CURRENT ISSUES

Workers Compensation Conference

March 15, 2019

Richard L. Montarbo
Law Office of Richard L. Montarbo
www.montarbolaw.com

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Red Bluff, CA 96080
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CURRENT ISSUES
WORKERS' COMPENSATION SEMINAR

Friday, March 15, 2019

The Citizen Hotel
926 J Street, Sacramento (916) 492-4420

8:00 a.m. - 9:00 a.m.	**Registration**
9:00 a.m. - 10:15 a.m.	**Introduction and Opening Comments: CaseLaw Update** Richard L. Montarbo, Esq. *Law Offices of Richard L. Montarbo*
10:15 a.m. - 10:30 a.m.	**Break**
10:30 a.m. - 12:00 p.m.	**Injury AOE/COE (Dynamex v. Superior Court of Los Angeles County)** William Herreras, Esq *Law Offices of William Herreras* Michael Giachino, Esq *Hanna, Brophy et al*
12:00 p.m. - 1:30 p.m.	**Lunch**
1:30 p.m. - 2:45 p.m.	**Psychiatric Injuries: Victims of Violent Acts/ Catastrophic Injuries** Julius Young, Esq. *Boxer & Gerson* Richard Jacobsmeyer, Esq. *Shaw, Jacobsmeyer, Crain & Claffey*
2:45 p.m. - 3:00 p.m.	**Break**
3:00 p.m. - 4:15 p.m.	**Orthopedic Medicine and the Medical Legal Process** Michael Sommer, M.D *Newton Medical Group* John Geyer, Esq. *Laughlin, Falbo, Levy & Moresi* Alexander Wong, Esq *Jones Clifford, San Francisco*

This seminar will be held at The Citizen Hotel, 926 J Street, Sacramento Ca 916-492-4420 As space is limited, please confirm with the Law Offices of Richard L. Montarbo, 146 Main Street, Red Bluff, California 96080, Telephone (530) 529-9860; Fax (530) 529-9865. Handouts will include Electronic Course Syllabus and IOS/Droid CompCalcPlus 2019.

Registration Fee: $265.00 for Attorneys; $125.00 for Legal Support Staff; $60.00 for Claims Examiners and Supervisors

Approved for 5.25 HOURS MCLE/QME WORKERS' COMPENSATION SPECIALIZATION AND WCCP CREDITS

This activity is approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 5.25 hours, of which 0 hours will apply to legal ethics/law practice management/prevention, detection, and treatment of substance abuse and emotional distress/elimination of bias credit, as appropriate to the content of the activity. QME credit is pending with the Industrial Medical Council. Law Offices of Richard L. Montarbo certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing Minimum Continuing Legal Education.

(One registration form per person. Photocopies o.k.)

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All cancellations must be received in writing no later than March 6, 2019.

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Pre-registration:
$265 - Attorneys
$125 - Legal Support Staff
$60 - Claims Examiners & Supervisors

At-Door
$275 - Attorneys
$150 - Legal Support Staff

Pre-registration, including payment must be received at the Law Offices of Richard L. Montarbo no later than February 25, 2019.

FEATURED AGAIN THIS YEAR

Following this year's Current Issues Workers' Compensation Conference, we will conclude with hors d'oeuvres pairing and wine tasting.

Speakers ~ Curriculum Vitae

• Richard L. Montarbo, Esq.

Admitted to California State Bar, 1987; Hawaii State Bar, 1989. *Education*: California State University at Sacramento (B.S. 1983 Business Economics and Computer Science); University of the Pacific, McGeorge School of Law (J.D., 1987). Admitted to Practice before U.S Court of Appeals for the Ninth Circuit; U.S State District Court, Northern District of California; State Courts of the State of California. Certified Workers' Compensation Specialist 1995. [U.S Navy, Flight active and reserve duty, 1987-1996.] Mr. Montarbo is a frequent presenter at various workers' compensation claims conferences including State Bar of California Section, CAJAPA, DVICA, as well as having provided the defense perspective on a number of occasions at the CAAA annual conference. Mr. Montarbo is an Adjunct Professor at McGeorge School of Law, as well as the author and assistant editor of the Work Comp Index: A Topic Guide to California Workers' Compensation Law, published by Lexis/Nexis, and is the developer of CompCalc Plus for Google, Apple and Microsoft.

• John Geyer, Esq.

Managing Partner of LFLM. Admitted to the State Bar in 1993, graduated University of California, Davis School of Law in 1993. He began working as an Associate Attorney in our Sacramento office immediately after taking the bar exam in 1993. In December, 2014, Mr. Geyer moved to the Oakland office to begin transitioning into the role of the firm's Managing Partner, a position he holds today. Mr. Geyer has devoted his entire career to defending the interests of employers, insurers, and third-party administrators in state workers' compensation matters, §132a claims, and Serious and Willful Misconduct claims.

• Michael Giachino, Esq.

University of California, Berkeley B.S., 1974, graduated with honors. San Francisco Law School, graduated with a Juris Doctor. Mr. Giachino joined Hanna Brophy in 1985 becoming a Partner of the firm in 1989. Mr. Giachino is currently a Senior Partner and Managing Partner for Oakland office. He handles all types of workers' compensation claims at any level of complexity. Mr. Giachino provides Workers' Compensation Defense, Labor Code Section 132a, Serious and Willful Misconduct, Insurance Defense and Workers' Compensation Subrogation for Hanna Brophy.

• William Herreras, Esq.

Graduated from Loyola University of Los Angeles in 1963 with honors. Graduated from Loyola Law School of Los Angeles in 1966 with honors. Admitted to the California State Bar in 1967. Since 1972 he has been certified as a Workers' Compensation Specialist by the Board of Legal Certification of the State Bar of California. Mr. Herreras has practiced on the Central Coast of California since 1970 and has practiced in the Santa Maria and San Luis Obispo area since 1975 representing disabled working men and women who have sustained industrial disabilities or injuries. Co-Chair of the Amicus Committee for the California Applicants' Attorneys Association (CAAA) since 1992 and continuing. Past-President of California Applicants' Attorneys Association 2000 – 2001. Mr. Herreras is an active member and lecturer of the Mexican-American Bar Association. Mr. Herreras has served as a lecturer before State Bar, defense and applicant legal associations.

• Richard M. Jacobsmeyer, Esq.

St. Mary's College 1968-1972; University of Santa Clara School of Law, (J.D., 1975) graduated cum laude. Currently employed with Shaw, Jacobsmeyer, Crain, Claffey & Nix as a Partner of the Oakland office. Member: Certified Workers' Compensation Specialist since 1981. Industrial Claims Association, Seminar Chair. CAAA, Board of Governors 1986-1990, 1992-1994. NCAAA, Board of Governors Treasurer 1987-1988, Secretary 1988-1990, President-elect 1990-1992, President 1992-1994. Affiliations: California State Bar, California Workers' Compensation Defense Attorneys Association.

• Michael Sommer, M.D.

Dr. Sommer is a graduate of Northwestern and completed his residency in General Surgery at St. Mary's Hospital in San Francisco in 1970. His Orthopedic Surgery residency was completed in 1793, also at St. Mary's Hospital. Dr. Sommer has been practicing orthopedic medicine with a special interest in problems of the spine since 1983. He is on the National Board of Medical Examiners, the American Board of Orthopedic Surgery and is a Qualified Medical Evaluator. Dr. Sommer served in the United States Air Force as a Captain from 1967-1969 and has published "Backsaver Industrial Training Manual" as well as "Low Back Pain, Etiology and Prevention for the AORN Journal in 1987. Dr. Sommer is a member of various Professional Societies including; American Medical Association, Santa Clara County Medical Society (1976-1995) The American Academy of Orthopedic Surgeons and the North American Spine Society.

• Alexander Wong, Esq.

Mr. Wong attended the University of California at San Diego, receiving a BA cum laude in 1990. In 1991 he served as Coro Foundation Public Affairs Fellow, after which he attended and graduated from UC Berkeley's Boalt Hall School of Law. Admitted to the State Bar in 1994, he served as a Deputy City Attorney for the City and County of San Francisco, specializing in Workers' Compensation. He joined Jones Clifford in 2000, becoming a partner in 2002. Alex is certified by the State Bar of California as a Specialist in Workers' Compensation law. He has served as a Chair of the State Bar Executive Committee on Workers' Compensation in 2001-2002. Editor and co-author of the legal treatise: California Workers' Compensation Law and Practice (St. Claire) from 2004-2013 and is a frequent lecturer. In 2014, he received the Applicant's Attorney of the Year Award from the San Francisco chapter of the California Applicants Attorneys Association.

• Julius Young, Esq.

A Partner at Boxer & Gerson LLP, Julius has practiced workers' compensation and social security disability law since 1979. He is the founder, writer, and editor of an award-winning blog on workers' compensation (http://www.workerscompensationzone.com). Julius was a board member for the California State Bar Executive Committee in Workers' Compensation from 2007 to 2010, he has sat as a Judge Pro Tem at the WCAB since 2005, been a consultant to Lexis Nexis on workers' compensation publications since 2008 and an instructor on Social Security Disability issues for Lohrman Seminars. Mr. Young has lectured for the California Applicant Attorneys Association, the Industrial Claims Association, State Compensation Insurance Fund, California Society of Industrial Medicine, Diablo Valley Claims Association. In addition, Julius has acted as a training consultant for the U.S Hastings Employment Law Center Workers' Compensation Clinic. In 2014 he was honored with the Fran Schreiberg Pro Bono award for community service.

The State Bar of California

OFFICE OF ADMISSIONS

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January 23, 2019

America Navarro
anavarro@montarbolaw.com

Program Title:	2019 Current Issues Workers' Compensation Conference
Provider Number:	422
Program Number:	155952
Approved Hours:	5.25
Subfield Area(s)/Hours:	A/4.00; B/1.25
Approval Period:	03/15/2019 - 03/14/2021

Dear America Navarro:

We are pleased to advise you that the above-referenced program has been approved for legal specialist continuing legal education (LSCLE) credit in **Workers' Compensation Law** and **MCLE** for the number of hours indicated above under rule 3.114 of Title 3, Division 2, Chapter 2 of the Rules of the State Bar of California ("Rules") (available at www.californiaspecialist.org).

If, during the past two years, you sponsored four separate courses that have been approved for LSCLE credit in the same area of law, you may qualify for Multiple Activity Provider (MAP) status in that area of law. MAP status would allow your organization to provide an unlimited number of qualifying courses over a multi-year period in the approved area of law for a single fee and with a single application. Please contact our office if you are interested in learning more.

On behalf of the California Board of Legal Specialization, we extend appreciation for your contribution to the educational component of the program and wish you every success in providing quality education for certified legal specialists and all attorneys.

Sincerely,

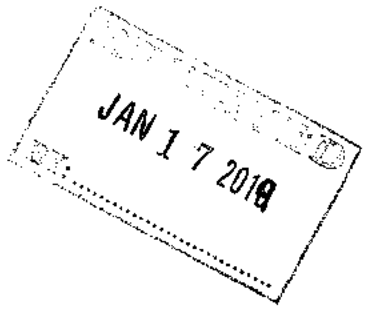
THE DEPARTMENT OF LEGAL SPECIALIZATION, OFFICE OF ADMISSIONS

Total Credit Awarded by Subfield

A - BASIC LEGAL
B - BASIC MEDICAL

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION
MEDICAL UNIT
P.O. Box 71010
Oakland, CA 94612
Tel. No. (510) 286-3700 . Fax No (510) 286-0693

January 15, 2019



Law Office of Richard L. Montarbo
146 Main Street
Red BluffCa.96080

Re: Provider No. 620
Approved Date: 01/14/2019
Expiration Date: 01/13/2021

Dear Richard Montarbo, Esq

This letter is to notify you that you have been renewed for two years as a provider of Qualified Medical Evaluator (QME) continuing education for the Division Of Workers' Compensation (DWC) in accordance with Labor Code section 139.2(d) and Title 8 of the California Code of Regulations, Section 55(e).

Any programs that were not approved at the time of either accreditation or reaccredidation must be sent to the DWC for review at least 45 days before the date of presentation. The DWC may require the submission of additional material to determine if the subject matter is in disability evaluation or workers' compensation related medical dispute resolution. The DWC may require changes in the program for credit to be granted.

Within 60 days of completion of the course, you must send the DWC a copy of your roster listing the names of the persons who attended your course. (8 Cal. Code of Regs. § 55(o).)

Again, congratulations. If you have any questions about your approval status, please call Diana Cornell at 1 (800) 794-6900.

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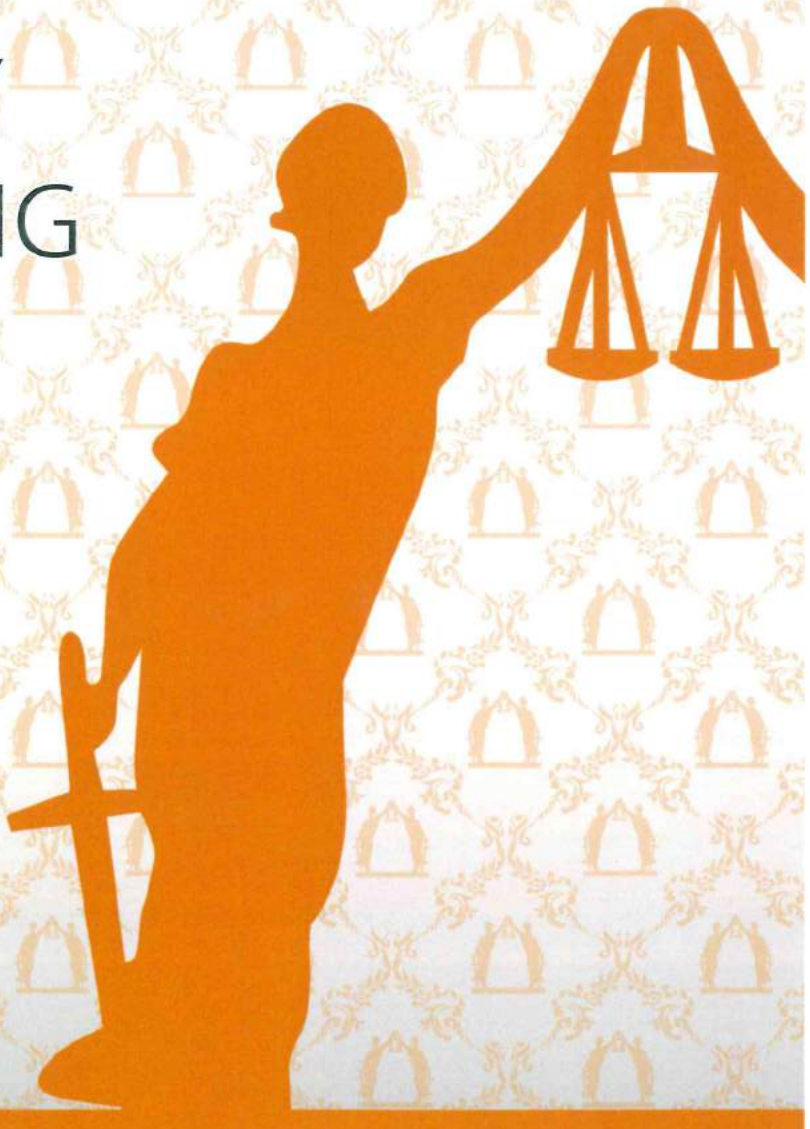

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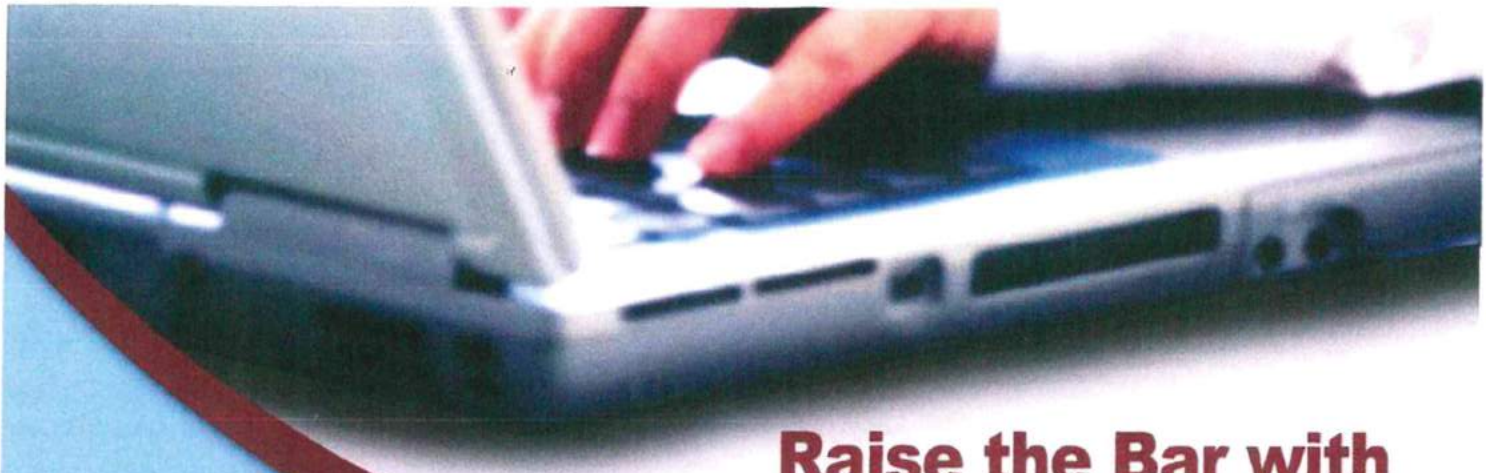

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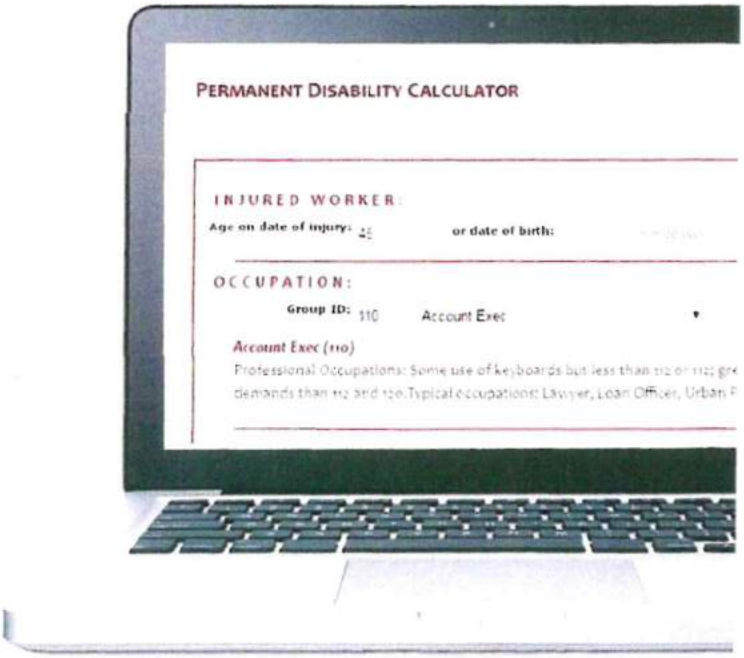

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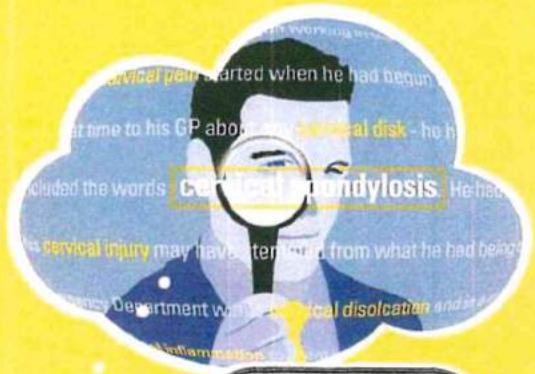

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2019 Workers' Compensation
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CASE LAW UPDATE 2018

GOING AND COMING RULE

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PERKINS v. KNOX

SESSION III: PSYCHIATRIC INJURIES: VICTIMS OF VIOLENT ACTS & CATASTROPHIC INJURIES:

CASE LAW UPDATE

2019

Richard L. Montarbo, Esq
LAW OFFICE OF RICHARD L. MONTARBO

CASE LAW UPDATE 2019

The following represents a summary of some of the most recent case decisions issued by the California Supreme Court, California Court of Appeal, and the Workers' Compensation Appeals Board, which the Editor believes will have significance in connection with the practice of Workers' Compensation law. The summaries are only the Editor's interpretation, analysis, and legal opinion, and the reader is encouraged to review the original case decision in its entirety.

Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision. WCAB panel decisions are citable authority, particularly on issues of contemporaneous administrative construction of statutory language [see Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and Workers' Compensation Judges [see Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236]. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]. Panel Decisions which are designated as "Significant" by the WCAB, while not binding in Workers Compensation proceedings, are intended to augment the body of binding appellate court and en banc decision and is limited to panel decisions involving (1) issue(s) of general interest to the workers' compensation community, especially a new or recurring issue about which there is little or no published case law; and (2) upon agreement en banc of all commissioners on the significance and importance of the issues presented and resulting decisions. (See Elliot v. WCAB (2010) 182 Cal.App. 4th 355, 361, fn. 3, 75 CCC 81; Larch v. WCAB (1999) 64 CCC 1098, 1099-1100 (writ denied).

I. AOE/COE -- Injury

Dynamex Operations West, Inc v. Superior Court of Los Angeles County (2018, California Supreme Court) 4 Cal.5th 903, 83 Cal.Comp.Cases 817, 2018 Cal. LEXIS 3152

> *". . .Thus, with respect to the control of details factor, the court concluded: "Under these circumstances, Borello retains all necessary control over the harvest portion of its operations. A business entity may not avoid its statutory obligations by carving up its production process into minute steps, then asserting that it lacks 'control' over the exact means by which one such step is performed by the responsible workers." (Borello, supra, 48 Cal.3d at p. 357.) . . ." (FN3)*
>
> *". . . we conclude that in determining whether, under the suffer or permit to work definition, a worker is properly considered the type of independent contractor to whom the wage order does not apply, it is appropriate to look to a standard, commonly referred to as the "ABC" test, that is utilized in other jurisdictions in a variety of contexts to distinguish employees from independent contractors. Under this test, a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity. . ."*
>
> *Dynamex Operations West, Inc v. Superior Court of Los Angeles County 83 Cal.Comp.Cases at pg. 823.*

Defendant was a nationwide same-day courier and delivery service that operates business centers throughout California employing delivery drivers. In 2004 defendant converted all of its drivers to independent contractors after management concluded that such a conversion would generate economic savings for the company. Under that policy, all drivers are treated as independent contractors and are required to provide their own vehicles and pay for all of their transportation expenses, including fuel, tolls, vehicle maintenance, and vehicle liability insurance, as well as all taxes and workers' compensation insurance.

Defendant/employer obtains its own customers, sets the rates, negotiates the amount to be paid to each driver, flat fee or an amount based on a percentage of the delivery fee. Drivers are generally free to set their own schedule but must notify Dynamex of the days they intend to work. Drivers are required to obtain and pay for a Nextel cellular telephone to maintain contact with Defendant. On-demand drivers are assigned deliveries by Dynamex dispatchers at

Dynamex's sole discretion; drivers have no guarantee of the number or type of deliveries they will be offered. Although drivers are not required to make all of the deliveries they are assigned, they must promptly notify Dynamex if they intend to reject an offered delivery so that Dynamex can quickly contact another driver; drivers are liable for any loss Dynamex incurs if they fail to do so. Drivers make pickups and deliveries using their own vehicles, but are generally expected to wear Dynamex shirts and badges when making deliveries for Dynamex, and, pursuant to Dynamex's agreement with some customers, drivers are sometimes required to attach Dynamex and/or the customer's decals to their vehicles when making deliveries for the customer. Drivers purchase Dynamex shirts and other Dynamex items with their own funds.

Editor's comments: The Dynamex decision is the comprehensive analysis on the employee vs. 'independent contactor' issue in wage and hour. The Dynamex decision cites and discusses every important decision in the last 30 years involving the issue of independent contractor. In the end the Court reaffirmed that the burden is on the party asserting that the relationship is that of independent contractor and has articulated the ABC test. The ABC test requires all three of the prongs be established by defendant "namely (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed."

A conflict appears to exists between the Borello "statutory purpose test" for workers' compensation purposes and now the Dynamex "ABC wage and hour test". The Borello "statutory purpose test" involves the weighing of factors related to 'right to control' and 'benefits conferred', e.g. right to hire/fire, method of and amount of payment/wages, instrumentalities, are they a separate business enterprise/trade/occupation, license required, opportunity for profit/loss, length of time (short IC likely), who has relationship with client/customer, who controls pricing, who collect payment. While the Dynamex "ABC wage and hour test" has three requirements, all of which must be established by defendant. See also, LC 2750.5, 3353, 3355, 3356, 335; Borello & Sons Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341, 54 CCC 80; Yellow Cab Coop. v. WCAB (1991) 226 Cal.App.3d 1288, 56 CCC 34; Martinez v. Combs (2010) 49 Cal.4th 35, 109 Cal.Rptr. 3d 514; O'Connor v. Uber Techs, Inc. (2018) 2018 U.S.App. LEXIS 27343; Karl v. Zimmer Biomet Holding Inc. (2018) 2018 U.S. Dist. LEXIS 189997; Perkins v. Knox, DLK Capital, Inc, Americans Modern Insurance Company, ADJ10183569 (LA District Office)(BPD).

The trial court granting certification of the class holding the delivery drivers were employees and not independent contractors as defendant/employer had argued.

In upholding the trial court, the Supreme Court held that a person providing services to another is presumed an employee and it is the employer asserting that a worker is an "independent contractor" who has the burden of proof to establish (1) that the worker is free from control and direction of the hirer in connection with the performance of the work, both under the contract for performance of such work and in fact; (2) that the worker performs work that is outside the usual course of the hiring entity's business; (3) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity. See also, cited and discussed, S.G. Borello & Sons v. Department of Industrial Relations, (1989) 48 Cal.3d 341[256 Cal.Rptr. 543, 769 P.2d 399; Martinez v. Combs (2010) 49 Cal.4th 35, 64 [109 Cal. Rptr. 3d 514, 231 P.3d 259]; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 3.06, 3.07, 3.130, 3.131; Rassp & Herlick, California Workers' Compensation Law, Ch. 2, § 2.06.]

". . .The court cautioned that "[a] business entity may not avoid its statutory obligations by carving up its production process into minute steps, then asserting that it lacks 'control' over the exact means by which one such step is performed by the responsible workers."

"Unlike a multifactor test [of Borello], the [Dynamex]/ABC test "'allows courts to look beyond labels and evaluate whether workers are truly engaged in a separate business or whether the business is being used by the employer to evade wage, tax, and other obligations . . . The ABC test "presumes a worker hired by an entity is an employee and places the burden on the hirer to establish that the worker is an independent contractor" by showing each of parts A, B, and C. The failure to establish any one prerequisite is sufficient "to establish that the worker is an included employee, rather than an excluded independent contractor, for purposes of the wage order."

". . .Supreme Court explained, the trial court properly applied the "suffer or permit to work" definition of employment in Martinez, instead of the "control" test in Borello, to evaluate class certification for wage order claims. (Id. at pp. 944–945, 950.) The "suffer or permit to work" definition fit the broad remedial purpose of wage orders to protect workers, shield law-abiding businesses from unfair competition, and prevent shifting the costs of ill effects to workers to the public at large. (Dynamex, at pp. 952–953.)

Next, the Dynamex Court considered what test applies to evaluate the employee-independent contractor question under the "suffer or permit to work" definition of "employ." Eschewing a multifactor standard, the court instead adopted the three-part "ABC" test used in many other jurisdictions to decide whether a worker is a covered employee or rather an independent contractor. (Dynamex, supra, 4 Cal.5th at pp. 956–957.) Unlike a multifactor test, the ABC test "'allows courts to look beyond labels and evaluate whether workers are truly engaged in a separate business or whether the business is being used by the employer to evade wage, tax, and other obligations."

Garcia v. Boarder Transportation Group (2018, 4th Appellate District) 28 Cal.App.5th at pgs. 567-570.

Garcia v. Boarder Transportation Group (2018, 4th Appellate District) 28 Cal.App.5th 558, 239 Cal.Rptr. 3d 360, 83 Cal. Comp. Cases 1775, 2018 Cal. App. LEXIS 949.

Plaintiff operated a taxicab and filed a wage and hour lawsuit against Border Transportation Group, LLC (BTG). Defendant brought a motion for summary judgement asserting that plaintiff worked as an independent contractor and thus was not subject to wage and hour law.

The evidence in this case was that there was a lease of the taxicab license by defendant to plaintiff as an individual. The lease clearly stated that no employer/employee relationship was created or existed. Further, the evidence of how the parties behaved and carried out the arrangement was consistent with the terms of the lease. It does not appear that Border Transport exercised any control over plaintiff's activities that would implicate an employee/employer relationship, in that there was no evidence that they provided any instruction on operation of the vehicle, no employee handbook was provided, rates were not dictated, nor was plaintiff required to maintain trip sheets.

Editor's Analysis: The Dynamex/ABC test arose out of child labor law which defined 'employ' to means to 'suffer, or permit to work.' This definition derives from child labor laws, which sought to extend beyond the common law master-servant relationship and target the defendant's failure to exercise reasonable care to prevent child labor from occurring. Applied to modern-day wage and hour claims, a proprietor who knows that persons are working in his or her business without having been formally hired, or while being paid less than the minimum wage, clearly suffers or permits that work by failing to prevent it, while having the power to do so.

To summarize, it is this editor's opinion that in the end the Dynamex/ABC test will become the standard not only for claims involving wage and hours but also workers' compensation. Again the important policy is to prevent the employer from evading wage, tax, and other obligations, by allowing the Courts to look beyond labels and evaluate whether workers are truly engaged in a separate business as an independent contractor, noting that. "[a] business entity should not be allowed avoid its statutory obligations by carving up its production process into minute steps, then asserting that it lacks 'control' over the exact means by which one such step is performed by the responsible workers."

Plaintiff operated his own vehicle and defendant did not get any part of those fares. Defendant did not dictate the geographical area, the shift, time or number of breaks, a schedule, or require plaintiff to record his whereabouts. Although plaintiff was required to respond to dispatch, he was not required to turn on the optional radio. Defendant exercised no control over how plaintiff used his vehicle for personal use and allowed plaintiff to market his taxicab business in his own name. Plaintiff was free to use his own cell phone, business phone, or other items. Last, plaintiff could elect not to renew his vehicle lease permit at any time." Defendant sought a motion for summary judgment. The trial court granted summary judgment to a taxi company on wage and hour claims finding that a driver was an independent contractor, not an employee.

The Court of Appeal reversed holding taxi driver was employee under the ABC test; In reversing the Court held that a worker is properly considered independent contractor to whom wage-order does not apply only if hirer establishes at least one of following: (1) that it does not control and direct worker with respect to performance of work both pursuant to contract and in actuality, (2) that worker performs work outside usual course of hirer's business, and (3) that worker is customarily engaged in independently established trade, occupation, or business of same nature as work performed for hirer. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 3.06, 3.07, 3.130, 3.131; Rassp & Herlick, California Workers' Compensation Law, Ch. 2, § 2.06.]

See also, Mireles v. S.O.S. Steel Co., Inc, 2018 Cal.Wrk. P.D. LEXIS 286 (BPD), holding Ironworker falling 14 feet held compensable as Defendant has burden of establishing horseplay/skylarking as a defense and is not met when an act could reasonably be expected and was within reasonable contemplation of employment activity/contract.; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.51[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.04[2]. SOC, Section 5.62, Horseplay/Skylarking]

Gund et al., v. Country of Trinity (2018 3rd Appellate District) 24 Cal.App. 5th 185, 234 Cal.Rptr. 3d 187, 83 Cal. Comp. Cases 1042, 2018 Cal.App. LEXIS 522.

A Trinity County deputy sheriff phoned two private citizens who do not work for the county asking them to go check on a neighbor who had called 911 for help likely related to inclement weather. The two private citizens unwittingly walked into a murder scene and were savagely attacked by the man who apparently had just murdered the neighbor and her boyfriend. The two private citizens sued for negligence and misrepresentation, alleging defendants created a special relationship and owed them a duty of care, which defendants breached by representing that the 911 call was likely weather related and "probably no big deal" and by withholding information known to defendants suggesting a crime in progress—i.e., that the caller had *whispered* "help me," that the California Highway Patrol (CHP) dispatcher refrained from calling back when the call was disconnected out of concern the caller was in danger, and that no one answered when the county dispatcher called.

Defendants filed a motion for summary judgment on the ground that plaintiffs' exclusive remedy was workers' compensation, because Labor Code section 3366 provides that any person "engaged in the performance of active law enforcement service as part of the posse comitatus or power of the county, and *each person ... engaged in assisting any peace officer in active law enforcement service at the request of such peace officer*, is deemed to be an employee of the public entity that he or she is serving or assisting *in the enforcement of the law*, and is entitled to receive compensation from the public entity in accordance with the provisions of this division [workers' compensation]."

Defendants' motion did not acknowledge or address plaintiffs' factual allegations that the deputy misled them about the nature of the activity, minimized the risk, lulled them into a false sense of security, and that plaintiffs relied on the deputy's misrepresentations. Absent section 3366, these allegations potentially support imposing tort liability against defendants. (E.g., *Wallace v. City of Los Angeles* (1993) 12 Cal.App.4th 1385, 1401–1402 [16 Cal. Rptr. 2d 113].) Plaintiffs' opposition submitted evidence supporting their factual allegations and argued section 3366 is inapplicable in these circumstances.

Defendants' reply denied that the deputy misrepresented facts or misled plaintiffs (thus displaying factual disputes) but claimed any factual disputes were immaterial because responding to a 911 call is a law enforcement activity. The trial court adopted the defense theory and entered summary judgment.

"... Section 3366 does not define "active law enforcement " However, responding to 911 calls for unspecified help is clearly active law enforcement. "The legislative purpose of [section 3366] was to cover a person who assumes the functions and risks of a peace officer ... ." (McCorkle v. City of Los Angeles (1969) 70 Cal.2d 252, 263, fn. 11 [74 Cal. Rptr. 389, 449 P.2d 453].) McCorkle briefly addressed and rejected a city's argument, made for the first time in the Supreme Court, that section 3366 precluded a civil lawsuit by a motorist injured when he was assisting a peace officer by pointing out skidmarks at the scene of a car crash. (McCorkle, at p. 263, fn. 11.) The statute covers a person who assumes the functions and risks of a peace officer, and not one who merely informs a peace officer of facts within his own knowledge. (Ibid.) Another case noted in dictum that workers' compensation benefits were granted under section 3366 to the family of a person killed while acting as an undercover agent for police in a narcotics investigation. (Page v. City of Motebello (1980) 112 Cal.App.3d 658, 662-665 [169 Cal.Rptr. 447] [family could not enforce in a civil suit a police officer's alleged promise that family would be compensated as if the informant had been a police officer].)

Although not of precedential value, we observe a workers' compensation adjudication held that section 3366 did not afford workers' compensation benefits to a member of a county sheriff's "Mounted Posse Program" for injuries she suffered when she was thrown from her horse during a training session. (County of Riverside v. Workers' Comp. Appeal Bd. (2012) 77 Cal.Comp.Cases 1033.) The program was a volunteer auxiliary group that assisted with such functions as traffic control, crowd management, crime scene protection, dealing with the public, first aid, "eyes and ears" patrols at special events, search and recovery, and appearances at parades and recruiting events. Membership in such a group was not the same as being engaged in assisting law enforcement in an evolving and possibly precarious situation, and at the time of the injury the member was training her horse, not providing any active law enforcement services. (Ibid.; see South Coast Framing, Inc. v. Workers' Comp. Appeals Bd. (2015) 61 Cal.4th 291, 305, fn. 4 [188 Cal. Rptr. 3d 46, 349 P.3d 141] [administrative cases are not of precedential value and persuasive value is debatable].)

*The term "active law enforcement" appears in other statutes, where special workers' compensation or retirement benefits are conferred on employees for "active law enforcement service" but with express exclusions for law enforcement employees whose principal duties are, for example, [**195] clerical positions such as stenographers and telephone operators."*

Gund et al., v. Country of Trinity (2018 3rd Appellate District) 24 Cal.App. 5th 185. at pgs. 190-191.

See also, Chang v. JLS Environmental Services, 2018 Cal.Wrk.Comp. P.D. LEXIS 314 (BPD) where claim barred as post-term where (1) reported after termination from employment, (2) employer did not have notice of claimed injury prior to his termination, and (3) medical records existing prior to his termination contain no evidence of claimed injury. Further, even if applicant claimed cumulative trauma, the CT date of injury was not subsequent to termination per the applicant own testimony of knowledge of workers' compensation procedures. Also, Labor Code § 3600(a)(10) does not indicates that post-termination bar is inapplicable where claimed injury is reported "at the first opportunity."; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 11.02[3][a], 21.03[1][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.03[7]. SOC, Section 5.28, Post-Termination Claims]

We conclude section 3366 applies to this case, because responding to a 911 call for help of an uncertain nature is active law enforcement, regardless of the deputy's misrepresentations. "Active law enforcement" under section 3366 means confronting the risks of dealing with the commission of crime or breach of the peace for the protection of the public. Any 911 call carries such risk, but particularly a 911 call for help of an uncertain nature.

Since we conclude section 3366 bars plaintiffs' lawsuit on the ground they were assisting in active law enforcement, we need not address alternate defense theories that the lawsuit is barred because (1) plaintiffs were employees because they assisted upon command (posse comitatus); (2) County Resolution No. 163-87 deems volunteers to be employees if they provide "service" to the county; or (3) defendants' new theory on appeal that the county and deputy sheriff have governmental immunity from tort liability for misrepresentation (Gov. Code, §§ 818.8, 822.2). We affirm the judgement.

