LFL&M LAUGHLIN, FALBO LEVY & MORESI LLP

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1900 S. State College Blvd., Suite 505
Anaheim, CA 92806
T: (714) 385-9400 F: (714) 385-9055

1001 Galaxy Way, Suite 200
Concord, CA 94560
T: (925) 499-4999 F: (925) 348-9710

575 E. Locust Street, Suite 311
Fresno, CA 93720
T: (559) 431-4900 F: (559) 431-4046

207 N. Goode Avenue, Suite 450
Glendale, CA 91203
T: (818) 638-8200 F: (818) 479-7548

505 14th Street, Suite 1210
Oakland, CA 94612
T: (510) 628-0496 F: (510) 628-0499

250 Hemsted Drive, Suite 310
Redding, CA 96002
T: (530) 222-0268 F: (530) 222-5705

One Capitol Mall, Suite 400
Sacramento, CA 95814
T: (916) 441-6045 F: (916) 441-7067

625 East Carnegie Drive, Suite 120
San Bernardino, CA 92408
T: (909) 890-2265 F: (909) 890-2377

600 B Street, Suite 2300
San Diego, CA 92101
T: (619) 233-9898 F: (619) 233-6862

255 California Street, Suite 700
San Francisco, CA 94111
T: (415) 781-6676 F: (415) 781-6823

1798 Technology Drive, Suite 120
San Jose, CA 95110
T: (408) 286-8801 F: (408) 286-1935

IN THIS ISSUE...

TREND ALERT: *Fitzpatrick* May Signify the Elimination of Diminished Future Earning Capacity as an Indicator of Permanent Impairment

By Nelly Sang, LFLM Sacramento

Before January 1, 2013

Prior to the major legal change that occurred on January 1, 2013, the decision under *LeBoeuf* allowed for a way to rebut the Permanent Disability Rating Schedule (PDRS) by using vocational expert reports. If the expert could show that the formula's "adjustment factor" was not an adequate reflection of diminished future earning capacity, it should be adjusted higher. In effect, the injured worker would be able to obtain permanent total disability (PTD) or 100% disability, even if the official ratings said otherwise.

This left open for litigation what would be considered loss of future earning capacity since that often needs to be estimated with the help of vocational experts. Cases since have attempted to clarify the consideration of loss of future earning capacity with the majority of cases involving dates of injury prior to SB 863. Approaches have shifted from *LeBoeuf* through to *Ogilvie III*, and *Fitzpatrick*, the most recent case on the application of Labor Code 4662(b) in finding permanent total disability.

After January 1, 2013: Focus on Vocational Rehabilitation

After January 1, 2013, the legislature enacted a major change to the formula. The adjustment factor was no longer variable and became fixed at 1.4 (the max). There was effectively no longer any adjustment factor to argue about.

But after this change, the focus of rebutting the PDRS shifted. Rather than argue about the adjustment factor, the focus was now on arguing for permanent and total disability based on an applicant's amenability to vocational rehabilitation. That is, if a vocational expert's opinion showed that a person would not be able to reenter the workforce because they are not amenable to rehabilitation, the PDRS would still be rebutted under *LeBoeuf*'s second method and a person could be deemed 100 percent permanently and totally disabled.

Succeeding cases also argued over whether there must be a showing that it is the work-related injury -- and not non-industrial factors -- that prevented them from partaking in vocational rehabilitation and partaking in the labor force.

(CONTINUED ON PAGE 4)

A STIPULATION FOR HOME HOUSEKEEPING SERVICES IS NOT "FOREVER"

By Vicki Rubin-Howton, LFLM Anaheim

The recent Court of Appeal decision, Certified for Publication, *Allied Signal Aerospace, Constitution State Service Company v. Workers' Comp Appeals Bd.* (*Wiggs*) 2019 Cal. App. LEXIS 3387, 2019 West Law 2120960, provides some much needed relief from the ever increasing burden of ongoing liability for housekeeping services.

