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AN EXAMINATION OF THE *DYNAMEX* CASE:

How *Dynamex* Changes the Standard for Employee vs. Independent Contractor

By Craig Lepore, LFLM San Diego

On April 30, 2018, the California Supreme Court issued an opinion in a wage and hour case called *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 232 Cal. Rptr. 3d. 1, 83 Cal. Comp. Cases 817. Although not a workers' compensation case, *Dynamex* was the subject of its own special seminar at the January 2019 California Applicants' Attorneys Association meeting.

Dynamex was decided by the California Supreme Court with Chief Justice Cantil-Sakauye writing the opinion. She began her opinion by discussing the importance and difference of employee versus independent contractor classification. The *Dynamex* Court wrote as follows:

> Under both California and federal law, the question of whether an individual worker should properly be classified as an employee, or instead, as an independent contractor has considerable significance for workers, businesses, and the public generally. On the one hand, if a worker should properly be classified as an employee, the hiring business bears the responsibility of paying the federal Social Security and payroll taxes, unemployment insurance taxes and state employment taxes, providing workers' compensation insurance, and, most relevant for the present case, complying with numerous state and federal statutes and regulations governing the wages, hours and working conditions of employees. The worker then obtains the protection of the applicable labor laws and regulations. On the other hand, if a worker should properly be classified as an independent contractor, the business does not bear any of those costs or responsibilities, the worker obtains none of the numerous labor law benefits, and the public may be required under applicable laws to assume additional financial burdens with respect to such workers and their families. *Dynamex* at p. 912-913.

The Supreme Court described its holding and new test for wage and hour cases in the *Dynamex* decision. This test has been classified as the ABC test. The ABC test consists of three parts or factors, and the hiring entity has the burden to establish each of those three factors:

> (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and

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REVISITING CUMULATIVE TRAUMAS AND *WESTERN GROWERS*

By John Orman & Emilee Brown, LFLM Fresno

Cases become complex when there is more than one injury, and they become even more complex when multiple, cumulative injuries overlap different time periods with different employers. Establishing the date of injury in a cumulative trauma injury can be complex but is imperative for defending cumulative trauma claims.

Labor Code section 3208.2 states "when disability, need for medical treatment, or death results from the combined effect of two or more injuries, either specific, cumulative or both, all questions of fact and law shall be separately determined with respect to each such injury."

Labor Code section 5303 states "no injury, whether specific or cumulative, shall, for any purpose whatsoever, merge into or form a part of another injury; nor shall any award based on a cumulative injury include disability caused by any specific injury or by any other cumulative injury causing or contributing to the existing disability, medical treatment or death."

It is imperative to correctly determine whether the applicant's injury is a specific injury, part of a cumulative trauma injury or possibly part of more than one cumulative trauma injury. It is equally important to establish the dates of injury for the alleged injuries.

Statutes of limitations defenses, contribution, apportionment and coverage are among the issues that can be greatly affected by the ultimate findings of fact, and one of the seminal cases in dealing with these types of issues is *Western Growers v. WCAB* (Austin) (1993) 16 Cal. App.4th 227.

***Western Growers v. WCAB* (1993) 16 Cal. App. 4th 227**

In *Western Growers*, the applicant worked for Kirshcenman Enterprises as a farm laborer from 1962 until March 17, 1987. The employer was insured by Western Growers Insurance Company and Industrial Indemnity during this period.

The injured worker was hospitalized from June 10, 1985 to July 26, 1985 after suffering major depression caused by work-related stress. He was released to work but continued under the care of a physician with medications.

The injured worker's condition worsened until he could no longer perform his job duties on March 17, 1987.

The AME, Dr. Wells, found that the applicant never recovered from his bout of depression in 1985, that the stress before and after the hospitalization was the same, and the injured worker maintained use of medications following his hospital discharge and his last day of work.

Dispute arose as to whether there was one continuous cumulative trauma or two separate periods of cumulative trauma with different carriers: the first being before the 1985 hospitalization and the second occurring after the hospitalization and up to the injured worker's last day of work.