See also, Chang v. JLS Environmental Services, 2018 Cal.Wrk.Comp. P.D. LEXIS 314 (BPD) where claim barred as post-term where (1) reported after termination from employment, (2) employer did not have notice of claimed injury prior to his termination, and (3) medical records existing prior to his termination contain no evidence of claimed injury. Further, even if applicant claimed cumulative trauma, the CT date of injury was not subsequent to termination per the applicant own testimony of knowledge of workers' compensation procedures. Also, Labor Code § 3600(a)(10) does not indicates that post-termination bar is inapplicable where claimed injury is reported "at the first opportunity."; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 11.02[3][a], 21.03[1][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.03[7]. SOC, Section 5.28, Post-Termination Claims]

See also, Palsgrove v. City of Palo Alto, 2018 Cal. Wrk. Comp. P.D. LEXIS 316 (BPD) holding that Applicant/firefighter was entitled to Labor Code § 3212.1 presumption that his basal cell carcinoma/skin cancer was industrial where panel QME cited scientific evidence that established cumulative impact of applicant's sun exposure was within latency period, and was partially responsible for development of his skin cancer. [See generally Hanna, Cal. Lawe of Emp. Inj. and Workers' Cop. 2d section 4.138[4][b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.07[5][c]. SOC, Section5 .18, Presumption of Injury – Public Employees Covered Conditions;].

AB 1749 was signed into law which provides that peace officers who are injured while engaged in law enforcement outside the state of California, not at the time at the immediate direction of their employers are within scope of employment and thus may receive workers' compensation benefits.

II. Apportionment

Hosino v. Xanterra Parks and Resorts, 2017 Cal. Wrk. Comp. P.D. LEXIS 341 (BPD)

The applicant had a prior injury in the 1970s which resulted in back surgery and an industrial injury on 10/26/11. The AME found apportionment of, but noted the complete absence of operative reports, hospital discharge summaries, or doctor's notes. Although the parties all agreed the applicant had a prior surgery, an issue existed as to the type of surgery. The AME did note that "x-rays many years later showed the level fused, which is different from saying he had a spinal fusion." The AME also noted that "patient was asymptomatic following the surgery as he carried out many years of work, and this category is more medically appropriate than guessing what kind of surgery he had performed." In the end the AME wrote "I felt that there was substantial medical evidence based on the fact that we have a known history of surgery, we have x-ray evidence, and we can see the results of the degenerative changes on x-ray currently, and as also noted on the x-rays taken soon after the 2011 injury. As noted in my answer on line 16, page 6 of the opinion, if the court determines that I need medical records, doctor's reports, operative reports, and hospital and clinic follow-ups, then I would not have substantial medical evidence. However, I feel the evidence I had did constitute substantial medical evidence."

The WCJ followed the opinion the AME reducing the disability award by apportionment found by the AME.

On reconsideration, the WCAB reversed holding "it is not clear that Dr. Wood distinguished between the "degenerative changes" that resulted from the prior surgery and those that resulted from the industrial injury. At the same time, Dr. Wood acknowledged the 'fact that [applicant] had radiating pain and required additional surgery after the specific industrial injury is medical evidence of significant new injury.' In other words, it appears that the permanent disability caused by the 'significant new industrial injury' stands alone; it is not superimposed upon a ratable permanent disability caused by the 1970s injury and back surgery. Dr. Wood also included a list of scholarly articles in support of apportionment, while stating that "all the articles indicate that there is a progression of the degenerative changes in the lumbar spine at levels besides that of surgery." In this case, however, it is not clear that pre-existing degenerative changes are causing any of the present permanent disability.

The WCAB concluded that the AME's supplemental report failed to explain "how and why" applicant's 1970s injury and back surgery caused permanent disability at the time of the doctor's evaluation, and how and why it is responsible for 35% of the permanent disability that exists now. See also, Caires v. Sharp Healthcare, 2014 Cal.Wrk.Comp. P.D. LEXIS 145 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§

Editor's comments: The Hosino opinion stresses the importance of the evaluating physician focusing on establishing the 'how and why' the pathology was (1) pre-existing and that (2) the pre-existing pathology was causative of the disability. This editor believes that the Hosino decision should not be interpreted as holding that the Escobedo substantial evidence standard cannot be met without medical records regarding prior injury, prior treatment and related pathology. However, the absence of records certainly makes it much more difficult for the evaluating physician's to satisfy the Escobedo standard of substantial evidence.

See also, Viray v. PG&E, 2017 Cal.Wrk.Comp. P.D. LEXIS 400 (BPD), holding that apportioned according to "range of evidence" held improper where different parts of body/conditions/medical specialties are involved; rather each physician's opinion on apportionment should be applied independently; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[1]-[3], 8.07, 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.40[1], 7.42[1], [2], [4]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Ch. 9. Sullivan on Comp, Section 16.20, Evidence at Trial – Weight of Medical Evidence]

See also, Sobol v. State of California Departement of Corrections and Rehab, 2017 Cal.Wrk.Comp. P.D. LEXIS 454, holding that an AME's opinion finding 25% apportionment to genetic predisposition was held not substantial evidence where AME failed to provide any medical detail, data, studies, or research articles in support, as described in City of Jackson v. W.C.A.B. (Rice) (2017) 11 Cal. App. 5th 109, 216 Cal. Rptr. 3d 911, 82 Cal. Comp. Cases 437. ; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[1]-[3], 8.07, 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.40[1], 7.42[1], [2], [4]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Ch. 9.];

But see also, Jensen v. County of Santa Barbara, 2018 Cal.Wrk.Comp. P.D. LEXIS 185 (BPD), holding apportionment to obesity and family history of hypertension was not impermissible apportionment to 'risk of injury', rather it was proper apportionment to the cause of permanent disability where disability was due to visual and mental/memory impairment caused by stroke due to hypertension, and hypertension was in part the result of obesity and pre-existing as evidenced by family history.

But see, also, Martinez v. County of Alameda, 46 CWCR 81 (BPD) holding apportionment to "risk factors" improper where stroke resulted in total disability but was in part caused by non-industrial atherosclerotic plaque formation which created the 'risk' of stroke.

Editor's Comments: Despite the holdings in City of Jackson, and Jensen, both QME's and defense attorney should be cautious of opinions apportioning directly to 'risk factors' including genetic predisposition; Rather, the relevance of 'risk factors' is to satisfy the 'substantial evidence' requirement that the pathology is pre-existing and thus nonindustrial. See accord, infra. City of Petaluma v. WCAB (Lindh) (2018, 1st Appellate District) 2018 Cal.App. LEXIS 1137. Further, the holding in Martinez v. County of Alameda, 46 CWCR 81 (BPD) seems incorrect as the pathology involving stenosis created by the atherosclerotic plaque formations created a blockage which as the AME stated "set up the stroke, while the events of employment precipitated the stroke itself." Merely because the 'causation of injury' and 'causation of disability' both involve the same causes does not negate apportionment of the resulting disability. Here the injury and disability was caused by a combination of the stenosis/arterial blockage coupled with the stress related to the employment which allows apportionment of the disability to the pre-existing non-industrial pathology resulting in stenosis caused by the atherosclerotic plaque formations.

8.05[1]-[3], 8.07, 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.40[1], 7.42[1], [2], [4]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Ch. 9.]

City of Petaluma v. WCAB (Lindh) (2018, 1st Appellate District) 2018 Cal.App. LEXIS 1137

Applicant sustained injury to left eye when he was struck three to six blows to the left side of his head while engaged in a canine training course. Afterwards, he "suffered severe headaches lasting between several hours to one or two days." Over a month later, while off duty, Lindh suddenly lost most of the vision in his left eye.

The applicant was evaluated by two treating physicians both of whom diagnosed that applicant with a "a left central vein occlusion and retinal artery occlusion with afferent pupillary defect" a "combined central retinal vein occlusion/cilioretinal artery occlusion in the left eye." Neither physician believed the vision loss was related to the blows to his head. The neuro-ophthalmologist QME described applicant as having "lost the central vision and part of his peripheral vision." He stated in his report and testified at deposition that there were "five diagnoses" pertinent to Lindh—"Presbyopia. Hyperopia. Left ischemic optic neuropathy. Left vitreous fibrosis and some retinal hemorrhages. History of migraine." Dr. Kaye explained that presbyopia and hyperopia are conditions requiring the individual to wear reading glasses or "magnifying lenses." "[L]eft ischemic optic neuropathy" is "a condition in which the circulation to the nerve of the left eye was affected in effect causing a stroke." "[V]itreous fibrosis and some retinal hemorrhages," Dr. Kaye explained as, "when God makes the eye, he packs it full[] of jelly and the jelly sometimes collapses and is replaced with scar tissue as in this case."

Dr. Kaye also concluded, as had the other physicians, that Lindh's "blood circulation to his left eye was defective." He stated Lindh "did not have any disability prior to receiving the blows to the head." And "[a]bsent the injury," he thought Lindh "most likely would have retained a lot of his vision in that eye," although he could not "guess" how much. Dr. Kaye agreed "it [was] possible that [Lindh] could have gone his entire life without losing vision." He also agreed, however, that even had Lindh not suffered the blows to his head, he still could have lost his vision "due to this underlying condition."

> *". . . Under the current law, the salient question is whether the disability resulted from both nonindustrial and industrial causes, and if so, apportionment is required. (See Brodie, supra, 40 Cal.4th at p. 1328; Jackson, supra, 11 Cal.App.5th at pp. 116–117; Acme Steel, supra, 218 Cal.App.4th at p. 1142.) Whether or not an asymptomatic preexisting condition that contributed to the disability would, alone, have inevitably become manifest and resulted in disability, is immaterial.*
>
> *Thus, while a number of cases have involved asymptomatic preexisting conditions involving a "degenerative" disease, including Jackson (cervical degenerative condition caused in large part by heredity and genetics), Acme Steel (congenital degeneration of the cochlea), and E.L. Yeager (degenerative disease of the lumbar spine), no case has suggested that that particular medical terminology is indicative of a legal requirement for apportionment. (See Jackson, supra, 11 Cal.App.5th at p. 117 ["We perceive no relevant distinction between allowing apportionment based on a preexisting congenital or pathological condition and allowing apportionment based on a preexisting degenerative condition caused by heredity or genetics."].)*
>
> *To the contrary, the post-amendment cases uniformly focus on whether there is substantial medical evidence the disability was caused, in part, by nonindustrial factors, which can include "pathology and asymptomatic prior conditions for which the worker has an inherited predisposition." (Jackson, supra, 11 Cal.App.5th at p. 116; see Escobedo, supra, 70 Cal.Comp.Cases at p. 617 [separately listing, and thus distinguishing between, all the "factors" that are apportionable—including those apportionable prior to 2004 ("the natural progression of a non-industrial condition or disease, a pre-existing disability, or a post-injury disabling event") and those apportionable after 2004 amendments ("pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions")].)"*
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> *City of Petaluma* v. WCAB (Lindh) (2018, 1st Appellate District) 2018 Cal.App. LEXIS 1137, at pg. 1144.
>
> *In addressing the doctrine of substantial evidence the Court cited to City of Jackson writing ". . .The court went on to conclude that the QME's opinion constituted "substantial medical evidence" supporting apportionment. (Jackson, supra, 11 Cal.App.5th at p. 119.) "Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion. (Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd. (1983) 34 Cal.3d 159, 164 [193 Cal. Rptr. 157, 666 P.2d 14].) In Escobedo, supra, 70 Cal.Comp.Cases at page 620, the Board opined that . . . in order for a medical opinion to constitute substantial evidence, it must be predicated on reasonable medical probability. It must also set forth the reasoning behind the physician's opinion. (Id. at p. 621.) In the context of an apportionment determination, the opinion must 'disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the Board can determine whether the physician is properly apportioning under correct legal principles.' (Ibid.) A medical opinion must be framed in terms of reasonable medical probability, must not be speculative, must be based on pertinent facts and on adequate examination and history, and must set forth the reasoning in support of its conclusions. (Ibid.)" (Jackson, at p. 119.)"*
>
> *City of Petaluma v. WCAB (Lindh) (2018, 1st Appellate District) 2018 Cal.App. LEXIS 1137, footnotes 5-7.*
>
> *See also, Chavez v. Chief Auto Parts, 2018 Cal.Wrk.Comp. P.D. LEXIS 257(BPD), holding that the opinion of AME finding no apportionment pursuant to Benson v. W.C.A.B. (2009) 170 Cal. App. 4th 1535, 89 Cal. Rptr. 3d 166, 74 Cal. Comp. Cases 113 as three injuries "inextricably intertwined" not credible as AME disregarded medical history and findings of the other medical evaluator. But see, contra, Herrera v. Maple Leaf Foods, 2018 Cal.Wrk.Comp. P.D. LEXIS 284 (BPD) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[1]-[3], 8.07, 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.40[1], 7.42[1], [2], [4]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Ch. 9; SOC, Section 10.37, Wilkinson Rule and Benson.]*

As to apportionment, it was Dr. Kaye's "opinion that [Lindh's] underlying vasospastic personality and vasculature placed him at high risk for damage to different parts of his body." He further explained: "So when you ask the question for the cause of injury, causation, I'm required to tell you that he does have an underlying condition, vasospastic type, body type. I'm also required to tell you that the injury contributed to his condition. … With regard to the cause of the disability, the same analysis applies."

At a later point in his testimony, Dr. Kaye reiterated: "I've pointed out to both of you that he has a vasospastic-type personality with a long history of migraine that's associated with this, and the majority of that is from his underlying condition and, yes, at the time of a stress in his life such as at work or being smacked in the head with some dogs, that places him at a much higher risk category and I'm comfortable in my own mind attributing that to the severe loss of vision. . . But not completely as I've tried to make clear." He subsequently repeated it was "unlikely" Lindh would have suffered a vision loss if he had not had the "underlying condition" of "vascular spasticity," a condition that is "rare."

Again, in discussing his initial apportionment of 90 percent (which he adjusted to 85 percent), Dr. Kaye stated, "90 percent [is] due to the underlying condition and 10 percent due to the stress of the injuries," the underlying condition meaning "vasospastic-migraine body type." He further agreed his opinion was to a reasonable medical certainty. While Dr. Kaye had initially apportioned 90 percent of the cause of the disability to Lindh's underlying condition and 10 percent to "the results of the trauma," after reviewing "all the previous data again," he stated both at deposition and in a follow-up to his report that: "[I]t is my professional opinion that 85% of the patient's permanent disability is due to his old condition and 15% of the applicant's permanent disability is due to his industrial injury."

The parties stipulated "the medical record, not including apportionment, rates 40 percent permanent disability, and with apportionment, rates six percent permanent disability."

The ALJ rejected Dr. Kaye's apportionment analysis, concluding it was not supported by substantial evidence, and found Lindh had 40 percent permanent disability without apportionment between his underlying condition and the work-related injury.

After granting the City's petition for reconsideration, the Board affirmed the ALJ's decision. As the Board saw it, "Dr. Kaye's opinion establishes that applicant's preexisting hyperreactive type personality and his asymptomatic and … preexisting systemic hypertension and vasospasm were mere risk factors that predisposed him to having a left eye injury, but the actual injury and its resultant disability (i.e., the left eye blindness) were entirely caused by industrial factors." (Italics omitted.) "[A]n opinion that bases apportionment upon the percentage to which non-industrial risk factors contributed to causing the injury is not substantial evidence that legally justifies apportionment." (Italics omitted.) The Board concluded Dr. Kaye had "confused causation of injury with causation of disability" and that "there is no legally valid basis for apportionment in this case."

The Court of Appeal reversed holding that apportionment under LC 4663 to an asymptomatic preexisting condition must be based on substantial medical evidence that the condition was a contributing cause of the actual disability. Further, a pre-existing non-industrial condition may be the basis for apportionment even where the condition had caused no disability prior to the work-related injury and might not have become symptomatic/disabling without the work-related injury. Last, apportionment to risk factors associated with a pre-existing condition is proper provided the apportionment is not based solely on risk factors, but on an actual cause of the permanent disability. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[1], [2][a], 8.06[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.40[1], [2], 7.41[3], 7.42[3].]

Cuevas v. Del Monte Meat Company, Inc, et al., 2018 Cal.Wrk. Comp.P.D. LEXIS 324 (BPD).

Defendant sought reconsideration of WCJ's decision finding a specific injury to his low back and psyche on January 14, 2011, and a cumulative injury to his right shoulder during the period from ending April 4, 2013 without apportionment. The AME neurologist found that there was no connection or apportionment between the shoulder injury and the back injury. The shoulder injury was due to CT injury while the back injury was due to a specific fall injury.

Although the Psych QME found an industrial psychiatric injury as a compensable consequence he was unable to apportion between the specific and CT injury opining that the two physical injuries combined to cause the psychiatric injury and were 'inextricable intertwined'. The WCJ issued a PD award without apportionment.

On reconsideration the WCAB Panel reversed holding the psych QME did not constituted substantial evidence due to internal conflict. Further, where opinion of the reporting QME does not constitute substantial evidence on issue of apportionment of psychiatric injury, clarification must be sought, and where panel qualified medical evaluator is unable to render adequate opinion on issue of apportionment, the parties may choose agreed medical examiner to evaluate applicant or WCJ may appoint regular physician. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[1]-[3], 8.07, 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.40[1], 7.42[1], [2], [4]; The Lawyer's Guide to the AMA *Guides* and California Workers' Compensation, Ch. 9.]

". . . [At deposition the psych QME testified], "I continue to believe that any apportionment opinion related to psychiatric permanent disability rendered in this case would be a pure speculation as there is no evidence in the medical file which would allow for an approximation using clinical judgment. Given the amount of time which has passed from the DOI and the short span of time which passed between the specific and the CT, with the CT following the specific injury, even Mr. Cuevas himself was unable to provide any useful testimony which would allow me to quantify (even approximately) each injury's contribution to the psychiatric permanent disability. ... (P) Based on my professional medical opinion and expertise, psychiatric symptom worsening is equally possible in response to continued pain, loss of functioning and lack of treatment of psychiatric symptoms. Even in the absence of the second injury, Mr. Cuevas was likely to have the same level of psychiatric permanent disability; however, there was a second injury which increased the pain and loss of functioning and possibly contributes to the level of permanent psychiatric disability; however, there is no way to confirm, deny or quantify this contribution."

". . .When asked to address both injury claims Dr. Bokarius stated that the specific injury caused applicant's psychiatric injury but he also stated that:

> *"I am unable to apportion between the two dates of injury as I find the psychiatric effects to be inextricably intertwined, given the fact that Mr. Cuevas's psychiatric symptoms are related to the combined experience of pain and loss of functioning."*

In his subsequent report the doctor stated,

> *"I find it impossible to parcel out the effects of specific injury from the effects of the cumulative injury as they relate to his current level of permanent psychiatric disability, without speculating."*

In his last report the doctor stated:

> *"Based on my professional medical opinion and expertise, psychiatric symptom worsening is equally possible in response to continued pain, loss of functioning and lack of treatment of psychiatric symptoms. Even in the absence of the second injury, Mr. Cuevas was likely to have the same level of psychiatric permanent disability; however, there was a second injury which increased the pain and loss of functioning and possibly contributes to the level of permanent psychiatric disability; however, there is no way to confirm, deny or quantify this contribution."*

Cuevas v. Del Monte Meat Company, Inc, et al., 2018 Cal.Wrk.Comp.P.D. LEXIS at pg. 330 (BPD).

Hirschberger v. Stockwell, Harris, Woolverton and Muehl, SCIF, 2018 Cal.Wrk.Comp. P.D. LEXIS 482 (BPD).

Applicant sustained a stress related psychiatric industrial injury which aggravated the applicants pre-existing Parkinson's Disease. The WCJ found that substantial medical evidence that the applicant is totally permanently disabled. The WCJ also determined that there is a basis for apportionment, writing in her report that she did not apply the conclusive presumption of total permanent disability set forth in section 4662(a)(4) because the "damage to [applicant's] brain was the result of the insidious progressive nature of Parkinson's and therefore, not a brain injury 'resulting in permanent mental incapacity' pursuant to Labor Code Section 4662." To support her opinion finding

". . .When considered as a whole, the doctor's reports and deposition testimony do not constitute substantial evidence on the issue of apportionment. If he believes applicant's psychiatric injury is a consequence of his low back injury, as he stated, then apportionment is not an issue that needs to be addressed. However, his comment that the effects of the two injuries are inextricably intertwined, and his explanation as to why he could not accurately apportion the disability between the two injuries, indicate that he believes both injuries contributed to applicant's psychiatric disability, i.e. that there are two psychiatric injuries."

Cuevas v. Del Monte Meat Company, Inc, et al., 2018 Cal.Wrk.Comp.P.D. LEXIS at pg. 331 (BPD).

But see also, Herrera v. Maple Leaf Foods/U.S. Fire Ins. Co. /Alea North American Ins. Co. (August 2018) 46 CWCR 157 (BPD), holding that it is the defendant who has the burden of proving apportionment, and where the physicians cannot parcel out nonindustrial factors in specific and cumulative trauma cases the applicant is entitled to a combined un-apportioned disability award.

apportionment, the WCJ noted that "[T]he onset of Parkinson's with observable symptoms occurred prior to the work incidents and environment leading to the psyche claim. The medical evidence further supports the fact that once there are observable symptoms, the disease has already existed for some time and the brain is already irrevocably damaged. There is no known cause for the disease but all doctors agreed that the industrial stress/psychiatric injury could aggravate the disease.

> *". . .Although the WCJ correctly found that applicant is currently totally permanently disabled due to the effects of applicant's Parkinson's disease on his brain functioning, she did not apply the conclusive presumption under section 4662(a)(4) that "an injury to the brain resulting in permanent mental incapacity" be "conclusively presumed to be total in character." Her reasoning for that is not supported by the record or the law.*
>
> *As discussed above, applicant's Parkinson's disease was earlier found to be an industrial injury on May 10, 2010. The medical evidence establishes that applicant's current total permanent disability is the result of mental incapacity caused by the effect of the Parkinson's disease on his brain. Nothing in the statute or case law precludes application of the section 4662(a)(4) conclusive presumption when the brain malfunction causing mental incapacity is a result of the progression of an insidious disease, as in this case. The impact of the industrially aggravated disease on applicant's brain is an injury to the brain, and the consequence of that brain injury is permanent mental incapacity that is conclusively presumed to be total in character under section 4662(a)(4). . . "*
>
> *Hirschberger v. Stockwell, Harris, Woolverton and Muehl, SCIF, 2018 Cal.Wrk.Comp. P.D. LEXIS at pg. 487.*
>
> *Editor's comments: This case might be explained by analogy. Simple stated, like death benefits, LC 4662 A (4) may not be apportionable provided an industrial injury by aggravation (causation of injury) is found. However, note that where the applicant has a* prior loss of one eye, or one hand, on a non-industrial basis and the loss of the other hand or eye is due to an industrial injury, apportionment may proper. The public policy argument to support allowing apportionment would be that we should encourage employers to hire the disabled, and punishing the employer by making the employer liable for disability which the applicant brought with him to the job would likely result in the opposite occurring.

To support the conclusion that the damage to applicant brain was the result of a disease and not an injury, the WCJ in reviewing the deposition testimony of the AME. The WCJ found that a fair and proper reading of the entire transcript indicates that AME's opinion was that [Parkinson's] is a degenerative disease process as opposed to an injury. The WCJ also noted that the applicant may choose to plead a case in any manner but pleadings may be and should be conformed to the evidence.

The WCJ found no evidence including the replacement psyche/neuropsyche AME, addressing the issue of whether or not the diagnosis of Parkinson's should be the equivalent of a brain injury, i.e. no discussion at all relating to the issue of disease versus injury. The WCJ made an award reflecting apportionment.

Applicant sought reconsideration. The WCAB Panel reversed. First, the Panel determined that the conclusive presumption of total disability under Labor Code 4662(a)(4) does not permit apportionment. In this case the industrial stress/psychiatric injury produced an injury by way of aggravation of the non-industrial Parkinson's Disease which resulted in total disability pursuant to the conclusive presumption 4662(a)(4). Labor Code 4662(a)(4) provides that "an injury to the brain resulting in permanent mental incapacity" is "conclusively presumed to be total in character.

CIGA

California Insurance Guarantee Association-General and Special Employment-Restricting and Limiting Endorsements-CIGA held liable for benefits where insurance policy issued to applicant's special employer expressly excluded special employees from coverage and was not "other insurance" pursuant to Insurance Code § 1063.1(c)(9), noting that agreement between general employer and special employer under Labor Code § 3602(d), cannot eliminate joint and several liability for their joint employees, as coverage is determined by looking at terms of relevant insurance policy and not agreement between employers. Mastache v. Staffchex, Inc., CIGA et al., 2018 Cal.Wrk.Comp. P.D. LEXIS 270 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 2.60[3], 2.84[3][a], 3.142[5]; Rassp & Herlick, California Workers' Compensation Law, Ch. 3, §§ 3.30[2], 3.33[3]. SOC, Section 3.47, CIGA – Coverage Limitations]

III. Compromise and Release

Camacho v. Target Corp. (4th Appellate District) 24 Cal.App.5th 291, 83 Cal.Comp.Cases 1014, 2018 Cal.App. LEXIS 529

Editor's comments: This opinion provides a clear roadmap of which is required by a defendant to have an enforceable settlement agreement of civil claims arising out of a workers' compensation claim. Certainty requires that the defendant have a separate mutual release and settlement agreement which articulate generally and specifically the parties intent to resolve civil claims or causes of action consistent with the requirements of 1542 of the California Civil Code. Reading between the lines it appears that Camacho may have involved an applicant/plaintiff who merely had a change of mind.

An office assistant filed a civil action against her former employer/supervisor alleging sexual harassment in violation of the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.). Before filing the civil action, the employee had filed two claims with the Workers' Compensation Appeals Board, one for an injury suffered in a slip and fall and the other for injury to psyche due to sexual harassment. In the civil action following approval of C&R defendant sought summary adjudication arguing that by executing the workers' compensation compromise and release the plaintiff had settled both the workers' compensation claim and the subject civil claim. The trial court granted the employer's motion.

The Supreme Court upheld the Court of Appeal's decision reversing the Trial Court. The Supreme Court held that the standard language of the preprinted form used in settling workers' compensation claims releases only those claims that are within the scope of the worker's compensation system and does not apply to claims asserted in separate civil actions. The Supreme Court also held that extrinsic evidence was not admissible to establish that the parties intended for the standard form release to apply to the employee's sexual harassment claims outside the workers' compensation system. The Court wrote that "execution of the mandatory standard preprinted compromise and release form only establishes the settlement of workers' compensation claims; the intended settlement of claims outside the workers' compensation system must be reflected in a separate document." This holding was a change in existing law on the admissibility of evidence extrinsic to the workers' compensation release, law upon which other parties may have relied on settling claims. Accordingly, the court held that its holding should apply only prospectively. In cases involving a preprinted standard release form executed before the finality of its decision, such as the case at bar, the interpretation of the compromise and release in any further proceeding will require consideration of all credible evidence offered to prove the intention of the parties.

In the end the Court held that language contained in addendum to C&R did not constitute general release of plaintiff's civil claims, citing Claxton v. Waters (2004) 34 Cal. 4th 367, 96 P.3d 496, 18 Cal. Rptr. 3d 246, 69 Cal. Comp. Cases 895; C&R intended to settle non-workers' compensation claims as part of workers' compensation must indicate desire in "clear and nontechnical language." ; But see, distinguished, Jefferson v. Department of Youth Authority (2002) 28 Cal. 4th 299, 48 P.3d 423, 121 Cal. Rptr. 2d 391, 67 Cal. Comp. Cases 727; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 29.01, 29.02[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 18, § 18.13[3], [4].] SOC, Section 2.23, Effect of Settlement.

IV. Contribution

Huckaby v. Plains All American Pipeline, et al., 2018 Cal.Wrk. Comp. P.D. LEXIS 267 (BPD)

Applicant sustained successive specific injuries on December 14, 1990, to the cervical and lumbar spine and on March 24, 2009, to lumbar spine and left leg. On November 3, 2014, defendant-carrier for the second specific injury filed a Petition for Contribution against defendant-carrier for the first specific claim of injury. On January 27, 2015, a WCJ consolidated the two case on the issue of rights as between defendant's. The WCJ thereafter order the parties to submit the issue of contribution to arbitration pursuant to section 5275.

On reconsideration the WCAB reversed holding that where the applicant has successive specific injuries and recovery is sought as between carriers, the action is for reimbursement and not contribution. Therefore, the WCJ's order instructing parties to arbitrate issue of contribution pursuant to Labor Code § 5275 was improper. The WCAB held that Labor Code § 5275 only applies to contribution involving Labor Code § 5500.5 cumulative trauma injury. Further, the WCAB has jurisdiction under Labor Code § 5300 to determine rights as between defendant for reimbursement involving successive specific injuries. ([See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 26.03[4], 31.13, 33.01[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.15, Ch. 16, § 16.05[2][b], Ch. 19, § 19.37. SOC, Section 5.8, Contribution Among Defendants

V. Discovery

Peluso v. Calgary Flames, 2017 Cal.Wrk.Comp. P.D. LEXIS 476 (BPD)

> *Editor's comments: The Peluso decision should be a reminder to both the defense bar as well as the Court that reasonable accommodation should always be provided to the injured worker.*
>
> *See also, Beitia v. City of Oakland 2018 Cal.Wrk.Comp. P.D. LEXIS 228, 83 Cal.Comp. Cases 1598, holding by split panel decision, that it was not denial of defendant right to due process to limit discovery of nonindustrial conditions that may have played role in causation of injury, where defendant's subpoenas seeking treatment records from three different medical facilities were impermissibly overbroad. Commissioner Lowe Dissenting, held that applicant did not show adequate basis for limiting scope of subpoenas in question and that full discovery of medical records requested by defendant was preferable given general rule allowing liberal pre-trial discovery to allow examining physician to render opinion. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 25.40, 25.43, 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.45, Ch. 19, § 19.37.].*

The applicant live outside the State of California and took exception to the WCJ's order which required him to appear for deposition on November 16 and 17, 2017, and attend 14 medical and vocational evaluations between November 15, 2017 and December 1, 2017.

Granting removal, the WCAB ordered the discovery plan set forth be stayed, and that (1) the record be developed on the issues of whether the applicant's seizure disorder prevents or limits his ability to travel from Minnesota to California, as well as the extent to which his medical condition affects his ability to participate in the additional medical and vocational evaluations, as well as two days of deposition; (2) that the WCJ shall direct the parties to select a physician to perform an evaluation in Minnesota, and in the absence of agreement between the parties, WCJ shall select an Independent Medical Evaluator to perform the evaluation; and (3) determination of how and where further proceedings and discovery will be conducted should be based upon the results of this medical evaluation with consideration given to alternative means of obtaining discovery, whether it be by online video conference, conducting all future medical evaluations and applicant's deposition in Minnesota, or by limiting discovery to the preparation of supplemental reports by physicians and vocational experts who have already examined or evaluated applicant.

In the end, the WCAB panel held that where applicant is out-of-state alternative means of obtaining discovery may be proper, whether it be by online video conference, conducting all future medical evaluations and applicant's deposition in the current state of residency or by limiting discovery to preparation of supplemental reports by physicians and vocational experts who have already examined or evaluated applicant. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 25.40, 25.41, 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.45[1], [2], Ch. 19, § 19.37.]

VI. Evidence/Procedure

Camacho v. Pirate Staffing/Lumbermen's Indemnity (11-20-17) 46 CWCR 11 (BPD).

The trier of fact may not draw a "negative inference" regarding the applicant's credibility when the applicant refuses to disclose his Social Security number by exercising his privilege against self-incrimination.

VII. Exclusive Remedy

People ex rel. Alzayat v. Hebb, (2017 4th Appellate District) 18 Cal.App.5th 801, 226 Cal.Rptr.3d 867, 83 Cal.Comp.Cases 70, 2017 Cal.App. LEXIS 1133 (Review by Supreme Court Denied April 11, 2018)

Editor's comments: The Insurance Frauds Prevention Act (IFPA), was designed to prevent workers' compensation fraud. The "general rule" of 'exclusive remedy rule' must yield to the "specific statute" comprising the IFPA as application of the general rule of 'exclusive remedy' as a bar to a qui tam action based upon the IFPA would nullify it's intended purpose. Further, the 'exclusive remedy' was intended to apply to a claim based upon the employee's own injuries, and a qui tam claim is not. Therefore, the 'exclusive remedy rule' does not apply. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 2.03[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.30[1], [2].]

See also, Alzayat v. Gerald Hebb (2018 4th Appellate District) 18 Cal.App.5th 801, 226 Cal.Rptr 3d 867, 83 Cal.Comp. Cases 70, 2017 Cal.App. LEXIS 1133, where a Qui Tam action alleging fraud on the part of the supervisor for false statement made in connection with a worker's claim of industrial injury resulting in the initial denial of the claim held not barred by either the exclusive remedy rule applicable to workers compensation claims nor bythe litigation privilege.; Insurance Code Section 1871 et Seq.:[See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 2.03[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.30[1], [2].]

An employee, on behalf of the People of the State of California, filed a qui tam action (whistleblower claim) against his employer and his supervisor alleging a violation of the Insurance Frauds Prevention Act (IFPA) (Ins. Code, 1871 et seq.) The employee alleged the supervisor made false statements in an incident report submitted in response to the employee's claim for workers' compensation, and the supervisor repeated those false statements in a deposition taken during the investigation into the employee's claim for compensation. The supervisor's false statements resulted in the employee's claim being initially denied. Defendants filed motions for judgment on the pleadings. The trial court ruled that the litigation privilege under Civ. Code, § 47, subd. (b), barred the employee's claim. The court granted the motions without leave to amend and entered judgment dismissing the lawsuit.

The Court of Appeal reversed the judgment. The court held that a false report submitted by or prepared to be submitted by an employer in response to a claim for workers' compensation insurance benefits, fraudulently disputing liability for the claimed injury, is a false oral or written statement in support of or opposition to a claim for benefits within the meaning of Pen. Code, § 550, subd. (b)(1), (2). Because that was what the employee alleged in his complaint, he pleaded predicate offenses under § 550, subd. (b)(1)and/or (2). Rather than limiting the IFPA's statutory penalties to one type of predicate violation, the most reasonable reading of Ins. Code, § 1871.7, subd. (b), is that it limits the number of penalties that can be imposed for insurance fraud violations related to a single claim. The court concluded that the employee's lawsuit was not barred by the litigation privilege. The litigation privilege does not bar an action filed under a more specific statute when application of the privilege would render the specific provision significantly or wholly inoperable. The IFPA is a more specific statute than the litigation privilege, and application of the litigation privilege to claims under the IFPA—which in many cases will be based on communications that are otherwise privileged under Civ. Code, § 47, subd. (b)—would in large measure nullify the IFPA. The court also concluded that the lawsuit was not barred by the workers' compensation exclusivity rule. The Workers' Compensation Act (Lab. Code, § 3200 et seq.) provides exclusive remedies for injuries to a worker arising out of his or her employment. Like any qui tam lawsuit, the employee's claim under the IFPA was based on an injury suffered by the People, not based on any injury he himself suffered. Therefore, the exclusivity rule was inapplicable. The trial court thus erred by granting judgment on the pleadings for defendants.

King v. CompPartners, (2018, Cal. Supreme Court)) 4 Cal.5th 1039, 83 Cal.Comp.Cases 1523, 2018 Cal. LEXIS 6268.

Editor's comments: Although a win for UR and the defendant, UR physicians must be careful to not "stepped outside of the utilization review role contemplated by statute" as the King decision suggest that any gratuitous comments or treatment recommendation may create a "duty" which might create liability on the part of the UR physician?

Plaintiffs filed a complaint after a utilization reviewer denied a treating physician's request to continue prescribing the drug Klonopin for the injured employee. The trial court sustained defendants' demurrer without leave to amend. The Court of Appeal on Writ of Review affirmed the order sustaining the demurrer but reversed the denial of leave to amend. The Court of Appeal agreed with defendants that plaintiffs' challenge to the decision to decertify the prescription was subject to the exclusive remedies of the workers' compensation system. The Court of Appeal held that because the plaintiffs were challenging the reviewer's failure to

warn plaintiffs of the risks of Klonopin withdrawal, the Court of Appeal concluded the claim was not preempted because it did not directly challenge the medical necessity determination.

The Supreme Court reversed the lower Court insofar as it permitted plaintiffs to amend their complaint to bolster their claim that defendants were liable in tort for failure to warn. The Supreme Court of California by unanimous decision held that the workers' compensation law provided the exclusive remedy for the employee's injuries and thus preempted plaintiffs' tort claims. The harm plaintiffs alleged was collateral to and derivative of that industrial injury and arose within the scope of employment for purposes of the workers' compensation exclusive remedy. Because the acts alleged did not suggest that defendants stepped outside of the utilization review role contemplated by statute, plaintiffs' claims were preempted. Further, the plaintiffs did not show that they could amend their complaint in a manner that would alter this conclusion.

Simply stated, the Supreme Court, held that the UR physician was not liable in tort for failure to warn finding that workers' compensation law provides exclusive remedy for employee's injuries and thus preempts employee's tort claims, where after two years of authorization and use of Klonopin, the UR physician decertified use without weaning regimen nor warning applicant/plaintiff of risks of abruptly ceasing Klonopin.

VIII. Fraud

Williams v. Department of Corrections & Rehabilitations, 2017 Cal.Wrk. Comp. P.D. LEXIS 458 (BPD)

On 4/2/07 the parties purportedly entered into a zero percent Stipulation with Request for Award. Approximately 10 later applicant sought to set the Stipulation. Unrebutted evidence presented by the applicant was that the signature on the Stips was not that of the applicant.

The WCAB upheld the WCJ finding that the Stipulations with Request for Award approved on 4/2/2007 was the product of mistake, error or fraud, based upon a finding that the signature on Stipulation was forged, and thereby constituting extrinsic fraud so as to justify setting aside Stipulation even outside five-year statute of limitations in Labor Code § 5803. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 26.06[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, §§ 16.23, 16.45[2].]

IX. Jurisdiction

Tripplett v. WCAB (4th Appellate District) 25 Cal.App.5th 556, 235 Cal.Rptr.3d 879, 83 Cal.Comp.Cases 1175, 2018 Cal.App. LEXIS 652

Applicant, a professional football player, filed a CT claim of injury to various parts of body. Applicant played from 2002-2008 with various NFL teams. During his NFL career applicant participated in a total of 2 games within the State of California. Each of the various defendants denied the claim. The Buffalo Bills and the Seattle Seahawks disputed California jurisdiction. At trial the parties stipulated to injury with trial held "solely California jurisdiction regarding Buffalo Bills and Seattle Seahawks."

