

KEGEL, TOBIN & TRUCE
INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/ALL OFFICES/CLIENTS

FROM: W. Joseph Truce

DATE: November 18, 2002

RE: INCREASE IN TEMPORARY TOTAL DISABILITY
BENEFITS AFTER TWO YEARS

Labor Code §4661.5 provides in relevant part as follows:

"...When any temporary total disability indemnity payment is made two years or more from the date of injury, the amount of this payment shall be computed in accordance with the temporary disability indemnity average weekly earnings specified in Section 4453 in effect on the date each temporary total disability payment is made..."

Labor Code §4661.5 has long been regarded as the two year benefit increase rule.

Therefore, the temporary disability rate for all injured workers whose "dates of injury" are at least two years old will be eligible for the increased temporary total disability benefit of \$602 as of January 1, 2003.

Although it is clear that the two year rule as enunciated in Labor Code §4661.5 applies to temporary disability benefits, many of us will be receiving inquiries from clients as to whether or not the two year increase applies to death benefits or cases on which the claims administrator has been paying death benefits to the dependents of the deceased employee.

The lawyer-like answer, of course, is: "it depends."

On April 8, 1998 the Board issued an en banc decision in Phillips v. Sacramento Municipal Utilities District 63 CCC 585 finding that death benefits, like temporary disability benefits, are to be increased in accordance with the two year rule per Labor Code §4661.5, since the "statutory scheme requires that death benefits are to be paid in the same manner and at the same rate as temporary disability benefits..."

However, the Board did not address the question of whether or not its decision in Phillips would be retroactive or prospective.

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The Board's initial decision as referred to above has come to be known as Phillips I.

Due to the confusion and utter chaos that would have resulted from a retroactive application of their decision, the Board issued Phillips II¹ on June 2, 1998 finding that the holding in Phillips I has prospective application only. In its order the Board stated as follows:

"In order to avoid unfairness to parties who have relied on the prior general understanding that death benefits did not increase, and to avoid an undue burden on the workers' compensation system, we have concluded that our holding in this case should be applied only to those cases in which the award of death benefits is made after the date upon which this decision becomes final..."

We should all remember, of course, that the increase in temporary disability benefits and/or death benefits pursuant to Labor Code §4661.5 is premised on the assumption that said increase is justified by the applicant's actual weekly wage at the time of injury.


WJT:dab