The matter proceeded to Trial where the WCJ found that there was only one cumulative trauma, despite two separate periods of temporary disability. Under Labor Code section 5500.5, all liability was shifted onto the last carrier, Western Growers, as they provided coverage for the entire last year. The WCAB affirmed this decision.

The Court of Appeal upheld the decision that the applicant sustained a single cumulative trauma injury. The Court noted that the two periods of temporary disability were linked by the continued need for medical care.

However, the Court annulled the award against Western Growers, finding that liability should be imposed on the first carrier because under Labor Code section 5412, the injured worker first suffered disability on June 10, 1985 and had testified that he knew his problems were work-related at that time.

Western Growers established the factors to be considered when deciding whether separate cumulative traumas exist: 1) continued medical treatment; 2) distinct

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periods of temporary disability; 3) similar injurious exposure; and 4) specific events causing separate periods of disability.

Subsequently, the courts have reached wide-ranging results in interpreting and applying *Western Growers*.

One Cumulative Period When No Lost Time For Separate Exposure

In *TAD Resources International*, the Court found the applicant sustained one continuous cumulative trauma injury based upon the opinion of the AME Dr. Sanders. (*TAD Resources International, Pacific Employers Insurance Company vs. WCAB* (Kimmel) 65 Cal. Comp. Cases 227.)

In this case, the applicant injured his back in 1988 while working for Electrolux. The applicant underwent back surgery in April 1989 and discontinued treatment later that year. He resolved this case by way of Compromise and Release with medical treatment remaining open.

In 1992, the injured worker began employment with Century Inspection Services/SCIF. In 1993, the injured worker resumed medical treatment for his back under the 1988 claim. The injured worker was laid off by Century Inspection Services on May 29, 1994.

On August 3, 1994, the applicant started employment with TAD Resources/Pacific Employers Insurance and worked until February 17, 1995 when he was laid off again. In July 1995, the applicant underwent a second back surgery. Most of the treatment was paid under the 1988 injury with Electrolux.

The injured worker filed cumulative trauma claims against Century Inspection and TAD Resources. The Agreed Medical Examiner, Dr. Sanders, opined that exposure would be apportioned equally between the two employers based upon his finding that "the increase in change of symptoms started with work at Century and TAD and based upon the injured workers' assertion that job activities were very similar at the two companies."

At Trial, two cumulative trauma periods were found but each employer was found jointly and severally liable. TAD/Pacific Insurance was to administer benefits subject to contribution, and allowed a medical treatment lien against TAD/Pacific Insurance from the 1988 case.

The WCAB reversed in a split decision. The majority of the panel concluded the applicant sustained only one cumulative trauma from 1993 through February 17, 1995 and that liability is placed on the last 12 months of industrial exposure pursuant to Labor Code section 5500.5, consistent with the findings of AME Dr. Sanders. The court held the applicant did not sustain a period of disability (i.e. no lost time) to fix the date of injury under Labor Code section 5412 and that the last date of injurious exposure controls.

TAD/Pacific Employers filed for writ of review contending the applicant sustained disability pursuant to LC 5412 prior to working for TAD. The writ was denied.

Treatment Alone, Without Temporary Disability or Lost Time, Not Enough to Establish New CT

In *CA Rasmussen v. WCAB*, the court reasoned that without any lost time, a separate cumulative trauma period was not warranted despite a brief period of chiropractic treatment three years after symptoms were first experienced. (*CA Rasmussen v. WCAB* (1999) 64 Cal. Comp. Cases 1395.)

The applicant alleged a cumulative trauma from 1979 to May 19, 1997. He worked for R-Help Construction insured by Fremont for most of this period. During the last year of alleged exposure he also worked for CA Rasmussen insured by Liberty Mutual.

At his deposition, the applicant testified to first experiencing problems with his back in 1989, and that he knew the issues were caused by work. Beginning in December 1992, he sought chiropractic treatment while employed by R-Help. The applicant lost no time from work until May 1997.