At trial applicant testified that his agent negotiated all his contracts and was located in Newport Beach. Applicant initially testified that at the time he signed his contract he was living in LA and signed the contract in his agent's office in Newport Beach. Applicant elected against the Indianapolis Colts who had not raised jurisdiction. With respect to the Indianapolis Colts contract, the fact were this it was signed by Applicant, the Colts representative, and by applicant's agent, all on July 26, 2002. Noteworthy, is that both applicant and the Colts representative signed on the same page, with applicant's agent signing on a different copy of the signature page. The contract containing the page with both the applicant's and Colts representative's signature appears to have been faxed from a telephone number in Buffalo, New York.

Editor's comments: Simply stated, for the WCAB to have jurisdiction there must be sufficient minimum contacts within the forum state, California. In establishing jurisdiction the Courts have traditionally considered factors to include where the contract for hire was negotiated, and executed, where services were to be performed, and where the parties were domiciled/reside. Often confused is the distinction between Subject Matter Jurisdiction, and the issue of Conflict of Law.

On the issue jurisdiction see, Booth v. Chicago Bulls, TIG Insurance, 2014 Cal.Wrk.P.D. LEXIS 487, in which WCAB reversed WCJ, held no jurisdiction where professional basketball player played 3 practices within California during two year professional career. Court writing, "California must have sufficient interest in applicant's claim to apply its workers' compensation law otherwise employer/carrier would be deprived of due process... " At best the effects of these practices were de minimis on any claim of CT injury. Mere exposure to injurious trauma is insufficient to confer jurisdiction where the effect are de minimis. Applicant, who has the burden on this issue did not meet that burden. See also, Federal Insurance Company v. WCAB (Johnson) (2013) 221 Cal.App.4th 1136, 165 Cal.Rptr.3rd 288, 78 CCC 1257. Pippen v. Portland Trail Blazers, Houston Rockets, Chicago Bulls, TIG Insurance, Chubb Group (Federal Insurance Company), 2015 Cal. Wrk. Comp. P.D. LEXIS 201(BPD). Cleveland Browns, PSI, v. WCAB (Saleh) (2014) 79 CCC 941, 2014 Cal.Wrk.Comp. LEXIS 87 (Writ Denied); Newberry v. San Francisco Forty Niners, Atlanta Falcons, Oakland Raiders, San Diego Chargers, ESIS, Tristar, Zenith Insurance, Berkley Specialty, Travelers Insurance, 2017 Cal. Wrk. Comp. P.D. LEXIS 143 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.01[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[1]. Sullivan on Comp. Section 5.6, Defining Multiple Injury Dates]

See also, Bruce Mathews v. National Football League Management Council (2012, 9th Circuit Court of Appeal) F.3rd 1107, 77 CCC 711, 40 CWCR 161, which upheld "choice of law" provision in contract where no evidence that contract was entered into, nor significant services provided, nor evidence of specific or CT injury within California, and applicant was not a resident of California, and where the employment contract selected an alternate state's worker's compensation laws which afforded a sufficient remedy.

See also, Totten v. LA Dodger, 2018 Cal.Wrk. P.D. LEXIS 366 (BPD, holding that the WCAB had jurisdiction over claim by minor league player/applicant playing for minor league teams affiliates outside California, as player was an employee of California-based defendant, Los Angeles Dodgers, contract was with California employer (LA Dodgers), who supervised applicant's activities, and paid applicant's salary. California had legitimate and substantial interest in adjudicating applicant's claim. Totten v. LA Dodger, 2018 Cal.Wrk. P.D. LEXIS 366 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 3.22[2], [3], 21.02, 21.06, 21.07[5]; Rassp & Herlick, California Workers' Compensation Law, Ch. 13, § 13.01[2]; SOC, Section 2.9, Jurisdiction Over Out-Of-State Injuries.]

When confronted the applicant was forced to state that he "honestly don't remember" where he signed the agreement, New York or California. The Colts representative testified that applicant likely signed the contract in Indianapolis while attending the team's minicamp from July 24 through July 26, 2002, and applicant would not have been eligible to play for Indianapolis until he signed his agreement making time of the essence. The WCJ found for the applicant holding that the California WCAB had jurisdiction. Defendant sought reconsideration.

The WCAB on reconsideration reversed writing holding that "[w]hile it [is] not necessary that all the terms of an employment agreement finalized within California in order for the WCAB to obtain jurisdiction pursuant to sections 3600.5(a) and 5305, there must nevertheless be evidence sufficient to support a finding that a hiring occurred in California by the acceptance of employment within this state in order for that jurisdictional basis to apply," and that "the limited number of professional games played by applicant" in the state of California was insufficient to establish jurisdiction.

Defendant sought review. The Court of Appeal found that the applicant had failed to satisfy his burden of proving he was hired in California, as the evidence showed that applicant, former professional football player, probably signed employment contract in Indianapolis, and that his agent, who negotiated applicant's employment contract from his office in California, faxed the applicant's signature from telephone number in Buffalo, New York, evidence the

applicant had signed the contract outside the state of California. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 3.22[2], [3], 21.02, 21.07[5]; Rassp & Herlick, California Workers' Compensation Law, Ch. 13, § 13.01[2].]

X. Lien Claims

Rendon v. Target Plastics, 2018 Cal.Wrk.Comp. P.D. LEXIS 292 (BPD)

Decision resolved fees and declaration requirements holding lien claimant who files lien before 1/1/13 must pay a lien activation fee of $100 on or before December 31, 2015 pursuant to LC § 4903.06(a) without requirement of declaration; A lien claimant who files a lien pursuant to section 4903(b) on or after January 1, 2013 must pay a filing fee of $150 pursuant to LC § 4903.05(d). A lien claimant who files a lien pursuant to section 4903(b) before January 1, 2017 *and* is subject to a filing fee under section 4903.05(d), must file a declaration by July 1, 2017 that states under penalty of perjury that the dispute is not subject to an independent bill review and independent medical review, and that the lien claimant satisfies certain enumerated criteria. (§ 4903.05(c)(2).) Lien claimants who file liens on or after 1/1/17 must pay a filing fee of $150 pursuant to LC 4903.05(d) and a declaration pursuant to 4903.05(c)(2).; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 30.20[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 17, §§ 17.10[4], 17.111[5]. SOC, Section 15.92, Liens.]

Chamberlin v. Santee School District, 2018 Cal.Wrk.Comp. P.D. LEXIS 323 (BPD)

Holding that the lien of copy service company was barred where filed more than 18 months after dates of service, and an attempt to extend period of statute limitations for subsequent and ongoing is not applicable where services are that of a copy service, as allowing copy service lien claimant to bootstrap its earlier lien claim to later independent date of service would be contrary to purpose of statute of limitations. But see contra, to Kindelberger v. City of Los Angeles, 2013 Cal. Wrk. Comp. P.D. LEXIS 209 (Noteworthy BPD); Labor Code Section 4903.5; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 30.04[8][a], 30.20[1], 30.21; Rassp & Herlick, California Workers' Compensation Law, Ch. 17, § 17.111[3]. SOC, Section 6.51, Statute of Limitations for Filing Liens]

Hernandez v. Alba Construction Company, SCIF, 2018 Cal.Wrk.Comp. P.D. LEXIS 311 (BPD).

Holding that interpreter-lien claimant was entitled to penalties and interest and/or award of costs and sanctions based on defendant's failure to timely pay invoice for interpreting services in connection with reading/translating Compromise and Release agreement as valid interpreting service under 8 Cal. Code Reg. § 9795.3 for which invoice must be paid within 60 days of receipt by claims administrator pursuant to 8 Cal. Code Reg. § 9795.4(a). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 23.13[3], 23.15; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, §§ 16.35[1], 16.49[2]. SOC, Section 15.111, Interpreters]

Cowger v. Jenny Craig, et al., 2018 Cal.Wrk.Comp. P.D. LEXIS 304 (BPD).

Medical-legal expense means any costs and expenses incurred by or on behalf of any party, and includes copy service fee incurred to secure medical records for the purpose of proving or disproving a contested claim. (Section 4620(a); Cornejo v. Younique Café, Inc. (2015) 81 Cal.Comp.Cases 48, 2015 Cal.Wrk.Comp. LEXIS 160 (En Banc); Martinez v. Terrazas (2013) 78 Cal.Comp.Cases 444, 2013 Cal.Wrk.Comp. LEXIS 69 (En Banc).) An employer objection to a medical-legal expense shall be made within 60 days on the explanation of review (EOR) form. (Lab. Code, § 4603.3, 4622(a)(1). Otis v. City of Los Angeles (1980) 45 Cal.Comp.Cases 1132 (En Banc).) Medical-legal billings liens are distinct and handled different from medical treatment liens. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 30.05[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 17, § 17.72[1][b]. SOC, Section 15.94, Procedure and Payment.]

XI. Medical Treatment

Go v. Sutter Solano Medical Center, 2017 Cal.Wrk.Comp.P.D. LEXIS 412 (BPD)

Applicant sustained industrial injury to her neck while working for defendant as a registered nurse on June 9, 2013. The PTP submitted an RFA for cervical spine surgery which was not UR certified and upheld on IMR appeal. In the absence of surgery the applicant on September 11, 2015 was found to be P&S with neck disability of 5% whole person impairment (WPI), which rated 7% permanent disability after apportionment of 20% to nonindustrial factors.

Applicant than returned to work for a period of time until March 22, 2016, and experienced increased symptoms during that time. On March 28, 2016, applicant self-procured cervical spinal surgery per the PTP's recommendations.

By report dated August 1, 2016, the PQME determined the applicant's condition became permanent and stationary on July 28, 2016, four months post-surgery. The PQME also determined that applicant's neck disability caused 17% WPI and that 20% of the permanent disability is properly apportioned to nonindustrial factors. Defendant contested both the increase in PD and TD as the surgery was not UR certified.

Following trial the WCJ found the applicant awarding the increase post-surgical PD and a period of post-surgical. The WCJ relied on the fact that the treatment proved to be reasonable by its positive outcome.

On reconsideration the WCAB held that TD and PD were properly awarded as result of self-procured surgery pursuant to Labor Code § 4605, despite the fact that the subject treatment had previously been UR/IMR denied.; See also, accord, Barela v. Leprino Foods; 2009 Cal.Wrk.Comp. P.D. LEXIS 482 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.01, 7.01[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.14, Ch. 6, § 6.01[1]. Sullivan on Comp, Section 14.36, Report Under LC 4605].

See also, Miller v. O'Reilly Auto Parts, 2017 Cal.Wrk.Comp.P.D. LEXIS 319 (BPD), holding that medical records establishing catastrophic nature of applicant's injury and credible testimony of applicant's family members demonstrated applicant's difficulties with activities of daily living and his need for almost constant home health care services, triggered under Labor Code § 4600 defendant's duty to investigate the applicant's need for home health care services; the employer should have taken initiative in providing benefits and investigating as necessary to determine extent of applicant's needs.; See also, accord, McKinney v. Enterprise Rent-A-Car, 2016 Cal.Wrk.Comp. P.D. LEXIS 495 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 5.04[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.05[3].]

See also, Zuniga v. WCAB (Interactive Trucking) (2018, 1st Appellate District) 19 Cal.App.5th 981 [228 Cal.Rptr.3d 294, 81 Cal.Comp. Cases 1, 2018 Cal.App. LEXIS 62]The identity of the reviewers in independent medical review (IMR) process need not be revealed. Labor Code §4610.6(f) confidentiality provision is clear and unambiguous that the WCAB lacked power to disclose the identity of the IMR reviewer nor did that provision violate either the state or federal due process provisions. See also, Stevens v. WCAB (2015) 241 Cal.App.4th 1074, 194 Cal.Rptr. 3d 469; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 5.02[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.11[2]-[4].]

See also, Galuppo v. Pebble Beach Community Services, 2018 Cal.Wrk.P.D. LEXIS 178 (BPD), holding that unanswered phone call without message being left to office of applicant's treating physician did not satisfy requirement in 8 Cal. Code Reg. § 9792.9.1(e)(3) that UR communicate its decision to requesting physician within 24 hours after decision. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02[2][c], 22.05[6][b][iii]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.10[4]. SOC, Section 7.36 Utilization Review, Procedures.]

See also, Maldonado v. Beverly Hilton Hotel/Ace American Insurance (12-7-17) 46 CWCR 12 (February, 2018), holding that it is inappropriate to remove the Nurse Case Manager (NCM) because the carrier had the right to use the NCM as a facilitator of the claims administration process and NCM was not providing (reasonable and necessary) medical treatment to the injured worker.

See also, California Dept of Corrections and Rehabilitation v WCAB (Gomez) 83 Cal.Comp. Cases 530, 2018 Cal.Wrk. LEXIS 15 (W/D), holding for the purpose of determining the timeliness of a request for additional information by a Utilization Review provider, a normal working day shall mean any day other than a Sunday or a holiday as defined in Civil Code section 9.; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02[2][c], 22.05[6][b][iii]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.10[4].]

XII. Medical-Legal Procedures

Wachiuri v. Torrance Memorial Medical Center, 2018 Cal.Wrk.Comp.P.D. LEXIS 196, 83 Cal.Comp.Cases 1494 (BPD).

Applicant claimed CT injury to various parts of body ending 3/4/15. Defendant denied the claim for all body parts for various reasons. In the joint advocacy letter Defendant sought to inform the QME as follows: "The claim was denied on 7/1/15, due to late filing, good faith termination, and post-termination defense. A supplemental denial was issued on 7/22/15 based on lack of medical evidence to substantiate the claim." Defendant also sought to provide the QME with a copy of the denial letter. Applicant objected to both the content of the joint advocacy and denial letters pursuant to LC 4062.3(b) and Maxham v. California Department of Corrections and Rehabilitation (2017) 82 Cal. Comp. Cases 136.

WCJ found that "the issues of late filing, good faith personnel defense and lack of medical evidence are not relevant to the determination of the medical issue in dispute as required by Reg. 35(a)(2). The above issues are all legal issues and are not appropriate for comment from the QME." The WCJ consequently ordered that defendant may inform the PQME that applicant's claim is denied, "but may not provide any information as to the reason for the denial." The WCJ further held with regards to the denial letter that the "other information which defendants wish to provide is not permissible."

The WCAB first discussed what constituted 'communication' vs 'information' noting that while an advocacy letter to the PQME is a 'communication', it can also provide 'information'. Further, providing the claim denial letters constitute 'information' which is within WCJ's discretion to preclude. Informing the QME that the denial is based on lack of medical evidence is relevant and proper as part of defendant's advocacy letter under Maxham v. California Department of Corrections and Rehabilitation (2017) 82 Cal. Comp. Cases 136, but informing that the basis for denial included late filing, good faith personnel action and post-termination defense, held improper as not relevant to qualified medical evaluator's medical determination. [See generally Hanna, Cal. Law of Emp. Inj. and Workers Comp. 2d §§ 22.06[1][d], [3], 22.11[18]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[4][d],[e].].

> ***35. Exchange of Information and Ex Parte Communications***
>
> *(a) The claims administrator, or if none the employer, shall provide, and the injured worker may provide, the following information to the evaluator, whether an AME, Agreed panel QME or QME:*
> *(1) All records prepared or maintained by the employee's treating physician or physicians;*
> *(2) Other medical records, including any previous treatment records or information, which are relevant to determination of the medical issue(s) in dispute;*
> *(3) A letter outlining the medical determination of the primary treating physician or the compensability issue(s) that the evaluator is requested to address in the evaluation, which shall be served on the opposing party no less than 20 days in advance of the evaluation;*
> *(4) Where the evaluation is for injuries that occurred before January 1, 2013, concerning a dispute over a utilization review decision if the decision is communicated to the requesting physician on or before June 30, 2013, whenever the treating physician's recommended medical treatment is disputed, a copy of the treating physician's report recommending the medical treatment with all supporting documents, a copy of claims administrator's, or if none the employer's, decision to approve, delay, deny or modify the disputed treatment with the documents supporting the decision, and all other relevant communications about the disputed treatment exchanged during the utilization review process required by Labor Code section 4610;*
> *(5) Non-medical records, including films and videotapes, which are relevant to determination of medical issue(s) in dispute, after compliance with subdivision 35(c) of Title 8 of the California Code of Regulations.35. Exchange of Information and Ex Parte Communications.*
>
> *See also, Gold v. City of Culver City (August 2018) 46 CWCR 167, holding that the need for a Functional Capacity Evaluation is a medical-legal evaluation cost pursuant to LC § 4620(c), and which is properly the subject of an expedited hearing.*
>
> *See also, Moore v. Wal-Mart, 2018 Cal Wrk Comp PD LEXIS 128, holding that a LC §4605 authorizing consulting physician reports applies only to applicants, and not to defendants. See also Horick (dec'd) v. Malloy, ADJ10034268, 5/25/2018, 46 CWCR 168. Labor Code 4605 provides "Nothing contained in this chapter shall limit the right of the employee to provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires. Any report prepared by consulting or attending physicians pursuant to this section shall not be the sole basis of an award of compensation. A qualified medical evaluator or authorized treating physician shall address any report procured pursuant to this section and shall indicate whether he or she agrees or disagrees with the findings or opinions stated in the report, and shall identify the bases for this opinion."*

Sundab Suon v. California Dairy; Insurance Company of the West; The Hartford, et. al. (10-23-18) 83 Cal Comp Cases 1803 (En Banc)

Applicant filed multiple claims of injury involving orthopedic, internal and psychiatry medicine against two separate defendants.

At deposition the internal medicine QME consented to review the Psychiatric QME report. Apparently no objection was made by any party. Following the deposition, one of the defendants wrote the internal medicine QME providing the Psychiatric QME report and requesting that it be reviewed and considered. Although this letter indicated that counsel for applicant was copied, it did not contain the counsel for applicant's address, and was without proof of service. This letter stated, *"In your recent deposition, you requested the opportunity to review applicant's psych QME report in order to finalize your opinion as to causation.*

Enclosed, please find the March 16, 2016 report of Psychiatric Qualified Medical Examiner Dr. Robindra Paul. Please review Dr. Paul's report and issue a supplemental report as to how your opinion may have changed, if at all."

After trial the WCJ granted counsel for applicant's request for new psychiatric and internal medicine panels finding that defendant Hartford had violated section 4062.3(b) by providing the internal QME Dr. Weber with medical information without first informing applicant, and The Hartford had ex parte communication with Dr. Weber. The WCJ ordered the parties to return to Psychiatric QME for any new issues related to stress and/or psychiatric injury but obtain a new QME panel in internal medicine or select an AME, and that the reports and deposition transcript of Dr. Weber are not to be provided to the new internal PQME or AME.

". . .the trier of fact must decide if the documents or materials sent to the QME nonetheless constitute "information" subject to section 4062.3(b). Section 4062.3 contains different procedural requirements depending on the nature of the documents or materials to be provided to the QME. Section 4062.3(b) requires that "information" proposed to be provided to the QME "shall be served on the opposing party 20 days before the information is provided to the evaluator." Section 4062.3(e) separately requires that "communications with a [QME] before a medical evaluation" must be served on the opposing party "20 days in advance of the evaluation." However, section 4062.3(e) further provides that "[a]ny subsequent communication with the medical evaluator ... shall be served on the opposing party when sent to the medical evaluator." The preliminary question is whether the documents or materials sent to the QME are "information" or "communication" as those terms are used in the Labor Code.

In Maxham, the Appeals Board distinguished between "information" and "communication" under section 4062.3 as follows:

> *1. 'Information,' as that term is used in section 4062.3, constitutes (1) records prepared or maintained by the employee's treating physician or physicians, and/or (2) medical and nonmedical records relevant to determination of the medical issues.*
>
> *2. A 'communication,' as that term is used in section 4062.3, can constitute 'information' if it contains, references, or encloses (1) records prepared or maintained by the employee's treating physician or physicians, and/or (2) medical and nonmedical records relevant to determination of the medical issues.*

Labor Code section 4062.3 provides in relevant part, as follows:

(a) Any party may provide to the qualified medical evaluator selected from a panel any of the following information:

(1) Records prepared or maintained by the employee's treating physician or physicians.

(2) Medical and nonmedical records relevant to determination of the medical issue.

(b) Information that a party proposes to provide to the qualified medical evaluator selected from a panel shall be served on the opposing party 20 days before the information is provided to the evaluator. If the opposing party objects to consideration of nonmedical records within 10 days thereafter, the records shall not be provided to the evaluator. Either party may use discovery to establish the accuracy or authenticity of nonmedical records prior to the evaluation.

(e) All communications with a qualified medical evaluator selected from a panel before a medical evaluation shall be in writing and shall be served on the opposing party 20 days in advance of the evaluation. Any subsequent communication with the medical evaluator shall be in writing and shall be served on the opposing party when sent to the medical evaluator.

(g) Ex parte communication with an agreed medical evaluator or a qualified medical evaluator selected from a panel is prohibited. If a party communicates with the agreed medical evaluator or the qualified medical evaluator in violation of subdivision (e), the aggrieved party may elect to terminate the medical evaluation and seek a new evaluation from another qualified medical evaluator to be selected according to Section 4062.1 or 4062.2, as applicable, or proceed with the initial evaluation.

Editor's Comments: Suon should serve as a reminded that sloppy work by one defendant can have a serious consequence on the unoffending defendant. In Suon it was the applicant who noticed the deposition of the internal medicine PQME, and it was the defendant who at that deposition sought to have the internal medicine PQME review the psych PQME report. This issue could have been easily resolved merely by securing an agreement between the parties at deposition, or by sending the transmittal to the parties with enclosures with a proof of service, awaiting 20 days, and then sending onto the PQME, also with a proof of service. See also, Maxham v. California Dept. of Corrections and Rehab. (2017) 82 Cal.Comp.Cases 136 (En Banc) defining 'communication' (need not be served 20 days prior but may not be ex parte), vs. 'information' (requires service 20 days prior).

Defendant sought reconsideration. By En Banc decision the WCAB held that (1) disputes over what information to provide to qualified medical evaluator are to be presented to WCAB if parties cannot informally resolve

dispute, (2) Labor Code § 4062.3(b) is without specific time for objection, opposing party must object within reasonable time in order to preserve objection, (3) election to terminate evaluation and seek new evaluation due to ex parte communication must do so within reasonable time following discovery of prohibited communication, and (4) the WCJ has wide discretion to determine appropriate remedy for violation of Labor Code § 4062.3(b), and (5) removal is appropriate procedural avenue over disputes regarding information to provide and ex parte communication with QME. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.06[3], 22.11[18]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.04[3].

XIII. Penalty – LC 5814

Flores v. Chualar Canyon Ranch Supply, 2017 Cal.Wrk.Comp. P.D. LEXIS 440 (BPD)

Applicant retained a VR expert who provided expert legal services to and at the request of applicant's attorney. When the VR expert was not paid he filed a petition for penalties pursuant to LC 5814. Defendant failed to raise the two year statute of limitations pursuant to LC 5814(g) at the time this issue was originally submitted for decision. A second hearing was held on a second petition for penalties when further demand for payment was not made and again defendant failed to raise at subsequent hearing the statute of limitations. In awarding multiple penalties the WCJ held that is issue of statute of limitation was waived as not raised at time of trial, noting that "the raising of the issue in a post-trial brief was untimely and improper".

See also, Escamilla v. Travelers Insurance Company, 2018 Cal.Wrk.P.D. LEXIS 49, holding that defendant was not entitled to credit pursuant to Labor Code § 3861 against its workers' compensation liability for applicant's net settlement recovery in legal malpractice lawsuit against her civil attorneys citing Soliz v. Spielman (1974) 44 Cal. App. 3d 70, 118 Cal. Rptr. 127, 40 Cal. Comp. Cases 130, and El Katan v. Barrett Business Services, Inc., 2013 Cal. Wrk. Comp. P.D. LEXIS 41 (Noteworthy Panel Decision). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 11.42; Rassp & Herlick, California Workers' Compensation Law, Ch. 12, § 12.02.]

In making an award of multiple penalties, the Court citing *Green v, WCAB (2005) 127 Cal.App.4th 1426, 1445 [70 Cal.Comp.Cases 294]* wrote that "multiple penalties may be assessed on the same unreasonably delayed benefit so long as the separate refusals and delays in payment are separated by legally significant events." Here multiple request had been made, successive petitions filed, with successive hearing held. The Court went on to hold however, that the delay justifying penalties was against the applicant's benefits and thus any penalty should be paid to the applicant and not the VR expert. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 10.40[1], [3], 27.12[2][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.11[1]-[3].]

XIV. Permanent Disability

Southwell v. County of San Diego, 2017 Cal.Wrk.Comp.P.D. LEXIS 397 (BPD)

The applicant was as deputy sheriff from 6/17/94 through 11/13/2007. Following his retirement he began experiencing symptoms which were later diagnosed as Hodgkin's lymphoma. Applicant asserted based on medical and VR evidence that he was totally disabled. Defendant asserted that the applicant was not totally disabled because the applicant had voluntarily removed himself from work. However, at trial the applicant testified that he had intended to return to work in some capacity. The WCJ found for the applicant and awarded total disability.

On reconsideration, the WCAB upheld the WCJ's award of permanent total disability resulting from industrially-related Hodgkin's lymphoma, injuries to his heart/hypertension and erectile dysfunction despite retirement from his employment prior to onset of industrially-related symptoms when evidence in this case indicated applicant intended to return to work in some capacity; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§8.02[3], [4][a], 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.11, 7.12; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Ch. 8.]

Department of Corrections and Rehabilitation v. WCAB (Fitzpatrick), (2018, 3rd District Court of Appeal) 27 Cal.App. 5th 607, 83 CCC 1680.

Applicant was examined by a cardiologist, who rated the applicant's heart condition as 97% WPI, and a psychiatrist who rated the applicant 71% WPI, for a total combined disability rating of 99%. The WCAB upheld the F&A of the WCJ finding the applicant was totally disabled based on 'credible testimony, medical reports. . ., and in accordance with the facts (LC 4662(b)'. The WCJ neither mentioned or discussed the combined rating under the 2005 Schedule.

On reconsideration, the WCAB in upholding the WCJ relied on the Report and Recommendations which provided "With regard to the argument that [Fitzpatrick] didn't rebut the schedule, total permanent disability may be shown by presenting evidence showing total permanent disability 'in accordance with the fact' as provided in Labor Code section 4662(b), or by rebutting a Labor Code section 4660 scheduled rating replying specifically on the holding in *Coca-Cola Enterprises, Inc. v. WCAB (Jaramillo) 2012 77 CCC 445 (WD)*. The WCJ expressly relied on the opinion of the psychiatrist who felt the applicant was 100% disabled psychiatrically.

Editor's Comments: Simply stated, pursuant to LC 4660, PD is established under one of three legal theories: (1) The Standard Rating under the standard method, chapter or table under the 5th Edition of the AMA Guides; (2) pursuant to Guzman; or (2) Leboeuf/Ogilvie doctrines. Any of these three theories may support a potential award of total disability according to the facts pursuant to LC 4662.

Note also that Fitzpatrick maybe a short live win for the defendant as the matter was remanded for further proceeding consistent with the written opinion. It is difficult to believe at a rating of 97% and 71% is not likely to result in a finding to total disability. Next, note that Fitzpatrick only applied to pre 1/1/13 dates of injury, and LC 4660.1 effective 1/1/13 might produce a different result.

Last, the Court did not address the interesting issue raised by Milpitas Unified School District v. WCAB (Guzman) 75 CCC 837 and Athens Administration v. WCAB (Kite) (2013) 78 Cal.Comp.Cases 213 (Writ Denied). Evidence supporting the application of the doctrines of 'synergy' allowing the additive approach rather than the CVE could also provide a considerable weapon for the applicant bar.

On using the 'additive approach' rather than the CVE, see, Wright v. Michael's, 2015 Cal. Wrk. Comp. P.D. LEXIS 455 (Panel Decision) decision which contains an excellent application of the doctrine of "direct causation" and the principle "synergy". In the Wright decision the VR expert, and evaluating QME's all properly focused on the "causation of disability" and that the "disability" be directly caused exclusively by the subject industrial injury. The industrial disability included the limitation caused by effects of the (1) physical industrial injury, (2) industrial component of the psychiatric injury, (3) effect from prescribed medication, and the (4) synergic effect of the three which rendered the applicant totally disabled.

But see, Johnson v. Wayman Ranches, 2016 Cal. Wrk. Comp. P.D. LEXIS 235 (Panel Decision) holding that simply using the word "synergistic" does not suffice to constitute substantial evidence, rather the physicians must explain how separate disabilities are acting in synergistic fashion and why adding disabilities rather than using CVE is a more accurate reflection of applicant's disability

See also, Diaz v. State of California, Corrections & Rehabilitation Parole (2015) 2015 Cal.Wrk.Comp. P.D. LEXIS __, holding that WCJ may properly issue an award of 93% by adding impairments rather than combining where AME testified at deposition that "additive approach would not be inappropriate because there was no clear overlap in impairments". But note dissenting opinion argued persuasively that the opinion of the AME was equivocal and therefore not substantial evidence on application of Combined Value Equation. The Diaz decision might be interpreted as an extension of the doctrine under Blackledge v. Bank of America (2010) 75 Cal. Comp. Cases 613 (Appeals Board en banc opinion) which allowed the WCJ to rate and award PD provided the award is based on substantial evidence. In Diaz the WCJ's rating included his determination to utilize the additive approach rather than the Combined Value Equitation as part of his rating and reflected in his award.

See also, Taina v. County of Santa Clara/Valley Medical Center 2018 Cal.Wrk.Comp. P.D. LEXIS 344, holding that combining by aggregation rather than using CVC/CVE was proper where Orthopedic AME and Psychiatric AME testified that aggregation was more accurate as there was no overlap and there was a synergistic effect as between Pysch and Orthopedic WPI, noting that adding disabilities is supported by AMA Guides, as shown by discussion of trier of fact's role provided in Chapters 1.4 and 1.5 on pages 9 and 10 of AMA Guides; [See generally Hanna, Cal.Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], [4][a]. 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.11, 7.12; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Ch. 6; SOC. Sectio 10.15, Use of 2005 PD Schedule.]

The issue on review was simply whether 4662(b) , "according to the fact" was a separate legal theory for establishing an award of total disability, or required a theory and compliance pursuant to LC 4660. To 'harmonize' section 4660 and 4662(b), the Court found that 4660 provides the method for how a determination of an award of total disability is to be made, and LC 4662(b) merely authorizes or allows such an award. Several rationales where offered to support the conclusion that LC 4662(b) does not provide a separate legal theory for establishing an award to total disability. The Court first criticized the *Jaramillo* decision writing that nothing could be concluded by the fact that separate LC sections existed for computation of disability below 100% and for 100% awards. (LC 4658(d) computation and 4659 computation of total) Second, noted that amendment to the Labor Code section 4660.1(g) expressly provided 'Nothing in this section shall preclude a finding of permanent total disability in accordance with Section 4662, a provision not contained in LC 4660 (LC 4660.1 is effective for DOI post 12/31/12). Last, the Court noted that within the

2005 Rating Schedule contain a 100% percent disability rating (pages 1-9 & 6-5), the CV chart contains over 50 combined ratings of 100 percent (pages 8-1, 8-3, 8-4), and pursuant to LC 4660 the schedule is rebuttable. The Court expressly noted that methods under LC 4660 for establishing total awards include Ogilvie and LeBoeuf. Although raised by the WCAB, the Court of Appeal did not expressly address the theory of aggregations rather than combining per *Athens Administration v. WCAB (Kite) (2013) 78 Cal.Comp.Cases 213 (Writ Denied)* decision.

The matter was remanded with direction.

Coca-Cola Enterprises v. WCAB (Jaramillo) 77 Cal.Comp.Cases 445, 2012 Cal.Wrk. Comp. LEXIS 45 (Writ Denied).

Applicant suffered industrial injuries to his cervical spine, lumbar spine, psyche, and in the forms of seizure disorder, headaches, neurologic disorder, cognitive disorder, language disorder, behavioral disorder, and sleep disorder on 2/3/2005 and during the period from 8/15/87 through 4/15/2005, while employed as a warehouseman for Defendant. A trial was held on various issues, including Applicant's entitlement to PD. The WCJ admitted into evidence the reports of AMEs in the fields of orthopedics, neuropsychology, and neurology. In addition, applicant testified that he has 2 to 20 seizures every day, trouble remembering things including the names of his own grandchildren, and difficulty holding a conversation. He testified that his surgeon told him that he would have short-term memory problems, and that he could not function because of these problems.

Dr. Freeman testified in his deposition that Applicant had sustained a cognitive disorder, a language disturbance, and a personality change due to his medical condition. He explained that Applicant has semantic or literal paraphasias, causing him to say words that he did not intend to say and misperceive language that is spoken. He also described psychotic symptoms, including hallucinations and paranoid ideation. Dr. Freeman's reports and deposition testimony addressed the AMA *Guides*, *Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District* (2009) 74 Cal. Comp. Cases 1084(Appeals Board en banc opinion) and *Milpitas Unified School Dist. v. W.C.A.B. (Guzman)* (2010) 187 Cal. App. 4th 808, 115 Cal. Rptr. 3d 112, 75 Cal. Comp. Cases 837, and Applicant's GAF score. Dr. Freeman also testified that, as a result of Applicant's head injury, Applicant was totally disabled and that he had a total diminution of his earning capacity. With reference to the Combined Values Chart, Dr. Freeman indicated that, within the ratings applicable to cognition, language, and personality change, the rating is lower if the combined method is used, which is exactly the opposite of what would be

". . . Support for interpreting these sections separately is found in section 4658(d), which establishes the benefit owed for permanent disability occurring as a result of an injury occurring after the effective date of the 2005 Schedule: "If the injury causes permanent disability, the percentage of disability to total disability shall be determined, and the basic disability payment computed as follows... " (Emphasis added [by WCAB].) The table that follows covers disabilities up to 99.75 percent. Computation of the benefit owed when permanent disability is 100 percent is governed by a separate section, section 4659(b). That there are separate sections for computing disability payments in cases involving partial and total disability confirms that there is a meaningful difference between disabilities that are a percentage of total disability and those that are total. [Emphases by WCAB]" . . . We note that section 4660(b) (1) and (2) apply only "[f]or purposes of this section...." Because these subdivisions expressly apply only for purposes of section 4660, i.e., for determining "the percentages of permanent disability" (emphasis added [by WCAB]), those subdivisions do not apply to the determination of permanent total disability under a different Labor Code section. Therefore, the specific constraints of section 4660(b) (1) and (2) are not necessarily applicable to a determination of permanent total disability "in accordance with the fact" pursuant to section 4662. [Emphasis by WCAB]

.Section 4662 and 4659(b) demonstrate that distinct statutory provisions may apply in cases of permanent total disability. Section 4662's language that "permanent and total disability shall be determined in accordance with the fact" was not changed by Senate Bill 899. While this language has not been definitively interpreted in a binding appellate or en banc decision, it appears to authorize a finding of permanent total disability based on an evaluation of the evidentiary record of an individual case. Moreover, the rules of statutory construction militate against our interpreting these statutes in such a way as to negate the language of section 4662 or to render it superfluous. (See, e.g., Klein v. United States of America (2010) 50 Cal. 4th 68, 80 [235 P. 3d 42, 112_ Cal. Rptr. 3d 722]; Shoemaker v. Myers (1990) 52 Cal. 3d 1, 22 [801 P. 2d 1054, 276 Cal. Rptr. 303, 55 Cal. Comp. Cases 494].) While it is theoretically possible to obtain a 100 percent rating using the Combined Values Chart, that result is highly improbable, even in cases involving "factually" total loss of earning capacity."

Editor's Comments: To the extent that Jaramillo is interpreted as allowing a 100% award where supported by medical and vocational evidence, it is consistance with Fitzpactrick, supra. However, to the extent that Jaramillo is interpreted as allowing an award outside a 4660 theory, I believe it is in direct conflict with the holding in Fitzpactrick and therefore an incorrect interpretatioms. This editor believes that the distinction between LC 4658 and 4659 is a distinction without a difference. TSimply stated the distinction, calculation of PD between 1-99.75% and total award, has no relevance on the legal theory of establishing a PD award between 1-100%.

Last, unlike Fitzpactrick, the Jaramillo decision specifically addressed rebutting the schedule under Almaraz/Guzman, suggested DFEC/Ogilivie, and even made noises sounding like a Kite analysis with the phrase "an interaction effect" suggesting both aggregation and "synergy". In end this editor believes that a prudent practitioner will follow the analysis of Fitzpactrick and proceed to a theory under 4660/4660.1 (depending on date of injury) in establishing a LC 4662(b) total award "according to the fats".

found clinically. He testified that the combination of the three actually results in greater, not lower, impairment due to "an interaction effect."

The WCJ awarded 100 percent PD based on the DEU's rating of the WCJ's formal rating instructions, which stated that Applicant was totally disabled with a total loss of earning capacity as a combined result of his injuries, and that the DEU specialist should apply the 2005 Permanent Disability Rating Schedule to determine PD. In her Opinion on Decision, the WCJ stated that she based her finding of 100 percent PD on the medical reports and deposition of Dr. Freeman and on the recommendation of the DEU specialist.

Defendant sought reconsideration and review. WCJ upheld with clarification on recon and review. Writ Denied.

Casado v. Kaiser Permanente, 2018 Cal.Wrk.Comp. P.D. LEXIS 399 (BPD).

Applicant sustained injury to her cervical spine, shoulders, arms and wrists for the period ending September 10, 2014. The PQME found injury to the neck, bilateral shoulders and bilateral wrists/hands was caused by cumulative trauma to September 10, 2014, and noted that the "Jamar grip strength maximums are measured on the second notch of the dynamometer and are expressed in pounds." He found no ratable impairment for her cervical spine, bilateral wrists or hands, but a 4% WPI rating for the bilateral shoulders. No work restrictions were provided by the PQME. The PQME declaration to the report provided "[v]ital signs and extremity measurements were obtained by my medical assistants. I conducted the physical examination, reviewed the provided medical records, then formulated and dictated this report." The report did not provide the name of the PQME's assistant.

