

# INTER-OFFICE MEMORANDUM

**TO:** ALL ATTORNEYS/ALL OFFICES/CLIENTS

**FROM:** JOE TRUCE

**DATE:** January 29, 2002

**RE:** BOARD IMPOSES LABOR CODE SECTION 5814 PENALTY  
WHEN DEFENDANT UNILATERALLY RE-  
CHARACTERIZES PRIOR PAYMENTS OF PERMANENT  
DISABILITY AS TEMPORARY DISABILITY

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The Writ denied case of **Liberty Mutual Insurance v. Workers' Compensation Appeals Board (Cedar Florian)** should raise a "red flag" to all in the defense industry.

In this case the defendant insurance carrier received an adverse decision that the applicant was entitled to temporary total disability benefits (retroactively) from January, 1996 to the present and continuing.

As defendant had felt that the applicant had long ago achieved a permanent and stationary status, the defendant had paid the applicant substantial amounts of VRMA and permanent disability benefits as well as total temporary disability benefits.

However, when faced with a decision that the applicant had actually been temporarily totally disabled since the date of the injury, the defendant insurance carrier simply computed the lump sum of temporary total disability benefits that were due to the applicant and subtracted the amount of permanent disability and VRMA benefits that had already been paid and sent the applicant a check for the balance.

The applicant's attorney then filed for multiple penalties and with respect to the issue as highlighted in this memo, requested a penalty for failure to properly and timely pay the award of temporary disability benefits.

In its decision on defendant's Petition for Reconsideration, the Appeals Board found that "we are convinced that defendant in reality took unauthorized credit for permanent disability advances against the total temporary disability payments, which mandates a penalty, citing **Rohrback v. WCAB (1983)**, 144 Cal. Ap. 3rd 896 . . ."

This certainly seems to be an unjust decision as requiring the defendant to pay the applicant

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Page 2

temporary and total disability as per the Award (retroactively going back to January, 1986) would result in a windfall to the applicant as the applicant would not only receive a check for the entire period of temporary total disability, but would also have substantial payments of permanent disability and VRMA which by terms of the F&A would not be due and payable.

However, I think that the Board is sending a message to us in the defense industry that if we to take credit for one benefit against another benefit (here credit for temporary disability against permanent disability already paid) we are to file the appropriate petition with the Board requesting that the Board allow such a credit pursuant to their authority as set forth in Labor Code Section 4909.

However, under this case we can no longer take credit against temporary disability owed by subtracting permanent disability benefits advanced unless we receive the appropriate order from the Board.

Therefore, whenever we are confronted with the situation that confronted Liberty Mutual Insurance Company in the above-referenced case, we are to immediately confer with our client with respect to filing a petition with the Board for credit pursuant to Labor Code §4909. Otherwise we may well be subjected to a penalty pursuant to Labor Code §5814.

WJT:wf

Enclosure- 3 WCAB Rptr. 10,355

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