

**KEGEL, TOBIN & TRUCE**  
**INTER - OFFICE MEMORANDUM**

**TO:** ALL ATTORNEYS/CLIENTS

**FROM:** JOE TRUCE

**DATE:** March 18, 2004

**RE:** LABOR CODE §5502 AND THE ADMISSIBILITY OF  
EVIDENCE DISCOVERED SUBSEQUENT TO THE  
MANDATORY SETTLEMENT CONFERENCE

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In a Court of Appeal decision certified for **non-publication**, the court in Gelson's/Arden Group v. WCAB (Bacz), Court of Appeal, Second Appellate District, Division 7, annulled a decision of the WCAB in which the Board refused to admit into evidence records obtained subsequent to the Mandatory Settlement Conference and while the case was under submission.

The applicant alleged a bilateral carpal tunnel syndrome and as the defendant disputed compensability, the case was first set for a Mandatory Settlement Conference and then went to Trial before Judge Howard Goodman of the Appeals Board District Office in Santa Monica.

At Trial the applicant testified that her problems began in the year 2000 and became worse with the continuing use of her hands. Judge Goodman found that the case was compensable and issued an award of continuing temporary disability.

However, while the case was under submission, defendants filed a Petition to Reopen for newly discovered evidence, as defendants, through a "master trace index," had uncovered medical records for the USC Medical Center showing that the applicant's carpal tunnel complaints came on almost immediately from the onset of her employment instead of a year later as she testified at Trial.

In answer to defendant's Petition for Reconsideration, Judge Goodman indicated that the new evidence would not be admissible, as discovery closed at the MSC and defendants did not show due diligence in obtaining the newly discovered evidence.

The Board affirmed Judge Goodman's decision but the Court of Appeal granted review and found that the defendant "had shown reasonable diligence in its discovery efforts. The discovery before the MSC was based on applicant's deposition testimony, which revealed nothing about prior treatment in 1999 or at the USC Medical Center. Although defendant could have obtained a "master trace" before the MSC, and it may be better practice to routinely check all possible sources, it was reasonable to rely on applicant's deposition testimony and records which appeared straightforward.

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After all, even the WCJ believed applicant. Since due diligence was exercised, the USC medical records should have been admitted as newly discovered evidence..."<sup>1</sup> Clearly, the Court of Appeal was upset at the fact that the applicant basically lied at his deposition and did not want the defendant to be prejudiced because of the applicant's misstatement.

Unfortunately the Court of Appeal did not certify its decision for publication, so this case is not citeable. However, we should always remember that simply because we discover evidence subsequent to the discovery cutoff at the Mandatory Settlement Conference, we can still argue that the evidence is admissible as newly discovered evidence.

  
WJT:dab

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<sup>1</sup>The Gelson's/Arden case is cited as 32 CWCR 7.