

KEGEL, TOBIN & TRUCE
INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/CLIENTS
FROM: JOE TRUCE
DATE: March 18, 2004
RE: WHAT DO I DO WHEN MY LABOR CODE §5402 DENIAL IS LATE?

I have fielded several questions recently as to whether or not we can still prevail on cases involving the defense of "post termination" and "good faith personnel action" when we have not denied the case within 90 days pursuant to Labor Code §5402.

I believe the answer can be found in a Court of Appeal decision entitled Rebecca James v. Workers' Compensation Appeals Board, Paso Robles Convalescent Hospital 55 Cal App. 4th 1053, 62 CCC 757.

This case involved Labor Code §3208.3(d) which provides "that in order for the employee's psychiatric injury to be compensable, the injured employee must be employed for more than six months..."

In James the applicant filed a claim alleging psychiatric disability but had not worked for the employer for more than six months. In response to the employer's claim that the case was barred pursuant to Labor Code §3208.3(d), the applicant claimed that the injury was presumed to be compensable as the case had not been denied within 90 days as mandated by Labor Code §5402.

However, in holding that Labor Code §3208.3 as amended trumps Labor Code §5402 the Workers' Compensation Judge (WCJ) held as follows:

**"This is because the opening phrase of 3208.3, subdivision (d) states:
'Notwithstanding any other provision of this division...'"**

This phrase was added to the amended version of Section 3208.3, subdivision (d), which postdated the enactment of 5402. Because both sections 5402 and 3208.3 are part of Division 4 of the Labor Code, and the legislature is presumed to be aware of how its existing laws will affect new laws it enacts, the WCJ reasoned that Section 3208.3, subdivision (d) created an exception to Section 5402..."

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In a rather brief decision, the Court of Appeal agreed with the reasoning of the WCJ and the Board.

On the applicant's Petition for Reconsideration, the Board affirmed the WCJ's reasoning and concluded "that the legislature made Section 5402 subordinate to the provisions of Section 3208.3, subdivision (d),..."

This decision is rather narrow, as it only addresses Labor Code §3208.3(d) which provides in relevant part as follows:

"Notwithstanding any other provision of this division, no compensation shall be paid pursuant to this division for a psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months..."

However, the reasoning of the court may well apply to the legislature's concurrent amendments to Labor Code §3208.3 involving good faith personnel actions and post-termination claims.

For example, Labor Code §3208.3(e) provides as follows:

"Where the claim for compensation is filed after notice of termination of employment or layoff, including voluntary layoff...No compensation shall be paid..."

Additionally, Labor Code §3208.3(h) provides:

"No compensation under this division shall be paid by an employer for a psychiatric injury if the injury was substantially caused by a lawful, non-discriminatory, good faith personnel action..."

Both of the above amendments to Labor Code §3208.3, similar to the six month employment limitation, may well supercede Labor Code §5402 under the court's reasoning that the subsequent amendments to Labor Code §3208.3 create an exception to Labor Code §5402.

Also, we have an additional argument: Labor Code §5402 refers to a "denial of injury" and the amendments to Labor Code §3208.3 simply provide that no compensation is payable in cases in which the applicant is employed for less than six months, the applicant's "injury" is filed post-termination, or the applicant's "injury" is due to a good faith non-discriminatory personnel action.

Therefore, we can certainly claim that even though there is a "presumption of injury" this is not

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being disputed since the amendments to Labor Code §3208.3 provides that even in the case of an injury, **no compensable is payable** if the injury is caused by either a good faith non-discriminatory personnel action or that the claim is a post-termination claim.

A handwritten signature in black ink, appearing to be the initials 'A' followed by a horizontal line.

WJT:dab