

INTER - OFFICE MEMORANDUM

TO: ALL ATTORNEYS/CLIENTS

FROM: JOE TRUCE

DATE: February 5, 2004

RE: PAYMENT OF TEMPORARY DISABILITY WHILE
APPLICANT CONTEMPLATES SURGERY

In the case of Gray v. Applied Materials, Inc. 31 CWCR¹ the Board addressed the question of whether or not temporary disability was payable during the time that the applicant was contemplating surgery.

In Gray the Workers' Compensation Judge (WCJ) found that an injured worker "was not temporarily disabled while deciding whether to accept spinal surgery..." In reversing the WCJ, the Board held that the injured worker is entitled to temporary disability during the period that he and/or she is contemplating surgery and commented as follows:

"The panel said that disability is not permanent and stationary until all reasonable healing modalities have been attempted and all reasonable diagnostic testing has been completed. Because a decision to undergo spinal surgery is not one to be made lightly in view of the possible risks, an injured worker is not to be penalized for understandable anxiety about surgery as long as the delay is not unreasonable..."

Although the Board did not specify the parameters of a reasonable period that an injured employee would have to decide whether or not he and/or she was going to undergo surgery, the period in question in this case was from October 23, 2001 through December 6, 2001. My impression from reading this case is that the Board would deem anywhere from six weeks to two months to be a reasonable period for an injured worker to make up his mind on surgery.

However, the most important part of the decision from our standpoint, is the fact that the Board opinion goes on to discuss the applicable case law on temporary disability and when a disability becomes permanent and stationary. For example, the Board cites Sweeney v. IAC (1951) 107 Cal. 2nd 155, 16 CCC 264 for the proposition that an applicant's disability is permanent and stationary "when the likelihood of improvement in the injured employee's condition by further medical treatment is remote."

¹The full text of the Gray v. Applied Materials, Inc. decision is attached.

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The Board also notes that Administrative Rule 10152 provides that a disability is considered permanent "when the employee has reached maximum improvement or the condition has been stationary for a reasonable period of time.

These are important principles to keep in mind at an Expedited Hearing in which our defense QME has found the applicant to be permanent and stationary and the so-called primary treating physician continues to the applicant on temporary disability.

WJT:dab
Attach - Gray