KEGEL, TOBIN & TRUCE

INTER-OFFICE MEMORANDUM

To: ALL ATTORNEYS AND CLIENTS

From: W. Joseph Truce

Date: February 10, 2005

Subject: WHEN THE APPLICANT'S ATTORNEY RAISES LEBOEUF IN AN EFFORT TO PROVE THE APPLICANT IS 100% DISABLED, SHOULD WE SHAKE IN OUR SHOES?

In the case of Ruiz v. Raley's 32 CWCR 321 (Oct 2004), the Board has answered the above question with a resounding "NO".

In the infamous Supreme Court decision in LeBoeuf v. WCAB (1983) 34 Cal. 3rd 234, 11 CWCR 185, 48 CCC 587, the Supreme Court declared that in determining permanent disability, consideration should also be given to the employee's ability to compete in the open labor market.

Subsequent to LeBoeuf, applicants' attorneys quite frequently employed vocational rehabilitation counselors to testify that even though the medical reports rated less than 100%, the applicant was still entitled to an award of total permanent disability. This argument is based on the theory that the applicant would not be able to compete in the open labor market due to his industrial injuries.

In the Ruiz case, the recommended rating based on the medical evidence was 84.5%, notwithstanding the testimony of applicant's vocational rehabilitation **"expert."**

As the applicant's attorney was dissatisfied with the 84.5% Findings and Award, he filed a Petition for Reconsideration contending that LeBoeuf required the judge to find that the applicant was "totally disabled . . ."

In his report and recommendation on the applicant's Petition for Reconsideration, the Workers' Compensation Judge (WJC), "observed that the application of LeBoeuf and Gill has evolved to the point where in many cases there is no earnest attempt by the VR counselor to determine whether the applicant was qualified for VR services . . ."[1]

The WCJ, in his report on reconsideration, went on to observe as follows:

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[1] Gill v. WCAB (1985) 167 Cal. Op. 3rd 306, 50 CCC 528, held that the "testimony and reports of rehabilitation counselors concerning the employees 'future employability in the open labor market' may be received in evidence even though there has been no determination by the rehabilitation unit."

> **"The focus of the experts produced by the applicant has almost universally been to persuade the WCJ that the applicant's PD is greater than would be expected from the medical evidence. It is axiomatic from the tenor and language of workers' compensation law, however, that medical evidence is normally required to justify a PD award. It could not have been the intent of thLeBoeuf or Gill courts to abrogate that requirement . . ."**

The WCJ noted that neither **LeBoeuf** nor **Gill,** "provided a method of determining what medical findings are necessary for a VR expert's opinion to be considered . . ."

The WCJ, "explained that Labor Code § 4660 provides the criteria for determining the percentage of PD. The schedule adopted under that section is prima facie evidence of that percentage for each disability covered by the schedule . . . the WCJ pointed out that, 'the rehabilitation counselor's testimony was not directed to the recommended rating because it came out before the recommended rating was requested. The obvious purpose of the testimony, 'was to trump medical findings and convince the WCJ that' rehabilitation counselor 'rather than physicians had more accurately described applicant's medical condition . . ."

In these types of cases, we want to point out to the workers' compensation judge that applicants' attorneys, in offering testimony by rehabilitation expert, are simply trying to replace expert medical evidence with testimony by a non-medical expert.

WJT