**MSKW QUARTERLY DRIP- FALL 2021**

**ATTACKING THE “POST TERMINATION CT CLAIM”**

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The story is almost always the same.

A former employee who has not been heard from in six months, has returned from parts unknown with an attorney to file a claim for a cumulative trauma injury. Their allegation is that repetitive job duties resulted in an injury to their back, or arms, or knees, or shoulders. They did not leave on the best terms. In fact, they were terminated. And so, exasperated, the employer reports the injury to their carrier, seeking justice for something so *obviously* fraudulent. A claim is opened, defense counsel hired, and the claim promptly denied.

But then something happens, which to the employer is inexplicable. The defense attorney shepherds the case through various stages of discovery. A deposition is taken, the employee is sent to a doctor, and after nine to twelve months, the claim is settled, EDD is reimbursed, and liens are resolved. The explanation given by defense counsel is that while the claim may be denied, the defense would not have really worked anyway, and it is just cheaper to settle.

To an unsophisticated observer, this sequence of events can be truly bewildering. How can it be possible to both deny a claimed injury and then settle it for seemingly the full value on the premise that the denial would not have succeeded, and that settlement is cheaper? The answer requires a thorough understanding of the post-termination defense, but too often we hear that the WCAB simply does not apply the defense in claims of cumulative trauma injury.

That level of analysis of the post-termination defense in claims of cumulative trauma is unfortunate, because as we will see it, it allows the Applicant to entirely take the initiative in the claim. And while it is true that the law itself makes it difficult to prevail with the defense, there is no case law or code that says the post-termination defense is inapplicable in claims of cumulative trauma.

We at MSKW are here to tell you that it is possible to successfully defend a post-termination cumulative trauma claim, but to do so requires in-depth knowledge of the post-termination defense, its exceptions, and a cohesive litigation strategy.

**POST TERM DEFENSE DEFINED- ACTUAL TERMINATION AND NOTICE OF TERMINATION**

In the current economic environment of involuntary layoffs and reductions in force, it is imperative that those who handle workers’ compensations claims have an understanding of the post-termination defense. The post-termination defense is an affirmative defense codified in **Labor Code section 3600(a)(10).** It eliminates all liability for compensation in connection with injuries which are filed after a termination. The stated public policy behind this defense was to protect employers from either fraudulent or retaliatory claims which are alleged after a termination. As such, not only is it within the employer’s interest to aggressively defend these claims, but it is also within the public’s interest at large.

The first issue that comes up typically with this defense is what is meant by termination. In various decisions of the WCAB, termination has been held to strictly apply to separations which are initiated by the employer. If the separation is not initiated by the employer, such as in the case of a resignation, or even just an employee walking off the job, then the Courts have typically held that the Defendant has failed to meet their burden of proof for the defense. We should also point out here that the termination **does not** actually have to have taken place. If an employer gives **notice of a termination or layoff**, and the claim is filed subsequent to that notice, then the defense can apply.

This is a **key detail** that often gets overlooked.

The language in section 3600(a)(10) is specific to claims that are filed after notice of termination or layoff. The language does not say that the termination needs to have actually occurred, but simply **that the notice has to have been given.** There is a burden on the employer to actually have given the notice, but as so long as that burden can be met, it is possible to invoke the defense.

**EXCEPTIONS TO THE POST TERMINATION DEFENSE**

As many of our readers undoubtedly know, the post-termination defense is riddled with exceptions. We will cover a few of them here as they are important to understanding the pitfalls of litigating the defense.

[**Labor Code section 3600(a)(10)**](https://ww3.workcompcentral.com/wiki/index.php/California_Labor_Codes_3600) states, in part, that when the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid **unless the employee demonstrates by a preponderance of the evidence** that one or more of the following conditions apply:

* The **employer knew about the injury** prior to termination.
* The **applicant has medical records existing prior to termination** that show **injury.**
* The **specific injury** occurs after notice of termination but before the last day of work.
* The **date of injury**, pursuant to Labor Code section 5412, **is subsequent to the date of the notice of termination or layoff**.
1. **FIRST TWO EXCEPTIONS: KNOWLEDGE OF INJURY/ MEDICAL RECORDS PRIOR TO INJURY**

The first two exceptions to the defense are rather self-explanatory. If the employer has **actual knowledge of the injury** prior to giving notice of the termination or layoff, and the employee can demonstrate this by a preponderance of the evidence, then the defense will not bar the claim. Likewise, if the employee’s medical records, existing prior to the notice of termination or lay, contain evidence of the injury, the defense will not work. While these exceptions are self-explanatory, there is significant case law on each of these exceptions fleshing out what level of knowledge is required by the employer or what it means the pre-termination medical records to actual evidence injury. However, for now, it is sufficient to state that if the **employer knows there was an injury**, **OR** there is a **medical report showing injury, prior to termination**, then the claim will be otherwise compensable.

