Significant Decision

Court of Appeal Upholds WCAB "En Banc" Decision in Simi v. Save-Max Foods, Inc.

Nunez v. Workers' Comp. Appeals Bd.
(Filed 2/7/2006)
Second Appellate District, Div. 4, Civil No. B182381
2006 Cal. App. LEXIS 157

Cortez v. Workers' Comp. Appeals Bd.
(Filed 2/8/2006)
Second Appellate District, Div. 4, Civil No. B181664
2006 Cal. App. LEXIS 166

Significance: The Court of Appeal gave its imprimatur to the WCAB's method for filling the gaping hole left when SB 899 repealed the old dispute resolution process for represented workers and replaced it with a new one that applies only to injuries on or after January 1, 2005.

Background: From 1991 through 2003, Labor Code §§ 4061 and 4062 provided the procedure for resolving medical-legal disputes in workers' compensation cases. Effective April 19, 2004, former § 4062 was amended by SB 899. Section 4062(a) now provides that for *represented* employees ''a medical evaluation to determine the disputed medical issue shall be obtained as provided in Section 4062.2, and no other medical evaluation shall be obtained.'' In turn, § 4062.2 still allows the parties to use an Agreed Medical Evaluator ("AME") but creates a new procedure that eliminates a party's right to select a Qualified Medical Evaluator ("QME") of its choice, substituting a panel QME procedure. Section § 4062.2(a), however, expressly limits the new procedure to represented employees with injuries occurring on or after January 1, 2005. Thus, the Legislature created a procedural "gap" for injuries occurring *before* January 1, 2005.

In *Simi v. Save-Max Foods, Inc*. (2005) 70 Cal. Comp. Cases 217 (WCAB "en banc"), the WCAB held that for injuries occurring before January 1, 2005, § 4062, as it existed before its amendment by SB 899, continues to provide the procedure by which AME and QME reports are obtained in cases involving represented employees. While the WCAB's decision was based, essentially, on a self-evident proposition, it was eminently reasonable. Are we supposed to assume that there is *no* dispute resolution process for represented employees injured before January 1, 2005? While something of a "ghost statute," the only reasonable approach here is to use former § 4062 in those cases where the new procedure is not applicable. And most members of the workers' compensation community were satisfied with this workable approach. But not everyone. The somewhat notorious law firm of Graiwer & Kaplan challenged the WCAB's approach in two cases but lost them both.

Holding and Rationale: Take Lourdes Nunez's case, for example. She sustained an industrial injury on July 15, 2002 for which her employer provided medical treatment, temporary

disability, and vocational rehabilitation benefits. When Nunez's employer objected to continuing medical treatment and disability—and the parties could not agree on an evaluator—the employer scheduled an exam with the QME of its own choice under former § 4062. Nunez failed to attend the scheduled examination. So, her employer obtained an order to compel attendance at the next scheduled examination using the WCAB's "walk-through" procedures. Nunez's petition for reconsideration or removal was denied by the WCAB; so, she sought a writ of review from the Court of Appeal.

The Court of Appeal, however, affirmed the WCAB's decision. The court agreed with *Simi* that the Legislature intended former §§ 4060, 4061, and 4062 to remain operative for represented cases with a date of injury before January 1, 2005. According to the court, the Legislature did not intend total deregulation of the abuses historically associated with medical evaluation and reporting in workers' compensation. Moreover, the statutory scheme should not be interpreted so that either side is arbitrarily deprived of the right to medical evaluation or reporting. The court also rejected Nunez's argument that she was denied due process by the "walk-through" procedure used to obtain the order compelling her attendance at the employer's QME exam. According to the court, Nunez had the opportunity to present her position in the petition for reconsideration or removal, and did so. There was no showing that she was actually prejudiced by the procedures utilized in her case.

Similarly, Manuel Cortez's case concerns the same basic issue as in Nunez's case; although, the issue arose somewhat differently. Cortez petitioned to reopen his claim that was temporarily resolved by a stipulated award. Consistent with the stipulated award, the parties used an AME in orthopedics; but, a dispute arose over the treating doctor's recommendation that Cortez have a psychological consultation for heightened anxiety. After Cortez ignored the employer's offer of an AME in psychiatry, the employer scheduled an exam with the psychiatric QME of its own choice. Cortez refused to attend on the ground that there was no statutory authority for the examination. The employer petitioned for an order compelling Cortez's attendance at the next scheduled QME exam. After a conference, the WCJ issued the proposed order. Cortez's petition for reconsideration or removal was denied by the WCAB and, so, he sought a writ of review from the Court of Appeal.

The same court that decided Nunez's case also affirmed the WCAB's decision in Cortez's case. For the reasons stated in *Nunez*, the court concluded that the medical evaluation and reporting procedure of former § 4062 applies to represented cases with a date of injury before January 1, 2005. The court noted that §§ 4050 and 5701—which, together, give the employer and the WCAB the right to compel periodic medical examinations—are not an appropriate alternative because those sections may result in reports that are inadmissible at trial and, thus, undermine the Legislature's goal of avoiding unnecessary and costly medical evaluations.

Comment: Court of Appeal decisions become final 30 days after filing. (California Rules of Court, rule 24(b)(1).) A disgruntled party may seek review before the California Supreme Court but must do so within 10 days after the Court of Appeal's decision becomes final. (California Rules of Court, rule 28(e)(1).)