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(B) that the worker performs work that is outside the usual course of the hiring entity's business; and

(C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

This standard is much more strict and difficult for employers to meet than the current controlling standard provided under the *Borello* decision in workers' compensation cases. In 1989, the California Supreme Court issued its opinion in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341, 54 Cal. Comp. Cases 80, whereby a plethora of factors were considered to determine whether a worker was an "employee" or an "independent contractor" in a workers' compensation case. The workers' compensation community has been using these Borello factors ever since to analyze the issue of employment.

The *Borello* test examines the total circumstances of the relationship between the business and the person performing the work, in light of the following 11 factors:

1. Whether the person performing work is engaged in an occupation or business that is distinct from that of the company;

2. Whether the work is part of the company's regular business;

3. Whether the company or the worker supplies the equipment, tools, and the place for the person doing the work;

4. The worker's financial investment in the equipment or materials required to perform the work;

5. The skill required in the particular occupation;

6. The kind of occupation, with reference to whether, in the locality, the work is usually done under the company's direction or by a specialist without supervision;

7. The worker's opportunity for profit or loss depending on his or her own managerial skill (a potential for profit does not include bonuses);

8. How long the services are to be performed;

9. The degree of permanence of the working relationship;

10. The payment method, whether by time or by the job; and

11. Whether the parties believe they are creating an employer/employee relationship.

Although no single factor in the Borello test is determinative, the first one, whether the individual's work is the service or product that is the company's primary business, is typically given the most weight.

Since the *Dynamex* decision issued, the workers' compensation defense bar has been attempting to hold the line by arguing that this is a civil, wage and hour case and not applicable to workers' compensation cases. However, defendants are not gaining traction at the Workers' Compensation Appeals Board.

Subsequent to *Dynamex*, the Court of Appeal held on October 22, 2018 in *Garcia v. Border Transportation*

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Group, LLC (2018) 28 Cal. App. 5th 558, that permitting a worker to engage in similar activities for other businesses is not sufficient to demonstrate that the worker is4"customarily engaged in an independently established business" for the purposes of the new ABC test. This results in a finding that the worker is an employee. However, in *Leamon Perkins v. Don Knox* (2018) 84 Cal. Comp. Cases 44, the Workers' Compensation Appeals Board sent the case back to the trial court for development of Borello factors. Thus, arguably *Borello* is still the law.

There is a bill in the California State Assembly known as A.B. 5 sponsored by Assembly Member Lorena Gonzalez which would codify the ABC test in the Labor Code. The text of A.B. 5 would change the law in California by codifying the Dynamex test in the Labor Code for workers' compensation cases. A section would be added to the Labor Code to read, for the purposes of provisions in the Labor Code, that "a person providing labor or service for remuneration shall be considered an employee unless the hiring entity demonstrates" that the ABC test outlined in *Dynamex* is met. The bill would require that the factors of the ABC test be applied in order to determine the status of a worker as an employee or independent contractor for all provisions of the Labor Code, unless another definition or specification of "employee" is provided.

Assembly Bill 5 provides exemptions to this definition of employee and ABC test for the following four listed occupations:

1. A person or organization who is licensed by the Department of Insurance.

2. A physician and surgeon licensed by the state of California performing professional or medical services.

3. A securities broker deal or investment advisor or their agents and representatives that are registered with the Securities and Exchange Commission or the Financial Industry Regulatory Authority, and

4. A direct sales salesperson as described in section 650 of the Unemployment Insurance Code.

If the legislation proposed by Assembly Member Gonzalez is passed into law, and the Dynamex ABC test becomes the standard, more workers will be classified as employees rather than independent contractors. This result is likely because companies that outsource significant aspects of their operation to independent contractors might not meet the burden of the B prong of the ABC test. The B prong requires that the worker performs work that is outside the usual course of the hiring entity's business. For companies in the gig or sharing economy like Uber, Lyft, Doordash, and Task Rabbit, it would be difficult for the company to prove that the worker is performing duties outside of the hiring entity's business. Rather, they are in the same field during the course of the performance of their duties.

