

COUNTY OF SAN DIEGO v. WCAB (PIKE):
Court of Appeal Recaps the 104 Week TD Statute
the Board Temporarily Uncapped

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The Fourth District Court of Appeal has reestablished a semblance of rationality over how long an applicant can receive temporary disability in its published *County of San Diego v. WCAB (Pike)* decision issued on March 6, 2018. The Board had previously turned the 104 week temporary disability cap (*Labor Code §4656 (c)(2)*) on its head by ruling that a deputy sheriff who injured his right shoulder in July 2010 had the right to receive §4850 salary continuation benefits and then temporary disability more than 5 years from the date of injury, simply because he had filed a petition to reopen his claim within 5 years from that date of injury, alleging a worsening shoulder condition.

The County had paid applicant additional §4850 salary continuation and then temporary disability benefits through late July 2015, the 5th anniversary of his injury date. The deputy claimed 6 1/2 added months of §4850 benefits and then temporary disability benefits for five more months. The judge followed the "open barn door" theory of awarding benefits, finding that applicant could get benefits beyond the five-year limit just by timely filing that petition to reopen. He concluded that he had jurisdiction to award such temporary total disability (which includes §4850 benefits) beyond 5 years from the injury date, but was kind enough to cut off benefits at 104 weeks, though beyond the 5th anniversary of the date of injury. A Board panel majority favored the judge's interpretation, with the dissent very civilly pointing out that the emperor had no clothes.

The Court of Appeal agreed with the dissent. *Labor Code §4656(c)(2)* applies to all injuries on or after January 1, 2008 and states that aggregate payments after that date for temporary disability are not to extend more than 104 compensable weeks within a period of **5 years from the date of injury**. According to the court, the injured deputy and the California Applicants' Attorneys Association, in their appellate briefs, failed to provide **any** interpretation of the statute, let alone one that allows temporary disability more than 5 years from the date of injury. The Board does have jurisdiction over a case once a petition to reopen is filed, but "in order to award benefits,

the Board must have jurisdiction to act, **and** the law must entitle the worker to benefits." No such entitlement exists in this case. In other words, once a petition to reopen is filed, the judge can award further permanent disability as long as the condition has permanently worsened. However, temporary disability benefits stop abruptly 5 years from the date of injury. End of story and end of judicial game playing with an absolutely clear statute.

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