Factual Background

The applicant sustained an admitted industrial specific injury on April 21, 1997 (ADJ2798585) and a CT from May 30, 1997 through May 30, 1998 (ADJ2723676). She underwent six surgeries from 1998 to 2012. By the time of the surgery in 2012, applicant was on multiple opioid and narcotic medications, another industry-wide burden for defendants. Applicant underwent two more surgeries between 2014 and 2017. She was taking multiple opioid and narcotics for pain management.

Eventually, defendant disputed the reasonableness and necessity of ongoing housekeeping services. On October 22, 2012, the parties stipulated to Irene Mefford, RN, serving as the agreed registered nurse to perform a home assessment for housekeeping services. Thereafter, pursuant to the stipulation, Mefford would prepare a report to be sent to applicant's doctors for review and comment. WCAB Jurisdiction was reserved over applicant's retroactive claim for housekeeping services.

Mefford's report issued on February 11, 2013 and recommended applicant have housekeeping services two times a month, and four hours per visit for housecleaning duties for one year. Mefford also reserved her right to make revisions to her report if additional information become available. Thereafter, Allied authorized home care for one year and also paid for retroactive home care. On March 7, 2014, applicant's PTP submitted an RFA for home care. Allied's UR authorized this on March 14, 2014 for four hours twice a month for deep cleaning assistance.

Applicant had an additional surgery, on June 18, 2015 and applicant's PTP requested authorization for increased services of four hours of house cleaning every week, which Allied's UR denied and applicant did not seek an IMR of the UR denial. Instead, Applicant filed for an expedited hearing. Applicant argued that Allied's failure to submit the April 6, 2016 RFA for home health care to the UR process had the effect of entitling her to home care.

At the hearing, Defendant argued that the request for home health services was governed by utilization review, and was not ripe for expedited hearing because the applicant had not availed itself of the IMR process.

Initially, a majority of the WCAB concluded one of the two exceptions applied in that the parties stipulated that the issue of a home assessment for housekeeping services would be decided by a specific registered nurse. The Court of Appeal however, found that the evidence did not support this conclusion. Specifically, the stipulation was that the nurse would provide a home assessment for housekeeping services in one visit in 2012. There was no agreement or stipulation that the nurse would continue to be the arbiter of this issue in the future after her one visit in 2012.

Parties Position

Applicant argued that Allied's failure to submit the April 6, 2016 RFA for home health care to the UR process had the effect of entitling her to home care. Allied argued that

(CONTINUED ON PAGE 3)

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Should you have any questions or comments regarding the Laughlin, Falbo, Levy & Moresi newsletter, or would like to suggest a topic or recent case you think would be of interest, please contact:

Nat Cordellos (LFLM San Francisco)
E: ncordellos@lflm.com T: (415) 781-6676

Mark Turner (LFLM Sacramento)
E: mturner@lflm.com T: (916) 441-6045

Omar Behnawa (LFLM San Diego)
E: obehnawa@lflm.com T: (619) 233-9898

Maryam Jalali (LFLM Anaheim)
E: mjalali@lflm.com T: (714) 385-9400

HOME HOUSEKEEPING SERVICES

(CONTINUED FROM PAGE 2)

the April 6, 2016 RFA was identical to an earlier denied RFA, which could not be asserted without any change in circumstance in applicant's condition.

The first time applicant raised the 2012 stipulation was in a June 1, 2017 letter to the WCJ requesting an order that the parties return to Nurse Mefford and she review all relevant and material medical evidence to determine applicant's need for continued home health care. Allied responded on June 8, 2017, that Mefford was retained for a one-time evaluation, which resulted in one year of home health care provided by Allied. The WCJ's decision was to develop the record. As such, the battle lines were drawn.

On appeal, a majority of a divided WCAB panel affirmed the WCJ's decision to develop the record and incorporated and adopted the WCJ's opinion and report. The majority construed the October 22, 2012 stipulation to use Mefford for a determination of home care needs to be "a procedure for evaluating applicant's need for homecare." Implied in that decision was the idea that the October 22, 2012 stipulation was to be in place forever and was the only means allowed to determine the need for housekeeping services.