It is important to note that companies such as Lyft and Uber do not view themselves as a livery service but rather as a technology platform wherein independent drivers use the service to locate fares. These companies have no drivers, only people who use the technology platform. Category "B" is where defendants can try and gain an advantage in specific cases. In situations where the drivers have another primary source of employment and only use Uber or Lyft to supplement their main income, they may still be independent contractors under *Dynamex*.

If the California Legislature adopts A.B. 5 (codifying the ABC test from *Dynamex* and requiring that it apply to California workers' compensation cases), then many workers previously classified as independent contractors may be re-classified as employees subject to workers' compensation laws and benefits. At the same time, the newly re-classified employers will be subject to workers' compensation coverage requirements, thereby increasing the cost of operations significantly.

Ironically, many independent contractors do not want to be classified as employees. Being a contractor provides a certain amount of freedom and autonomy not usually experienced by employees. Yet at the same time, many "independent contractors" seek to benefit from the workers' compensation system as if they are employees despite prior agreements to work as independent contractors, particularly in the "gig economy". As more claims for workers' compensation benefits arise among independent contractors, the very nature of such "jobs" will likely change. The freedom of being a contractor will erode as those workers are re-classified as employees thanks to codification of the Dynamex ABC test. ⌘

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Both the applicant's treating doctor and the medical-legal doctor indicated the applicant suffered a Cumulative Trauma injury throughout the entire course of his employment. Fremont joined CA Rasmussen prior to Trial.

At Trial, applicant elected to proceed against Fremont. The case settled by way of Compromise and Release. Fremont later petitioned for contribution against Liberty Mutual/CA Rasmussen.

The contribution issue was submitted to arbitration. The arbitrator found the date of injury was from May 19, 1996 to May 19, 1997. The Arbitrator also found that Fremont was entitled to contribution based upon the percentage of days worked in that year which resulted in approximately 67% reimbursement from Liberty Mutual.

In their report and recommendation, the arbitrator noted the applicant had worked many years in heavy construction until he was finally unable to continue working. They reasoned that this was exactly the scenario that Labor Code section 5500.5 was intended to apply. The arbitrator distinguished this case from *Western Growers*, as the applicant had a brief stint of chiropractic treatment but **did not miss any time from work**.

The Workers' Compensation Newsletter is published by Laughlin, Falbo, Levy & Moresi LLP. Contributors to this issue include Emilee Brown (Fresno), Craig Lepour (San Diego) & John Orman (Fresno).

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The WCAB affirmed, finding the medical treatment provided was not sufficient to establish a new cumulative trauma. They looked at the applicant's deposition testimony and found that the 1992 chiropractic treatments were not significant or substantial because they were transitory in nature and not accompanied by any period of temporary disability. One dissenter argued that *American Bridge Company* should apply, where a significant need for medical treatment alone (without a period of temporary disability) was sufficient to establish the date of injury under LC 3208.1.

Diagnosis Without Lost Time/ Earning Capacity Not Enough to Find Second CT

In *Saldana v. WCAB*, the court found that the mere diagnosis of a hernia was not enough to trigger an injurious period, especially in light of no lost time from work or loss of earning capacity. (*Saldana v. WCAB* (1994) 59 Cal. Comp. Cases 1109.)

The applicant was employed by Pleasant Hill Bayshore Disposal as a garbage collector (purchased in April of 1990 by Browning- Ferris Industries) and sustained an admitted injury to back and tailbone on October 17, 1991. He also alleged a cumulative trauma injury for a hernia from 1969 to October 1991, when the applicant left work.

At Trial, the WCJ found: 1) a cumulative trauma injury to the applicant's abdomen up to the last date of work, 2) a period of total temporary disability from August 27, 1992 to the present and continuing, and 3) defendants unreasonably delayed temporary disability and medical treatment such that penalties are warranted.

Defendants petitioned for reconsideration, asserting in relevant part, that the date of injury for the hernia was in 1985 when the applicant first noticed symptoms of the hernia. Defendants argued that Labor Code section 5412 should apply. Defendants argued the date of injury should be shifted onto their predecessor.