The matter initially proceeded to trial on 4/18/17. At trial counsel for applicant contended that the PQME report was not substantial evidence, but because the parties had failed to file the PQME report with the Board the submission was vacated and the matter dropped from calendar. Counsel for applicant immediately noticed the deposition of the PQME which was held on 10/5/17. When the PQME was asked to identify the name of the assistant who took the measurements he simply replied, "I have no idea. There's three of them that work with me and any one of the three could have done it." Regarding impairment rating the PQME testified:

> *". . . .In City of Sacramento v. WCAB (Cannon) (2013) 222 Cal.App. 4th 1360 the Court of Appeal addressed whether a physician could provide a permanent impairment rating utilizing Almaraz-Guzman based purely on the employee's subjective complaints without objective findings. The police officer in Cannon had plantar fasciitis, which has no standard rating in the AMA Guides, but caused the officer to have heel pain. The agreed medical evaluator (AME) provided a WPI rating by analogy to a limp (gait derangement abnormality) due to the heel causing weightbearing problems. (Id. at p. 1365.) The City of Sacramento argued that his condition could not be rated by analogy under Almaraz-Guzman in the absence of objective findings and where the rating is based solely on subjective complaints. (Id. at p. 1366.) The Court rejected the City's argument holding that the AME's rating by analogy was permissible and concluded that nothing in the statute "precludes a finding of impairment based on subjective complaints of pain where no objective abnormalities are found."*
>
> *As discussed above, a medical opinion based on an incorrect legal theory is not substantial evidence. (Hegglin, supra.) In the instant matter, portions of Dr. Ghazal's testimony suggest that because applicant has no positive objective findings, he will not provide an impairment rating greater than zero based on her subjective complaints. However, the Cannon Court specifically opined that the Labor Code does not preclude a finding of impairment based on subjective complaints even in the absence of objective findings. Accordingly, a physician may provide an impairment rating greater than zero based solely on subjective complaints if he or she finds that alternate rating to most accurately reflect the injured employee's impairment.*
>
> *The evaluating physician thus may provide a rating by analogy to another chapter, table or method in the AMA Guides where the impairment rating would otherwise be zero pursuant to the case law discussed above. However, a rating of zero may accurately reflect an injured employee's permanent impairment in some cases. As outlined above, the physician is expected to utilize his or her "judgment, experience, training, and skill in assessing WPI" in order to provide a rating that accurately reflects the injured employee's permanent impairment and provide the reasoning behind the assessment in order for the rating to be relied on as substantial evidence. . . "*
>
> *Casado v. Kaiser Permanente, 2018 Cal.Wrk.Comp. P.D. LEXIS at pg. 402 .*

> "So that's basically what a zero rating in impairment means. It's like I can't really give you a disability based on the fact that your symptoms are all subjective in nature and I find no objective evidence to substantiate your complaints, meaning if you tell me you have this and this and this and this wrong with you or if you tell me you have nothing wrong with you and I evaluate you I'm going to find exactly the same thing; and that's where I end up with no ratable impairment. . .So I'm not going to give her a ratable impairment when she has zero objective findings. I don't care how high her subjective complaints are. That's the bottom line.
>
> We can go through this as much as you want. Her rating is zero because her objective findings are not present. Her MRI findings are normal, absolutely normal MRI findings that are appropriate for her age and her nerve conductions study is negative and she's getting zero percent impairment and we can ask these facts of how much

it bothers her life and how it impairs her, add item to item and she's going to get the zero impairment rating from me forever. And you have to find one of those applicant guys who has no conscience and he will give her a higher impairment rating than me and then you go to court and you figure it out. . .So basically if you want a fair objective evaluation she gets zero impairment because she's just subjective [sic] complaints."

The PQME ended the deposition with:

> In my opinion this patient has all subjective complaints and she is not eligible for an impairment rating in any way that you want to measure impairment. If I thought that there was—this lady deserved a ratable impairment for her subjective complaints, I could have used Almaraz-Guzman and given her one. I can—I have the authority under Work Comp standards to issue an impairment rating even if it doesn't fit into the book because of case law. And in this case I thought this was the appropriate impairment rating.

Following the PQME deposition counsel for applicant filed a Petition to Strike the QME Report as inadmissible for violation of Labor Code section 4628 and that the report was not substantial evidence.

The matter proceeded to trial again on December 28, 2017, and ultimately the WCJ awarded applicant 10% permanent disability based on the PQME impairment rating for the shoulders. Although the WCJ found injury AOE/COE to the cervical spine and wrists in addition to the shoulders, no permanent disability was provided for these body parts per the PQME.

Applicant argued on reconsideration that the PQME report did not constitute substantial evidence as it was based on incorrect legal theory. Applicant argued that it was improper for the PQME to refuse to rate applicant's subjectiveS because there was a lack of positive objective findings.

The WCAB first found the report defective and inadmissible under Labor Code § 4628(e) for failure to properly identify the person who performed diagnostic testing on applicant as required under Labor Code § 4628(b). Next, citing and discussing *City of Sacramento v. WCAB (Cannon) (2013) 222 Cal.App.4th 1360*, the Board held that the PQME report does not constitute substantial evidence where PQME relied on incorrect legal theory and that a finding of no permanent disability based on lack of positive objective findings, and refusing to provide impairment rating for applicant's subjective complaints regarding these body parts was based on an incorrect legal theory. The WCAB explained that physician may provide impairment rating greater than zero percent based solely on subjective complaints if he or she finds that alternate rating, using alternative table, chapter or method of AMA *Guides*, focusing on "accuracy" reflects the injured employee's level of impairment. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], [4], 32.02[2], 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.11, 7.12; The Lawyer's Guide to the AMA *Guides* and California Workers' Compensation, Chs. 2, 6, 8.].

XV. Petition to Re-Open

Nakamoto v. City of Watsonville, 2018 Cal.Wrk.Comp. P.D. LEXIS 189 (BPD).

Applicant sustained an admitted cumulative injury to his bilateral ears (hearing loss) and hypertension/cardiovascular system while employed as a peace officer for the City of Watsonville during the period from 09/26/81 through 06/14/11. The parties utilized two medical legal examiners to resolve the disputed issues in this case as agreed medical examiners: David Schindler, M.D., for the hearing loss and Jonathan Ng, M.D., for the hypertension/cardiovascular injury. The parties resolved the disputed issues by agreeing to Stipulations with Request for Award for 39% permanent disability which was approved by WCJ Haxton on 12/30/15. An angiogram was obtained five days after approval of the Stips which was positive for "substantial blockage of applicant's coronary artery, causing agreed medical examiner to amend his whole person impairment finding for applicant's coronary atherosclerosis from previous 9 percent to 25 percent". Applicant sought to reopen for increased PD. The WCJ granted applicant's petition and defendant sought reconsideration/removal.

See also, Hunter v. Ryerson Steel Service/Travelers, (January 2018) 46 CWCR 31 (Order Denying Removal), holding that a claim for New and Further Disability under LC §5410 may be supported by medical evidence obtained after the Petition has been filed.; See accord, Blanchard v. WCAB (1975) 40 Cal Comp Cases 784; City of Santa Rosa v. WCAB (Scolieri), (1997) 62 Cal Comp Cases 1703 (W/D); Ruedas v. Moana Corp/Wausau Inc., (2015) 43 CWCR 180. See also, Ontiveros v. Bragg Investment Co., (2018) 46 CWCR 37, the medical evidence was fully developed, record was complete, thus substantial medical evidence existed to support decision to not allow petition to reopen.

The WCAB upheld the WCJ finding that the angiogram was newly discovered evidence for purposes of reopening prior award, where angiogram was not recommended as part of medical-legal evaluation to address whole

person impairment but rather treating physician recommended that applicant undergo test as part of medical treatment, and applicant acted diligently in scheduling angiogram, although test was delayed due to physician's scheduling difficulties. Thus, the angiogram obtained five days after approval of Stipulation with Request for Award constituted good cause as newly discovered evidence for purposes of reopening prior award. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 31.04[1], [2], 31.05; Rassp & Herlick, California Workers' Compensation Law, Ch. 14, § 14.09. SOC, Section 6.27, Five-Year Statute – Reopening for Good Cause.]

XVI. Presumption

Molar v. State of California Department of Corrections and Rehabilatation, 2018 Cal.Wrk.Comp. P.D. LEXIS 35, 83 Cal.Comp.Cases 929 (BPD).

By panel decision the WCAB upheld the WCJ's holding that the presumption of compensability applicable to blood-borne infectious diseases pursuant to Labor Code § 3212.8 applies to correctional officer who was exposed and developed Herpes/Epstein-Barr Virus which per QME is a "bloodborne pathogens" as defined in 8 Cal. Code Reg. § 5193(b) which provides that "pathogenic microorganisms that are present in human blood and can cause disease in humans," including *but not limited to* hepatitis B virus, hepatitis C virus and human immunodeficiency virus; and that plain language of Labor Code § 3212.8 and 8 Cal. Code Reg. § 5193(b) permits application of presumption to broader range of blood-borne conditions than those specifically identified. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.138[4][j]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.07[5][f]. Sullivan on Comp, Section 5.18, Presumption of Injury].

XVII. Practice and Procedure

Cowger v. Jenny Craig, et al., 2018 Cal.Wrk.Comp. P.D. LEXIS 304 (BPD).

A party may seek to disqualify WCJ provide petition is filed within 10 days of knowledge of grounds and upon grounds including (1) that WCJ has formed unqualified opinion on merits of action or has demonstrated bias/prejudice, and provided (2) petition to disqualify is supported by declaration under penalty of perjury detailing specific facts establishing grounds for disqualification. Bias, prejudice or unqualified opinion is not established where petitioner fails to show that this opinion is fixed and could not be changed upon production of evidence and presentation of arguments. The WCJ is not subject to disqualification for bias or prejudice where opinion is based on evidence before WCJ or conception of law as applied to evidence, or in the discharge of his or her official duties. (Labor Code § 5311; Code of Civil Procedure § 641; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][b][iii], 26.03[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 1, § 1.09[3], Ch. 16, § 16.08[2].])

XVIII. Psychiatric Injury

SCIF v. WCAB (6th Appellate District) 20 Cal.App.5th 796, 229 Cal.Rptr.3d 506, 83 Cal.Comp.Cases 185, 2018 Cal.App. LEXIS 144;

The applicant had been employed as a construction laborer for less that 6 months at time of injury. The applicant usual job included operating a compactor. The applicant sustained injury while using a soil compactor on the side of a hill when the compactor struck a rock in the soil, rose in the air which caused the applicant to fall backwards with the compactor falling on top of him. As a result the applicant sustained injury to his back which resulted in two back surgeries. He also sustained a psychiatric injury for which he sought treatment.

At trial applicant testified that he had operated compactors for approximately 12 years and had never thought there was any risk of injury while using the compactor or that he was in danger of having a compactor fall on him before the accident. He had not had a prior accident or any "close calls" involving potential injury while using a compactor. He had never heard of a compactor falling on top of someone. He had never previously lost control of a compactor, and he never had any work injuries before this accident.

The WCJ in finding for the applicant in that the psychiatric injury as a compensable consequence noting that the applicant (1) had never been injured by having a compactor fall on him, (2) never experienced such an incident before, (3) there was no evidence that this type of injury had occurred in a similar fashion before, (4) applicant had never had any close calls involving an injury when using a compactor, nor had he an accident using a compactor before, and (5) applicant never thought there was any risk of injury while using the compactor. The WCJ concluded that "having a compactor fall on top of an employee is not something that would reasonably be expected to occur. This type of injury is not a frequent, regular, or routine part of the job, and thus it is reasonable to find that this injury was not something that could have been anticipated, nor the type of injury that would be foreseeable." On reconsideration the WCAB upheld the WCJ.

On Review the Court of Appeal reversed holding that applicant had failed to meet his burden of proving that a "sudden and extraordinary employment condition" caused his injury pursuant to LC 3208.3(d). Applicant did not provide any evidence establishing that it is "uncommon, unusual, and totally unexpected" for a rock to be in soil, for a compactor to rise when striking a rock, or for an operator to become unbalanced and to fall when the compactor rises on a 45-degree hillside. Indeed, he did not introduce *any* evidence regarding what regularly or routinely happens if a compactor hits a rock on a slope. In fact, applicant admitted that he had previously worked on flat surfaces only. Consequently, his history of maintaining control of the compactor and being accident-free on flat surfaces, as well as his lack of awareness of a compactor falling on someone else, had little bearing on whether the event that occurred while he was on the slope, and that caused his injury, was uncommon, unusual, and unexpected. To summarize the applicant provided no evidence that striking a rock with the compactor, the compactor rising into the air after striking a rock, operating the compactor on a slope, nor that the compactor falling on the operator after striking a rock rising into the air were "sudden and extraordinary". Rather, the evidence was limited to the applicant's testimony which was limited in scope, only involving the applicant's testimony, and given the applicant's lack of experience of working on a slope and his short tenure with the company is insufficient to meet the burden of proof on 'sudden and extraordinary'.

See also, Lopez v. General Wax Co., 2017 Cal Wrk Comp PD LEXIS 291(BPD), holding that LC §4660.1(c) does not preclude recovery of TD benefits. Award of 100% upheld to include psychiatric PD when applicant's finger was partially amputated after becoming stuck in machine, not precluded under LC §4660.1(c) from receiving increased permanent disability for psychiatric injury because applicant's mechanism of injury constituted "violent act" as defined in LC 3208.3(b) as "an act that is characterized by either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening," and, therefore, all of applicant's psychiatric impairment was compensable regardless of whether it was directly caused by getting her finger stuck in machine or whether it was caused as compensable consequence of her physical injuries. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §4.02[3][a], [b], [f], 4.69[1], [3][a], 8.02[4][c][ii], [5], 32.02[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.05[3][b][i][ii], 7.06[6], Ch. 10, § 10.06[3][a], [b][i].

See also, Guerrero v. Ramcast Steel, 2017 Cal.Wrk.Comp. P.D. LEXIS 285, 82 Cal.Comp.Cases 1222, holding that fingers amputated by hydraulic punch press held within "violent act" and "catastrophic injury" exceptions to provision in Labor Code § 4660.1(c)(1) precluding increased permanent disability for psychiatric injuries arising out of compensable physical injuries. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3][a], [b], [f], 4.69[1], [3][a], 8.02[4][c][ii], [5], 32.02[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.05[3][b][i][ii], 7.06[6], Ch. 10, § 10.06[3][a], [b][i].]

See also, Zarifi v. Group 1 Automotive, 2018 Cal.Wrk.Comp.P.D. LEXIS 300 (BPD)Applicant was not entitled to PD resulting from compensable consequence psychiatric injury where injury to head (1) did not result in lose consciousness after striking his head, did not involve a fall, or immediate medical treatment, and force of incident was neither extreme nor intense for purposes of constituting "violent act pursuant to Labor Code § 3208.3," and (2) diagnosis of consciousness and cognitive disorders did not establish that applicant suffered "catastrophic injury" to his head as provided in Labor Code § 4660.1(c)(2)(B), where none of evaluating physicians characterized applicant's injury as severe and diagnosed only minor concussion. Zarifi v. Group 1 Automotive, 2018 Cal.Wrk.Comp.P.D. LEXIS 300 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3][a], [b], [f], 4.69[1], [3][a], 8.02[4][c][ii], [5], 32.02[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.05[3][b][i][ii], 7.06[6], Ch. 10, § 10.06[3][a], [b][i]; SOC, Section 10.16, Use of 2013 PD Schedule.]

See also, Gonzales v. Swift Transportation, 2018 Cal.Wrk.Comp. P.D. LEXIS 354 (BPD), holding CT psychiatric injury was not barred as post-termination (LC § 3208.3(e)), when medical evidence established first treatment was prior to termination, but not prior to suspension.); Further, psychiatric injury not barred by good faith personnel action defense (LC § 3208.3(h) where termination for drinking did not meet objective reasonableness standard as undertaken in good faith, where testing completely negative for alcohol and sole basis was that there were used and unused alcohol bottles in office shared by applicant with many employees. Last, defendant has burden of establishing good faith personnel action defense. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3][e], 4.65[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[3][e].] [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3][a], [b], [f], 4.69[3][a], [b], [d]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[3][b], [d].]

To summarize, the applicant had the "burden of showing that [his] psychiatric injury did not 'derive from the effects of a … routine physical injury', and was not the result of the routine type of … employment event that all employees who work for the same employer may experience or expect. The applicant failed to present evidence relevant to the employment condition that caused his injury—that is, operating a compactor on a slope when it hits a rock, rises in

the air, causes the operator to fall, and hits the operator—and whether such an event was uncommon, unusual, and unexpected. Therefore, the applicant failed to meet his burden of proving that his injury was the result of a sudden and extraordinary employment condition or event. (See Labor Code 3208.3(d); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3][d], 32.03A[5]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.11[7], Ch. 10, § 10.06[3][c], Ch. 16, § 16.45[3].])

Allen v. Carmax, 2017 Cal. Wrk. Comp. P.D. LEXIS 303(BPD)

Applicant was employed as a satellite service manager when on 5/22/2014 he sustained injury to his low back, right shoulder, neck, knees, and psyche, when brakes failed on car applicant was test-driving, causing car to hit cement pillar.

The WCAB upheld the WCJ finding that (1) Labor Code § 4660.1(c) does not preclude permanent disability award for psychiatric impairment caused by direct events of employment, and based on opinion of psychiatric qualified medical evaluator in this case, 20 percent of applicant's psychiatric impairment directly resulted from events of employment and would be compensable regardless of whether applicant's injury constituted violent act, and (2) WCJ correctly found that applicant was not precluded under Labor Code § 4660.1(c) from receiving increased permanent disability for psychiatric injury because applicant's mechanism of injury constituted "violent act" as described in prior panel decisions as act that is characterized by either strong physical force, extreme or intense force, or act that is vehemently or passionately threatening. Citing and discussing Lopez v. General Wax Co, 2017 Cal.Wrk.Comp.P.D. LEXIS 291 (BPD), Partial amputation of finger after becoming stuck in machine constituted "violent act"; Guerrero v. Ramcast Steel Fabrication, 2017 Cal.Wrk.Comp. P.D. LEXIS 285, 82 Cal.Comp.Cases 1222 (BPD), tool mechanic's fingers amputated by machine held 'violent act' and also 'catastrophic injury'; Labor Code Section 4660.1(c); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§4.02[3][a], [b], [f], 4.69[1], [3][a], 8.02[4][c][ii], [5], 32.02[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.05[3][b][i][ii], 7.06[6], Ch. 10, § 10.06[3][a], [b][i].]

Rockefeller v. Department of Northern Transportation, 2018 Cal.Wrk.Comp. P.D. LEXIS 273 (BPD)

Decedent committed suicide on a Friday night after finishing his shift as a correctional officer and shortly after arriving at home some hours later. While on the way home calling his wife at about 5:30 pm to discuss dinner and weekend plans. Prior to coming home, he stopped at local bar where he talked to other patrons and drank until around 10:30 pm. At that time, he ate a BBQ sandwich, made a few calls from his vehicle, and left at 10:42 pm, arriving home around 11 pm where he found his wife asleep. Applicant awoke his wife insisting they talk about stress over an upcoming test and that he was concerned that he would be "harassed" about it. He then took a gun, fired three shots into the ceiling, and then shot himself in the head, ending his life.

The case was tried before Workers' Compensation Administrative Law who found the death compensable. On reconsideration the WCAB stated that the record needed to be developed as to whether an industrial psychiatric injury exists pursuant to Labor Code section 3208.3 and Rolda v. Pitney Bowes Inc., (2001) 66 Cal.Comp.Cases 241 (Appeals Board en banc), and/or that an industrial injury contributed to decedent's act of suicide. (Section 5705; South Coast Framing v. Workers' Comp. Appeals Bd. (2015) 61 Cal.4th 291, 297–8, 302.) Finally, if each of these elements are met, the defendant's affirmative defenses of intentional self-infliction (section 3600(a)(5)) and employee willful and deliberate causation (section 3600(a)(6)) would be considered, with the defendant bearing the burden of proof.

At a second trial the WCJ found for the defendant holding that the decedent's suicide was not a compensable injury, when applicant, decedent's widow, alleged that decedent's suicide was precipitated by work stress, but failed to establish that decedent suffered industrial psychiatric injury under Labor Code § 3208.3 and Rolda v. Pitney Bowes, Inc. (2001) 66 Cal. Comp. Cases 241 (Appeals Board en banc opinion), and because applicant did not demonstrate that there was compensable psychiatric injury (or any other industrial injury contributing to suicide). Further, WCAB concluded that suicide was not industrially-related, rendering affirmative defenses of intentional infliction of injury and willful and deliberate causation of death under Labor Code § 3600(a)(5) and (6) was moot. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.21; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.03[2].]

XIX. Statute of Limitations

De La Torre v. County of San Luis Obispo, 2017 Cal.Wrk.Comp. P.D. LEXIS 438 (BPD)

On 11/8/08, the applicant and his supervisor had an unpleasant interchange. Applicant's last date of work was 12/4/08. Applicant filed a claim form November 8, 2008, which was denied by defendant on February 6, 2009 based on defendant's investigation revealed that applicant's alleged injury was brought about by a good faith personnel action, and because applicant refused to cooperate in its investigation. Defendant's denial included how applicant could obtain a qualified medical evaluation, and that he had "one year from the date of this denial notice to pursue your claim. You must act by filing an Application for Adjudication before the Appeals Board within this one year." The applicant's PTP had informed the applicant that applicant's "problem was cumulative in nature." The PTP placed applicant on medical leave, stating on January 24, 2009 that applicant could not "return to work for more than one year without suffering significant clinical distress," and numerous incidents that had occurred between the applicant and his supervisor, and numerous incidents of death-related traumas related to his job as an animal control person.

See also, County of San Bernardino v. WCAB (Nelson-Watkins), 2018 Cal.Wrk.Comp. LEXIS 46 (W/D), holding applicant's correlation of her symptoms with her work was insufficient to establish requisite knowledge absent medical advice that her condition was caused by her employment to bar claim by LC 5405 one-year statute of limitations. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 24.03[6], 24.04[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 14, §§ 14.01[4], 14.16. SOC, Section 6.14, One Year From Date of Injury].

The WCAB upheld the WCJ finding that CT claim was barred by statute of limitations in Labor Code § 3208.1(b), when (1) applicant suffered compensable temporary disability, and (2) PTP placed him on medical leave due to post-traumatic stress syndrome associated with his employment, and (3) substantial evidence established that applicant knew his injury and disability were industrially related at that time for purposes of Labor Code § 5412, and (4) that applicant was informed by defendant that applicant had one year to file Application for Adjudication of Claim. De La Torre v. County of San Luis Obispo, 2017 Cal.Wrk.Comp. P.D. LEXIS 438 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 24.03[6], 24.04[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 14, §§ 14.01[4], 14.16.]

XX. Subrogation and Right to Credit

See, Escamilla v. Travelers Insurance Company, 2018 Cal.Wrk.P.D. LEXIS 49, holding that Defendant was not entitled to credit pursuant to Labor Code § 3861 against its workers' compensation liability for applicant's net settlement recovery in legal malpractice lawsuit against her civil attorneys citing Soliz v. Spielman (1974) 44 Cal. App. 3d 70, 118 Cal. Rptr. 127, 40 Cal. Comp. Cases 130, and El Katan v. Barrett Business Services, Inc., 2013 Cal. Wrk. Comp. P.D. LEXIS 41 (Noteworthy Panel Decision). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 11.42; Rassp & Herlick, California Workers' Compensation Law, Ch. 12, § 12.02.]

See, Escamilla v. Cacique, Inc. /Travelers Ins. Co. (2-15-18) 46 CWCR 80 (BPD), holding that a workers' compensation insurer is not entitled to a credit for damages recovered and obtained by an injured worker where the worker claimed a law firm committed professional malpractice when they negligently failed to timely file a lawsuit against a third party whose negligence allegedly caused her industrial injury.

XXI. Supplemental Job Displacement Benefits

Dennis v. State of California, et al. 2018 Cal.Wrk.Comp.P.D. LEXIS 349 (BPD).

Applicant sustained an industrial injury to his right wrist on October 29, 2013 while working as an inmate laborer for the California Department of Corrections and Rehabilitation. Applicant's claim settled via Stipulation and Award for 31% permanent disability on September 11, 2017. Prior to the settlement, on May 15, 2017 defendant sent a Notice of Offer of Modified Work stating that applicant had voluntarily terminated his employment since he had been released from prison after the injury occurred. Applicant disputed the offer of work and requested a dispute resolution before the Administrative Director on September 19, 2017. The parties never received a response from the AD. Applicant thus filed a DOR to address the matter on February 5, 2018 alongside a "Petition for Grant of Supplemental Job Displacement Benefit" of the same date.

> *"....Labor Code section 4658.7(h) authorizes the Administrative Director to adopt regulations for the "administration" of the SJDB, including, but not limited to, administration of an employer's notices of rights under the SJDB and the administration of the medical reports that inform of an employee's capacity to work. (§ 4658.7(h).)*
>
> *In light of this authority, the Administrative Director adopted Rule 10133.54, which provides that "[w]hen there is a dispute regarding the Supplemental Job Displacement Benefit, the employee, or claims administrator may request the administrative director to resolve the dispute." (Cal. Regs., tit. 8, § 10133.54(b).) The rule further provides that opposing has twenty (20) calendar days to respond to the request (subdivision (d)) and authorizes the Administrative Director the power to request additional information from the parties (subdivision (e)). The Administrative Director has thirty (30) calendar days from the date that the opposing party's response is due or thirty (30) calendar days from the administrator's receipt of the requested additional information, if any, to issue a written determination or order. (subdivision (f).) If the Administrative Director fails to issue a written determination or order within sixty (60) calendar days from the date that the opposing party's response is due or sixty (60) calendar days from the Administrator Director's receipt of the requested additional information, whichever is later, the request shall be deemed denied. (Ibid.) The parties then have twenty (20) calendar days from the issuance of the Administrative Director's decision to file an appeal and a declaration of readiness with a workers' compensation district office. (subdivision (g).)"*
>
> *Dennis v. State of California, et al. 2018 Cal.Wrk.Comp.P.D. LEXIS at pgs. 352.*

At trial defendant raised the issue of timeliness of applicant's DOR/Appeal of the Administrative Directors presumed denial. The Court found that it was not and thus, the ADs determination (denial) was final. Applicant filed his appeal of this finding and also arguing that applicant is eligible to the voucher.

The WCAB held that because the parties never received a finding from the Administrative Director, the request was deemed denied on December 8, 2017 pursuant to 8 CCR 10133.54(f). An appeal of the denial was to be filed by December 28, 2017 per 8 CCR 10133.54(g). Applicant filed his Petition for Grant of Supplemental Job Displacement Benefit on February 5, 2018, well after the time allotted per the regulations. 8 CCR 10133.54(g) which states "Either party *may* appeal the determination of the administrative director by filing a written petition together with a declaration of readiness to proceed pursuant to section 10250 within twenty days after a request is deemed denied. The WCAB maintains exclusive jurisdiction to adjudicate issue of whether applicant is entitled to benefits under SJDB program. That under LC 4658.7(b) injured employee with permanent partial disability is entitled to SJDB unless employer makes timely bona fide offer of regular, modified or alternative work. ; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 3.100[1], 35.01, 35.02; Rassp & Herlick, California Workers' Compensation Law, Ch. 2, § 2.04[6], Ch. 21, §§ 21.01, 21.02.].

> *See also, Potter v. California Department of Corrections (Inmate Claims ADJ9621960 (FRE), Dec. 8, 2017) 46 CWCR 10 (BPD), holding that an employee inmates are not barred from SJDB voucher benefits by an offer of modified work requiring the employee to return to prison; Held not a bona fide job offer.*

XXII. Temporary Disability

See, Alvarado v. Dart Container Corporation of California, (2018 Supreme Court) 4 Cal. 5th 542, 411 P.3d 528, 229 Cal.Rptr 3d 347, 2018 Cal. LEXIS 1123, holding that when calculating the per-hour value of flat sum bonus for determining the proper rate of overtime compensation, whether payable at 150% or 200% of base rate to be divided and average into and allocated based the number of non-overtime hours that the employee actually worked during the pay period.

See, County of San Diego v. WCAB (2018, 4th Appellate District) 21 Cal.App.5th 1, 229 Cal.Rptr. 3d 815, 83 Cal.Comp.Cases 465, 2018 Cal.App. LEXIS 184, holding that a petition to reopen does not change that an award of temporary disability payments pursuant to LC 4656(c)(2) may not be awarded beyond five years from date of injury where payments were begun before five years from date of injury (DOI: July 31, 2010).; See also, County of San Deigo v. WCAB (Pike) (2017 4th Appellate District) 83 Cal.Comp. Cases 465; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[2][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.12. Sullivan on Comp, Section 9.14, Time Limits on Payments On or After 4/19/04].

See also, Villano v. Livingston Concrete Services, ICW, 2018 Cal.Wrk.Comp. P.D. LEXIS 298 (BPD) holding that an amputation must be causative of the temporary disability for application of Labor Code § 4656(c)(3)(C) extending TD cap from 104 to 240 weeks of temporary disability indemnity. Applicant's period of TD related to hip condition not orchiectomy procedure. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[2][b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.12; SOC, Section 9.14, Time Limits on Payments.]

See also, Cardoza v. County of Alameda, 2018 Cal.Wrk.Comp. P.D. LEXIS 279 (BPD), holding that Applicant entitled to single period of Labor Code § 4850 benefits where medical evidence establishes single period of disability despite arising from separate injuries, and since applicant did not lose time from work between his two injuries, the periods of temporary disability for both injuries ran concurrently occurring after second injury.; See also, Forster v. WCAB (2008) 161 Cal.App.4th 1505 [73 Cal.Comp.Cases 466] holding where independent injuries result in concurrent periods of temporary disability, 104-week, two-year limitation of Labor Code § 4656(c)(1) likewise runs concurrently; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 3.113; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.21; SOC, Section 9.43, One Year Salary -Public Safety Employees].

CASE LAW UPDATE 2018

The following represents a summary of some of the most recent case decisions issued by the California Supreme Court, California Court of Appeal, and the Workers' Compensation Appeals Board, which the Editor believes will have significance in connection with the practice of Workers' Compensation law. The summaries are only the Editor's interpretation, analysis, and legal opinion, and the reader is encouraged to review the original case decision in its entirety.

Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision. WCAB panel decisions are citable authority, particularly on issues of contemporaneous administrative construction of statutory language [see Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and Workers' Compensation Judges [see Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236]. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]. Panel Decisions which are designated as "Significant" by the WCAB, while not binding in Workers Compensation proceedings, are intended to augment the body of binding appellate court and en banc decision and is limited to panel decisions involving (1) issue(s) of general interest to the workers' compensation community, especially a new or recurring issue about which there is little or no published case law; and (2) upon agreement en banc of all commissioners on the significance and importance of the issues presented and resulting decisions. (See Elliot v. WCAB (2010) 182 Cal.App. 4th 355, 361, fn. 3, 75 CCC 81; Larch v. WCAB (1999) 64 CCC 1098, 1099-1100 (writ denied).

I. Injury AOE/COE

Garcia v. Whitney, 2016 Cal.Wrk.Comp.P.D. LEXIS 526 (BPD)

The applicant was temporarily living rent free at defendant's house. During this stay the applicant performed "maintenance activities for the house". Applicant sustained injury at an alternate address owned by defendant and sought workers' compensation benefits for that injury. The WCJ found applicant was not an employee at the time of the injury. The WCJ noted first that the applicant was injured at a different address altogether. Second, the WCJ held that asking someone staying rent free in your home to perform activities is not, in this WCJ's opinion, an offer or creation of employment unless there is evidence that declining to perform said activities would result in the "consideration" (free rent in this case) being withdrawn. The WCJ noted that the Applicant himself testified that he was never given the impression that the defendant would have to move out if he did not perform. Applicant did testify that "he couldn't answer" why he felt he could not live at the house without performing work even though neither defendant ever told him that. In the absence of any evidence that the consideration (free rent) would be be terminated if the work was not performed, this WCJ could not and cannot find employment.

See also, Lee v. West Kern Water District, (5th Appellate District) 5 Cal. App. 5th 606; 210 Cal. Rptr. 3d 362; 81 Cal. Comp. Cases 966; 2016 Cal. App. LEXIS 985, where a civil claim in tort held not barred by exclusive remedy defense where employer held mock robbery applying LC 3601/02 assault exception to AOE/COE.; [Hanna, Cal. Law of Employee Injuries and Workers' Compensation Law (2016) ch. 11, § 11.02; Levy et al., Cal. Torts (2016) ch. 10, § 10.11; Cal. Forms of Pleading and Practice (2016) ch. 577, Workers' Compensation, § 577.356; Wilcox, Cal. Employment Law (2016) ch. 20, § 20.41. Sullivan on Comp, Section 2.19, Exceptions to Exclusive Remedy Rule for Conduct Outside Compensation Bargain]

See also, Rowe v. Road Dog Drivers, LLC, Insurance Company of the State of Pennsylvania, 2016 Cal. Wrk. Comp. P.D. LEXIS 622 (BPD), holding that motor vehicle accident not barred by "Going and Coming Rule" where applicant's travel to co-worker's home was not ordinary commute to fixed place of business, was undertaken for employer's benefit and to saved employer costs of reimbursing two separate trips; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.157; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.05[3][d][iv], [8]. Sullivan on Comp, Section 5.48, Special Mission – Special Errand.]

If Applicant's arguments were to be followed, anyone doing anything for anybody else is an employee. The WCJ Wrote that "at the risk of oversimplifying the issue, the case law is clear that not only must work be performed for another, but consideration must be paid to the person performing said work, *in exchange* for that work."

Yu Qin Zhu v. Department of Social Services IHSS, 2016 Cal. Wrk. Comp. P.D. LEXIS 513 (BPD)

Applicant, a caregiver with IHSS, on her way to a second client, travelling by bicycle, was hit by a motor vehicle at approximately noon. At trial the Applicant testified that she was hired by the State of California after applying to work as a caretaker in 2003; Was paid by the State of California once every two weeks, and no money or salary from the clients for whom she worked. She did not stop to have lunch between clients. On the date of the accident, she would eat her lunch at the house of the second patient before she started working. Applicant was not compensated for her transportation time between the clients' houses. Defendant denied the claim AOE/COE. The WCJ found for the applicant. Defendant sought reconsideration.

In reversing the WCJ by split panel decision, the WCAB focus on the traditional tests of "control and right to control" and "benefit conferred". The WCAB first noted the existence of a "dual employment relationship" with applicant employed by both the State of Californian and the clients for which the applicant was a caregiver. Discussing but distinguishing *Hinojosa v. Workers' Comp. Appeals Bd.* (1972) 8 Cal.3d. 150, 158–159 [37 Cal.Comp.Cases 734] (*"Hinojosa"*).) and *Smith v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 814 [33 Cal.Comp.Cases 771], wrote "this case is different from *Hinojosa* and *Smith*. Here, applicant suffered injury while commuting between the homes of clients whom applicant had selected and with whom she had chosen her work hours. Unlike the ranch workers in *Hinojosa*, applicant chose her own clients and work locations and hours. In essence, applicant merely used defendant to obtain client referrals. Applicant also chose the means of transport to her clients. As with any employee who drives to work or takes some other form of transit in a "normal" commute, in this case it did not matter to defendant how applicant got to work. Applicant's travel to her clients' houses by bicycle was for her own convenience and benefit. This case also is different from *Smith* because defendant did not require applicant to have a car or bicycle. Again, there was an implied requirement that applicant get herself to work, but this is no different from the vast number of employers who implicitly require their employees to transport themselves to work by whatever means of conveyance they choose". In the end the WCAB was not persuaded that this case comes within any exception to the going and coming rule as the defendant did not have control over applicant's commute, and the benefit to defendant as a result of applicant's self-transport was indirect and minimal compared to the ease and convenience realized by applicant.

On Writ of Review, the Court of Appeal reversed holding that applicant within course and scope of employment during bicycle commute between two clients' homes, the <u>employer knew</u> applicant provided care to more than one home each day, and <u>employer impliedly required</u> the applicant to provide her own transportation which provided a <u>direct benefit</u> to employer, and was thus 'part and parcel' of job. Zhu v. Workers' Compensation Appeals Board (2nd Appellate District) 12 Cal. App. 5th 1031; 82 Cal. Comp. Cases 692; 2017 Cal. App. LEXIS 564; [See generally Hanna, Cal. Law

See also, Carrillo v. LLG Corporation, dba Fresco II, Employers Compensation Insurance Company, 2016 Cal. Wrk. Comp. P.D. LEXIS 658 (BPD), holding that injury as result of MVA not compensable where occurring after consumption of alcohol when applicant returned to his workplace following end of his shift, and applicant contended that basis for liability was permissive use of alcohol condoned by employer such that alcohol use became "customary incident to employment," but where drinking occurred after his shift was completed, at restaurant/bar open to public, was not employer condoned drinking on job, applicant was not called back to work, owner not present no special meeting, event or party, nor performing service for employer, and no reasonable belief per Labor Code § 3600(a)(9) and Ezzy v. W.C.A.B. (1983) 146 Cal. App. 3d 252, 194 Cal. Rptr. 90, 48 Cal. Comp. Cases 611. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.20, 4.25; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, §§ 10.03[1], 10.05[6]. Sullivan on Comp, Section 5.22, Intoxication] See also, Hansen v. Par Electrical Contractor, Inc. 2016 Cal.Wrk.Comp. P.D. LEXIS 661 holding evidence of acute alcohol intoxication held substantial and proximate cause of accident as and when it occurred and bar to recovery.

See also, M.F. v. Pacific Pearl Hotel Management LLC, (2017) 16 Cal. App. 5th 693, 224 Cal. Rptr. 3d 542, 82 Cal. Comp. Cases 1304, 2017 Cal. App. LEXIS 933, holding that the workers' compensation exclusivity remedy doctrine is inapplicable to claims under the FEHA, and such claims against an employer are not subject to demurrer where the employee alleges facts that (1) employee was raped on employer property while working by drunk nonemployee; and (2) employer knew or should have known alleged rapist was on the property prior to the rape; and (3) knew or should have known that the alleged rapist presented risk of potential harm citing B & E Convalescent Center v. State Compensation Ins. Fund (1992) 8 Cal.App.4th 78, 89-92 [9 Cal.Rptr. 2d 894]; Meninga v. Raley's, Inc. (1989) 216 Cal.App.3d 79, 91 [264 Cal. Rptr. 319]; Jones v. Los Angeles Community College Dist. (1988) 198 Cal.App.3d 794, 808–809 [244 Cal. Rptr. 37]; see also Light v. Department of Parks & Recreation (2017) 14 Cal.App.5th 75, 97–98 [221 Cal. Rptr. 3d 668]. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.70[3][b]; Sullivan on Comp, Section 2.20, Exceptions to Exclusive Remedy Rule for Violation of Public Policy.]

