Shaoping Corder (wife) and Lisa Corder (adult daughter) settled with defendant for the

lump sum of \$1.1 million based on the wrongful death of Raymond Corder. After settlement, plaintiffs could not agree on the apportionment of this sum and they brought suit against each other to determine the division of the settlement proceeds.

Lisa presented testimony that her father intended to divorce Shaoping. Lisa also presented significant evidence supporting her loss of society, care and companionship. Accordingly, the trial court determined that Lisa's reasonable expectation of "benefits" in the form of support from her father was substantial because of their close relationship and his financial support. As for Shaoping, she could only expect to receive the benefits of Raymond's support for at most four months more before the impending divorce.

California's long history of wrongful death cases allowing evidence of the "kind and loving" feelings between decedent and the wrongful death plaintiff make it clear that it is proper for a beneficiary to produce evidence of the decedent's affection. If a defendant has the right to rebut this type of evidence, then an adverse wrongful death plaintiff must also have the same right when apportioning a lump-sum award. Here, statements of Raymond's intent to terminate the marriage were substantial evidence in support of the trial court's apportionment. It did not matter whether Raymond's suspicions about his wife's behavior were right or wrong – what mattered is what he intended to do about it. Apportionment upheld.

The trial court apportioned the wrongful death proceeds giving 90% to Lisa and 10% to Shaoping. Shaoping appealed arguing that the evidence supporting Raymond's intent to divorce her was "irrelevant."

IN THE NEWS

Managing Partner Speaks At NRMCA Conference

Patrick E. Taylor, Jr., managing partner of Taylor & Gutierrez LLP, was a key-note speaker at the National Ready Mixed Concrete Association Business Administration Conference. This was a 3-day educational program regarding new developments and techniques in the area of financial and administrative management for construction and construction materials industries. Mr. Taylor's presentation was designed to detail liability exposures for businesses in general and those specifically within the construction industry. On a scale of 1-4, with 4 being the highest rating given to a speaker, Mr. Taylor received a 3.84. The PowerPoint presentation can be viewed on the firm website at www.taylor-gutierrez.com/newsletters.shtml.

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