

# INTER - OFFICE MEMORANDUM

**TO:** ALL ATTORNEYS/CLIENTS

**FROM:** JOE TRUCE

**DATE:** December 30, 2002

**RE:** LABOR CODE §5402 - LANDMARK DECISION BY COURT  
OF APPEAL

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D'Arcy Swartz of our Long Beach office has obtained a landmark decision from the Court of Appeal in the case of Honeywell (formerly AlliedSignal Aerospace) v. WCAB (William Wagner).<sup>1</sup>

The proceedings in Wagner were closely watched by the workers' compensation community and Amicus briefs were filed on behalf of the California Workers' Compensation Defense Attorneys, the California Self-Insurance Association, and the California Applicant's Attorneys Association.

In Wagner it is undisputed that the applicant's psychiatric claim was denied within 90 days of the filing of the DWC 1 Claim Form with the employer.

However, the controversy centered on the applicant's contention that the employer had notice of the injury prior to the filing of the Claim Form and therefore the 90 day period pursuant to Labor Code §5402 commenced from the date that the employer first received notice - not from the filing of the Claim Form.

When this case was initially litigated, Judge Sosna found that the applicant had received sufficient notice prior to the filing of the Claim Form to commence the running of the 90 days. Therefore, Judge Sosna issued a decision that the case was presumed to be compensable pursuant to Labor Code §5402.

D'Arcy filed a Petition for Reconsideration and in an **en banc decision** the Board rescinded Judge Sosna's decision and adopted the "reasonably certain" standard.

In essence the Board held that the 90 days commences to run when the employer is "**reasonably certain**" that the employee is claiming workers' compensation benefits or that an industrial has occurred.

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<sup>1</sup>The published decision of the Court of Appeal in Wagner was filed on December 20, 2002. As the case was only recently filed there is no official citation as yet.

D'Arcy then filed a Petition for Writ of Review in the Court of Appeal which was granted.

After oral argument the court has now filed its published decision basically adopting D'Arcy's persuasive argument that Labor Code §5402 means what it says, i.e. that the 90 day period in which to accept or deny a claim commences to run on the **filing** of the Claim Form with the employer.

In rescinding and reversing the en banc decision of the Board, the court stated in relevant part as follows:

**"The WCAB had no legal authority to substitute 'reasonably certain' for the statutory language enacted by the legislature..."**

In adopting D'Arcy's argument that Labor Code §5402 is enacted by the legislature "means what it says" the court stated as follows:

**"We find that the plain language of Section 5401, however, is a clear and unambiguous expression of legislative intent..."**

The court went on to note:

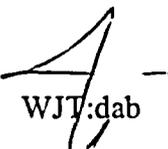
**"While the WCAB is empowered to enact rules and regulations, it may not create and change legislation that is within the Plenary power of the legislature...The statutory language regarding the commencement of the 90-day period in 5402 is very straightforward. That section clearly provides that liability must be rejected within 90 days after the completed Claim Form is filed under Section 5041...The only reasonable reading of this clear statutory language is that the 90 day period commences to run from the date the Claim Form is actually filed with the employer..."**

In criticizing the WCAB, the Court of Appeal commented as follows:

**"The WCAB has effectively rewritten Section 5402 to eliminate the provision that the 90 day investigatory period commences upon the filing of the Claim Form."**

However, the court does recognize that in certain circumstances the employer's conduct could be so egregious as to create an estoppel so as to commence the running of the 90 day period prior to the actual filing of the Claim Form but the court also warned that these type of situations would be "in very limited circumstances." The court emphasized that "a mere negligent failure to provide a timely Claim Form is not sufficient."

It is not known at this point as to whether or not the applicant will file a Petition for Review in the California Supreme Court.

  
WJT:dab