See also, Miranda v. Southwest Airlines, Ace American Insurance Company, 2017 Cal. Wrk. Comp. P.D. LEXIS 497 (BPD), which found injury where employee chased car thief as applicant's actions were normal human response and did not materially deviate from his employment, noting that employer did not discipline applicant for his actions indicating that applicant's employment was extended to include time and place of his injury). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.137; Rassp WCAB affirmed WCJ& Herlick, California Workers' Compensation Law, Ch. 10, § 10.05.]

of Emp. Inj. and Workers' Comp. 2d § 4.155[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.05[3][d][ii]. Sullivan on Comp, Section 5.45, Transportation Controlled by Employer]

Davis, v. State of California, Department of Forestry and Fire Protection, State Compensation Insurance Fund, 2016 Cal.. Wrk. Comp. P.D. LEXIS 611; 82 Cal. Comp. Cases 285 (BPD)

Applicant contends that he is entitled to the presumption of industrial causation pursuant to Labor Code section 3212.85, due to the fact that he "was regularly exposed to a biochemical substance (Fire-Trol) during his seven years of employment with the Department of Forestry and Fire Protection. The WCJ found for defendant and issued a take nothing holding that LC 3212.85 did not apply and that applicant had failed to otherwise establish injury.

LC 3212.85 provides,

. . .(d) The injury that develops or manifests itself in these cases shall be presumed to arise out of, and in the course of, the employment. This presumption is disputable and may be controverted by other evidence. Unless controverted, the appeals board is bound to find in accordance with the presumption. This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

(e) For purposes of this section, the following definitions apply:

(1) "Biochemical substance" means any biological or chemical agent that may be used as a weapon of mass destruction, including, but not limited to, any chemical warfare agent, weaponized biological agent, or nuclear or radiological agent, as these terms are defined in Section 11417 of the Penal Code

In upholding the WCJ the WCAB on reconsideration held that the presumption of industrial causation for injury from exposure to biochemical substances in Labor Code § 3212.85 requires that the person using the chemical or hazardous materials as weapons of mass destruction "knowingly utilizes those agents with the intent to cause harm"/use of substance as weapon with intent to cause widespread great bodily injury or death. In this case the applicant's exposure during the process of refuel firefighting aircraft did not establish the requisite intent. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.138[4][p]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.07[5][g]. Sullivan on Comp, Section 5.18, Presumption of Injury]

County Of Riverside v. WCAB (Sylves) (4th Appellate District) 10 Cal. App. 5th 119; 215 Cal. Rptr. 3d 693; 82 Cal. Comp. Cases 301; 2017 Cal. App. LEXIS 269

Substantial evidence supported single cumulative injury extending throughout applicant's entire professional football career, where periods of employment were linked with applicant receiving medical treatment for injured body parts, including surgeries, medications and electrical stimulation in accordance with Western Growers Ins. Co. v. W.C.A.B. (Austin) (1993) 16 Cal. App. 4th 227, 20 Cal. Rptr. 2d 26, 58 Cal. Comp. Cases 323. Newberry v. San Francisco Forty Niners, Atlanta Falcons, Oakland Raiders, San Diego Chargers, ESIS, Tristar, Zenith Insurance, Berkley Specialty, Travelers Insurance, 2017 Cal. Wrk. Comp. P.D. LEXIS 143 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.01[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[1]. Sullivan on Comp, Section 5.6, Defining Multiple Injury Dates]

*Applicant suffered single cumulative trauma to his heart, neck, low back, right knee, and left foot while working as correctional officer despite there were two different dates of injury under Labor Code § 5412 for applicant's heart and orthopedic injuries, but one period of injurious exposure for purposes of determining liability under Labor Code § 5500.5. Bass v. State of California, Department of Corrections & Rehabilitation, 2017 Cal. Wrk. Comp. P.D. LEXIS 213 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.01[2][a]; [*2] Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[1].]*

Injury upheld as AOE/COE where applicant was in wheelchair due to nonindustrial disability and employer accommodated applicant's disability by allowing her to work from home for 10 months prior to incident, and thereby created applicant's home into worksite/workplace. Santa Clara Valley Transportation Authority v. Workers' Compensation Appeals Board (Tidwell) 82 Cal. Comp. Cases 1514, 2017 Cal. Wrk. Comp. LEXIS 129 (WD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.139; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.05[2][a]. Sullivan on Comp, Section 5.50, Home as Second Job Site]

The applicant was employed with a County Defendant employer from 1998-2010, after which he went to work for an Indian tribe from 2010-2014. All periods were as a police officer. In 2013 applicant learned from his doctor that his condition was the result of a CT industrial injury during his employment with the County Defendant. This issue was whether LC 5500.5 excluded County Defendant as the last year of employment was with the Indian Tribe Defendant.

The Court of Appeal appears to hold that pursuant to Labor Code § 5500.5, employee's cumulative trauma was limited to last year of injurious exposure, excluding Federal Indian Tribes as Labor Code § 5500.5 should not limit liability to tribal employers where the WCAB lacked jurisdiction, and evidence established that employee, while previously employed by non-tribal employer, sustained a compensable cumulative trauma injury AOE/COE. [See

generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 21.02[2], 31.13[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[1][d]; Sullivan on Comp, Section 5.7, Cumulative Injury – Liability.]

II. Apportionment

City Of Jackson v. WCAB (Rice), (3rd Appellate District) 11 Cal. App. 5th 109; 216 Cal. Rptr. 3d 911; 82 Cal. Comp. Cases 437; 2017 Cal. App. LEXIS 383

Applicant claimed CT injury for the period ending 4/22/09 to neck arising out of a four year of full time employment as a police officer. Applicant was 29 years old as of the last year of the pled CT. Before undergoing surgery the applicant underwent a QME examination. The QME found the applicant's condition was caused by (1) his work activities for the city; (2) his prior work activities; (3) his personal activities, including prior injuries and recreational activities; and (4) his personal history, in which the QME included "heritability and genetics," [applicant's] "history of smoking," and "his diagnosis of lateral epicondylitis [commonly known as tennis elbow]." Dr. Blair apportioned each factor equally at 25 percent.

"In Kos v. WCAB (2008) 73 CCC 529 the worker developed back and hip pain while working as an office manager. She was diagnosed with "multilevel degenerative disease," and the medical evaluator found that the underlying degenerative disc disease was not caused by work activities, but that the worker's prolonged sitting at work "'lit up'" her preexisting disc disease. (Id. at pp. 530, 531.) The medical evaluator testified that the worker's "pre-existing genetic predisposition for degenerative disc disease would have contributed approximately 75 percent to her overall level of disability." (Id. at p. 531.) Nevertheless, the ALJ found no basis for apportioning the disability. (Id. at p. 532.) The Board granted reconsideration and rescinded the ALJ decision. (Id. at p. 532.) The Board stated that in degenerative disease cases, it is incorrect to conclude that the worker's permanent disability is necessarily entirely caused by the industrial injury without apportionment. (Id. at p. 533.) Thus, in Kos, the Board had no trouble apportioning disability where the degenerative disc disease was caused by a "pre-existing genetic predisposition." (Id. at p. 531.)". . .

In Escobedo, supra, 70 Cal.Comp.Cases at pages 608, 609, the ALJ apportioned 50 percent of the worker's knee injury to nonindustrial causation based on the medical evaluator's opinion that the worker suffered from "'"significant degenerative arthritis."'" The Board stated: "In this case, the issue is whether an apportionment of permanent disability can be made based on the preexisting arthritis in applicant's knees. Under pre-[Senate Bill No.] 899 [(2003–2004 Reg. Sess.)] apportionment law, there would have been a question of whether this would have constituted an impermissible apportionment to pathology or causative factors. [Citations.] Under [Senate Bill No.] 899 [(2003–2004 Reg. Sess.)], however, apportionment now can be based on non-industrial pathology, if it can be demonstrated by substantial medical evidence that the non-industrial pathology has caused permanent disability. [¶] ... [¶] ...

Thus, the preexisting disability may arise from any source—congenital, developmental, pathological, or traumatic." (Id. at pp. 617–619.) We perceive no relevant distinction between allowing apportionment based on a preexisting congenital or pathological condition and allowing apportionment based on a preexisting degenerative condition caused by heredity or genetics. . . . In Acme Steel v. Workers' Comp. Appeals Bd. (2013) 218 Cal.App.4th 1137, 1139 [160 Cal. Rptr. 3d 712], the medical examiner apportioned 40 percent of the worker's hearing loss to "'congenital degeneration'" of the cochlea. (Id. at p. 1139.)

The ALJ nevertheless refused to apportion the disability, and the Board denied the employer's petition for reconsideration. (Id.at pp. 1140–1141.) The Court of Appeal granted the employer's writ of review and remanded the matter to the Board, holding Labor Code sections 4663 and 4664 required apportionment for the nonindustrial cause due to congenital degeneration where substantial medical evidence showed 100 percent of the hearing loss could not be attributed to the industrial cumulative trauma. (Acme Steel, at pp. 1142–1143.) Again, we see no relevant distinction between apportionment for a preexisting disease that is congenital and degenerative, and apportionment for a preexisting degenerative disease caused by heredity or genetics..."

By supplemental report, the QME affirmed that she could state "to a reasonable degree of medical probability that genetics has played a role in Mr. Rice's injury," despite the fact that there is no way to test for genetic factors. To support her opinion apportioning genetic factor, the QME cited to the referenced medical studies. In the end the QME apportioned 49% to the applicants 'personal history including genetic issues'. The WCJ found that the city had carried its burden of showing apportionment as to 49 percent attributable to genetic factors, and this is the determination at issue here. The Board reversed reasoning that "finding causation on applicant's 'genetics' opens the door to apportionment of disability to impermissible immutable factors. ... Without proper apportionment to specific identifiable factors, and therefore the Board held that the opinion of the QME was not substantial medical evidence to justify apportioning 49% of applicant's disability to non-industrial factors."

"'Disability' as used in the workers' compensation context includes two elements: "(1) actual incapacity to perform the tasks usually encountered in one's employment and the wage loss resulting therefrom, and (2) physical impairment of the body that may or may not be incapacitating." (Allied Compensation Ins. Co. v. Industrial Acc. Com. (1963) 211 Cal.App.2d 821, 831 [27 Cal. Rptr. 918].) Permanent disability is "'"the irreversible residual of an injury,"'" and permanent disability payments are intended to compensate for physical loss and loss of earning capacity. (Brodie, supra, 40 Cal.4th at p. 1320.) Here, Dr. Blair identified Rice's disability as neck pain and left arm, hand, and shoulder pain, which prevented him from sitting for more than two hours per day, lifting more than 15 pounds, and any vibratory activities such as driving long distances. All of these activities were included in Rice's job description.

Rice's injury, on the other hand, was a cumulative injury, which Dr. Blair stated Rice acknowledged was not an exact or isolated injury, but which he believed was a consequence of repetitive motion primarily resulting from his employment. Thus, the injury was repetitive motion. Dr. Blair did not conclude, as the Board apparently determined, that the repetitive motion (the injury) was caused by genetics. Rather, Dr. Blair properly concluded that Rice's disability, i.e., his debilitating neck, arm, hand, and shoulder pain preventing him from performing his job activities, was caused only partially (17 percent) by his work activities, and was caused primarily (49 percent) by his genetics. Contrary to the Board's opinion, Dr. Blair did not apportion causation to injury rather than disability."

The Court of Appeal reversed the WCAB, holding that disability may be apportioned to a genetic predisposition. In support the Court appeared to focus on whether the QME's report constituted substantial evidence

writing that the report reflected, 'without speculation, that Rice's disability is the result of cervical radiculopathy and cervical degenerative disc disease. Her diagnosis was based on medical history, physical examination, and diagnostic studies that included X-rays and MRI's (magnetic resonance imaging scans). She determined that 49 percent of his condition was caused by heredity, genomics, and other personal history factors. Her conclusion was based on medical studies that were cited in her report, in addition to an adequate medical history and examination. Dr. Blair's combined reports are more than sufficient to meet the standard of substantial medical evidence.' In the end the Court held that apportionment may properly be based on genetics/hereditability, i.e., apportionment based on pathology and asymptomatic prior conditions for which the worker has an inherited predisposition," and that "no relevant distinction between allowing apportionment based on a preexisting congenital/pathological condition and allowing apportionment based on a preexisting degenerative condition caused by heredity or genetics exist. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[1], [2][a], 8.06[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.40[2], [3], 7.41[3].

Editor's Comments: The Rice opinion is correct as to its conclusion, but fatally flawed as to the analysis. Simply put the WCAB was correct that the WCJ had improperly apportioned based on causation of injury not causation of disability. First, the careful reader of the Rice decision with note that the Court incorrectly cited the Kos v. WCAB (2008) 73 CCC 529 for the concept of "lighting up" as a basis for apportionment of disability. The 'lighting up' doctrine is only applicable a causation of injury analysis post SB-899/1/1/15, and not causation of disability. While an industrial injury may 'light up' asystematic pathology to create disability, the concept of 'lighting up' is only relevant to establish industrial injury/causation of injury. It is then up the evaluating physician to apportion between the industrial event, activity, or exposure which 'lit up' the prior non-industrial and pre-existing pathology. The relevance of risk factors, (genetic predisposition in the Rice case), is to support that the pathology was pre-existing and not industrial caused. The Court of Appeal should have started, discussed and ended with the single sentence found in the Discussion, section II section: "Again, we see no relevant distinction between apportionment for a preexisting disease that is congenital and degenerative, and apportionment for a preexisting degenerative disease caused by heredity or genetics."

Hikida v. WCAB, Costco (2nd Appellate District) 12 Cal. App. 5th 1249; 219 Cal. Rptr. 3d 654; 82 Cal. Comp. Cases 679; 2017 Cal. App. LEXIS 572

Applicant developed carpal tunnel after working for over a quarter century with Costco. During May of 2010 the applicant elected to proceed with carpal tunnel surgery. Following, and as a result of the surgery the applicant development CARPS. Applicant had no pre-existing history of CARPS. Although the AME apportioned the carpal tunnel as 10% nonindustrial, he found no apportionment of the CARPS as it was the direct result of the carpal tunnel surgery. The AME found that the applicant was totally disabled entirely due to the CARPS. The WCJ apportioned 10% of the disability to non-industrial causation. Applicant sought reconsideration.

The WCAB, in a split panel decision upheld the WCJ. However, the dissent argued that because the entirety of the total disability was the result of the industrial surgery, apportionment was not proper.

"Under the changes brought by the 2004 amendments, the disability arising from petitioner's carpal tunnel syndrome was apportionable between industrial and nonindustrial causes. However, petitioner's permanent total disability was caused not by her carpal tunnel condition, but by the CARPS resulting from the medical treatment her employer provided. The issue presented is whether an employer is responsible for both the medical treatment and any disability arising directly from unsuccessful medical intervention, without apportionment. For the reasons discussed below, we conclude it is. . . The long-standing rule that employers are responsible for all medical treatment necessitated in any part by an industrial injury, including new injuries resulting from that medical treatment, derived not from those statutes, but from (1) the concern that applying apportionment principles to medical care would delay and potentially prevent an injured employee from getting medical care, and (2) the fundamental proposition that workers' compensation should cover all claims between the employee and employer arising from work-related injuries, leaving no potential for an independent suit for negligence against the employer. Nothing in the 2004 legislation had any impact on the reasoning that has long supported the employer's responsibility to compensate for medical treatment and the consequences of medical treatment without apportionment."

Hikida v. WCAB, Costco (2nd Appellate District) 82 Cal. Comp. Cases at pgs. 685-90.

Editor's Comments: A careful reading of the Hikida decision might limit its application to medical treatment resulting in a "new condition/diagnosis". I believe that an aggravation and worsening of an existing condition/diagnosis due to medical treatment would justify apportionment. In Hikida if the surgery had merely produced a worsening of the PD associated with the carpal tunnel, apportionment would have been appropriate. In Hikida a completely new condition, CARPS, not previously present and solely the result of the surgery rendered the applicant totally disabled.

See also, County of Sac. v. WCAB (Chimeri) 75 CCC 159; Nilsen v. Vista Ford 2012 Cal.Wrk.Comp.P.D. LEXIS 528; Moran v. Dept. of youth Authority 2011 Cal.Wrk.Cop. P.D. Lexis 43; Steinkamp v. City of Concord 2006 Cal.Wrk.Comp. P.D. LEXIS 24

The Court of Appeal reversed the WCAB/WCJ holding that while disability resulting from the carpal tunnel appeared proper, apportionment of compensable consequence injuries may not be proper. Here the applicant developed CARPS as a result of the surgery, not the CT injury. The Court found that "Nothing in the 2004 legislation had any impact on the reasoning that has long supported the employer's responsibility to compensate for medical treatment and the consequences of medical treatment without apportionment.

III. Compromise & Release

Ferragamo vs. St. Louis (Los Angeles) Rams (2017) 45 CWCR 175

A former professional NFL quarterback for the Los Angeles Rams originally pled, in the mid-l980s, a cumulative trauma injury to "multiple body parts, including but not limited to orthopedic, internal and ENT" as a result of his playing career with the Rams and two other NFL teams. This claim was resolved via C&R in 1988 with the standard language of "Employee releases and forever discharges said employer and insurance carrier from all claims and cause of action, whether now known or ascertained, or which hereafter arise or develop as a result of said injury, ... " The applicant was later diagnosed with chronic traumatic encephalopathy (CTE) as a result of repetitive head trauma. Applicant sought recovery for injury to brain due to the same period of CT resolved by the prior CT. Applicant argued that the effects of the CTE were latent and that CTE is an insidious brain disease that neither he, nor the professional football teams had any knowledge of the existence at the time of the original C&R. Thus, Applicant had not released the defendants from the liability for its effects. Defendant asserted that the additional claim of injury of CT injury was resolved by the prior C&R and thus was barred by res judicata because the C&R had the pre- printed language akin to an applicant releasing an employer for all known and unknown cause of action, now and in the future. The WCJ agreed holding that the prior C&R was a "final judgment on the merits," thus preventing applicant from adjudicating any newly-discovered liability issues" against the same defendants.

By split panel the WCAB reversed the WCJ's decision, holding that the res judicata doctrine did not bar applicant's later brain injury claim as neither applicant nor the teams could have known at the time of signing the 1988 C&R that he was suffering from CTE, as the disease was not discovered by medical science until well after the settlement agreement. The Applicant could not have "knowingly" released a condition based upon the non-existence of evidence known to either the medical or legal community. Citing *Casey vs. Proctor* (1963) 59 C2d 97 the WCAB noted that sanctity of contract should be enforced where an injured worker knows or should have known that there was the possibility of further complications occurring from the injury that is claimed. This record and medical evidence proffered at the trial had not supported a conclusion that Ferragamo knew or should have known that he had an undiagnosed brain injury, then without symptoms, and he intended to waive any and all claims related to that unknown condition. Yes, Ferragamo had experienced some mild post-concussion symptoms and occasional headaches but one could not presume to have knowledge of a condition that requires an expert opinion to diagnose and which had not yet entered the medical community. At the time of the first C&R, CTE diagnoses could not have been made even with expert testimony. Citing *Chevron USA vs. WCAB (Steele)* (1990) 219 Cal App 3d 1265, 55 CCC 107 the WCAB wrote that "There can be more than one injury, specific or cumulative, from the same or separate events that give rise to more than one claim." The WCAB majority also cited and discussed *O'Meara vs. Haiden* (1928) 204 C 354, which held that only an injury that is known at the time of the settlement, even if unknown or unexpected consequences result therefrom," can be released by the parties. The WCAB concluded that the injury itself was unknown to the football player, as CTE was unknown to the medical community at the time of the settlement.

IV. Cumulative Trauma Injury

Roger Bass v State of California, Dept. of Corrections & Rehabilitation 82 Cal Comp Cases 1034, 2017 Cal.Wrk.Comp. P.D. LEXIS 213 (BPD)

Applicant, a correctional officer for over 30 years, sustained a CT injury for the period ending 7/15/14, to heart, neck, low back, right knee, and left foot. Although Applicant continued to work in his normal and customary job without restriction, he received treatment provided by the employer for a number of years to chronic neck, low back, right knee, and left foot pain. Although the parties stipulated that the orthopedic injuries and injury to heart were the result of a single cumulative injury, the defendant's contended that since the disease process for each type of injury was from different causes, there should be two separate awards, one for orthopedic injury, and one for injury to heart. After trial the WCJ held a single CT, and an awarded PD without application of the CVE, merely adding the disability for the orthopedic injury to the disability for the injury to heart.

In upholding the WCJ, the WCAB held that even though there were two different dates of injury under Labor Code § 5412 for applicant's heart and orthopedic injuries, there was a single period of injurious exposure for purposes of

determining liability under Labor Code § 5500.5. Further, that while the date of injury under Labor Code § 5412 has relevance to statute of limitations and perhaps allocation of liability for cumulative injury under Labor Code § 5500.5, it does not determine whether employee sustained one or two cumulative injuries. Here the WCAB held a single period of injurious industrial exposure was responsible for both injury to spine, right knee/left foot, as well as to heart. As to whether the disability should be added or the CVE should be applied, the WCAB held that this was a medical question and because the medical record was silent on the issue the matter was remanded for development of the medical record.

Editor's Comments: The decision of Bass v. State of California, Dept. of Corrections is important for two reasons. First, this is the first reported decision that expressly prohibits the WCJ from deciding whether or not to apply the CVE. In the absence of medical evidence on this issue it appears the WCJ must either apply the CVE or perhaps request further development of the medical record. Second, although separate parts or conditions may be injured, where the injurious period in the same, a single CT injury will be found. Here however, if the defendant had established that the injurious exposure for orthopedic injury was different from that of the injury to heart, the result might have been different.

Apportionment of Liability as between co-defendants again applies the doctrine of "Substantial Evidence" but is a hybred of the elements of "strict legal apportionment" and "Date of CT Injury. Apportionment of liability starts with an analysis to determine the Date of CT injury. Here the focus in on "injurious exposure/activity" and the documented consequence. Here the physician is expected through review of medical records, deposition transcripts, and review of job descriptions, to allocate liability among co-defendant who are either sharing the period of CT or are responsible for successive CT industrial injuries. This analysis is factually dependent and requires the reporting physician to use in equal parts medical knowledge, factual/medical information, and common sense. The primary consideration by the evaluating physician should focus on the physical arduousness of the industrial activity, and/or the intensity of the exposure/stressor in addressing the allocation of liability for the subject injurious exposure/activity period or periods. It is the evaluating physician's analysis that is the most important component to apportionment of liability as between co-defendants.

The first step in the analysis is to determine the date of CT injury: (1) Injurious industrial exposure, (2) Disability and (3) applicant's knowledge or reason to know the existence of a cause and effect relationship.

The second step is: Did the last date of "injurious exposure" occur before or after the "Date of CT Injury". If the "injurious exposure" ended before than the "Date of CTinjury", than liability would be on the carrier on the risk during the year ending with the ending of the "injurious exposure/activity/stressor". If the injurious exposure continued beyond "Date of CT Injury" than liability as between co-defendants would be the year period ending upon "Date of CT Injury".

V. Death Dependency Benefits

Pantus v. Get'er Done Trucking, State Compensation Insurance Fund, 2016 Cal. Wrk. Comp. P.D. LEXIS 619 (BPD)

Decedent employee was killed in a motorcycle accident within course and scope of employment. Decedent's son was passenger on the motorcycles and was severely injured. The issue was whether the decedent's son entitled to lifetime benefits as physically and mentally incapacitated from earning as the result of the accident which killed his father/employee.

The WCAB upheld the WCJ's decision which determined that contrary to defendant's positon, Labor Code § 3501(a) support that for minor to be entitled to lifetime benefits, his or her physical or mental incapacity where the decedent's son became physically and mentally incapacitated at time of and resulting from the industrial accident. Decedent's son was held entitled to lifetime benefits pursuant to Labor Code § 4703.5. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 9.05[3][a], [b]; Rassp &.05 Herlick, California Workers' Compensation Law, Ch. 9, § 9.11[3]. Sullivan on Comp, Section 12.19, Special Deaths Benefits for Totally Dependent Minor Children.]

VI. Discovery

See also, Morgan v. National Steel and Shipbuilding Company, PSI, Campbell Industries, Zenith Insurance Company, State Compensation Insurance Fund, California Insurance Guarantee Association, 2017 Cal. Wrk. Comp. P.D. LEXIS 141(BPD) holding Defendant not allowed to discover applicant medical records regarding HIV/AIDS where claim alleged that decedent's death was caused by industrial exposure to asbestos; Filing workers' compensation claim does not cause injured worker to sacrifice all privacy rights with respect to medical information; Commissioner Razo, dissenting, opined that medical records regarding decedent's HIV/AIDS status were discoverable, and he would return matter to WCJ to determine how best to protect decedent's privacy rights while permitting defendant to review relevant medical records.; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 25.40, 25.43, 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.45, Ch. 19, § 19.37. Sullivan on Comp, Section 14.17, Privacy of Employee with HIV/AIDS].

Cann v. Desert View Auto Auction, Insurance Company of the State of Pennsylvania, 2017 Cal. Wrk. Comp. P.D. LEXIS 214 (BPD)

Applicant sustained industrial injuries to his arm on July 13, 2012, and his spine on September 11, 2012. Defendant filed a "Petition to Compel Applicant's Attendance at Defense Vocational Evaluation" on October 27, 2016 and applicant responded by objecting to the evaluation on November 7, 2016. Applicant agreed to the evaluation but requested a court reporter's presence. The WCJ without testimony or other evidence ordered the applicant to attend defendants Vocational Evaluation but also granted applicant's request that a court reporter be present.

On reconsideration, the WCAB reversed holding that although the WCJ has discretion to decide whether or not to order recording of vocational examinations, such an order requires that evidence be provided establishing good cause to allow recording of vocational evaluation. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 22.07, 25.40, 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.45[1], Ch. 19, § 19.37.]

Abea v. Parco, Inc. PSI, Administered by ClaimQuest, Inc., 2017 Cal. Wrk. Comp. P.D. LEXIS 302, 82 Cal. Comp. Cases 141

Applicant claimed CT injury to various parts of body for the period ending 11/14/14. The Application in this matter was filed February 1, 2016. Defendant sent delay notice on February 11, 2017, filed an Answer April 18, 2016, which indicated that injury AOE/COE was denied, and set applicant's deposition. A denial notice was sent by defendant on April 28, 2016. Applicant failed to appear at his deposition set for June 9, 2016 and this forced defendant to file a motion to compel. Applicant did not request a PQME until July 20, 2016, and he appeared late for his deposition on September 8, 2016. Dr. Lee, the PQME, did not issue his report until November 7, 2016, after which defendant timely objected and noticed the doctor's deposition for March 17, 2017. On December 21, 2016, applicant file a DOR requesting an AOE/COE hearing.

". . .In setting this matter for trial, the WCJ apparently agreed with applicant's argument at the Pretrial Conference that this case was ripe for trial because "defendant has already denied the case without need for the discovery at issue." To the extent this position interprets Labor Code section 5402 as placing a limit on defendant's right to discovery once a claim is denied, we disagree. It is well-settled that although the statute's presumption of compensability precludes a defendant from disputing liability for injury with evidence which could have been obtained with the exercise of reasonable diligence within the initial 90-day period, this does not mean that defendant thereafter is permanently prevented from seeking evidence on corollary and related issues. (Napier v. Royal Insurance Co. (1992) 20 Cal. Workers' Comp. Rptr. 124 (writ den.).) In other words, the fact that a defendant denies a claim within 90 days does not mean defendant should be deemed ready to proceed to trial on the issue of injury at the expiration of the 90-day period.

In this case, the fact that defendant denied applicant's claim within the 90-day period does not mean that defendant's right to further discovery ended after denial of the claim. This case involves a relatively complex claim of cumulative trauma to multiple body parts or systems, i.e., applicant's lumbar spine, right knee, bilateral hernia, hypertension, and sleep disorder. It also appears that applicant has not been cooperative with discovery, and defendant timely objected to Dr. Lee's report and noticed his deposition before applicant filed his DOR. Defendant also filed a timely objection to applicant's DOR. Under these circumstances, we conclude the WCJ erred in setting the matter for trial. Defendant should have been allowed some time to complete the depositions of applicant and Dr. Lee, which had already been set before the Pretrial Conference. . ."

Abea v. Parco, Inc. PSI, Administered by ClaimQuest, Inc., 2017 Cal. Wrk. Comp. P.D. LEXIS at pg. 303, 82 Cal. Comp. Cases 141

But see contra, Willis v. The Kroger Company dba Food 4 Less, 2017 Cal. Wrk. Comp. P.D. LEXIS 526 (BPD), where removal was denied where order closing discovery pursuant to Labor Code § 5502(d)(3) was determined that defendant had ample opportunity and failed to obtain additional qualified medical evaluator panels to contest issue of extent of psychiatric and internal permanent disability and failed to timely object under Labor Code § 4062 to opinions of primary and secondary/consulting treating physicians regarding psychiatric and internal parts of body being industrially injured, thereby waiving its objection. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 26.03[4], 26.04[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.45[1], Ch. 19, § 19.37; Sullivan on Comp, Section 15.25, Declaration of Readiness to Proceed.]

At conference on February 8, 2017, applicant requested a trial date. At that point defense objected, on the grounds that they had not completed the discovery necessary before the matter could proceed to trial. Applicant argued that the matter should be set for trial as defendant has already denied the case without need for the discovery at issue. Following discussion with the parties the case was ordered set for AOE/COE trial, with the trial judge to address any issues regarding the need for further discovery with the trial judge.

The WCAB reversed holding, the fact that a defendant denies a claim within 90 days does not mean defendant should be deemed ready to proceed to trial on the issue of injury at the expiration of the 90-day period.

Ford v. Workers' Comp. Appeals Bd., (Fourth Appellate District) 82 Cal. Comp. Cases 1105, 2017 Cal. App. Unpub. LEXIS 6899.

Applicant was caught on surveillance video acting in a way which established applicant had exaggerated his symptoms and related disability. Specifically, on one of several occasions the applicant was videotaped following medical examination taking off his sling, driving his car and stopping at an appliance store where, using both hands, he lifted a washing machine into the back of the car he was driving. The PTP neurologist, who found some neurological abnormalities, stated applicant did "seem to have complex regional pain syndrome" but noted he was concerned about the fact "the patient seems to be on multiple medications, yet continues to have severe pain." The surveillance video was taken the early part of 2010, disclosed the middle part of 2010, with a re-examination by the AME the later part of 2010. May 10, 2012, Hernandez pled guilty to one count of violating section 1871.4, based on his May 2010 visit to PTP neurologist. He was placed on summary probation and required to pay $9,000 in restitution.

Editor's Comments: It should be highlighted that two facts were critical in the Ford v. WCAB decision. First, the parties were utilizing an AME whose opinion the WCJ relied. Second, the AME conducted a re-examination of the applicant after disclosure of the surveillance video. It was this report after this examination in which the AME noted the applicant's condition had improved and appeared consistent with the surveillance video. The Court in reaching their decision cited and discussed , Tensfeldt v. WCAB (1998) 66 Cal.App.4th 116 [77 Cal. Rptr.2nd 691, and Farmers Ins. v. WCAB (2002) 104 Cal.App.4th 684 [128 Cal.Rptr.2d 353]. The Court wrote, "notwithstanding a conviction for workers' compensation fraud, "entitlement to receive further compensation benefits after a fraud conviction necessarily will require (1) an actual, otherwise compensable, industrial injury; (2) substantial medical evidence supporting an award of compensation not stemming from the fraudulent misrepresentation for which the claimant was convicted; and (3) that claimant's credibility is not so destroyed as to make claimant unbelievable concerning any disputed issue in the underlying compensation case." (Ford v. Workers' Comp. Appeals Bd., (Fourth Appellate District) 82 Cal. Comp. Cases at pg. 1107). Thus, it would appear the succinct holding is that Insurance Code 1871.5 bars only that portion of the benefit secured by the fraudulent misrepresentation, and not those benefits to which the applicant is determined otherwise to be entitled.

During the re-examination in 2010 after disclosure of the videotape, the AME noted improvement, but found disability justifying a 56% WPI based upon a diagnosis of CRPS. The WCJ made a disability awarded of 70%.

In upholding the WCJ, the Court of Appeal held that although the applicant's falsely exaggerated the extent of his disability and pled guilty to insurance fraud, this did not bar applicant's entitlement to a 70% PD award per the AME. The Court held that where the benefits were not "owed or received as a result of a violation of Section 1871.4 for which the recipient of the compensation was convicted, and thus the exaggeration did not affect applicant's actual entitlement to benefits, applicant's entitlement is not barred. See also, Tensfeldt v. WCAB (1998) 66 Cal.App.4th 116 [77 Cal. Rptr.2nd 691; Farmers Ins. v. WCAB (2002) 104 Cal.App.4th 684 [128 Cal.Rptr.2d 353]. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 2.03[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.30[2], [3].]

I. Lien Claims

Maria De La Luz Garcia v. Morton Manufacturing, 2016 Cal. Wrk. Comp. P.D. LEXIS 480 (BPD)

WCAB rescinded WCJ's finding that lien filed by lien claimant Sepulveda Plaza Medical Center, Inc., on 5/25/2012 for services rendered to applicant between 7/2/2007 and 8/27/2007 was barred by three-year statute of limitations in Labor Code § 4903.5(a), when WCAB found that amendments made to Labor Code § 4903.5 defining statute of limitations for filing liens became effective on 1/1/2013 and does not apply retroactively to liens filed prior to effective date, and that, consequently, WCJ acted without or in excess of her powers in applying three-year statute of limitations to bar lien claimant's lien for reasonable medical expenses incurred on applicant's behalf. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 30.04[8][a], 30.20[1], 30.21; Rassp & Herlick, California Workers' Compensation Law, Ch. 17, § 17.111[3], [5].]

". . .Generally, statutes operate prospectively only, and there is a presumption against retroactivity absent "'. . . express language of retroactivity or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application.' (McClung v. Employment Development Dept. (McClung) (2004) 34 Cal.4th 467, 47 quoting Myers v. Phillip Morris Companies, Inc. (Myers) (2002) 28 Cal.4th 828, 844, emphasis in the original.) It is too well settled to require citation of authority, that in the absence of a clearly expressed intention to the contrary, every statute will be construed so as not to affect pending causes of action. Or, as the rule is generally stated, every statute will be construed to operate prospectively and will not be given a retrospective effect, unless the intention that it should have that effect is clearly expressed. (Collet v. Alioto (1930) 210 Cal. 65, 67.). . . "

Maria De La Luz Garcia v. Morton Manufacturing, 2016 Cal. Wrk. Comp. P.D. LEXIS at pg. 482.

Editor's Comment: The Court in De La Luz Garcia v. Morton Manufacturing also affirmed that a claim on delay pursuant to Labor Code § 5402(c) requires employer to provide applicant with reasonable and necessary medical treatment until claim is either accepted or rejected, and that lien claimant in this situation is not required to establish that applicant's alleged injuries for which treatment was provided were industrial to recover its lien for treatment provided during delay period pursuant to Labor Code § 5402(c). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.07[3][a], 30.25[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4 § 4.03[2], [3].]

See also, McKinney v. Enterprise Rent-A-Car of San Francisco, 2016 Cal. Wrk. Comp. P.D. LEXIS 495 (BPD), which held that Administrative Director Rules 9785(g) and 9792.6.1(t)(2) which requires the RFA to include documentation substantiating the need for the requested treatment, but it is the primary treating physician, and not a claims adjustor, who knows what medical records substantiate the requested treatment. Therefore, the defendant's failure to take the initiative and submit applicant's complete medical record to the UR doctor will not constitute a willful failure to comply with its regulatory and statutory obligations, nor an indication of a bad faith tactic that is frivolous or solely intended to cause delay justifying the impositions of 5813 sanctions. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02[2][f], 22.05[6][b][v], 23.15; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.10, Ch. 16, § 16.35[2]. Sullivan on Comp, Section 7.34 Utilization Review – Requests for Authorization]

See also, California Insurance Guarantee Association v. Sylvia Mathews Burwell, Secretary Of Health And Human Services; United States Department Of Health & Human Services; And Center For Medicare & Medicaid Services (United States District Court For The Central District Of California) 227 F. Supp. 3d 1101; 2017 U.S. Dist. LEXIS 1681; 96 Fed. R. Serv. 3d (Callaghan) 793; 82 Cal. Comp. Cases 47, in which CMS held only entitled to that portion of medical treatment provided by CIGA pursuant to an accepted industrial injury, and not that portion of non-industrial treatment despite charges containing diagnosis codes covered and diagnosis codes not covered by workers' compensation insurance policies [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 29.09[2][c], [e], [g]. Sullivan on Comp, Section 3.47, California Insurance Guarantee Association]

See also, Riddle v. Las Flores Convalescent Hospital, CIGA by its servicing facility Intercare Insurance Services, for Ullico Casualty Co., in liquidation, 2017 Cal. Wrk. Comp. P.D. LEXIS 20 (BPD), in which CIGA held not entitled to reimbursement where prior injury settled by C&R before CIGA injury, as defendant for prior injury was no longer liable to applicant for benefits and was not "other insurance" for purposes of relieving CIGA of liability for benefits following applicant's second injury. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 2.84[3][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 3, § 3.33[3]; Sullivan on Comp, Section 3.47, California Insurance Guarantee Association].

See also, Maya v. All Commercial Industries, State Compensation Insurance Fund, 2017 Cal. Wrk. Comp. P.D. LEXIS 223 (BPD), holding that although attorney has broad discretion in deciding how to conduct discovery, attorney's broad discretion does not automatically allow for issuance of redundant subpoenas requesting documents that were ordered, obtained, and available from by prior counsel. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 30.05; Rassp & Herlick, California Workers' Compensation Law, Ch. 17, § 17.72[1]. Sullivan on Comp, 14.64, Defining Medical-Legal Expenses]

Duncan v. Walmart Stores, (Fourth Appellate District) 18 Cal.App.5th 460, 2017 Cal.App.LEXIS 1111.

