

COMPENSATION NEWS

MONTHLY REPORT

Appellate Court decides 132 (a) and apportionment case

This is a published appellate court decision

This is a significant decision from an appellate court, on two important issues.

The applicant developed pain in his elbows, wrists and hands and filed a workers' compensation claim. The parties agreed to an Agreed Medical Examiner (AME) who determined that 70 % of the applicant's problems were industrial and 30 % were nonindustrial.

The applicant returned to modified duties with the employer. The applicant need medical care for his injuries and the employer required him to use earned vacation time instead of sick time for medical appointments.

The applicant file a 132 (a) claiming discrimination for making him use vacation as opposed to sick time.

The applicant went to trial and the Workers' Compensation Judge (WCJ) found no discrimination and found on amended award the need for apportionment under SB 899. The Workers' Compensation Appeals Board (WCAB) concurred.

The appellate court indicated in regards to the discrimination that the employer did not establish a "legitimate business purpose for this discrimination."

They indicated that employer may not discriminate against active, industrially-injured workers in the use of sick leave.

The applicant contended that the apportionment was speculative. The AME indicated his apportionment was not precise and required some intuition and medical judgement. The court stated this does not mean his conclusions are speculative and therefore, the apportionment, was substantial evidence. The AME stated the factual basis for his determination were based on his medical expertise.

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