INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/ALL OFFICES/CLIENTS

FROM: JOE TRUCE

DATE: May 2, 2002

RE: IMPORTANT WCAB EN BANC DECISION ON EARNING FOR SEASONAL WORKERS

On January 24, 2002 the Appeals Board issued an En Banc Decision in the case of **Maria Yolanda Jimenez v. San Joaquin Valley Labor**, Superior National Insurance Company finding that seasonal workers were entitled to temporary disability at two different rates for in-season and off-season and that an injured worker should also receive vocational rehabilitation maintenance allowance benefits (VRMA) at the two different rates determined for temporary disability benefits.

In the **Jimenez** case the parties stipulated that the applicant's average weekly earnings were $405.00 per week during the **season** and 0 (zero) per week during the **off-season**.

Accordingly, the workers' compensation judge (WCJ) found that the applicant was entitled to a temporary disability rate of $270.00 per week during the **in-season** and during the **off-season** the applicant had a temporary disability compensation rate of $0 per week.

Since the weekly temporary disability rate was based on the applicant's **earning capacity** the WCJ found that during the **off-season** the applicant's earning capacity was 0 (zero) therefore entitling the applicant to weekly payments of temporary disability of 0 (zero).

However, notwithstanding this determination, the WCJ found that the applicant was, in fact, entitled to VRMA benefits during not only the **in-season** but also the **off-season**.

This was based on the theory that the purpose of VRMA is to provide some income to injured workers during the vocational rehabilitation process **"so that the workers "can survive" while being re-trained into a new career."**

In reversing the WCJ the Board granted reconsideration En Banc[1]. The Board stated in relevant part as follows:

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[1] En Banc Decisions are binding precedent on all Board panels and workers' compensation judges.

> **"Based on our review of the relevant statutory and case law, we conclude that an industrially injured seasonal employee shall be awarded temporary disability at two rates: (1) an in-season rate based on the employee's in-season earnings capacity and (2) an off-season rate based on the employee's off-season earnings capacity taking into consideration such factors as the employee's earnings history, willingness and ability to work, age and health, education and skill, as well as employment opportunities and general condition of the labor market . . ."**

Based on the above the Board would presumably take into consideration the fact that an applicant, during the off-season, : (1) continually applied for employment and was not able to obtain same because of the depressed labor market; (2) the applicant had some special skills and/or education that qualified the applicant for other jobs; (3) the applicant's age. Youthful workers may be considered better able to find job opportunities.

In reaching its decision in this case, the Board reviews the applicable case law and the landmark earning capacity case by the California Supreme Court in **Argonaut Insurance Company v. Industrial Accident Commission**, 57 Cal 2d; 27 CCC 133. This is the now famous **Montana** case in which the Court stated in relevant part as follows:

> **"An estimate of earning capacity of a prediction of what an employee's earnings would have been had he not been injured. Earning capacity, for the purpose of a temporary Award, however, may differ from earning capacity for the purposes of a permanent award. In the former case the prediction of earnings need only be added for the duration of the temporary disability. In the latter the prediction is more complex because the compensation is for loss of earning power over a long span of time . . . "**

Therefore, the Board reaffirms that an applicant's **"earning capacity"** for temporary disability can differ from an applicant's earning capacity for calculating permanent disability benefits.

After concluding an excellent discussion of case law with respect to earning capacity the Board then turned its attention to whether or not an applicant's VRMA benefits should also be tied to his and/or her earning capacity for temporary disability benefits.

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In the affirmative the Board stated in relevant part as follows:

> **"Here, the clear and unambiguous terms of §139.5(d) provide that the amount of VRMA due to an injured employee shall be the amount he or she would have received as continuing temporary disability indemnity " (emphasis added), except the amount shall not exceed $246.00 per week. Thus, if a seasonal employee's off-season earning capacity would justify an off-season temporary disability indemnity rate of $0 per week, then §139.5(d) mandates that he or she must also receive VRMA at $0 per week during the off-season."**

The Board's decision in **Jimenez** emphasizes how vitally important it is for us to be aggressive with respect to a particular applicant's earning capacity and earnings history. If we are dealing with an applicant who is not categorized as a full-time employee, with a particular employer then we certainly want to obtain a full and complete wage statement from the employer and in most cases we will want the applicant to sign a Social Security release at the earliest possible time so that his earnings history can be documented.

WJT:wf
Encl- En Banc Dec- **Maria Yolanda Jimenez v. San JoaquinValley Labor** (for attorneys only)