Applicant fell during the course and scope of her employment with Wal-Mart. Applicant received workers' compensation benefits including TD and medical care paid by defendant/employer. However, the employee/plaintiff failed to seek recovery for lost wages in the third party civil case. When the applicant/plaintiff received a judgement of

$355,000 for pain and suffering, past and future medical treatment, but without an award for loss wages, plaintiff contested workers' compensation lien as to TD.

The Court of Appeal held that the workers' compensation lien against third party recovery maybe properly reduced by amount of reasonable attorney fees and costs. However, the employer/workers' compensation carrier is entitled to recover the amount of TD paid despite the employee mading no attempt to recover those lost wages from the third party citing and explaining LC§ 3856, subd. (b)). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 11.22[6], 11.42[2][a], [b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 12, §§ 12.06[1], 12.08[4], 12.10; Sullivan on Comp, Section 2.39, Subrogation – Civil Suits]

Williams v. First Student (BPD) 45 CWCR 43 (BPD)

Applicant claimed a cumulative trauma injury while working as a school bus driver. The case was dismissed for lack of prosecution in January 2015. Prior to the dismissal, applicant's attorney had issued subpoenas through lien claimant Med- Legal Photocopy from May through November 2011. The matter proceeded to trial with lien claimant presenting invoices with accompanying proofs of service on defendant. Included in the exhibits was an Invoice Explanation & Review letter that summarized and attached all previous billings and that requested payments. Defendants offered no evidence and no objections to the invoice or the letter. The WCJ found essentially for the defendant holding that the subpoenas were unreasonable and unnecessary as those were for the same documents that defendant already subpoenaed before the lien claimant issued the subpoena. The WCJ also denied reimbursement for subpoenas that hadn't been served on the parties in the case, reasoning that applicant is required to first request documents from the entity before subpoenaing them. Lien claimant filed a petition for reconsideration.

In reversing the WCJ, the WCAB first noted that Labor Code § 4622 requires defendants to pay all medical legal expenses for which the employer is liable including any costs and expenses incurred by or on behalf of any party needed for the purpose of proving or disproving a contested claim. (See Cornejo 81 C.C.C. 451 and Martinez 78 C.C.C. 444.

Next, citing the case of Torres 77 C.C.C. 1113, the Board stated that a lien claimant asserting a lien claim has the burden of proving the necessary elements of its claim. Those elements include showing that (1) a contested claim existed that the time expenses were incurred; (2) the incurred expenses were for the purpose of proving or disproving the contested claim; and (3) the expenses were reasonable and necessary at the time they are incurred. (Labor Code §§ 4620 and 4621 and the case of American Psychometric Consultants 60 C.C.C. 559).

Pursuant to Labor Code § 4622 and 37 (e) (1), if the defendant objects to the reasonableness or necessity of the incurred expenses, the defendant must notify the provider and must indicate the reasons for the objection. The Panel also noted that the defendant must make a specific and non-conclusory written objection to the reasonableness of any medical-legal bill within 60 days of receipt. Failure to do so precludes the defendant from raising reasonableness of the medical-legal cost as a defense. In this case, the WCAB noted that all parties agree that the claim was contested and the expenses that were incurred were for the purpose of proving or disproving a contested claim. Pursuant to Rule 10530, it is not necessary that the attorney first seek to obtain copies of the documents by written release before seeking them by subpoena in order for the lien for photocopy services to be valid nor first request copies from defendant. The panel found the record insufficient to support the WCJ's conclusions and findings that the subpoenas were unreasonable and unnecessary at the time they issued. Pursuant to Labor Code § 4621 (a) the reasonableness and necessity for incurring these expenses shall be determined with respect to the time when the expenses were actually incurred. Reversed and Remanded.

II. Medical-Legal Procedures

Hernandez v. Ramco Enterprises, PSI, 2016 Cal. Wrk. Comp. P.D. LEXIS 486 (BPD)

Applicant was a farm laborer who suffered multiple industrial injuries to various body parts. Applicant had filed previously four claims on or before 2/9/2015 and was evaluated for those claims by panel qualified medical evaluator Ernest Miller, M.D., on 12/2/2015. Applicant file with his employer on 2/12/16, after his QME examination, a new claim alleging injury occurring on 9/25/2015, prior to the QME examination date. Applicant sought a new QME panel for the new date of injury. The WCJ found for the applicant and allowed the new Panel. Noteworthy was that the original panel was with an orthopedist and that applicant was seeking the new panel in pain specialty.

In upholding the WCJ, the WCAB held that the applicant was allowed a new QME as the date of injury under LC 4062.3(j) and LC 4064(a) is the date the claim form was filed with the employer pursuant to LC 5401 interpreting Navarro v. City of Montebello (2014) 79 Cal. Comp. Cases 418 (Appeals Board en banc opinion), despite the fact that the new claim form alleged a DOI prior to date of QME examination set on previously filed injuries, but was filed subsequent to date of QME examination. The WCAB rejected defendant's suggestion that applicant had intentionally delayed filing claim for 9/25/2015 injury until after initial evaluation in order to obtain another panel qualified medical evaluator as there was no evidence

See, Portner v. Costco, Liberty Mutual Insurance Company, 2016 Cal. Wrk. Comp. P.D. LEXIS 499 (BPD) holding dispute over appropriate qualified medical evaluator specialty must first be submitted to Medical Director as required by 8 Cal. Code Reg. § 31.5(a)(10), and 31.1(b) applicable rules do not permit parties to bypass requirement that qualified medical evaluator specialty disputes "shall be resolved" by Medical Director, and that it was improper for WCJ to issue determination without first directing parties to submit dispute to Medical Director [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 22.06[1][a], 22.11[2], [4], 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[2], [4], Ch. 19, § 19.37. Sullivan on Comp, Section 14.29, Medical-Legal Process]

See, Garza v. O'Reilly Auto Parts, Corvel, 2017 Cal. Wrk. Comp. P.D. LEXIS 3; 82 Cal. Comp. Cases 424 (BPD) deciding orthopedic panel specialty was correct panel notwithstanding applicant's request for chiropractic panel; Parties' Labor Code § 4062.2, right to designate specialty is not absolute, and Medical Director has authority under 8 Cal. Code Reg. §§ 31and 31.1(b) to issue panel in different specialty if that specialty is more appropriate than specialty designated by requesting party. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 22.06[1][a], 22.11[2], [4], 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[2], [4], Ch. 19, § 19.37. Sullivan on Comp, Section 14.29, Medical-Legal Process]

See, Feige v. State of California Department of Corrections, 2017 Cal. Wrk. Comp. P.D. LEXIS 10 (BPD), holding applicant entitled to second QME where claimed back injury involved two cases with separate and distinct injuries with different causes, citing Navarro v. City of Montebello (2014) 79 Cal. Comp. Cases 418 (Appeals Board En Banc opinion); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 22.11[11], 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[11], Ch. 19, § 19.37. Sullivabn on Comp, Section 14.52, Subsequent Evaluations and Additional QME]

See, Ventura v. The Cheesecake Factory, Zurich American Insurance Company, 2014 Cal. Wrk. Comp. P.D. LEXIS 417 (BPD) where matter dropped from calendar despite no objection by Defendant to applicant's DOR as Labor Code § 4061(i), as amended by SB 863, expressly requires evaluation by agreed or qualified medical evaluator before parties can file declaration of readiness to proceed on issue of permanent disability, and no waiver by Defendant because Labor Code § 4061contains no specific time limits for objection to treating physician's permanent disability findings, and defendant acted reasonably and timely in medical legal process.); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 22.06[1][a], [2], 22.11[7], 26.03[4], 32.06[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[2], Ch. 16, § 16.54[7]. Sullivan on Comp, Section 15.17, Declaration of Readiness to Proceed]

See also, Luisa Lopez v. County of San Joaquin, PSI, administered by Tristar Risk Management2017 Cal. Wrk. Comp. P.D. LEXIS 197, held that applicant entitled to QME/AME re-examination on petition to reopen pursuant Labor Code § 4062.3(k), as the report after re-examination is admissible on existence, prior to end of five-year period, of new and further disability. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.06[1][e], 32.06[1][f]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[4][f]. Sullivan on Comp, Section 14.52, Subsequent Evaluation and Additional Qualified Medical Evaluator Panels in Different Specialties]

See also, Yarbrough v. Southern Glazer's Wine and Spirits, 2017 Cal. Wrk. Comp. P.D. LEXIS 508 (BPD), holding Labor Code § 4062.2(f) only precludes withdrawal from agreed medical examiner after agreed medical examiner has conducted evaluation, but does not preclude unilateral withdrawal by party before submitting to evaluation. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 22.06[1][a], 22.11[11], 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[1], [2], Ch. 16, § 16.54[11], Ch. 19, § 19.37. Sullivan on Comp, Section 14.29, Medical-Legal Process – Represented Employee]

See also, Dorantes v, Dirito Brouthers and Insurance Co. of the West, 2017 Cal. Wrk. Comp. P.D. LEXIS 237 (BPD), holding that although 8 Cal. Code Reg. §38(i) creates guidelines for the timeline for supplemental QME report, the 60 day requirement when read with Labor Code §4062.5 does not mandate replacement QME Panel absent good cause such as that the delay would result in prejudice to the parties, and the issue of whether the QME report was substantial evidence was not grounds for replacement under 8 Cal. Code Reg. §31.5. See also, Garcia v. Child Development, Inc. 2017 Cal.Wrk.Comp.P.D. Lexis 112, Alvarado v. CR&R Inc, 2016 Cal.Wrk.Comp.P.D. LEXIS 112, Corrando v. Aquafine Corp. 2016 Cal.Wrk.Comp.P.D. LEXIS 318 [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.11[4], [6], 22.13; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[6], [14].]

to support defendant's assertion. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[11]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[11]. Sullivan on Comp, Section 14.52, Subsequent Evaluations and Additional QME Panels in Different Specialties.]

Catlin v. J.C. Penney, Inc., American Home Assurance, 2017 Cal. Wrk. Comp. P.D. LEXIS 106 (BPD)

Editor's Comments: While the holding in Batten puts to rest securing a privately retained medical-legal report not secured pursuant to Labor Code Sections 4060, 4061, 4062, 4062.1 4062.2 for the purpose of establishing injury and entitlement to PD, Catin also puts to rest securing a medical report" for purposes of addressing issues involving medical treatment.

See also, Cortez v. WCAB (2006) 136 Cal.App.4th 596, 71 CCC 155 in which attempts to secure medical-legal opinions under LC sections 4050 and/or 5701 where both held improper and therefore inadmissible on a pre-SB-899 med-legal case and that the only way in which to obtain an admissible med-legal report is pursuant to LC 4062 et. seq.

See also, Ward v. City of Desert Hot Springs (2006) 34 CWCR 266, 71 CCC 1313 (WCAB Significant Panel Decision) where the WCAB upheld the WCJ noting the limiting language contained in LC 4060(c) and 4062.2(a) which provides that medical evaluations "shall be obtained only" by the procedures contained in 4060& 4062.2 without mention of 4064. The WCAB noted the conflict was irreconcilable and therefore the new amended sections must prevail over the older section of 4064. See also, accord, Nunez v. WCAB (Assoluto, Inc) 136 Cal.App. 584; 38 Cal.Rptr. 3d 914; 71 CCC 161; 2006 Cal.App. LEXIS 157.

Applicant sustained injury which was ultimately resolved via C&R with open med. An issue arose over medical treatment with defendant seeking to return the applicant for re-examination to the AME pursuant to LC 4050. The WCJ agreed by minute order.

On removal, the WCAB held that Applicant may not be compelled to attend 4050 consultation re-examination with AME post C&R with open med, as the original purpose of Labor Code § 4050 was subsumed by more specific statutes, including Labor Code §§ 4060, 4061, 4062, and 4610. Labor Code § 4050 cannot circumvent process set forth in these provisions, in the absence of additional issues beyond medical treatment justifying further examination pursuant to including Labor Code §§ 4060, 4061, 4062. The Court provided an excellent discussion and analysis citing Nunez v. Workers ' Comp. Appeals Bd., 136 Cal.App.4th 584 [71 Cal.Comp.Cases 161]; Cortez v. Workers' Compensation Appeals Bd., 136 Cal.App.4th 596 [71 Cal.Comp.Cases 155]; Batten v. Workers' Comp. Appeals Bd. (2015) 241 Cal.App.4th 1009, 1015. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 22.06[1], 22.07[2][a], 22.11[11], 24.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03, Ch. 16, § 16.54[11], Ch. 19, § 19.37.]

III. Medical Treatment Including MPN, and UR/IMR

Lambert v. State of California Department of Forestry, SCIF, 2016 Cal. Wrk. Comp. P.D. LEXIS 492 (BPD)

> *"Labor Code section 4604.5(c)(1) sets a 24 visit cap on physical therapy visits "notwithstanding the medical treatment utilization schedule." However, this cap is not applicable to physical therapy visits for "postsurgical physical medicine and postsurgical rehabilitation services provided in compliance with a postsurgical treatment utilization schedule established by the administrative director pursuant to Section 5307.27." (Labor Code section 4604.5(c)(3).)*
>
> *Applicant was correct in asserting that since this was a postsurgical treatment request, SCIF's claims adjuster erroneously relied on the 24 visit cap in Labor Code section 4604.5(c)(1) when he denied Dr. McLennan's request.*
>
> *When considering requests for medical treatment for post-surgical knee complaints, the MTUS provides:*
>
> *(d) If surgery is performed in the course of treatment for knee complaints, the postsurgical treatment guidelines in section 9792.24.3 for postsurgical physical medicine shall apply together with any other applicable treatment guidelines found in the MTUS. In the absence of any cure for the patient who continues to have pain that persists beyond the anticipated time of healing, the chronic pain medical treatment guidelines in section 9792.24.2 shall apply. (Cal. Cod Regs., tit. 8, section 9792.23.6 Emphasis added.)*
>
> *When a treating physician submits a Request for Authorization for medical treatment to a claims adjuster, Labor Code section 4610(e) provides that only a licensed physician "may modify, delay, or deny requests for authorization of medical treatment for reasons of medical necessity to cure and relieve." Thus a reviewing physician, and not a claims adjuster, is required to apply the MTUS when determining the medical necessity of a proposed medical treatment. (Labor Code section 4610(f).)"*
>
> *Lambert v. State of California Department of Forestry, 2016 Cal. Wrk. Comp. P.D. LEXIS at pg. 494*

Applicant sustained an admitted injury to his left knee on February 7, 2015, while employed as a firefighter by California Department of Forestry and Fire Protection. Applicant's PTP performed a surgical repair of the medial meniscus on October 24, 2015. Applicant was provided physical therapy prior and subsequent to his surgery. The parties stipulated that applicant had at least 28 post-operative physical therapy visits. Applicant's PTP submitted an RFA for an additional eight physical therapy visits. Defendant's claims adjuster issued a denial of the request on May 26, 2016, citing the 24 physical therapy visit cap in Labor Code section 4604.5(c)(1). The additional RFA of 8 PT visits was not submitted to UR, rather the adjuster relied on a pre-surgical denial based upon pre-surgical PT totaling 24 visit. Applicant's attorney responded on May 31, 2016, noting that the 24 visit cap on physical therapy cited by defendant's claims adjuster was not applicable to post-surgical physical therapy, and he demanded that defendant immediately authorize the requested treatment. The matter was submitted on this record at an expedited hearing.

> *See, Garcia, v. American Tire Distributors, Broadspire, 2016 Cal. Wrk. Comp. P.D. LEXIS 527 (BPD), where the Board held that an agreement between the parties to resolve a single medical issue through the use of an AME pursuant to LC 4062(b) cannot be used to avoid application of the UR/IMR process pursuant Labor Code §§ 4610 and 4610.5. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02, 22.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, §§ 4.10, 4.11. Sullivan on Comp. Section 7.36, Utilization Review -- Procedure]*
>
> *See also, Hogenson v. Volkswagen of America, Insurance Company of the State of Pennsylvania, 2016 Cal. Wrk. Comp. P.D. LEXIS 488 (BPD, holding that RFA from MPN treating physician is subject to UR/IMR process, which is consistent with the legislative goal of assuring that medical treatment is provided by all defendants consistent with uniform evidence-based, peer-reviewed, nationally recognized standards of care; Commissioner Sweeney concurring separately noted two separate statutory tracks to dispute recommendation of MPN treating physician, consisting of UR IMR (employer objects) and second opinion MPN IMR process (applicable when employee objects); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§5.02[2], 5.03[4], [5], 22.05[6][b][iv]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, §§ 4.10, 4.11, 4.12[8]. [9]. Sullivan on Comp, Section 7.55, Medical Provider Network – Dispute Resolution]*
>
> *See also, Rivas v. North American Trailer, 2016 Cal. Wrk. Comp. P.D. LEXIS 572 (BPD) holding that Applicant may properly select individual physician not individually listed on employer's MPN where physician's medical group is listed, and MPN medical groups employs services of physicians who do not register individually with MPN; WCAB interpreting Labor Code § 4616(a)(3) and 8 Cal. Code Reg. § 9767.5.1. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 5.03[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.12[2]. Sullivan on Comp, Section 7.53, Medical Provider Network.]*

The WCJ held that when treating physician submits RFA for medical treatment, the UR Physician, not claims adjuster, is required to apply MTUS to determine medical necessity of proposed treatment, and that since application of MTUS post-surgical guidelines was required to determine whether additional physical therapy visits were medically necessary to treat applicant's injury, it was beyond claims adjuster's authority to apply MTUS to deny treating physician's RFA, and RFA should have been submitted to UR for review by licensed physician. However, Labor Code section 4604.5(c)(1) sets a 24 visit cap on physical therapy visits "notwithstanding the medical treatment utilization schedule." However, this cap is not applicable to physical therapy visits for "postsurgical physical medicine

and postsurgical rehabilitation services provided in compliance with a postsurgical treatment utilization schedule established by the administrative director pursuant to Section 5307.27." (Labor Code section 4604.5(c)(3).); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§5.02[2][a], [b], 22.05[6][b][i], [ii]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.10[6].]

Federal Express Corporation v. WCAB (Paynes) 82 Cal. Comp. Cases 1014, 2017 Cal.Wrk.Comp. LEXIS 243

Applicant sustained a specific injury on 2/25/97 to various parts of body to include bilateral knees. The claim was settled via C&R with open medical treatment with AME Peter Mandel to decide issues regarding reasonableness and necessity for future medical care. In 2015 the PTP reported that Applicant was a candidate for left knee total arthroplasty after she lost weight. Defendant's UR denied the weight loss requested extension, and the UR denial was upheld by IMR. Thereafter Dr. Mandel issued a report indicating that Applicant needed an additional six months of the weight loss program to enable a left knee replacement.

Applicant filed a DOR requesting an expedited hearing on the issue of her entitlement to an extension of the recommended weight loss program, seeking to enforce the C&R stipulation that the parties would utilize AME Dr. Mandel on future issues of treatment. Defendant objected to the DOR, asserting that the requested treatment was denied by UR/IMR, and that the WCAB had no jurisdiction over the medical treatment dispute.

The matter proceeded to a trial, with the WCJ agreeing with Defendant and concluded that he had no jurisdiction to decide the necessity of the weight loss program since Applicant triggered the IMR process by appealing the UR denial. The WCJ stated, however, that, had the IMR appeal not been filed, he may have allowed the weight loss program, based on Dr. Mandel's opinion and the WCAB's holding in Bertrand v. County of Orange, 2014 Cal. Wrk. Comp. P.D. LEXIS 342(Appeals Board noteworthy panel decision).

See, Gonzalez v. Imperial County Office of Education, 2016 Cal. Wrk. Comp. P.D. LEXIS 528 (BPD), holding that dismissal without prejudice be rescinded where when medical reports established diagnosis of agoraphobia and panic disorder and applicant was medically unable to appear in court; Due process required accommodations such as being permitted to appear telephonically or via Skype [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 26.01[3][b], 26.04[1][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.07[2][b]. Sullivan on Comp, Section 15.37, Requirement to Appear at Hearing.]

See, Williams v. Department of Corrections & Rehabilitation, 2016 Cal. Wrk. Comp. P.D. LEXIS 511(BPD) holding that it was error for WCJ to order former counsel to attend hearing as witness rather than by subpoena pursuant to Cal. Code Civ. Proc. § 1985, and the subpoena must be personally served as required by Cal. Code Civ. Proc. § 1987. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 25.10[2][a], 26.03[4], 26.05[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.45[1], Ch. 16, § 16.48[1], Ch. 19, § 19.37. Sullivan on Comp, Section 15.47, Trial – Proceedings and Submission]

See, Bonilla v. San Diego Personnel and Employment dba Good People Employment Services, 2017 Cal. Wrk. Comp. P.D. LEXIS 56 (BPD), holding that treatment requests from all physicians, even those treating within MPN, must go through UR/independent medical review (IMR) process mandated by Labor Code § 4610 et seq., and that existing law requires RFAs for medical treatment be utilized by MPN physicians and are subject to all UR requirements.; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02[2], 5.03[4], [5], 22.05[6][b][iv]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, §§ 4.10, 4.11, 4.12[8], [9]; Sullivan on Comp, Section 7.34, Utilization Review – Requests for Authorization.] See also, Parrent v. Workers' Compensation Appeals Board, Pacific Bell Telephone Co. SBC, 82 Cal. Comp. Cases 155; 2017 Cal. Wrk. Comp. LEXIS 3 (Writ Denied), holding that treatment recommendations of medical provider network treating physician, may only be disputed through utilization review/independent medical review process; Commissioner Sweeney, concurring, wrote separately to emphasize that, even if employer raises dispute with medical provider network treating physician's recommendation and submits issue to utilization review, injured worker may, at same time, exercise his or her right to initiate second opinion process provided in Labor Code § 4616.3 or change treating physicians within medical provider network.; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02[2], 5.03[4], [5], 22.05[6][b][iv]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, §§ 4.10, 4.11, 4.12[8], [9]. Sullivan on Comp, Section 7.55, MPN -- Dispute Resolution]

See also, Ramirez v. Workers' Comp. Appeals Bd., 10 Cal. App. 5th 205, 215 Cal.Rptr.3d 723, 82 Cal.Comp.Cases 327, 2017 Cal.App. LEXIS 282, holding that the WCAB has no jurisdiction over whether utilization review and independent medical review had used correct standard, where IMR reviewer arguable corrected but upheld UR basis for denial of further RFA for additional acupuncture treatments holding that whether utilization reviewer correctly followed medical treatment utilization schedule is question directly related to medical necessity and, therefore, is reviewable only by independent medical review; Court of Appeal also held that independent medical review does not violate state separation of powers or due process and does not violate federal procedural due process citing and following Stevens v. WCAB (2015) 241 Cal.App.4th 1074 [194 Cal.Rptr. 3d 469; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 5.02[1], [2][a]-[d]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, §§ 4.10, 4.11.]

See also, Mata v. Supermercado Mi Tierra, 2017 Cal. Wrk. Comp. P.D. LEXIS 166 (BPD), holding that Applicant was entitled to UR approved treatment where defendant failed to act timely within five-day timeframe in 8 Cal. Code Reg. 9792.9.1(b)(1) to defer liability for recommended treatment, and where defendant decided to proceed with UR rather than defer, it cannot later decide to delay medical treatment approved by UR on basis that it is disputing industrial injury; Since defendant ultimately in this case accepted liability for applicant's neck injury and recommended surgery was certified by UR there was no basis for defendant's failure to authorize surgery.; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02, 22.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, §§ 4.10, 4.11.]

On reconsideration the WCAB reversed holding that the 2003 agreement within C&R to utilize AME on issues of future medical treatment was enforceable despite statutory changes implementing utilization review/independent medical review citing Bertrand v. County of Orange, 2014 Cal. Wrk. Comp. P.D. LEXIS 342 (Appeals Board noteworthy panel decision). The WCAB also seemed to allow in this limited situation the applicant to proceed both as the to UR/IMR procedures and pursuant to the Stipulation within the C&R. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02, 22.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, §§ 4.10, 4.11.]

IV. Procedure

Fassett v. Bruce K. Hall Construction, 2017 Cal. Wrk. Comp. P.D. LEXIS 9 (BPD)

Applicant sustained an industrial injury to multiple parts of body resulting from a MVA occurring on July 28, 2008. Applicant received a net civil settlement from the third-part defendant of $271,558.58. In Pro Per Applicant objected to Defendant's seeking credit. In opposition to defendants request for credit applicant argued (1) that defendant had committed workers' compensation fraud in initially denying his workers' compensation claim and that multiple acts of defendant caused applicant to obtain a reduced judgment from the civil claim; (2) that defendant conducted a sub-rosa investigation and refused to disclose the results of said investigation; (3) that defendant failed to provide certain documents to applicant upon request, which caused applicant detriment in connection with a home mortgage modification; (4) that defendant failed to comply with its regulatory duty to provide relevant medical information to the agreed medical evaluator (AME), which caused inaccuracies in the AME's report, which was placed in evidence in applicant's civil trial, which resulted in a reduced judgment, in that the AME opined that applicant was not a candidate for surgery, when in fact applicant was a surgical candidate and actually underwent surgery following the civil judgment. On April 23, 2013, applicant filed a petition for penalties reasserting the allegations in his objection to credit. Defendant denies applicant's allegations.

See, Gonzalez v. Imperial County Office of Education, 2016 Cal. Wrk. Comp. P.D. LEXIS 528 (BPD), holding that dismissal without prejudice be rescinded where when medical reports established diagnosis of agoraphobia and panic disorder and applicant was medically unable to appear in court; Due process required accommodations such as being permitted to appear telephonically or via Skype [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 26.01[3][b], 26.04[1][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.07[2][b]. Sullivan on Comp, Section 15.37, Requirement to Appear at Hearing.]

See, Williams v. Department of Corrections & Rehabilitation, 2016 Cal. Wrk. Comp. P.D. LEXIS 511(BPD) holding that it was error for WCJ to order former counsel to attend hearing as witness rather than by subpoena pursuant to Cal. Code Civ. Proc. § 1985, and the subpoena must be personally served as required by Cal. Code Civ. Proc. § 1987. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 25.10[2][a], 26.03[4], 26.05[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.45[1], Ch. 16, § 16.48[1], Ch. 19, § 19.37. Sullivan on Comp, Section 15.47, Trial – Proceedings and Submission]

See, Alvirde v. Barrett Business Services, 2017 Cal. Wrk. Comp. P.D. LEXIS 5 (BPD), holding that the WCJ cannot compel parties to settle their dispute in particular way, nor can defendant's due process right to trial be made contingent on obtaining job analysis. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 21.02[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 13, § 13.01[2]. Sullivan on Comp, 14.74, Resolution by C&R]

See also, Thompkins v. Citizens Telecom, Continental Insurance Company, 2017 Cal.Wrk.Comp.P.D. LEXIS 300, holding that the "Good cause" standard does not apply to requests to withdraw from representation, and that attorney may withdraw from case as long as withdrawal does not cause prejudice to client's case, even absent good cause, and withdrawal not at a critical stage with proper notice to applicant causes no prejudice to client's case. See also, Ramirez v. Sturdevant (1994) 21 Cal.App.4th 904; Code Civ.Proc., § 284. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 20.01[3], 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.04[6], Ch. 19, § 19.37.]

See also, Vargas v. Becker Construction and Ace Private Risk(decision after reconsideration) (August 2017) 45 CWCR 182, 82 C.C.C 182 where a deported applicant was allowed to testify by "FaceTime" (cell phone) where the applicant's identity can be authenticated.

See also, Southern Ins. Co. v. Workers' Comp. Appeals Bd., 11 Cal. App. 5th 961, 217 Cal.Rptr. 3d 898, 82 Cal.Comp.Cases 448, 2017 Cal.App. LEXIS 457, holding that a policy of workers' compensation insurance may be rescinded (Insurance Code 650) effective retroactively based on fraud under Civ. Code 1691, by giving notice of rescission and restoring, or offering to restore, everything of value received under the contract and any party to the contract may seek legal or equitable relief based upon the rescission pursuant to Civ. Code 1692. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 2.61[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 3, § 3.24[2].]

Applicant filed a DOR for expedited hearing on the issues of temporary disability and medical treatment on August 26, 2016. At expedited hearing the matter was continued to October 20, 2016, with the WCJ writing on the

minutes of hearing: "Discovery is closed. Record open for 15 days for [applicant] to provide RFA & related docs & info from [defendant] RE: trial testimony."

Thereafter, Defendant submitted a request to take the trial off calendar on October 14, 2016, and stated that it had authorized the requested consultation for applicant's right shoulder. Applicant objected to defendant' request to go off calendar on the basis that applicant had already attended a consultation for the right shoulder and wanted medical treatment authorized per the consultant's report. Furthermore, applicant wanted to try the issue of retroactive temporary disability. The WCJ denied the request to take the matter off calendar and instead converted the October 20, 2016 trial date into a status conference.

At the October 20, 2016 status conference the WCJ wrote on the minutes of hearing: "(1) consultation w/ Dr. Simonian RT shoulder - [defense attorney) to advise if apt not scheduled forthwith (2) PQME tentatively to be scheduled w/ Dr. Privite in March. (3) Pet for Removal pending." The WCJ ordered the matter off calendar.

Applicant petitioned for removal of the order taking this matter off calendar. The WCJ issued a Report and Recommendation writing, "Defendant has filed an Answer which the undersigned adopts in its entirety and incorporates herein except for the paragraph on page 5 of Defendant's Answer." Although the WCJ adopted and incorporated defendant's answer into the Report and Recommendation, there was no record or evidence supporting any of the statements made by defendant in its answer.

On removal, the WCAB held that a WCJ may be disqualified for bias pursuant to Labor Code § 5311, Code of Civil Procedure § 641 and 8 Cal. Code Reg. § 10452, where as here the WCJ (1) without hearing testimony or receiving evidence on issues raised by parties granted defendant's petition for credit, and (2) used language suggesting bias against applicant including that applicant was vexatious litigant and that applicant's allegations were "nearly incomprehensible", both without supporting evidence and determined to be factually untrue and improperly dismissive of claims made. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][b][iii], 26.03[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 1, § 1.09[3], Ch. 16, § 16.08[2]. Sullivan on Comp, Section 15.54, Disqualification and Reassignment of Judge.]

"Code of Civil Procedure Section 641 states, in pertinent part:

A party may object to the appointment of any person as referee, on one or more of the following grounds:
(f) Having formed or expressed an unqualified opinion or belief as to the merits of the action.
(g) The existence of a state of mind in the potential referee evincing enmity against or bias toward either party.

WCAB Rule 10452 Provides, "Proceedings to disqualify a workers' compensation judge under Labor Code Section 5311 shall be initiated by the filing of a petition for disqualification supported by an affidavit or declaration under penalty of perjury stating in detail facts establishing grounds for disqualification of the workers' compensation judge to whom a case or proceeding has been assigned. If the workers' compensation judge assigned to hear the matter and the grounds for disqualification are known, the petition for disqualification shall be filed not more than 10 days after service of notice of hearing. In no event shall any such petition be allowed after the swearing of the first witness. A petition for disqualification shall be referred to and determined by a panel of three commissioners of the Appeals Board in the same manner as a petition for reconsideration.

Labor Code section 5313 requires a WCJ to state the "reasons or grounds upon which the determination was made." The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (Hamilton v. Lockheed Corporation (Hamilton) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing Evans v. Workmen's Comp. Appeals Bd. (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision ***[*14]*** *"must be based on admitted evidence in the record" (Hamilton, supra, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); Lamb v. Workmen's Comp. Appeals Bd. (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; Garza v. Workmen's Comp. Appeals Bd. (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; LeVesque v. Workmen's Comp. Appeals Bd. (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in Hamilton, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (Hamilton, supra, at p. 475.) This matter has proceeded to multiple hearings; however, no evidence has been received and no testimony has been offered to support either party's allegations."*

Fassett v. Bruce K. Hall Construction, 2017 Cal. Wrk. Comp. P.D. LEXIS at pg. 12.

See also, Flores v. Epic Management, The Hartford, 2017 Cal. Wrk. Comp. P.D. LEXIS 11 (BPD), holding that neither the Labor Code nor the WCAB Rules permit parties to choose their own judges. (See Lab. Code, §§ 5310, 5311; Cal. Code Regs., tit. 8, §§ 10452 , 10453.); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 21.02[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 13, § 13.01[2]; Sullivan on Comp, Section 15.54, Disqualification and Reassignment of Judge.]

Ly v. County of Fresno (9-15-17) (Fifth Appellate District), 82 Cal Comp Cases 1138; 2017 Cal. App. LEXIS 882.

The three correctional officers filed suit against the County under FEHA and simultaneously pursued a workers' compensation case alleging psychiatric injuries caused by racial and national original discrimination, harassment and retaliation. The WCAB issued a take nothing finding that the employer committed no discriminatory action in that the actions of the employer were based on good faith personnel actions.

Thereafter, the three officers proceeded with their FEHA claims, alleging discrimination with the employer seeking summary judgment arguing that the doctrines of *res judicata* and *collateral estoppel* barred any further action of the FEHA claims.

But see, contra, Jackson v. The City of Sacramento (1991) 117 Cal. App. 3d 596, where the Court of Appeal held that a finding by the WCAB that an injury was industrial and that the injured worker could not return to his or her prior occupation was not res judicata or collateral estoppel in a case involving denied retirement.

The plaintiffs argued (1) *Res judicata* did not apply because workers' compensation is the exclusive remedy for industrial injuries and FEHA claims involved different primary rights and the only differences were remedies in both forums and, (2) Collateral estoppel could not apply because the officers were not litigating an industrial injury in the FEHA action. The trial judge granted the motions for summary judgment holding that the doctrine of collateral estoppel applied and barred the claims. The trial judge held that there were identity of issues, parties, facts and law. The court noted that (1) the officers were afforded the opportunity to present evidence and call witnesses and the parties were represented by counsel before the WCAB; (2) The issues litigated were identical; and (3) The WCJ found that the actions of the County were non-discriminatory, in good faith and based upon business necessity.
The appellate court affirmed the motions for summary judgement.

In upholding the trial court, the Court of Appeal noted that where the former decision is final on the merits and the present proceedings involve the same causes of action the second case is barred under the doctrine of *res judicata*, citing *Busick v. WCAB* (1972) 7 Cal. 3d 967, 973-974. In the *Busick* case, the applicant in the workers' compensation case sued the employer after being shot by the employer in a civil action and recovered. The injured employee then sought a workers' compensation recovery. The Supreme Court held, that once a primary right or a single cause of action is litigated that party may not re-litigate the issue in a different tribunal. There is simply one cause of action."
Here, a finding of unlawful discrimination, harassment and retaliation was overcome by the defense that the employer engaged in lawful, good faith, personnel action.

Essentially the Court held that the plaintiffs had one primary right, the right to recover for an injury caused by discrimination, harassment and retaliation in the workplace. The correctional officers had two alternative forums, FEHA action in the Superior Court and the WCAB under *City of Moorpark v. Superiod Court (1998) 18 Cal. 4th 1143.* Since the WCAB issued a final judgement regarding the same cause of action (discrimination) this bars the FEHA action under the doctrine of *res judicata.*

V. Penalties & Sanctions

Gage v. Workers' Compensation Appeals Board and County Of Sacramento (3RD Appellate District) 6 Cal. App. 5th 1128; 211 Cal. Rptr. 3d 892; 81 Cal. Comp. Cases 1127; 2016 Cal. App. LEXIS 1120

A deputy sheriff who had sustained a job-related injury and had applied for industrial disability retirement sought penalties under Labor Code 5814 for the county's unreasonable delay in payment of her advance disability pension payments under LC 4850.4. The WCJ ruled LC 5814 penalties were available for the unreasonable delay, but deferred the decision on whether the delay in the deputy's case was unreasonable. The county petitioned for removal. The Workers' Compensation Appeals Board reversed the workers' compensation judge's findings of fact and order.

The Court of Appeal annulled the appeals board's decision and remanded the matter to the board. The court held that the appeals board has jurisdiction to impose penalties under LC 5814, for the unreasonable delay or denial of advance disability pension payments, available under LC 4850.4, to local peace officers who are disabled on the job, because such payments qualify as compensation under LC 3207, because 5814 penalties are available for unreasonable delay or denial of the payment of compensation, and because no other provision of the California Labor Code evinces a legislative intent to exclude such payments from the penalty provisions of 5814. In the instant case, the appeals board had not addressed the plain language of LC 3207 defining compensation, had failed to identify any statute that showed a

legislative intent not to follow this plain language in this circumstance, and had failed to recognize its own prior (but more recent) decisions. [See generally, Hanna, Cal. Law of Employee Injuries and Workers' Compensation Law (2016) ch. 10, § 10.40; Cal. Forms of Pleading and Practice (2016) ch. 577, Workers' Compensation, § 577.243. Sullivan on Comp, Section 13.21, Unreasonable Delay]

McFarland v. Redlands Unified School District, 2017 Cal. Wrk. Comp. P.D. LEXIS 495 (BPD)

Applicant contends that defendant's unreasonable delay in providing applicant with the section 4658.7 voucher caused delay in applicant's submission of a claim for section 139.48 supplemental payments, and that supports the imposition of a penalty pursuant to section 5814. The WCJ denied applicant's LC 5814 petition for penalties.

> "...section 139.48 provides for *"supplemental* payments to workers whose permanent disability benefits are disproportionately low in comparison to their earnings loss." (Italics added.) Section 139.48 supplemental payments are not the liability of the injured worker's employer, but are made from a fund administered by the AD. For these reasons, section 139.48 supplemental payments are not "compensation" under Division 4 of the Labor Code as defined by section 3207 and are not "compensation" as that word is used in section 5814(a) as construed in *Gage*."
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> *McFarland v. Redlands Unified School District, 2017 Cal. Wrk. Comp. P.D. LEXIS at pg. 496.*

On reconsideration, the WCAB upheld the WCJ holding that the Applicant was not entitled to Labor Code § 5814 penalty for delay in providing Labor Code § 4658.7 supplemental job displacement voucher which alledgedly resulted in applicant's delayed application for Labor Code § 139.48 return-to-work supplemental payment. The WCAB held that Labor Code § 139.48 supplemental payments held not employer's liability but are made from fund administered by Administrative Director and, therefore, are not compensation subject to penalty as defined by Labor Code § 3207 or within meaning of Labor Code § 5814(a). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 10.40[1], [3], 27.12[2][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.11[1]-[3].]

