

# COMPENSATION NEWS

MONTHLY REPORT

## Appellate Court will not rescind an old award that was incorrect due to waiver

This is a non published Appellate Court decision that has major implications.

This is a very significant case for workers' compensation purposes. Even though this case is not published it cites published cases for principles that can be effectively utilized.

The applicant had an admitted injury in 1994. Earnings were an issue presented to the original Workers' Compensation Judge (WCJ). The WCJ found the average weekly earnings to be \$507 a week resulting in a

temporary disability rate of \$338.17. The applicant apparently petitioned the Workers' Compensation Appeals Board (WCAB) and lost on the issue of earnings.

The applicant again raised the issue of earnings in 2008. The WCJ in a hearing raised the temporary disability weekly rate to \$410.00. The employer appealed and the WCAB indicated that the applicant had not timely filed a petition to reopen and therefore reversed the WCJ.

The WCAB has the authority to "rescind, alter or amend" its awards on the showing of "good cause". Labor Code 5803. However, this has to be accomplished within five years of the date of injury. Labor Code 5804.

The court indicated under the "Doctrine of waiver" a party

loses the right to appeal an issue caused by their own affirmative conduct or failings to correct an error. Under the doctrine of "invited error" a party is estopped from asserting prejudicial error where their own conduct caused the error.

Therefore, in this instance even though temporary disability was paid at the incorrect rate the applicant was not allowed to correct the error and the original incorrect award was upheld.

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