

INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/CLIENTS
FROM: W. JOSEPH TRUCE
DATE: August 16, 2004
RE: WHAT HAPPENS WHEN WE FORGET TO RAISE AN ISSUE
SUCH AS GOOD FAITH PERSONNEL ACTION AT TRIAL?

A Panel at the Appeals Board answered this question in the case of Jeri Corriveau v. Workers' Compensation Appeals Board, Safeway Stores, Incorporated, 6 WCAB Rptr. 10,217.

In the Corriveau case the applicant filed a claim for psychiatric injury alleging that her injury had occurred on a cumulative trauma basis as a result of her employment with the defendant employer, Safeway Stores.

The claim was denied after investigation on the basis that the applicant's psychiatric injury was caused by a good faith non-discriminatory personnel action.

At Trial, defendant (for some reason that is not clear on the record) raised the issue of injury but did not raise good faith personnel action as an affirmative defense. The Workers' Compensation Judge (WCJ), after Trial, found injury and ordered the defendant to pay benefits.

A Panel of the Board granted defendants Petition for Reconsideration and stated in relevant part as follows:

"We conclude that where evidence on the issue of §3208.3(h) was clearly presented and the parties had put their minds to the issue, removing any potential for surprise or prejudice to the injured worker, the principal in National Convenience Store v. Workers' Compensation Appeals Board (Kesser) (1981) 120 Cal. App. 3d 420 should apply . . ."

Although the Board saved defendants (who forgot to raise the affirmative defense of good faith personnel action at Trial) by its decision, the better practice, of course, is to raise all affirmative defenses at Trial or better yet at the MSC.

WJT
[Signature]