VI. Permanent Disability

Truesdell v. Von's Grocery Company, 2017 Cal. Wrk. Comp. P.D. LEXIS 102 (BPD)

Applicant filed three Applications for Adjudication of Claim (Applications) alleging both specific and CT industrial injuries to psyche, right foot and right ankle, bilateral lower extremities, the psyche, hip, hypertension and GERD, cervical spine, thoracic spine, lumbar spine, right foot, right ankle, sleep disorder, bilateral lower extremities, head, headaches, both legs, both feet, both ankles, psyche, internal systems, stomach, hypertension and bilateral upper extremities.

> *But see, also, Singh v. State of California, Legally Uninsured, 2017 Cal. Wrk. Comp. P.D. LEXIS 204 (BPD), where the opinion of VR expert does not constitute substantial evidence where VR expert failed to address whether permanent total disability was solely caused by industrial injury, or in part by non-industrial causation; Labor Code § 4663 and Benson v. W.C.A.B. (2009) 170 Cal. App. 4th 1535, 89 Cal. Rptr. 3d 166, 74 Cal. Comp. Cases 113, which requires that applicant's permanent total disability be apportioned among his various industrial injuries is applicable to VR opinions where multiple and successive injuries exist; The Combined Values Chart is reserved for combining disability caused by a single injury. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], [4][a], 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.11, 7.12; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Ch. 8.]*

Defendant accepted applicant's claim of cumulative injury to the back and both feet, paid periods of temporary disability indemnity, and provided some medical treatment. Brian S. Grossman, M.D., evaluated applicant on February 14, 2013, and issued a report dated March 28, 2013 in which he recommends a "lateral interbody fusion of all accessible discs from LI-L2 to L4-L5, followed by multilevel posterior laminectomy and instrumented spinal fusion with pedicle screw instrumentation extending from LI through the sacrum.

On January 23, 2014, applicant underwent the multi-level fusion as recommended by Dr. Grossman. Unfortunately, the surgery was not successful. In a report dated January 6, 2015, Philip A. Sobol, M.D., applicant's treating physician, states that the surgery "has resulted in a failed back surgical syndrome." Dr. Sobol opines that applicant's combined orthopedic, psychiatric, internal and sleep disorders have rendered him unable to return to a gainful employment in the open labor market. (*Id.*, at p. 22.) Dr. Richard Scheinberg, then became applicant's treating doctor. In his report dated March 18, 2015, Dr. Scheinberg states his belief that "this patient is essentially permanent and stationary and is totally disabled and precluded from gainful employment in the open labor market."

Dr. Angerman evaluated applicant on March 3, 2016, and issued report, stating that applicant has reached maximum medical improvement with regard to his spinal injuries and the injury to his right foot and ankle. That after a comprehensive reviews the diagnostic studies, with subjective and objective findings, noted chronic L5-S1 radiculopathy

on the left, a fusion of the lumbar and lumbosacral vertebrae from L2-S1 to L6-S1, three broken screws at SI, and clinical findings of tenderness and rigidity in the diffuse lumbar spine, decreased range of motion due to pain, and ambulation with antalgic gait. He then provides a standard whole person impairment rating of 67% WPI. However, Dr. Angerman opines, "from an orthopedic standpoint, ...based on the information currently available to me including his clinical findings in this office as well as his medication intake as described to me, it is felt that the patient would be considered 100% permanently disabled and would be unable to compete in the open labor market." Dr. Angerman confirmed this opinion through supplemental report after review of additional records and also at deposition.
At depositon, Dr. Angerman added that "even after apportionment to degenerative changes, as a result of his low back surgeries and the medications he must take to alleviate pain." Based on the opinion of Dr. Angerman, the WCJ after Trial found for the applicant and awarded total disability.

On reconsideration Defendant argued that the Finding and Award was not supported by substantial evidence as it was improper for the AME to address whether the applicant was "precluded from gainful employment in the open labor market". Defendant argued that the issue of "preclusion from the open labor market" should be address by a vocational expert.

The WCAB upheld the WCJ holding that the 100 percent permanent disability "in accordance with the fact" under Labor Code § 4662(b) based upon AME due to combination of failed back surgery/strong pain medications constituted substantial medical evidence without the need for VR expert; Orthopedic AME may properly assess that from medical standpoint that applicant was unable to compete in labor market. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], [4], 32.02[2], 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.11, 7.12; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Chs. 3, 4, 5, 8.].

Torres v. Greenbrae Management/SCIF (July 2017) 45 CWCR 152 (writ den.)

Applicant, a tree trimmer fell 20 feet landing on his head. Applicant claimed injury to various parts of body including injury to psyche as a compensable consequence. Applicant also sought compensation under the Guzman Doctrine for sexual and sleep disorder contrary to LC 4660.1.

The WCJ ruled that the psychiatric disability was excluded by the 2013 enactment of LC 4660.1 which excluded psychiatric injuries as a compensable consequence of a work injury.

The applicant petitioned for reconsideration arguing that: (1) the psychiatric injury was a "direct result of the injury", (2) the injury was a "violent act" exception and (3) the injury was "catastrophic" as exceptions to § 4660.1. The applicant also argued that § 4660.1 did not apply where the PD increase involving sleep and sexual disorders where it is assessed pursuant to *Almaraz/Guzman* Doctrine.

The WCAB held that the injury was a "direct cause" of the disability and therefore the "violent act" exception under § 4660.1(c) (2) (A) applied. The panel cited *Larsen v. Securitas Security Services* (2016) 44 CWCR 111 and *Madson v. Michael J. Covaletto Ranches* (Zenith Ins. Co.) (2017) 45 CWCR 65 observing that the fall from the tree and the resulting psychiatric disability, post- traumatic stress syndrome, was a "direct" cause of the injury and not a compensable consequence. Further, the panel held that the "*violent act*" exception applied because the accident was (1) characterized by a strong physical force; (2) characterized by extreme or intense force, or (3) vehemently or passionately threatening. The panel observed that all three exceptions applied to this accident. The panel never addressed whether the injury was a "catastrophic injury" because the "violent act" exception applied and made the claim compensable.

The panel also held that § 4660.1 prohibited the add-on of sleep and sexual dysfunctions to ratings. The panel found that it was a legislative intent, to exclude sleep and sexual dysfunction as an add-ons. To allow add-ons under *Almaraz/Guzman* analysis would circumvent the intent of § 4660.1. The panel also noted that the sleep and sexual dysfunctions are incorporated into the activities of daily living (ADL) under calculation at *Table 1-2* of the AMA Guides. To allow sleep and sexual disorder add-on would duplicate the rating for the same condition.

See also, accord Madson v. Cavaletto Ranches 45 CWCR 65 involving truck roll over pining applicant upside down held "violent act" citing Larson v. Securitas Security 44 CWCR 111.

CompWest Insurance Company v WCAB (Gonzales) (2nd Appellate District) 82 Cal Comp Cases 897, 2017 Cal.Wrk.Comp. LEXIS 54 (WD)

Applicant suffered what appeared to be a catastrophic industrial injury which resulted in a DEU rating of the

AME's report of 92 percent. However, the WCJ awarded a 100% PD based upon the opinion of the AME, VR expert and the applicant's testimony. All the Applicant's inability to work and lack of amenability to vocational rehabilitation. Defendant sought reconsideration.

Editor's Comments: A claim under Ogilvie is very difficult to establish for three reasons: The Doctrine of Substantial Evidence, the Doctrine of Direct Causation, and that applicant not be Amenable to Rehabilitation pursuant to Contra Costa County v. WCAB (Dahl) (2015 First District Court of Appeals) 240 Cal.App. 4th 746, 80 CCC 1119. Be reminded that it is the applicant who has the burden of proof.

The WCJ highlighted that he relied on the Applicant's credible testimony regarding his inability to work, along with the medical evidence and the findings of vocational expert Ms. Winn, which together indicated to the WCJ that Applicant suffered a greater loss of earning capacity than reflected in the formal rating, consistent with In *Ogilvie v. City and County of San Francisco* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624]. The WCJ concluded that Applicant was not amenable to rehabilitation or placement in any modified work offered or otherwise. The WCJ noted that applicant VR expert had thoroughly analyzed Applicant's skills and found several occupations within which Applicant could work. Despite the fact that the defendant's VR expert believed that the applicant's disability was in part caused by the applicant's age, education, and inactive work status, the WCJ found the applicant's VR expert more persuasive. The WCJ noted that the Applicants may rebut their disability ratings by evidence providing an individualized assessment of whether industrial factors limit an applicant's ability to benefit from vocational rehabilitation. In making the determination of applicant's inability to benefit from vocational rehabilitation and re-enter the labor market, the WCJ here relied upon the entire record including the medical evidence that establishes applicant's physical limitations preclude him from rehabilitation or performing the modified work offered by his employer. Writ Denied.

VII. Psychiatric Injury

Xerox Corporation v. WCAB (Schulke)(2nd Appellate District) 82 Cal. Comp. Cases 273, 2017 Cal.Wrk.Comp. LEXIS 13.

Heart attack resulting in death caused by 10% industrial stress held industrial where WCAB reasoned that when stress causes physical injury occurs, that Labor Code § 3208.3 does not apply, that Labor Code § 3208.3 applies only to physical injuries that are solely caused by psychiatric injury as described in County of San Bernardino v. WCAB (McCoy) (2012) 203 Cal.App. 4th 1469, 138 Cal.Rptr. 3d 328, 77 Cal.Comp.Cases 219. Pursuant to McCoy defendant has burden of proof of establishing that applicant's heart attack was caused solely by non-compensable psychiatric injury so as to avoid liability for death benefits.; See also, accord, Wang v. Southern California Edison (2015) 2015 Cal.Wrk.Comp. P.D. LEXIS 511 (BPD) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3], 4.68[1]-[3], 4.69; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, §§ 10.04[1], 10.06[3][d].]

VIII. Statute of Limitations

Garza v. City of Fresno, 2016 Cal.Work Comp. P.D. Lexis 556.

Applicant was involved in a shooting incident September 20, 2005 and at that time the passenger in a vehicle was killed by Applicant and Applicant was struck by a vehicle which dragged him along the pavement causing a laceration to his arm. Applicant filed a DWC 1 which was filed with the employer on September 22, 2005 and the claim was accepted. Applicant was sent to the department's psychologist and

*"...proceedings for the collection of benefits must commence within one year of the date of injury or the last date on which medical benefits were furnished. (Lab. Code, § 5405.) The employee bears the initial burden of notifying the employer of an injury, unless such notice is unnecessary because the employer already knows of the injury or claimed injury from other sources. The employer then bears the burden of informing the worker of his or her possible eligibility for benefits and providing a claim form. (Lab. Code, §§ 5401, 5402; Honeywell v. Workers' Comp. Appeals Bd. (Wagner) (2005) 35 Cal.4th 24 [70 Cal.Comp.Cases 97].) A breach of the duty to provide the [*11] requisite information tolls the statute of limitation for the filing of an application, for so long as the injured employee actually remains unaware of his possible rights. (Reynolds v. Workers' Comp. Appeals Bd. (1974) 12 Cal.3d 726, 730 [39 Cal.Comp.Cases 768].) Moreover, under section 5409, the statute of limitations is an affirmative defense, and thus, it is defendant's burden to show that it has run and that the claim is barred. (Lab. Code, § 5409; Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Martin) (1985) 39 Cal.3d 57 [50 Cal.Comp.Cases 411].)"*

See also, Bolanos v WCAB (Jimenez) (10/3/2017) 82 Cal Comp Cases 1097, where the applicant filed worker's compensation claim against uninsured employer contractor and not owner of premises where he was working at time of injury, and where applicant knew of the potential liability of an entity other than the named target employer, the statute of limitation was not tolled against the unnamed entity while the issue of employment was being litigated against the named entity.

after some disability leave returned to work.

A subsequent claim was filed for [cumulative trauma (CT)] injury ending July 29, 2011 which included injury to psyche. This claim has been settled in accord with the medical opinions of Brian Jacks, M.D. In his reports evaluating Applicant, Dr. Jacks opined that Applicant had sustained a psychiatric injury related to the 2005 shooting incident and that he had experienced a suicide equivalent (responding to police calls without backup) and also PTSD resulting in a psychological splitting maneuver. Because of the symptoms and problems experienced by Applicant particularly related to the suicide equivalent. When Applicant's sergeant learned of this he took Applicant for treatment with psychiatrist Richard Blak, M.D., with the first treatment being in July 2011. Dr. Jacks apportioned some of the psychiatric disability in his reports to the CT claim but also to the September 20, 2005 specific shooting incident.

Thereafter, Applicant filed an Application for Adjudication regarding the September 20, 2005 claim alleging injury to psyche. The Application was filed March 29, 2012, which is within one year of the last provision of medical benefits when the sergeant transported Applicant for interventional treatment with Dr. Blak.

In his Report, the WCJ states that "there is no reliable evidence by anyone with actual knowledge of what was sent to Applicant, that he received correct information and/or the benefits pamphlet." The WCJ thus found for the Applicant that the claim was timely filed within one year of the date of last treatment provided. Further, the settlement of the companion CT ending 2011 left unresolved liability for psychiatric injury involving the 2005 injury.

In upholding the WCJ, the WCAB wrote, "In this case, defendant had knowledge of the psychiatric component of the September 20, 2005 injury. Applicant testified that he was sent by the Department to police psychologist Jana Price-Sharps who told him to take a week off of work. This testimony was corroborated by defendant's adjusting supervisor Ms. Artist who testified that Dr. Price-Sharps' psychological treatment was paid for by the City. Applicant received psychological treatment for the 2005 psychiatric injury in July 2011 when applicant's sergeant learned of psychiatric symptoms applicant was experiencing and physically took him to Dr. Blak. The furnishing of this treatment was within one year of the date that applicant filed the Application alleging injury to body part "842" (referring to "Nervous system—Psychiatric/psych" in the instructions to the form) on March 29, 2012. Therefore, the filing of the Application was timely under section 5405.

IX. Subsequently Injury Benefits

Baker (as SIBTF administrator) v. WCAB (Guerrero), July 28, 2017, 82 Cal Comp Cases 825, 13 Cal. App. 5th 1040, 2017 Cal.App. LEXIS 662.

Applicant, a construction laborer, filed a claim for worker's compensation claim and received TD from 11/18/05-12/4/05 and 1/17/06-6/15/06. His case settled by compromise and release in December 2014. The applicant also applied for SIBTF benefits. The SIBTF contested applicant's entitlement to benefits, and further argued that its obligation should begin when Applicant's injuries became permanent and stationary on January 26, 2011, rather than the last date of payment of TD which occurred on 7/15/06.

> *". . . LC 4650(b)(1) provides that an employer must begin making permanent disability payments to an employee within 14 days of the date that the employee's last payment for temporary disability was owed. Even if the employee's injury has not yet been determined to be permanent and stationary, the employer must start making permanent disability payments once temporary benefits cease. . ."*
>
> *". . . Section 4751 provides, "[i]f an employee who is permanently partially disabled receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and the previous disability or impairment is a permanent disability equal to 70 percent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury compensation for the remainder of the combined permanent disability existing after the last injury as provided in this article. . .."*
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> *Baker (as SIBTF administrator) v. WCAB (Guerrero), July 28, 2017, 82 Cal Comp Cases at pg. 829*

The WCJ founds that Applicant's pre-existing condition which when combined with the subsequent industrial injury left applicant permanently disabled and made an awarded against the SIBTF. The WCJ also found that the SIBTF payments should begin June 16, 2006, the day after temporary disability payments stopped, rather than the day after the applicant became P&S (1/26/11).

On reconsideration, the WCAB upheld the WCJ. On Writ of Review, the Court of Appeal began by discussing the three rules of interpreting workers' compensation statutes noting that (1) "words should first be given their usual and

ordinary meanings; (2) that where a statute can have different interpretations, "the interpretation that leads to the most reasonable result should be followed,"; (3) and that "if the statute can reasonably be construed in a manner that would provide coverage or payments [that interpretation] must adopted."

Next, the Court discussed both LC 4650 and 4751 writing that LC 4650(b) provides that an employer must begin PD payments 14 days after the last payment for TD was owed even if the employee is not yet permanent and stationary. LC 4751 provides that an employee entitled to SIBTF benefits, "shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury compensation for the remainder of the combine permanent disability existing after the last injury as provided in this article..."

A commonsense interpretation, the Court wrote, of the phrase "in addition to" is that the SIBTF must begin payments at the same time the employer is required to begin PD payments. Though this is admittedly subject to different interpretations, the statute does not expressly state when SIBTF benefits should begin. The Court must use the construction that leads to the most reasonable result. Supporting a determination that SIBTF benefits should begin with last payment of TD, the Court noted the change in the law altering the timing for payment of temporary and permanent disability supports its analysis. Specifically, when Section 4656 was amended to cap TD at 104 weeks, the law was also amended to provide that payment of permanent disability was to begin when temporary disability stop preventing a gap in payments to the injured worker. Thus "[a]s a result, the timing for the start of SIBTF benefits, which under section 4751 must be paid 'in addition to' permanent disability benefits, necessarily also changed." Therefore, the commencing at P&S, PD is due at the end of TD. Further, to deny the injured worker benefits during the period from the end of TD and the P&S date would create a gap. Thus, the Court should adopt a construction that provides payment rather than the creation of a gap in payment.

X. Temporary Disability

Castellanos v. County of Kern, County Counsel, 2016 Cal. Wrk. Comp. P.D. LEXIS 632 (BPD)

Applicant, a medical investigator, sustained CT injury for the period ending February 28, 2013, to her wrists, arms and neck. At hearing, the WCJ found the applicant to be entitled to temporary disability benefits from March 31, 2016 to date and continuing. Defendant sought reconsideration contending that applicant is not entitled to temporary disability benefits because she retired in May 2015 and thereby voluntarily removed herself from the labor force, and that "the award of temporary disability is improper because there is no evidence that applicant actually suffered a wage loss."

The WCAB in upholding the WCJ found that the applicant was entitled to temporary disability benefits for post-retirement period of temporary disability citing Gonzales v. W.C.A.B. (1998) 68 Cal. App. 4th 843, 81 Cal. Rptr. 2d 54, 63 Cal. Comp. Cases 1477,where applicant credibly testified that she retired due to effects of her industrial injury, that defendant presented no legal authority for its proposition that there must be medical evidence establishing that industrial injury forced applicant to retire, and that defendant's reliance on applicant's post-injury medical treatment and benefit history was overwhelmingly rebutted by

> *Citing Gonzales v. Workers' Comp. Appeals Bd. (1998) 68 Cal.App.4th 843, 847–848 [63 Cal.Comp.Cases 1477], the WCAB wrote:*
>
> *"[T]he decision to retire implicates the element of "willingness to work" in the earning capacity calculus, and the primary factual component of the analysis must be whether the worker is retiring for all purposes, or only from the particular employment. (See Van Voorhis v. Workmen's Comp. Appeals Bd. (1974) 37 Cal. App. 3d 81, 90 ["matter of common knowledge" people often work at other jobs after retirement].) If the former, then the worker cannot be said to be willing to work, and earnings capacity would be zero. If the latter, then it would be necessary to determine an earning capacity from all the evidence available. A subsidiary question is whether the decision to retire is a function of the job-related injury. If the injury causes the worker to retire for all purposes or interferes with plans to continue working elsewhere, then the worker cannot be said to be unwilling to work and would have an earning capacity diminished by the injury. Thus, the worker may establish by preponderance of the evidence an intent to pursue other work interrupted by the job-related injury. (§ 3202.5, 5705; cf. [West v. Industrial Acc. Com. (1947) 79 Cal.App.2d 711, 726] [burden on worker to explain reason for periods of unemployment].)"*
>
> *Finally, we are not persuaded by defendant's reliance upon Moore v. Workers' Comp. Appeals Bd. (2015) 80 Cal.Comp.Cases 299 (writ den.) to support its contention that "the award of temporary disability is improper because there is no evidence that applicant actually suffered a wage loss." Moore is factually distinguishable. In Moore, although applicant's testimony indicated she was reluctant to retire and her retirement letter showed her physical duties also played a role, the rest of the record showed that applicant retired on account of work stress and a work environment she perceived as hostile. In this case, by contrast, applicant liked her work and she wanted to keep working. She wanted to work long enough to obtain full health benefits in retirement. Applicant did keep working for a considerable time after her alleged permanent and stationary date despite significant, ongoing medical symptoms. Applicant's testimony also shows that she struggled to keep working even after the employer provided accommodation, and this continued until the symptoms worsened to the point that she could not continue. Factually, this case is worlds apart from Moore. We will deny defendant's petition for reconsideration.*
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> *Castellanos v. County of Kern, County Counsel, 2016 Cal. Wrk. Comp. P.D. LEXIS pgs 634-635.*

applicant's credible testimony regarding her decision to retire.; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 7.01[2], 7.02[4][b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.01[1]. Sullivan on Comp, Section 9.27, Temporary Disability for Retired Employees.]

Venancio v. White Labs, Inc., Cypress Insurance Company, administered by Berkshire Hathaway, 2017 Cal. Wrk. Comp. P.D. LEXIS 181(BPD)

Applicant, a long-term employee of White Labs, sustained an admitted injury to his neck and back on February 22, 2016. On or about March 15, 2016, agents from the Federal Department of Homeland Security came to the employer's premises and served an Immigration Enforcement Subpoena to produce documents including Forms 1–9. At the same time, the agents served a March 15, 2016 Notice of Inspection to produce documents pertaining to the employment eligibility verification process and Forms 1–9 on March 18, 2016. A March 18, 2016 receipt was provided acknowledging that 101 1–9 forms were received by the Department of Homeland Security.

See also, Romero v. Plantel Nurseries, Inc., AGG Cap Insurance Ltd, 2016 Cal. Wrk. Comp. P.D. LEXIS 672 (BPD) holding an undocumented farm laborer was entitled to temporarily partially disabled during period for which benefits were awarded despite undocumented work status; Entitlement to temporary disability benefits cannot be effected by immigration status, but undocumented applicant may not be provided with more extensive benefits than similarly situated worker who was working in United States legally as doing so would violate constitutional right to equal protection citing Del Taco v. W.C.A.B. (Gutierrez) (2000) 79 Cal. App. 4th 1437, 94 Cal. Rptr. 2d 825, 65 Cal. Comp. Cases 342.); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 3.31, 7.01[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 2, § 2.01[4], Ch. 6, § 6.10. Sullivan on Comp, Section 9.26, Temporary Disability for Terminating Employees].

On April 12, 2016, a Notice of Suspect Documents was served on the employer. Applicant's name was listed as one, whom at that present time, was not authorized to work in the United States. On June 13, 2016, the matter proceeded on the issues of temporary disability claimed from June 13, 2016 to present and continuing, less an attorney's fee.

At trial applicant testified that he resigned because he was worried he was facing potential jail time. There was no evidence that applicant was under duress by the employer when signing the change in relationship form. The defense witness credibly testified that had the applicant not voluntarily terminated his employment and that the applicant would have been offered a modified-duty position. Defendant-employer further testified that he did not know if he could even offer modified work based on the fact that applicant was listed on the April 12, 2016 Notice of Suspect Documents. Applicant never provided any documentation that he was legally allowed to work in the United States, to either the employer or at trial.

The WCJ issued the Findings of Fact and Order that applicant was not entitled to temporary partial disability.

Citing and discussing Salas v. Sierra Chemical Co. (2014) 59 Cal. 4th 407, 173 Cal. Rptr. 3d 689, 327 P.3d 797, 79 Cal. Comp. Cases 782, 785, the WCAB upheld the WCJ finding that the applicant was not entitled to temporary disability benefits pursuant to Insurance Code § 1171.5, when applicant was undocumented worker at time of his injury and resigned from his employment because he was worried about potential jail time; Because employer knew applicant was not legally working in United States at time he claimed temporary disability, employer was not required to offer applicant modified or alternative work.; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 3.31, 7.01[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 2, § 2.01[4], Ch. 6, § 6.10. Sullivan on Comp, Section 9.26, Temporary Disability for Terminated Employees].

XI. Third Party Liability

Kesner v. The Superior Court Of Alameda County; Kesner v. Pneumo Abex, LLC; Haver v. BNSF Railway Company, (Supreme Court Of California) 1 Cal. 5th 1132; 384 P.3d 283; 210 Cal. Rptr. 3d 283; 81 Cal. Comp. Cases 1095; 2016 Cal. LEXIS 9431.

This case present the issue of whether an employers or landowners owe a duty of care to prevent secondary exposure to asbestos. Such exposure, sometimes called domestic or take-home exposure, occurs when a worker who is directly exposed to a toxin carries it home on his or her person or clothing, and a household member is in turn exposed through physical proximity or contact with that worker or the worker's clothing. Plaintiff alleges that take-home exposure to asbestos was a contributing cause to the death and that the employer of descendent husband had a duty to prevent this

exposure. Defendants argue that users of asbestos have no duty to prevent nonemployees who have never visited their facilities from being exposed to asbestos used in defendants' business enterprises.

The Supreme Court reversed and remanded holding that in secondary exposure to asbestos cases it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from premises to household members, and employers have a duty under Civ. Code, § 1714, to take reasonable care to prevent this means of transmission. This duty also applies to premises owners, subject to any exceptions and affirmative defenses generally applicable to premises owners; This duty extends only to members of a worker's household because the duty is premised on the foreseeability of both the regularity and intensity of contact that occurs in a worker's home. Kesner v. The Superior Court Of Alameda County (Supreme Court Of California) 1 Cal. 5th 1132; 384 P.3d 283; 210 Cal. Rptr. 3d 283; 81 Cal. Comp. Cases 1095; 2016 Cal. LEXIS 943; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 23.03[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.01[4][c]; Sullivan on Comp, Section 2.30, Civil Claims by Dependents and Other Third Parties.]

Injury AOE/COE

(Dynamex v. Superior Court of Los Angeles County)

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Injury AOE/COE

The following represents a summary and analysis of some of the most recent case decisions issued by the California Supreme Court, California Court of Appeal, and the Workers' Compensation Appeals Board, and Statutes which the Editor believes is significant to the issue of Injury AOE/COE and the practice of Workers' Compensation law generally. The summaries are only the Editor's interpretation, analysis, and legal opinion, and the reader is encouraged to review the original case decision in its entirety.

Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision. WCAB panel decisions are citable authority, particularly on issues of contemporaneous administrative construction of statutory language [see Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236]. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]. Panel Decisions which are designated as "Significant" by the WCAB, while not binding in workers compensation proceedings, are intended to augment the body of binding appellate court and en banc decision and is limited to panel decisions involving (1) issue(s) of general interest to the workers' compensation community, especially a new or recurring issue about which there is little or no published case law; and (2) upon agreement en banc of all commissioners on the significance and importance of the issues presented and resulting decisions. (See Elliot v. WCAB (2010) 182 Cal.App. 4th 355, 361, fn. 3, 75 CCC 81; Larch v. WCAB (1999) 64 CCC 1098, 1099-1100 (writ denied).

I. General Discussion – Injury AOE/COE

As a general rule, an injury will be industrial as arising out of and within the course and scope of employment where there exists (1) a CONSENSUAL EMPLOYMENT RELATIONSHIP, in that the activity or service was INCIDENT TO EMPLOYMENT; The primary factors which the court consider is whether (2) there exists BENEFIT CONFERRED to the employer by the employee; and whether (3) the employer has CONTROL OR RIGHT TO CONTROL work related activity or service. Whether the activity or service is incident to employment requires a determination that the employee/applicant subjectively believe that their participation in the activity was expected by the employer; and second, that the subjective belief of the employee/applicant is objectively reasonable.

However, where the issue is that of employee vs. independent contractor the California Supreme Court has adopted the ABC Test: (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed. *(Dynamex Operations West, Inc v. Superior Court of Los Angeles County (2018, California Supreme Court) 4 Cal.5th 903, 83 Cal.Comp.Cases 817, 2018 Cal. LEXIS 3152)*

§ 3600. Conditions essential

(a) Liability for the compensation . . .shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

(1) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.

(2) Where, at the time of the injury, the employee is **performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment.**

(3) Where the injury is **proximately caused** by the employment, either with or without negligence.

(4) Where the injury is **not caused by the intoxication, by alcohol or the unlawful use of a controlled substance**, of the injured employee. As used in this paragraph, "controlled substance" shall have the same meaning as prescribed in Section 11007 of the Health and Safety Code.

(5) Where the injury is **not intentionally self-inflicted**.

(6) Where the **employee has not willfully and deliberately caused his or her own death**.

(7) Where the injury does not arise out of an **altercation** in which the injured employee is the **initial physical aggressor**.

(8) Where the **injury is not caused by the commission of a felony, or a crime** which is punishable as specified in subdivision (b) of Section 17 of the Penal Code, by the injured employee, for which he or she has been convicted.

(9) Where the injury does not arise out of voluntary participation in any **off-duty recreational, social, or athletic activity** not constituting part of the employee's work-related duties, except where these activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment. The administrative director shall promulgate reasonable rules and regulations requiring employers to post and keep posted in a conspicuous place or places a notice advising employees of the provisions of this subdivision. Failure of the employer to post the notice shall not constitute an expression of intent to waive the provisions of this subdivision.

(10) Except for psychiatric injuries governed by subdivision (e) of Section 3208.3, where 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:

(A) The **employer has notice of the injury**, as provided under Chapter 2 (commencing with Section 5400), prior to the notice of termination or layoff.

(B) The employee's **medical records**, existing prior to the notice of termination or layoff, **contain evidence of the injury**.

(C) The **date of injury**, as specified in Section 5411, is **subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.**

(D) The **date of injury**, as specified in Section 5412, *[CT Injury]* is **subsequent to the date of the notice of termination or layoff**.

* * *

Editor's Comments: A short list of affirmative defenses includes the (1) "going and coming rule" and "special mission exception"; (2) the "commercial traveler rule"; (3) "horseplay"; (4) "initial physical aggressor"; (5) "post termination claims"; (6) "six months aggregate employment" for psychiatric injury; and (7) Statute of Limitations. Note that each of these defenses should be analyzed on whether there exist (1) a CONSENSUAL EMPLOYMENT RELATIONSHIP in that activity or service was INCIDENT TO EMPLOYMENT; and whether (2) there exists BENEFIT CONFERRED to the employer by the employee; and whether (3) the employer has CONTROL OR RIGHT TO CONTROL work related activity or service. Whether the activity or service is incident to employment requires a determination that the employee/applicant subjectively believe that their participation in the activity was expected by the employer; and second, that the subjective belief of the employee/applicant is objectively reasonable.

But note that affirmative defenses may be waived if not timely raised under the doctrines of Laches and estoppel. (See also Labor Code 5409 on waiver of Statute of Limitations.)

II. Relevant Case Law

A. Control/Right to Control

Alexander et. al. v. Fedex Ground Package System (2014 United State Court of Appeals, 9th Circuit) 765 F.3rd 981, 79 CCC 1161, 2014 U.S. App. LEXIS 16585.

> *". . .The principle test of an employment relationship is whether the person to who service is rendered has the right to control the manner and means of accomplishing the result desired. . .Additional factors include: (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. . ."*
> *Alexander et. al. v. Fedex Ground Package System (2014 United State Court of Appeals, 9th Circuit) 765 F.3rd 981, 79 CCC 1161, 2014 U.S. App. LEXIS 16585.*
> *See also, Gregory v. Cott (2014 Supreme Court of Ca.) 59 Cal. 4th 996, 79 CCC 985, 2014 Cal. LEXIS 5460, holding employee of in-home caregivers agency injured by violent Alzheimer's patient assumed risk of injury (primary assumption of risk doctrine) and Alzheimer patient was not liable in tort with injured employee limited to a claim for workers' compensation benefits against his employer.*
> *See also, Ruiz v. Affinity Logistics Corporation (2014) 754 F3d 1093, 79 CCC 897, 2014 U.S. App. LEXIS 11123, in which furniture delivery drivers who were rehired by delivery company as drivers and told to get fictitious business names, business licenses and commercial bank accounts was held to be an employee due to analysis of "right to control test". Also, CEVA Freight, New Hampshire Insurance Co. v. WCAB (Vasquez)(2014) 79 CCC 935, 2014 Cal.Wrk. Comp. LEXIS 92 (Writ Denied).*

Plaintiff was comprised of a class of delivery drivers for Fedex who sought reimbursement and payment of expenses and unpaid wages. Fedex denied liability asserting plaintiffs were independent contractors focusing on the description and terms of the relationship between Fedex and drivers as contained in the Operating Agreement. The trial judge determined plaintiffs were employees not independent contractors as defendant/employer asserted.

The Court of Appeal upheld the trial judge noting that "California law is clear that the label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced. . .what matters is what the contract, in actual effect, allows or requires. . .if the employer has the authority to exercise . . .control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists." Here Fedex retained the right to control the manner and means of delivery which included route, times of work, type/color of delivery truck, dress and grooming standards for delivery person, and some measure of input on hiring/firing.

Young v. WCAB (2015, 3rd Appellate District) 227 Cal.App. 4th 472, 79 CCC 751, 2014 Cal.App. Lexis 562

> *"The focus is "on the specific activity in which the employee was involved when the injury occurred. There must be a 'substantial nexus between an employer's expectations or requirements and the specific off-duty activity in which the employee was engaged. . .[otherwise] the scope of coverage becomes virtually limitless and contrary to the legislature intent of section 3600(a)(9). The decisions that have found workers' compensation coverage under section 3600(a)(9) have generally found 'the employer expected the employee to participate in the specific activity in which the employee was engaged at the time of injury' and have found 'specific conduct by the employer with respect to the activity at issue.' (City of Stockton v. WCAB (2006) 135 Cal.App.4th 1513, 71 CCC 5)*
> *Editors' Comments: As discussed at length at last year's conference, the issue of AOE/COE turn on the analysis of three issues: First, (1) a consensual employment relationship; (2) the employer's actual control or the right to control the actions/activities of the employee at time of injury; and (3) benefit conferred by employee to the employer. In the Young decision the case turned on an analysis of both the "control test" (working out to keep fit was part of directive and encouraged) and the "benefit conferred" (employer needed correctional officers to be physically fit in order to properly perform their jobs.) It was this analysis which satisfied the subjective/objective requirements under the two prongs of Ezzy.*

Applicant was a correctional officer who sustained injury on 1/9/12 while at home during "his usual warm-up calisthenics" which involved jumping jacks. The corrections department had issued a directive that correction sergeants are required to "maintain themselves in good physical condition so that they can handle the strenuous physical contacts often required of a law enforcement officer." Applicant testified that he encouraged

those under his supervision to work out and as part of his job training session involving offensive/defensive takedowns and other "extremely strenuous" activities were practiced. He also testified that he subjectively believed that keeping fit was a requirement of his job. Last, Applicant testified that the department does not provide any guidance on the type of exercise considered appropriate. At trial defendant argued that pursuant to LC 3600 the applicant at the time of injury was not within the course and scope of employment.

The WCJ and WCAB found for the Applicant applying the two prong test under *Ezzy v. WCAB (1983) 48 CCC 611*, noting that the applicant had subjectively believed the activity of working out and keeping fit was a requirement of his job. Further, it was objectively reasonable given the department directive, the job requirements, and general policy of the department.

For an excellent discussion on the "right to control" analysis, see Ayala et al., v. Antelope Valley Newspaper (2014 Supreme Court of Cal.) 59 Cal.4th 522, 79 CCC 760, 2014 Cal. LEXIS 4649, which involved the certification of a class action requiring that paper delivery persons be held an employee. The Court wrote "the principal test of an employment relationship is whether the person to who service is rendered has the right to control the manner and means of accomplishing the result desired. . .What matters is whether the hirer 'retains all necessary control' over its operations. . .The fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control over it.". . .Perhaps, the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because "the power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities." See also, S.G. Borello & Sons, Inc. Department of Industrial Relations (1989) 48 Cal.3rd 341, 350, 54 CCC 80; Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal.3rd 943, 946; Burlingham v. Gray (1943) 22 Cal.2nd 87, 100, 8 CCC 105.

See also, CIGA v. WCAB (Villanueva) (2014) 79 CCC 921, 2014 Cal. Wrk. Comp. LEXIS 90 (Writ Denied), in which the WCAB held applicant injured while taking down scaffolding at construction site failed to establish that the primary contractor had "directed or exercised any substantial control over" the work involving taking down the scaffolding.

See also, Compos v WCAB (USC) 79 CCC 927, 2014 Cal.Wrk. Comp. LEXIS 79, in which employee who was sexually assaulted when she returned to workplace 5 hours after work day ended for purpose of obtaining husband's keys was outside course and scope of employment as it was for "purely personal motives" or reasons.

See also, California Self-Insurers' Security Fund v. WCAB (Golden State Health Center) 79 CCC 1535, 2014 Cal.Wrk.Comp. LEXIS 161, where by split panel decision applicant's claim of injury due to a "dog pile" was not barred as "horseplay" where despite questions of applicant's credibility and evidence to the contrary, WCAB held that applicant did not start, nor consent to participation in "dog pile".

See also, Swift Transportation v. WCAB (Coon) 79 CCC 1576, 2014 Cal.Wrk.Comp. LEXIS 168, where long haul truck driver beaten by unknown assailant while on dinner break held within AOE/COE under "commercial travelers doctrine" and "personal comfort doctrine".

See also, Lanz v. WCAB 79 CCC 488, which provided an excellent discussion on the exceptions to the "going and coming" rule which include "special mission exception" which requires that the activity (1) be within course of employee's employment, (2) undertaken at the express or implied request of the employer and for the employer's benefit; and (3) that the activity is extraordinary in relation to the employee's routine duties.

