

CA 5th: Can't Turn Off TTD Retroactively: 05/24/05

1. In a decision not certified for publication, California's Fifth Appellate District on Monday reversed the Workers' Compensation Appeals Board where a denial of temporary disability indemnity was based on medical evidence dated after the date claimed for the benefit.

In *Borges vs. WCAB; Quality Terminal Services* (F046996, 05/23/05), Borges sustained an admitted injury on 11/16/03. Borges' primary treating physician opined in a progress report dated 1/26/04 that, "This patient has been instructed to ... Remain off work until 4/1/04." The doctor also reported: "Will attempt to get the patient to work before the six weeks, as soon as the shoulder can tolerate it."

Defendant Quality sent Borges to Paul Manchester, M.D., for a Qualified Medical Examination (QME) on Feb. 11, 2004. In a QME report dated Feb. 11, 2004, but not signed until March 2, 2004, Dr. Manchester found Borges was not yet permanent and stationary and that "He should be able to return to all of his usual and customary work duties as of the date of this examination." According to correspondence between counsel, Quality first received a faxed copy of Dr. Manchester's QME report on May 3, 2004, and forwarded it to Borges the next day. A facsimile machine heading along the top of the WCAB's copy of the QME report further confirms it was faxed from Dr. Manchester's office on May 3.

Quality deposed Borges, who admitted that Dr. Manchester "asked me if I felt I could go back to work, and I said yes." Dr. Manchester, however, did not give Borges any indication that he should return to work. Borges admitted that he was waiting to tell Dr. Manchester of the improvement he was getting from physical therapy at the next appointment.

Quality thereafter ceased TTD payments on 2/12/04.

Borges returned for treatment with Dr. Rhoades on March 1, 2004. Dr. Rhoades noted that Borges pain had improved but that he suffered from a "chronic 4 subluxating shoulder." Dr. Rhoades instructed Borges to remain off work until May 1, 2004, and requested Dr. Williamson re-evaluate Borges. Dr. Williamson concurred with her former diagnosis and expressly directed Borges to comply with Dr. Rhoades's work restrictions. On March 19, 2004, Dr. Rhoades released Borges to work as of March 21, 2004.

After trial the WCJ found undisputed Borges's personal belief that he was capable of working as of the date of his deposition. The WCJ found irrelevant whether Quality asked Borges to return to work and when Borges received a copy of Dr. Manchester's QME report. Accordingly, the WCJ concluded Quality appropriately terminated Borges's temporary indemnity payments after February 12, 2004. The WCAB upheld the decision.

The Court of Appeals reversed:

"While Dr. Manchester may have concluded Borges was medically capable of returning to work earlier, his opinion was never conveyed to Borges, Dr. Rhoades, or Quality before Dr. Rhoades released Borges to return to work as of March 21, 2004, and therefore should not have been considered in depriving him of temporary disability benefits. Given that temporary disability indemnity is intended as a substitute for lost wages during a period of transitory incapacity to work, we find the termination of such benefits based on the retroactive consideration of a medical opinion not yet received by the parties unreasonable, illogical, and inequitable. By relying on Borges's lay testimony and Dr. Manchester's not yet created QME report, the WCAB's determination that Borges was capable of returning to work as of February 12, 2004, was not supported by substantial evidence."