



HURLEY ROGNER
MILLER, COX, WARANCH & WESTCOTT, P.A.

1560 Orange Avenue, Suite 500
Winter Park, FL 32789

Phone: (407) 571-7400

Fax: (407) 571-7401

“Westphal Decision: Now What?”
5/15/13 Conference Call Update by William H. Rogner
Q&A

Question Number 1. What’s next?

- Well, there is no timeframe. Unlike the JCC’s, the appellate judges get to decide the case on their own schedule.
- Oral argument has not been set, but likely will be. The new 1st DCA courthouse is designed to handle *en banc* arguments and all 15 can fit in the main court room.
- After oral argument the *en banc* ruling could come out in a week or two, but likely not for a month or more.
- One interesting note. The three judges that decided *Westphal* are J. Thomas, J. Padovano, and J. Davis. Right after the decision J. Davis retired. So, that’s 1 known vote less for the claimant’s side of the argument.
- IF the entire court upholds the panel decision then we go automatically to the Florida Supreme Court and the Court has to hear it. IF the entire court reverses the panel the claimant can *ask* the Florida Supreme Court to hear the case, but the Supreme Court can decline the case.
- Bottom line – we’re as much as a year away from final resolution.

Question Number 2. Do we have to follow the case right now?

- In a word, no.
- It is not a final decision. An appellate decision becomes final when mandate is issued. Mandate was not issued b/c timely motions for rehearing were filed. Mandate will not be issued until 15 days after the *en banc* opinion is released. Under the appellate rule, the opinion is non-final and subject to revision or withdrawal.
- That does not mean, however, that you just ignore it. A JCC, faced with similar facts, will understandably look to *Westphal* for guidance.

Question Number 3. Even if the case stands as written, how does a JCC apply it?

- Well, this is where we get a little bit technical, but JCC's *cannot* apply the opinion's holding to cases that follow because the Court invalidated section the 104 week cap as applied to the specific facts of Mr. Westphal's case. They did not rule that the 104 week cap was unconstitutional on its face which means it would apply to everyone. By definition, a statute facially invalidated is constitutionally invalid no matter the facts, while one invalidated as applied IS valid under some facts, but not under others.
- So, imagine hypothetical claimant Brett Westlake, a cop injured while arresting a criminal. He runs out of TTD and then has a total knee replacement 3 weeks later. He and his lawyer come to the JCC asking for TTD in excess of 104 weeks. He says to the JCC, "Look at me, I'm just like Brad Westphal." The JCC agrees. In order to apply the *Westphal* case, however, the JCC has to write the words "I find that, applying *Westphal*, the 104 week cap is unconstitutional *as applied* to Brett Westlake." A JCC CANNOT do that b/c JCC's have no authority to declare a statute unconstitutional either facially or as applied.
- Therefore, even if faced with facts nearly identical to those present in *Westphal*, I submit that a JCC must apply the statute and deny the TTD claim. And the DCA will then be called upon to address, as a matter of first impression, whether *Westphal* applies to each individual situation. Of course, claimant lawyers will argue that *Westphal* establishes that everyone is entitled to TTD for up to 260 weeks, but that ignores the "as applied" analysis utilized by the *Westphal* judges.
- By using an "as applied" standard they've given the JCC's something that is completely unworkable.

Question Number 4. Does *Westphal*, should it stand, mean that everyone can get more than 104 weeks of TTD?

- Technically, the answer is no, unless they modify the opinion to state that the 104 week cap is facially unconstitutional.
- If it stands, however, I believe that ultimately we will end up paying all C's who remain in a TTD status up to 260 weeks. And I believe that because I think the Court will realize that the as applied framework is not workable. Therefore, SUBSEQUENT cases will expand the ruling to apply to all claimants who remain in a TTD status after 104 weeks.

Question Number 5. What about TPD benefits?

- The case specifically applies only to TTD benefits. BUT, the case will be used to try to invalidate:
 - the TPD cap;
 - the max comp rate;
 - IB caps;
 - the 1% psych rating cap;
 - the 6 mo. psych TTD cap;
 - and PTD benefits ceasing at age 75.
 - The list goes on
- And the reason is that the court relied on natural justice and focused on economic hardships caused by the law. Thus, whenever we can present a fact pattern that demonstrates such hardship a great argument can be made to invalidate other provisions as applied.
- For example, take a 74 year old claimant getting PTD. She lives exclusively on \$400/mo in SSR and \$1,600 in PTD benefits. Those benefits cease at 75. Her income will go from \$2,000/mo. to \$400/mo. One could easily imagine her losing her housing or even not being able to afford food and needed medications. And the 1992 version of the Act, the version embraced by *Westphal*, permitted PTD benefits for life. Plug in *Westphal* and the PTD cap is unconstitutional as applied.

Question Number 6. If we wait to pay TTD in excess of 104 weeks until the case is finalized will we owe attorney's fees?

- That one's easy. Yes.

Question Number 7. Does Westphal apply to all dates of accident?

- Well, obviously, it does not apply to any date of accident before 1/1/94 b/c claimants before then had 260 weeks available.
- It also does not apply to any settled case
- And, according to the opinion, it applies "prospectively only and shall not apply to rulings, adjudications, or proceedings that have become final prior" to Feb. 28, 2013.
 - If you have a merits order or stip that finds that the 104 weeks have been exhausted then the case does not apply
 - But it does apply to all other open cases

Question Number 8. Until Westphal is finally decided what do we do with cases where the 104 weeks has run and the claimant is still on a TTD status?

- Well, the easiest thing to do is just pay the TTD. We're likely talking about relatively few cases
- Option 2 is to get some authority and settle the case. The claimant has leverage because of *Westphal*, BUT the carrier has leverage b/c it's not certain that *Westphal* will survive the rehearing process or S. Court review. That uncertainty usually makes for a great settlement.
- Option 3 is perhaps the best – And that's a case by case consideration.
 - Do you have a hearing coming up soon?
 - Is the claimant in the hospital, catastrophically injured, or just milking a minor injury with the help of a bad doctor?
 - Is the comp rate \$150 or \$800?
 - The best thing to do is to consider all the facts and decide each case on its own

###