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The record contained no evidence of lost time from work due to the hernia, which began to develop in 1985. The applicant testified he tried to dump a bin and felt pain. The record contained no evidence that the applicant knew he had permanent disability, and no evidence of work restrictions. There was also no loss of earning capacity.

The WCJ held that the mere fact the applicant's physician diagnosed a hernia before filing the claim was insufficient to show permanent disability. The applicant continued working without losing time or restricting his duties. He found no compensable disability back in 1985, and therefore *Western Growers* was not applicable.

Either Compensable Temporary Disability or Permanent Disability Enough to Satisfy Disability Requirement

In *Rodarte* the Court of Appeals held that either permanent disability or compensable temporary disability satisfied the disability requirement of Labor Code section 5412. (*State Compensation Insurance Fund v. WCAB (Rodarte)* (2004) 119 Cal.App.4th 998.) Modified work alone without wage loss did not establish an adequate basis to satisfy the requirement.

The applicant in *Rodarte* developed carpal tunnel while working at a sound equipment manufacturing plant. She began treating on October 3, 1997 and eventually returned to modified work with wrist splints. She filed a claim at that time, but management was not aware of the injury. In August of 1998 applicant was terminated after management learned of her injury.

The Workers' Compensation Judge found the last date of the cumulative trauma to be August of 1998, and the WCAB agreed. State Fund, who carried liability for the entire period, appealed, arguing that when applicant filed a claim form and received medical treatment, the wrist splints and was working modified duties in October of 1997, she had disability and knowledge of work-relatedness.

The Court of Appeals reasoned that the medical treatment alone was not a disability, nor was the modified work, but that either could have led to a finding of potential permanent disability. Prior WCAB cases had resulted in mixed decisions, with some holding that compensable permanent disability established the date or injury, and others holding that only compensable temporary disability would suffice.

Clarity was needed, and it was provided in *Rodarte* where it was ultimately held that either permanent disability or compensable temporary disability satisfied the disability requirement.

Moving Forward

Unfortunately, there is no bright-line rule when it comes to assessing issues concerning periods of injurious exposure and the date of injury for cumulative trauma injuries.

However, the above-referenced cases flesh out the basic outline of a majority of the scenarios that present themselves in these types of claims.

In essence, when there is one long allegedly injurious period, absent any lost time the period will be found to be the last year of exposure. However, if there is compensable permanent disability or temporary disability prior to the last year of exposure, the cumulative period will revert back one year from that date.

Ultimately, the determination of the date of injury, whether there are multiple cumulative injuries, a single continuous trauma or one or many specific injuries is up to the trier of fact. The medical-legal evidence, personnel information, witness testimony and the applicant's medical history will factor into that consideration, along with the factors set forth in *Western Growers* and its progeny. ⌘

UPCOMING CONFERENCES & EVENTS

Inland Empire Workers' Compensation Forum
May 14, 2019
Marc Leibowitz (LFLM San Diego) presenting: "Block & Tackle: Proper Handling of Your Workers' Compensation and Civil Employement Risks!"

ELEVATE
May 16, 2019
San Diego, California
Marc Leibowitz (LFLM San Diego) moderating

COSIPA
Southern California (Westin, Costa Mesa): June 6, 2019
Northern California (Hilton, Concord): June 20, 2019
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2019 California Coalition of Workers' Compensation
July 17 - July 19, 2019
Disney's Grand Californian Hotel & Spa - Anaheim, California
LFLM is a Conference Sponsor

2019 California Workers' Compensation & Risk Confernece
September 3 - September 6, 2019
Dana Point, California
LFLM is a Conference Sponsor

2019 Western Regional RIMS
September 9 - September 11, 2019
Las Vegas, Nevada
Omar Behnawa (LFLM San Diego) presenting: "Keeping Your Cool: Challenges of Secondary/ Concurrent Employment in Workers' Compensation Law"

2019 CAJPA
September 11 - September 13, 2019
Lake Tahoe
Conference Sponsor