The dissent agreed with Allied that the stipulation of October 22, 2012, was for a one-time evaluation by Mefford following her spinal surgery in 2012 and **not an ongoing agreement**.

The Take Away

The Court of Appeal disagreed, and turned to the specific language of the agreement for guidance on the parties' arguments.

In reaching its conclusion, the Court of Appeal noted that the stipulation simply did not reflect any agreement by the parties to submit any **future** disputes to Mefford for resolution. The stipulation was for an assessment by Mefford to be performed on one occasion, and nothing more than that was agreed to. The Court of Appeal specifically held that "…nothing in the 2012 stipulation indicates an ongoing agreement to use Nurse Mefford. We hold that the 2012 stipulation was intended, as plainly stated, to be a one-time home assessment and report by Mefford."

Because the stipulation was for a one-time service, it did not remove or supplant the jurisdiction of Utilization Review and Independent Medical Review. Similarly, the Court noted that the parties' behavior following the initial stipulation for home care confirmed that neither believed it was a continuing obligation to re-consult Mefford, in that subsequent requests for home care were submitted through utilization review. It was only after the home care was denied by UR and not appealed through the IMR process that applicant's attorney alleged the services were subject to the stipulation.

The Court of Appeal concluded that the WCAB did not have jurisdiction to adjudicate the dispute, and found that since applicant's attorney did not avail themselves of Independent Medical Review, and the treatment was properly denied.

Conclusions/Practice Pointer

As a matter of best practices, a close eye should be kept on the length of time an applicant has been receiving uncommon benefits like housekeeping, especially where entitlement to that treatment may arise out of a settlement document. In this case, the difference was jurisdictional; if worded slightly differently, the stipulation could have served as a means two deprive utilization review of jurisdiction over an entire category of medical benefits.

As a general rule, if it has been more than one year since the last RN assessment of reasonable and necessary services, applicant attorney should be approached about the RN conducting an up to date assessment. There will most likely be resistance from applicant's attorney but that should not be a deterrent. Set the matter for a status conference or an expedited hearing if applicant attorney will not cooperate. This is especially important if there has been any change in applicant's condition that might justify reduced services.

Lastly, be careful with the wording of the stipulation to avoid any ambiguity about the length of the stipulation. Defendant got a break in this case as the wording of the stipulation left open the possibility that the RN assessment would be for a one-time visit, and later subject once again to Utilization Review. Being careful with wording can ensure that your client does not get stuck paying costly medical treatment in perpetuity without the benefit of Utilization Review. ⌘

TREND ALERT: *FITZPATRICK*

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To give an example, in *Dahl*, the applicant's vocational expert argued that because of her work injury, she could not adequately compete for the same jobs, but she was otherwise a good candidate for vocational rehabilitation. Although allowed by the board, this conclusion was overturned on appeal. The appellate court found that the expert still needed to show how her **injury** prevented her from participating in vocational rehabilitation. In other words, it must be the injury itself that prevents an injured worker from taking advantage of the program's job placement, retraining, counseling and other services. In other words, *LeBoeuf*'s "amenability to rehabilitation" consideration lives, but that the opinion of a vocational expert as to level of permanent disability may not simply replace a rating obtained under the PDRS short of 100%.

Fitzpatrick

In a seeming repudiation of the expansive application of the holdings in *Dahl*, the *Fitzpatrick* case returned to the roots of *LeBoeuf/Dahl*, limiting the methods by which an applicant may prove permanent total disability.

Fitzpatrick concerned a pre-2013 claim where it was assumed that there were two paths to being deemed permanently and totally disabled.

The first was under the former Labor Code section 4660. Section 4660 mandated consideration of the nature of the physical injury/disfigurement (using the AMA Guides), occupation, age, and diminished future earnings capacity.

The second was under Labor Code section 4662 et al. Section 4662(a) defines physical conditions that would be a presumption for permanent and total disability (complete blindness, loss of both hands, etc.).