1. **THIRD EXCEPTION- INJURY AFTER NOTICE BUT BEFORE TERMINATION- APPLICABLE TO SPECIFIC INJURIES**

The third exception to the post-termination defense is also rather specific. It applies to those situations where the employer has given notice of termination, but the employee has yet to be terminated.

During this period between the notice of the termination and the termination, if the employee has an injury, that injury will be compensable. This exception only applies to **injuries which occur during this period between notice of termination and the termination**. If the injury occurs prior to the notice of termination, then this exception would not be applicable.

1. **FOURTH EXCEPTION- UNDERSTANDING LABOR CODE 5412 ESTABLISHING “INJURY” AND “DATE OF INJURY” AND WHETHER SAME IS ESTABLISHED POST TERMINATION OR LAYOFF**

The final exception to the post-termination defense is the one most folks get caught up on. Let us start with the plain language of the exception. The post-termination defense is applicable unless by a preponderance of the evidence the employee can demonstrate that “the date of injury, as specified in section 5412, is subsequent to the date of the notice of termination or layoff.” On its face, it is rather easy to understand. If the date of injury comes after the notice of termination or layoff, then the post-termination defense does not apply.

**But how do we go about figuring out what the date of injury is according to section 5412?!?!**

Our workers’ compensation system loves to find dates for everything. We have to know the last date of service of the provider treating on a lien, when the objection was made to the medical determinations of the PTP under section 4062, and in the case of an employee who works 20 years doing the same job, we have to know what their date of injury is. To create such a fiction, we turn to **Labor Code section 5412** which defines the date of injury for a cumulative trauma as the date the ***employee first suffered disability and either knew, or in the exercise of reasonable diligence should have known, that the disability was caused by their present or previous employment.***

It can be helpful to think of determining the legal date of injury under section 5412 like plotting points on a graph.

* On the Y axis of the graph, we have the date the employee first suffered disability.
* On the X axis, we have the date the employee knew or should have known that the disability was caused by his employment.
* Where the two meet is the legal date of injury per Labor Code section 5412, and if this date is after the notice of termination or layoff, then the claim will be compensable.

Note how both the axis of our graph speak of **disability**. The date of injury cannot occur until there is compensable disability. This means that even if an **employee knows** that their strenuous, long-term job is hurting their back**,** the date of injury will not be until **they actually have disability**. And while there is convoluted case law on the subject, see *Rodarte*, generally disability means **lost wages (including arguable prophylactic work restrictions) or** possibly **compensable permanent disability**. But without getting into the weeds too much, this focus on disability means that pinpointing when the employee **first suffered disability** is crucial to assessing the strength of a post-termination defense. And if **that disability** occurred after the employer gave notice of termination to the employee, then the post-termination defense cannot apply.

Subjective complaints without knowledge of disability would not be applicable under this exception. In additionally, a private physician merely mentioning applicant’s subjective complaints and applicant’s repetitive employment without evidence of disability as referenced above.

Without prior evidence of the above, the WCJ will typically look to the first med legal examination (PTP or PQME/AME) post injury, and should same provide a comprehensive analysis discussing injury, and nature and extent of industrial disability post filing of claim, that first exam date post termination/layoff would likely be considered the exception to the post termination defense.

**STRATEGIES: COMBATING POST TERMINATION DEFENSE**

Now that we have a general understanding of the post-termination defense and its exception, we can return to our example of the disgruntled, terminated employee who resurfaces after six months to allege a cumulative trauma injury. There are some general strategies we can pursue to defend these types of claims that do not involve treating a denied claim as essentially accepted.

The first strategy is to ensure counsel is not giving up on the post-termination defense before they even begin. Yes, the exception for date of injury occurring subsequent to the notice of termination is a loophole in the defense. But we must remember, the defense exists for a reason, and every claim, even post-termination cumulative trauma claims, deserve aggressive discovery and litigation.

1. **GATHER THE FACTS- CASE BY CASE ANALYSIS: DUTIES OF CLAIMS EXAMINER AND YOUR DEFENSE ATTORNEY**

What that discovery and defense looks like is going to be **case dependent**. But in general, a few facts should be established through the initial investigation and subsequent discovery. Specifically, the **claims handler** needs to determine the following:

1. **When** notice of termination was given,
2. Was the **employer aware** that the Applicant had any injury, and assuming the Applicant has released his medicals, are there any medical records evidencing an injury.
3. Assuming there was no employer knowledge of an injury, no medical records showing injury, and there was no injury occurring after notice of the termination, the claims handler can focus **discovery efforts on the final exception** to the post-termination defense, namely is the date of injury per Labor Code section 5412 after the notice of termination.

With this exception, **Defense counsel** must:

1. Be keen to look for any time that the Applicant may have **lost time from work**.
	1. The Applicant’s **personnel file, any attendance records, and wage records** should be secured and thoroughly analyzed for lost time.
	2. The **Applicant’s deposition** can be extremely useful to discover any missed work, as well. Here, it is helpful for counsel to devote a portion of the deposition to questions specific to assessing the strength of the post-termination defense. The Applicant should be questioned **directly about potential knowledge** that their employment **caused their injury** and whether or not **they took any time off of work** because of it.
2. **VALUE YOUR CLAIM- DEFNENSE ATTORNEYS SHOULD ANALYZE FROM THE INITIAL ONSET OF FILE HANDLING**

After gathering the above information, counsel should be able to provide a preliminary analysis of the legal date of injury.

It is at this stage in the litigation and discovery that counsel and claims should reach a mutual plan of action on how the post-termination defense should be litigated. However, prior to conducting extensive litigation, the first option would be to consider expediting settlement and avoiding litigation costs, med-legal evaluations, and further discovery if possible.

An initial valuation analysis should be provided to the client at the time the defense attorney first reviews the file in an attempt to expedite resolution, unless this is specifically not an option, such as when there has already been a decision to aggressively litigate the claim.

From the onset, your Defense attorney should provide a comprehensive analysis taking into consideration the following factors when providing an initial valuation for lump sum settlement, while concurrently aggressively maintaining your denial of claim:

* 1. Likelihood of compensability
	2. Length of employment
	3. Issues with post termination defense
	4. Prior stressors/claims- ISO Search/ EAMS database search

Thereafter, an **estimated valuation** for lump sum settlement should be provided, considering the issues set forth above, as well as potential disability should there be any objective findings to body parts alleged, (x-rays, EMG studies, MRI studies, range of motion measurements from physicians, etc.)

Your defense attorney can then creatively utilize formal and/or informal litigation proceedings as avenues to expedited resolution prior to any med-legal evaluation or trial, including:

* + 1. Informal conferences
		2. Deposition of Applicant
		3. Bulk Settlement Conferences
		4. Status Conferences/WCAB formal proceedings
1. **LITIGATION OF POST TERM DEFENSE**

A **medical-legal evaluation** can be considered in the absence of favorable facts, but aggressively **pursuing a Trial** on the threshold issue of the defense should absolutely be considered. The Defendant is entitled to a Trial on the threshold issue of the defense, and if the facts are favorable, a Trial not only could result in a take-nothing with the right set of facts but could put the Defendant in a much stronger position to negotiate a settlement for a value that is fitting of a fully denied claim.

And ultimately that is the goal of the defense, either assertively pursuing a Trial or pursuing a settlement of the claim for its actual worth.

Unfortunately, when the Defendant assumes that the post-termination defense has failed at the outset of the claim simply because the injury is alleged as a cumulative trauma, the Defendant will lose all initiative in the litigation of the claim, and Applicant's attorneys will rightfully assess the claim as being denied in name only.

**FINAL REMARKS**

**In conclusion,** defense counsel should not be afraid of post-termination defense cumulative trauma claims because these claims are as equally deserving of aggressive and competent litigation and defense as specific injury post-termination claims. Your counsel should provide you with “think outside the box” litigation strategies, analyzing each case for compensability and exposure, and should utilize all avenues to expedite resolution and aggressively litigate your post-termination claim.

We hope this article has been useful at providing an overview of the post-termination defense and its exceptions and some general strategies for handling the discovery and litigation of these difficult claims.

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