Section 4662(b) is much less clear, and it was the source of contention in the Fitzpatrick case. It provides that an injured worker can be deemed permanently and totally disabled "in accordance with the fact." Applicant argued that its vagueness implies that a judge could use their discretion in considering multiple factors not limited to those enumerated in *LeBoeuf* and its progeny.

The Court in *Fitzpatrick* explicitly disallowed the application of a judge's discretion in reaching a PTD award. Rather, the Court found that because Labor Code section 4662(b) was so vague, it must have been referring to applying the standard mandated under section 4660.

In other words, *Fitzpatrick* requires that for a showing of permanent and total disability, either the formula under section 4660 or the presumptions under 4662(a), and the three (3) methods spelled out in *LeBoeuf* could still be applied.

But what, if anything, does this case tell us about the injuries in a post-SB 863 world? Can the PDRS and diminished future earning capacity be rebutted via *LeBoeuf/Ogilvie/Dahl* for injuries after January 1, 2013?

Applying *Fitzpatrick* Post-2013

One glaring omission from SB 863 4660.1, which similarly mandates consideration of the nature of the physical injury/disfigurement, occupation, and age, is any mention of consideration for diminished future earnings capacity in that calculus.

Does that mean evidence of diminished future earning capacity is no longer permissible evidence to rebut the PDRS? This issue is yet undecided, as the Fitzpatrick Court involves application of Labor Code 4660, 4662(b) and an injury predating January 1, 2013, seemingly leav-

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TREND ALERT: *FITZPATRICK*

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ing the methods of reaching permanent total disability in *Dahl/LeBoeuf* unaffected. However, the court's reluctance to follow an expansive reading of Labor Code 4662(b) may spell a good omen for those arguing that the specific omission of diminished future earning capacity from the language of the statute evidences an intent to remove it as a factor in calculating permanent disability. That is, applying *Fitzpatrick* broadly, there would be no extra-judicial discretion to show permanent total disability, and therefore consideration of diminished future earnings capacity in determining partial or total permanent disability could no longer be permitted.

Similarly, subsequent to *Fitzpatrick*, a panel decision was issued under *Bermejo v. Jorge Castro Farms* (2019), which again held that 4662(b) does not provide an independent basis for showing permanent and total disability. This case involved a 2014 date of injury. Though not mandatory authority, it similarly shows a willingness by the WCAB to reduce rather than expand the methods by which an applicant can demonstrate PTD by rebutting a scheduled rating.

Vocational Rehabilitation after *Fitzpatrick*

While it is arguable vocational experts are still employable to rebut the scheduled rating to show a person is not amenable to vocational rehabilitation per *LeBoeuf*. it is amenability to vocational rehabilitation, and not diminished future earnings capacity, that is the factor considered for rebutting the scheduled rating. One might argue that these two considerations are one and the same.

It remains to be seen what effect *Fitzpatrick* will have on the jurisprudence evolving from *LeBoeuf* and its progeny for 2013 dates of injury and beyond, but if this holding is any indication, it is reasonable to assume that the Court of Appeal may defer to legislative intent and the removal of the consideration of diminished future earning capacity in rebutting the scheduled rating. ⌘

UPCOMING CONFERENCES & EVENTS

2020 PARMA
February 25 - February 28, 2020
Monterey, California
Jesus Mendoza (LFLM San Francisco) presenting: "Latency Lost? Recent Developments in Rebutting the Cancer Presumption in Public Safety Cases"

2020 EWC
March 19 - March 20, 2020
Huntington Beach, California
Omar Behnawa (LFLM San Diego) presenting: "Settlement Strategies: How to Contain Spiraling Workers' Compensation Costs and Mitigate Damages"
LFLM is the Pit Stop Break Sponsor

Richard Montarbo Current Issues Workers' Compensation Seminar
March 21, 2020
Brian Egan (LFLM San Francisco) presenting: "Neurology and Med-Legal Process Panel"