See also, Mireles v. S.O.S. Steel Co., Inc, 2018 Cal.Wrk. P.D. LEXIS 286 (BPD), holding Ironworker falling 14 feet held compensable as Defendant has burden of establishing horseplay/skylarking as a defense and is not met when an act could reasonably be expected and was within reasonable contemplation of employment activity/contract.; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.51[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.04[2], SOC, Section 5.62, Horseplay/Skylarking]

Yu Qin Zhu v. Department of Social Services IHSS, 2016 Cal. Wrk. Comp. P.D. LEXIS 513 (BPD)

Applicant, a caregiver with IHSS, on her way to a second client, travelling by bicycle, was hit by a motor vehicle at approximately noon. At trial the Applicant testified that she was hired by the State of California after applying to work as a caretaker in 2003; Was paid by the State of California once every two weeks, and no money or salary from the clients for whom she worked. She did not stop to have lunch between clients. On the date of the accident, she would eat her lunch at the house of the second patient before she started working. Applicant was not compensated for her transportation time between the

See also, Carrillo v. LLG Corporation, dba Fresco II, Employers Compensation Insurance Company, 2016 Cal. Wrk. Comp. P.D. LEXIS 658 (BPD), holding that injury as result of MVA not compensable where occurring after consumption of alcohol when applicant returned to his workplace following end of his shift, and applicant contended that basis for liability was permissive use of alcohol condoned by employer such that alcohol use became "customary incident to employment," but where drinking occurred after his shift was completed, at restaurant/bar open to public, was not employer condoned drinking on job, applicant was not called back to work, owner not present no special meeting, event or party, nor performing service for employer, and no reasonable belief per Labor Code § 3600(a)(9) and Ezzy v. W.C.A.B. (1983) 146 Cal. App. 3d 252, 194 Cal. Rptr. 90, 48 Cal. Comp. Cases 611. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.20, 4.25; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, §§ 10.03[1], 10.05[6]. Sullivan on Comp, Section 5.22, Intoxication] See also, Hansen v. Par Electrical Contractor, Inc. 2016 Cal.Wrk.Comp. P.D. LEXIS 661 holding evidence of acute alcohol intoxication held substantial and proximate cause of accident as and when it occurred and bar to recovery.

clients' houses. Defendant denied the claim AOE/COE. The WCJ found for the applicant. Defendant sought reconsideration.

In reversing the WCJ by split panel decision, the WCAB focused on the traditional tests of "control and right to control" and "benefit conferred". The WCAB first noted the existence of a "dual employment relationship" with applicant employed by both the State of Californian and the clients for which the applicant was a caregiver. Discussing but distinguishing *Hinojosa v. Workers' Comp. Appeals Bd.* (1972) 8 Cal.3d. 150, 158–159 [37 Cal.Comp.Cases 734] (*"Hinojosa"*).) and *Smith v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 814 [33 Cal.Comp.Cases 771], wrote "this case is different from *Hinojosa* and *Smith*. Here, applicant suffered injury while commuting between the homes of clients whom applicant had selected and with whom she had chosen her work hours. Unlike the ranch workers in *Hinojosa*, applicant chose her own clients and work locations and hours. In essence, applicant merely used defendant to obtain client referrals. Applicant also chose the means of transport to her clients. As with any employee who drives to work or takes some other form of transit in a "normal" commute, in this case it did not matter to defendant how applicant got to work. Applicant's travel to her clients' houses by bicycle was for her own convenience and benefit. This case also is different from *Smith* because defendant did not require applicant to have a car or bicycle. Again, there was an implied requirement that applicant get herself to work, but this is no different from the vast number of employers who implicitly require their employees to transport themselves to work by whatever means of conveyance they choose". In the end the WCAB was not persuaded that this case comes within any exception to the going and coming rule as the defendant did not have control over applicant's commute, and the benefit to defendant as a result of applicant's self-transport was indirect and minimal compared to the ease and convenience realized by applicant.

On Writ of Review, the Court of Appeal reversed holding that applicant within course and scope of employment during bicycle commute between two clients' homes, the employer knew applicant provided care to more than one home each day, and employer impliedly required the applicant to provide her own transportation which provided a direct benefit to employer, and was thus 'part and parcel' of job. Zhu v. Workers' Compensation Appeals Board (2nd Appellate District) 12 Cal. App. 5th 1031; 82 Cal. Comp. Cases 692; 2017 Cal. App. LEXIS 564; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.155[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.05[3][d][ii]. Sullivan on Comp, Section 5.45, Transportation Controlled by Employer]

II. Benefit Conferred

Garcia v. Whitney, 2016 Cal.Wrk.Comp.P.D. LEXIS 526 (BPD)

The applicant was temporarily living rent free at defendant's house. During this stay the applicant performed "maintenance activities for the house". Applicant sustained injury at an alternate address owned by defendant and sought workers' compensation benefits for that injury. The WCJ found applicant was not an employee at the time of the injury noting that the applicant was injured at a different address altogether. Second, the WCJ held that asking someone staying rent free in your home to perform activities is not, in this WCJ's opinion, an offer or creation of employment unless there is evidence that declining to perform said activities would result in the "consideration" (free rent in this case)

See also, Lee v. West Kern Water District, (5th Appellate District) 5 Cal. App. 5th 606; 210 Cal. Rptr. 3d 362; 81 Cal. Comp. Cases 966; 2016 Cal. App. LEXIS 985, where a civil claim in tort held not barred by exclusive remedy defense where employer held mock robbery applying LC 3601/02 assault exception to AOE/COE.; [Hanna, Cal. Law of Employee Injuries and Workers' Compensation Law (2016) ch. 11, § 11.02; Levy et al., Cal. Torts (2016) ch. 10, § 10.11; Cal. Forms of Pleading and Practice (2016) ch. 577, Workers' Compensation, § 577.356; Wilcox, Cal. Employment Law (2016) ch. 20, § 20.41, Sullivan on Comp, Section 2.19, Exceptions to Exclusive Remedy Rule for Conduct Outside Compensation Bargain]

See also, Rowe v. Road Dog Drivers, LLC, Insurance Company of the State of Pennsylvania, 2016 Cal. Wrk. Comp. P.D. LEXIS 622 (BPD), holding that motor vehicle accident not barred by "Going and Coming Rule" where applicant's travel to co-worker's home was not ordinary commute to fixed place of business, was undertaken for employer's benefit and to saved employer costs of reimbursing two separate trips; Discussion on 'Special Mission' exception to 'Going and Coming'. Rowe v. Road Dog Drivers, LLC, Insurance Company of the State of Pennsylvania, 2016 Cal. Wrk. Comp. P.D. LEXIS 622 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.157; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.05[3][d][iv], [8]. Sullivan on Comp, Section 5.48, Special Mission – Special Errand.]

being withdrawn. The WCJ noted that the Applicant himself testified that he was never given the impression that the defendant would have to move out if he did not perform work and that no one ever threatened to fire him for not doing work. Applicant did testify that "he couldn't answer" why he felt he could not live at the house without performing work even though neither defendant ever told him that. In the absence of any evidence that the consideration (free rent) would be terminated if the work was not performed, this WCJ could not and cannot find employment.

If Applicant's arguments were to be followed, anyone doing anything for anybody else is an employee. The WCJ Wrote that "at the risk of oversimplifying the issue, the case law is clear that not only must work be performed for another, but consideration must be paid to the person performing said work, *in exchange* for that work." Recon denied.

B. Incident to Employment/Consensual Employment Relationship

Espinoza v. WCAB 78 CCC 89 (Not Certified for Publication) (Writ Denied)

While incarcerated and working as a prison cook, the applicant sustained successive injuries. The issue involved whether the applicant was performing voluntary work and therefore an employee of the county, or whether he was not an employee as the work he was performing was required as a condition of incarceration. At hearing, the applicant through counsel introduced an offer of proof which provided that the applicant believed "his work was voluntary, and was never told his work was mandated by the terms of his incarceration and that he received preferential treatment in exchange for the work". The County of L.A., prior to the subject injury, had enacted Order 91 which provided that a person confined in the county jail may be compelled to perform labor under the direction of a county official. The order went on to state that "no prisoner engaged in labor pursuant to this order shall be considered an employee of, or to be employed by the county or any department thereof, nor shall any prisoner fall within any of the provisions of the Workers' Compensation Act." The WCJ however reasoned that no evidence was presented that the applicant was compelled to work, just simply that he may be compelled to work. Further, no evidence was presented that the applicant's sentence required him to work. The WCJ found for the applicant with the defendant seeking reconsideration.

The WCAB reversed citing Order 91and holding that work is not voluntary if it is performed subject to a county ordinance that requires an inmate to work while incarcerated. The WCAB further noted that by definition a statutory compulsion to work negates any consensual employment relationship, and "if an inmate is directed to work by the sheriff, the work is necessary not voluntary". LC 3351 requires a consensual relationship between the worker and his alleged employer as a prerequisite to the existence of an employment contract. Whether an inmate is in a consensual employment relationship should be made on a case by case basis and depends on the policy which the county has chosen. The trial court is directed to make this determination considering whether (1) the employment is a condition/requirement of incarceration? (2) was the employment voluntary? (3) was consideration involved? e.g. preferential treatment, benefit or payment provided to applicant? In this case no evidence was presented that the county consented to the employment. Decision of WCAB upheld by Court of Appeal on Review.

City of Anaheim v. WCAB (Quick) 78 CCC 41 (Writ Denied)

Applicant was a police officer who collapsed from heat stroke while participating in a 120 mile challenge cup relay. Applicant was one of 20 off-duty police officers participating in the relay from the Anaheim police department. At trial evidence established that the Anaheim team was ranked in the top 10, and that was a source of pride for the department. Further, team member schedules were changed to allow them to train and that included training while on duty. Also, city owned vans were used to transport the team on the day of the subject race. Applicant was approached to be on the team when the department learned he and his daughter ran a family 5k race and that the applicant had the fastest time. Applicant testified that he believed a refusal to participate would adversely affect his career. There was also evidence presented that the employer had failed to provide a LC 3600(a)(9) notice which requires the employer to post a notice stating that the injuries associated with a particular activity might not be covered by workers' comp. The WCJ found injury with defendant seeking reconsideration.

The WCAB upheld the WCJ citing and discussing *Ezzy v. WCAB 48 CCC 611.* In the *Ezzy* decision the court set forth a two-step analysis in determining whether a recreational off-the-job activity could give rise to an industrial injury. First, does the employee/applicant subjectively believe that their participation in the activity was expected by the employer? Second, was the subjective belief of the employee/applicant objectively reasonable.

In this case the WCAB noted that the applicant's running times prior to injury made him the department's best runner, he was asked by supervisors and encouraged by rank-and-file, and co-workers to participate on the team. It was also clear that being a member of the department cup relay team was a big deal and that the runners were the "elite, allowed to train while on duty, and schedules were juggled to accommodate the training. Also noteworthy was the employer's failure to post a LC 3600 notice that injury would not be covered. Given the facts of the case, substantial evidence existed to support the decision of the WCJ.

Davis, v. State of California, Department of Forestry and Fire Protection, State Compensation Insurance Fund, 2016 Cal. Wrk. Comp. P.D. LEXIS 611; 82 Cal. Comp. Cases 285 (BPD)

Applicant contends that he is entitled to the presumption of industrial causation pursuant to Labor Code section 3212.85, due to the fact that he "was regularly exposed to a biochemical substance (Fire-Trol) during his seven years of employment with the Department of Forestry and Fire Protection. The WCJ found for defendant and issued a take nothing holding that LC 3212.85 did not apply and that applicant had failed to otherwise establish injury.

LC 3212.85 provides,

. . .(d) The injury that develops or manifests itself in these cases shall be presumed to arise out of, and in the course of, the employment. This presumption is disputable and may be controverted by other evidence. Unless controverted, the appeals board is bound to find in accordance with the presumption. This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

(e) For purposes of this section, the following definitions apply:

(1) "Biochemical substance" means any biological or chemical agent that may be used as a weapon of mass destruction, including, but not limited to, any chemical warfare agent, weaponized biological agent, or nuclear or radiological agent, as these terms are defined in Section 11417 of the Penal Code

In upholding the WCJ the WCAB on reconsideration held that the presumption of industrial causation for injury from exposure to biochemical substances in Labor Code § 3212.85 requires that the person using the chemical or hazardous materials as weapons of mass destruction "knowingly utilizes those agents with the intent to cause harm"/use of substance as weapon with intent to cause widespread great bodily injury or death. In this case the applicant's exposure during the process of refuel firefighting aircraft did not establish the requisite intent. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.138[4][p]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.07[5][g]. Sullivan on Comp, Section 5.18, Presumption of Injury]

Gund et al., v. Country of Trinity (2018 3rd Appellate District) 24 Cal.App. 5th 185, 234 Cal.Rptr. 3d 187, 83 Cal. Comp. Cases 1042, 2018 Cal.App. LEXIS 522.

> *". . . Section 3366 does not define "active law enforcement." However, responding to 911 calls for unspecified help is clearly active law enforcement. "The legislative purpose of [section 3366] was to cover a person who assumes the functions and risks of a peace officer . . ." (McCorkle v. City of LA (1969) 70 Cal.2nd 252, 263 fn.11) McCorkle briefly addressed and rejected a city's argument, made for the first time in the Supreme Court, that section 3366 precluded a civil lawsuit by a motorist injured when he was assisting a peace officer by pointing out skidmarks at the scene of a car crash. (McCorkle, at p. 263, fn. 11.) The statute covers a person who assumes the functions and risks of a peace officer, and not one who merely informs a peace officer of facts within his own knowledge. (Ibid.) Another case noted in dictum that workers' compensation benefits were granted under section 3366 to the family of a person killed while acting as an undercover agent for police in a narcotics investigation. (Page v. City of Motebello (1980) 112 Cal.App.3d 658, 662-665 [169 Cal.Rptr. 447] [family could not enforce in a civil suit a police officer's alleged promise that family would be compensated as if the informant had been a police officer].)*
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> *Although not of precedential value, we observe a workers' compensation adjudication held that section 3366 did not afford workers' compensation benefits to a member of a county sheriff's "Mounted Posse Program" for injuries she suffered when she was thrown from her horse during a training session. (County of Riverside v. Workers' Comp. Appeal Bd. (2012) 77 Cal.Comp.Cases 1033.) The program was a volunteer auxiliary group that assisted with such functions as traffic control, crowd management, crime scene protection, dealing with the public, first aid, "eyes and ears" patrols at special events, search and recovery, and appearances at parades and recruiting events. Membership in such a group was not the same as being engaged in assisting law enforcement in an evolving and possibly precarious situation, and at the time of the injury the member was training her horse, not providing any active law enforcement services. (Ibid.; see South Coast Framing, Inc. v. Workers' Comp. Appeals Bd. (2015) 61 Cal.4th 291, 305, fn. 4 [188 Cal. Rptr. 3d 46, 349 P.3d 141] [administrative cases are not of precedential value and persuasive value is debatable].)*
>
> *The term "active law enforcement" appears in other statutes, where special workers' compensation or retirement benefits are conferred on employees for "active law enforcement service" but with express exclusions for law enforcement employees whose principal duties are, for example, [**195] clerical positions such as stenographers and telephone operators."*
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> *Gund et al., v. Country of Trinity (2018 3rd Appellate District) 24 Cal.App. 5th 185, at pgs. 190-191.*

A Trinity County deputy sheriff phoned two private citizens, who do not work for the county, and asked them to go check on a neighbor who had called 911 for help likely related to inclement weather. The two private citizens unwittingly walked into a murder scene and were savagely attacked by the man who apparently had just murdered the neighbor and her boyfriend. The two private citizens sued for negligence and misrepresentation, alleging defendants created a special relationship and owed them a duty of care, which defendants breached by representing that the 911 call was likely weather related and "probably no big deal" and by withholding information known to defendants suggesting a crime in progress—i.e., that the caller had *whispered* "help me," that the California Highway Patrol (CHP) dispatcher refrained from calling back when the call was disconnected out of concern the caller was in danger.

Defendants filed a motion for summary judgment on the ground that plaintiffs' exclusive remedy was workers' compensation, because Labor Code section 3366 provides that any person "engaged in the performance of active law enforcement service as part of the posse comitatus or power of the county, and *each person ... engaged in assisting any peace officer in active law enforcement service at the request of such peace officer*, is deemed to be an employee of the public entity that he or she is serving or assisting *in the enforcement of the law*, and is entitled to receive compensation from the public entity in accordance with the provisions of this division [workers' compensation]."

Defendants' motion did not acknowledge or address plaintiffs' factual allegations that the deputy misled them about the nature of the activity, minimized the risk, lulled them into a false sense of security, and that plaintiffs relied on the deputy's misrepresentations. Absent section 3366, these allegations potentially support imposing tort liability against defendants. (E.g., Wallace v. City of Los Angeles (1993) 12 Cal.App.4th 1385, 1401–1402 [16 Cal. Rptr. 2d 113].) Plaintiffs' opposition submitted evidence supporting their factual allegations and argued section 3366 is inapplicable in these circumstances.

> *See also, Mireles v. S.O.S. Steel Co., Inc, 2018 Cal.Wrk. P.D. LEXIS 286 (BPD), holding Ironworker falling 14 feet held compensable as Defendant has burden of establishing horseplay/skylarking as a defense and is not met when an act could reasonably be expected and was within reasonable contemplation of employment activity/contract.; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.51[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.04[2]. SOC, Section 5.62, Horseplay/Skylarking]*

Defendants' reply denied that the deputy misrepresented facts or misled plaintiffs (thus displaying factual disputes) but claimed any factual disputes were immaterial because responding to a 911 call is a law enforcement activity. The trial court adopted the defense theory and entered summary judgment.

On appeal, plaintiffs contend section 3366 is inapplicable because they were not engaged in assisting in active law enforcement.

We conclude section 3366 applies to this case, because responding to a 911 call for help of an uncertain nature is active law enforcement, regardless of the deputy's misrepresentations. "Active law enforcement" under section 3366 means confronting the risks of dealing with the commission of crime or breach of the peace for the protection of the public. Any 911 call carries such risk, but particularly a 911 call for help of an uncertain nature.

See also, Chang v. JLS Environmental Services, 2018 Cal.Wrk.Comp. P.D. LEXIS 314 (BPD) where claim barred as post-term where (1) reported after termination from employment, (2) employer did not have notice of claimed injury prior to his termination, and (3) medical records existing prior to his termination contain no evidence of claimed injury. Further, even if applicant claimed cumulative trauma, the CT date of injury was not subsequent to termination per the applicant own testimony of knowledge of workers' compensation procedures. Also, Labor Code § 3600(a)(10) does not indicates that post-termination bar is inapplicable where claimed injury is reported "at the first opportunity."; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 11.02[3][a], 21.03[1][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.03[7]. SOC, Section 5.28, Post-Termination Claims]

See also, Palsgrove v. City of Palo Alto, 2018 Cal. Wrk. Comp. P.D. LEXIS 316 (BPD) holding that Applicant/firefighter was entitled to Labor Code § 3212.1 presumption that his basal cell carcinoma/skin cancer was industrial where panel QME cited scientific evidence that established cumulative impact of applicant's sun exposure was within latency period, and was partially responsible for development of his skin cancer.); [See generally Hanna, Cal. Lawe of Emp. Inj. and Workers' Cop. 2d section 4.138[4][b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.07[5][c]. SOC. Section5 .18, Presumption of Injury – Public Employees Covered Conditions;].

AB 1749 was signed into law which provides that peace officers who are injured while engaged in law enforcement outside the state of California, not at the time at the immediate direction of their employers are within scope of employment and thus may receive workers' compensation benefits.

Since we conclude section 3366 bars plaintiffs' lawsuit on the ground they were assisting in active law enforcement, we need not address alternate defense theories that the lawsuit is barred because (1) plaintiffs were employees because they assisted upon command (posse comitatus); (2) County Resolution No. 163-87 deems volunteers to be employees if they provide "service" to the county; or (3) defendants' new theory on appeal that the county and deputy sheriff have governmental immunity from tort liability for misrepresentation (Gov. Code, §§ 818.8, 822.2). We affirm the judgment

D. Independent Contractor vs. Employee

Dynamex Operations West, Inc v. Superior Court of Los Angeles County (2018, California Supreme Court) 4 Cal.5th 903, 83 Cal.Comp.Cases 817, 2018 Cal. LEXIS 3152.

Defendant was a nationwide same-day courier and delivery service that operates business centers throughout California employing delivery drivers. In 2004 defendant converted all of its drivers to independent contractors after management concluded that such a conversion would generate economic savings for the company. Under that policy, all drivers are treated as independent contractors and are required to provide their own vehicles and pay for all of their transportation expenses, including fuel, tolls, vehicle maintenance, and vehicle liability insurance, as well as all taxes and workers' compensation insurance.

"...Thus, with respect to the control of details factor, the court concluded: "Under these circumstances, Borello retains all necessary control over the harvest portion of its operations. A business entity may not avoid its statutory obligations by carving up its production process into minute steps, then asserting that it lacks 'control' over the exact means by which one such step is performed by the responsible workers." (Borello, supra, 48 Cal.3d at p. 357.)..." (FN3)

"...we conclude that in determining whether, under the suffer or permit to work definition, a worker is properly considered the type of independent contractor to whom the wage order does not apply, it is appropriate to look to a standard, commonly referred to as the "ABC" test, that is utilized in other jurisdictions in a variety of contexts to distinguish employees from independent contractors. Under this test, a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity..."

Dynamex Operations West, Inc v. Superior Court of Los Angeles County 83 Cal.Comp.Cases at pg. 823.

Defendant/employer obtains its own customers, sets the rates, negotiates the amount to be paid to each drivers, flat fee or an amount based on a percentage of the delivery fee. Drivers are generally free to set their own schedule but must notify Dynamex of the days they intend to work. Drivers are required to obtain and pay for a Nextel cellular telephone to maintain contact with Defendant. On-demand drivers are assigned deliveries by Dynamex dispatchers at Dynamex's sole discretion; drivers have no guarantee of the number or type of deliveries they will be offered. Although drivers are not required to make all of the deliveries they are assigned, they must promptly notify Dynamex if they intend to reject an offered delivery so that Dynamex can quickly contact another driver; drivers are liable for any loss Dynamex incurs if they fail to do so. Drivers make pickups and deliveries using their own vehicles, but are generally expected to wear Dynamex shirts and badges when making deliveries for Dynamex, and, pursuant to Dynamex's agreement with some customers, drivers are sometimes required to attach Dynamex and/or the customer's decals to their

Editor's comments: The Dynamex decision is the comprehensive analysis on the employee vs. 'independent contactor' issue in wage and hour. The Dynamex decision cites and discusses every important decision in the last 30 years involving the issue of independent contractor. In the end the Court reaffirmed that the burden is on the party asserting that the relationship is that of independent contractor and has articulated the ABC test. The ABC test requires all three of the prongs be established by defendant "namely (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed."

A conflict appears to exists between the Borello "statutory purpose test" for workers' compensation purposes and now the Dynamex "ABC wage and hour test". The Borello "statutory purpose test" involves the weighing of factors related to 'right to control' and 'benefits conferred', e.g. right to hire/fire, method of and amount of payment/wages, instrumentalities, are they a separate business enterprise/trade/occupation, license required, opportunity for profit/loss, length of time (short IC likely), who has relationship with client/customer, who controls pricing, who collect payment. While the Dynamex "ABC wage and hour test" has three requirements, all of which must be established by defendant. See also, LC 2750.5, 3353, 3355, 3356, 335; Borello & Sons Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341, 54 CCC 80; Yellow Cab Coop. v. WCAB (1991) 226 Cal.App.3d 1288, 56 CCC 34; Martinez v. Combs (2010) 49 Cal.4th 35, 109 Cal.Rptr. 3d 514; O'Connor v. Uber Techs. Inc. (2018) 2018 U.S.App. LEXIS 27343; Karl v. Zimmer Biomet Holding Inc. (2018) 2018 U.S. Dist. LEXIS 189997; Perkins v. Knox, DLK Capital, Inc, Americans Modern Insurance Company, ADJ10183569 (LA District Office)(BPD).

vehicles when making deliveries for the customer. Drivers purchase Dynamex shirts and other Dynamex items with their own funds.

The trial court granting certification of the class holding the delivery drivers were employees and not independent contractors as defendant/employer had argued.

In upholding the trial court, the Supreme Court held that a person providing services to another is presumed an employee and it is the employer asserting that a worker is an "independent contractor" who has the burden of proof to establish (1) that the worker is free from control and direction of the hirer in connection with the performance of the work, both under the contract for performance of such work and in fact; (2) that the worker performs work that is outside the usual course of the hiring entity's business; (3) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity. See also, cited and discussed, S.G. Borello & Sons v. Department of Industrial Relations, (1989) 48 Cal.3d 341[256 Cal.Rptr. 543, 769 P.2d 399; Martinez v. Combs (2010) 49 Cal.4th 35, 64 [109 Cal. Rptr. 3d 514, 231 P.3d 259]; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 3.06, 3.07, 3.130, 3.131; Rassp & Herlick, California Workers' Compensation Law, Ch. 2, § 2.06.]

Garcia v. Boarder Transportation Group (2018, 4th Appellate District) 28 Cal.App.5th 558, 239 Cal.Rptr. 3d 360, 83 Cal. Comp. Cases 1775, 2018 Cal. App. LEXIS 949.

Plaintiff operated a taxicab and filed a wage and hour lawsuit against Border Transportation Group, LLC (BTG). Defendant brought a motion for summary judgement asserting that plaintiff worked as an independent contractor and thus was not subject to wage and hour law.

The evidence in this case was that there was a lease of the taxicab license by defendant to plaintiff as an individual. The lease clearly stated that no employer/employee relationship was created or existed. Further, the evidence of how the parties behaved and carried out the arrangement was consistent with the terms of the lease. It does not appear that Border Transport exercised any control over plaintiff's activities that would implicate an employee/employer relationship, in that there was no evidence that they provided any instruction on operation of the vehicle, no employee handbook was provided, rates were not dictated, nor was plaintiff required to maintain trip sheets.

> *"...The court cautioned that "[a] business entity may not avoid its statutory obligations by carving up its production process into minute steps, then asserting that it lacks 'control' over the exact means by which one such step is performed by the responsible workers."*
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> *"Unlike a multifactor test [of Borello], the [Dynamex]/ABC test "'allows courts to look beyond labels and evaluate whether workers are truly engaged in a separate business or whether the business is being used by the employer to evade wage, tax, and other obligations... The ABC test "presumes a worker hired by an entity is an employee and places the burden on the hirer to establish that the worker is an independent contractor" by showing each of parts A, B, and C. The failure to establish any one prerequisite is sufficient "to establish that the worker is an included employee, rather than an excluded independent contractor, for purposes of the wage order."*
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> *"...Supreme Court explained, the trial court properly applied the "suffer or permit to work" definition of employment in Martinez, instead of the "control" test in Borello, to evaluate class certification for wage order claims. (Id. at pp. 944–945, 950.) The "suffer or permit to work" definition fit the broad remedial purpose of wage orders to protect workers, shield law-abiding businesses from unfair competition, and prevent shifting the costs of ill effects to workers to the public at large. (Dynamex, at pp. 952–953.)*
>
> *Next, the Dynamex Court considered what test applies to evaluate the employee-independent contractor question under the "suffer or permit to work" definition of "employ." Eschewing a multifactor standard, the court instead adopted the three-part "ABC" test used in many other jurisdictions to decide whether a worker is a covered employee or rather an independent contractor. (Dynamex, supra, 4 Cal.5th at pp. 956–957.) Unlike a multifactor test, the ABC test "'allows courts to look beyond labels and evaluate whether workers are truly engaged in a separate business or whether the business is being used by the employer to evade wage, tax, and other obligations."*
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> *Garcia v. Boarder Transportation Group (2018, 4th Appellate District) 28 Cal.App.5th at pgs. 567-570.*

Plaintiff operated his own vehicle and defendant did not get any part of those fares. Defendant did not dictate the geographical area, the shift, time or number of breaks, a schedule, or require plaintiff to record his whereabouts. Although plaintiff was required to respond to dispatch, he was not required to turn on the optional radio. Defendant exercised no control over how plaintiff

used his vehicle for personal use and allowed plaintiff to market his taxicab business in his own name. Plaintiff was free to use his own cell phone, business phone, or other items. Last, plaintiff could elect not to renew his vehicle lease permit at any time." Defendant sought a motion for summary judgment. The trial court granted summary judgment to a taxi company on wage and hour claims finding that a driver was an independent contractor, not an employee.

Editor's Analysis: The Dynamex/ABC test arose out of child labor law which defined 'employ' to means to 'suffer, or permit to work.' This definition derives from child labor laws, which sought to extend beyond the common law master-servant relationship and target the defendant's failure to exercise reasonable care to prevent child labor from occurring. Applied to modern-day wage and hour claims, a proprietor who knows that persons are working in his or her business without having been formally hired, or while being paid less than the minimum wage, clearly suffers or permits that work by failing to prevent it, while having the power to do so.

To summarize, it is this editor's opinion that in the end the Dynamex/ABC test will become the standard not only for claims involving wage and hours but also workers' compensation. Again the important policy is to prevent the employer from evading wage, tax, and other obligations, by allowing the Courts to look beyond labels and evaluate whether workers are truly engaged in a separate business as an independent contractor, noting that "[a] business entity should not be allowed avoid its statutory obligations by carving up its production process into minute steps, then asserting that it lacks 'control' over the exact means by which one such step is performed by the responsible workers."

The Court of Appeal reversed holding taxi driver was employee under the ABC test; In reversing the Court held that a worker is properly considered independent contractor to whom wage-order does not apply only if hirer establishes at least one of following: (1) that it does not control and direct worker with respect to performance of work both pursuant to contract and in actuality, (2) that worker performs work outside usual course of hirer's business, and (3) that worker is customarily engaged in independently established trade, occupation, or business of same nature as work performed for hirer. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 3.06, 3.07, 3.130, 3.131; Rassp & Herlick, California Workers' Compensation Law, Ch. 2, § 2.06.]

E. Going and Coming Rule

Schultz v. WCAB (2nd Court of Appeal) 232 Cal.App.4th 1126, 80 Cal.Comp.Cases 16, 43 CWCR 1, 2015 Cal.App. LEXIS 5.

Editor's Comments: Recall that "the implied use of an automobile as a condition of employment" under Hinojosa v. WCAB (1972) 8 Cal.3rd 150, 37 CCC 734, brings injury during operation of the automobile within "course of employment". The Court of Appeal never addressed this issue in the Schultz decision. But even under the Hinojosa the analysis again turns on (1) whether the injury was incident to employment? (2) Was benefit conferred to the employer by the employee? And (3) does the employer have control or the right to control the employee at the time of injury; and as stated in the Dynamex Operations West, Inc v. Superior Court of Los Angeles County (2018, California Supreme Court) 4 Cal.5th 903, 83 Cal.Comp.Cases 817, 2018 Cal. LEXIS 3152, and the
ABC Test (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity. . ."

Applicant was involved in a single car accident after entering Air Force base where he was employed but before arriving at his place of work. The Air Force base was secure and not open to the public. The applicant worked primarily at a single location but on occasion used his vehicle to travel to other locations within the base. The WCJ held that the claim was not barred by the going and coming rule. The WCAB reversed noting no special mission, injury was outside normal working hours, and during an otherwise normal commute.

The Court of Appeal reversed the WCAB holding that the "premise line rule" required that once the applicant reaches the employer's premises, all injuries are within course and scope of employment. Here the Court citing *Smith v. Industrial Acc.Com (1941) 18 Cal.2nd 843, 6 CCC 261,* noted that the base was not open to the public, applicant had passed the security gate, and the applicant worked at various locations within the base confines. Reversed and remanded with direction.

Wright v. State of California (Court of Appeal, 1st Appellate District) 233 Cal.App.4th 1218, 80 CCC 157, 2015 Cal.App. LEXIS 91.

Applicant/Plaintiff was a correctional officer at San Quentin Prison, and lived on the prison premises leasing a house from his employer, the State of California. The Plaintiff was injured during his walk from his house to the specific location of his work. Applicant sought and received workers' compensation benefits. Plaintiff then sought recovery against the State of California under premise liability for defective construction and failure to maintain. Defendant moved for summary judgment asserting the exclusive remedy afforded Plaintiff is workers' compensation. Defendant argued that under the "premises line" rule applicant was within the course and scope of employment at the time of injury. The "premise line" rule for the purpose of the "going and coming rule holds the employment relationship begins when the employee enters the employer's premises. . .after entry, injury is generally presumed compensable as arising in the course of employment." Plaintiff's counsel argued that the "premises line rule" did not apply, instead sought to apply the "Bunkhouse rule" which provides that "when an employee is injured while living on the employer's premises, the course of employment requirement in Lab. Code, § 3600, subd. (a), is satisfied if the employment contract of the employee contemplates, or the work necessity requires, the employee to reside on the employer's premises." Plaintiff argued that Wright was not required to live in the State-owned housing, and his employment contract did not contemplate he would do so. Plaintiff argued that a (1) the applied and presented triable issues of material fact which precluded summary judgment; (2) that the lease agreement demonstrated that the State did not intend the Plaintiff to be covered by workers' compensation while residing in the residence; and (3) that no double recovery would occur as the State would be entitled to full credit for overlap between any tort recovery and workers' compensation previously received. The Trial Judge granted Defendant's motion for summary judgment from which Plaintiff sought appeal.

> *"Vaught v. State of California (2007) 157 Cal.App.4th 1538, 1545 [69 Cal. Rptr. 3d 605] (Vaught), which summarized the bunkhouse rule as follows: "When an employee is injured while living on the employer's premises, the course of employment requirement in [Labor Code] section 3600, subdivision (a), is satisfied if the employment contract of the employee contemplates, or the work necessity requires, the employee to reside on the employer's premises." Here, by contrast, Wright was not required to live in the State-owned housing, and his employment contract did not contemplate he would do so. Thus, he contended, he did not fall within the bunkhouse rule and, consequently, was not injured in the course of employment*
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> *". . .injuries sustained by an employee while commuting to and from work are not compensable under the workers' compensation system. This rule, known as the going and coming rule, bars workers' compensation injuries that occur "during a local commute enroute to a fixed place of business at fixed hours in the absence of special or extraordinary circumstances. . ."*

In reversing the trial court the Court of Appeal first noted the liberal construction requirements under LC 3202 played a role in the State accepting liability for the workers' compensation claim. The Court also noted that the applicant paid fair market value for the house, and the lease was purely voluntary on the part of the plaintiff. In the end the Court found a triable issue as to application of the bunkhouse rule.

California Department of Corrections and Rehabilitation v. WCAB (DeCourcey) (2012, 4th Appellate District) 77 CCC 767

Applicant was severely injured as a result of a motor vehicle accident which occurred on his way to a facility in a relatively remote area. The facility was staffed by nine officers, three per shift, three shifts per day. The officers regularly swapped shifts to ensure full staffing and avoid overtime costs. The officers were permitted to swap shifts without first obtaining approval. The accident occurred while applicant was on his way to work a "swapped" shift. The WCAB found that the "special mission" exception to the "going and coming" rule applied and therefore the accident and resulting injuries were compensable.

On review, the Court of Appeal discussed at length that had the shift "swap" not occurred, and the accident occurred to the originally scheduled employee, that event would not have been compensable. Further, the Court noted that the "special mission" exception to the "going and coming" rule requires proof that the underlying activity was (1) special, that is extraordinary in

relation to the employee's routine duties; (2) within the course of the employee's employment, and (3) the activity was undertaken at the express or implied request of the employer and for the employer's benefit. Although the Court found that shift swapping was clearly to the benefit to the employer, the Court could not conclude that applicant was rendering extraordinary service to the employer noting that shifts rotated every three months, that shift swapping was a generally accepted practice, and was consistent with the customary manner in which the facility operated, Further, the duties performed were routine and the location of work the same. Therefore, the "special mission" exception did not apply and the Order of the WCAB was annulled.

Choi v. WCAB, (2010, Second Appellate District) 75 CCC 750. (Writ Denied.)

> *"... The special mission exception requires three factors to be met, (1) the activity is extraordinary in relation to the employee's routine duties, (2) the activity is within the course of the employee's employment, and (3) the activity was undertaken at the express or implied request of the employer and for the employer's benefit.".*
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> *Choi v. WCAB, 75 CCC at pg. 752, citing City of L.A. v. WCAB (2007) 72 CCC 1463, 1467.*

Applicant was directed by his boss to drop off payroll checks to several employees. Prior to delivering the last check the applicant met a friend for dinner. After dinner the applicant's boss called and requested the applicant wait in the parking lot so that the last employee could pick up his check. After waiting and delivering the final check, the applicant was rear-ended while driving home. Applicant filed a claim for injuries sustained as a result of the accident on an industrial basis.

> *But see also, Lobo v. Tamco (2010) 75 CCC 286 where "going and coming" rule applied as there no evidence of compensated commute; and see Zoucha v. Liberty Mutual Insurance (2010) 38 CWCR 64 (WCAB Panel) within course and scope where employee was required to use personnel vehicle to go between job sites. Both decision included tools and other facts which seemed to benefit the employer at time of injury.*

WCJ found that the applicant's injuries were not compensable as precluded by the "going and coming" rule. Applicant filed a Petition for Reconsideration contending that his injury fell within the special mission exception to the "going and coming" rule. Applicant argued that his injury occurred within a reasonable time and space from the employment so as to render the injury compensable.

WCAB denied reconsideration, agreeing with the WCJ that applicant has not met his burden of establishing that he was on a special mission. The applicant had been injured while he was driving home after his work day was over. The applicant's injury was not compensable under the "going and coming" rule as the employee's special mission certainly ended once the last check was delivered. At the point when the applicant left the parking lot of the restaurant he fell squarely within the "going and coming" rule. Writ denied.

Going and Coming Rule

Exceptions:
Special Missions, Compensated Commute, and Commercial Travelers Rule.

The following represents a summary of some of the most recent case decisions issued by the California Supreme Court, California Court of Appeal, and the Workers' Compensation Appeals Board, which the Editor believes will have significance in connection with the practice of Workers' Compensation law and related to the "Going and Coming Rule". The summaries are only the Editor's interpretation, analysis, and legal opinion, and the reader is encouraged to review the original case decision in its entirety.

Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision. WCAB panel decisions are citable authority, particularly on issues of contemporaneous administrative construction of statutory language [see Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236]. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]. Panel Decisions which are designated as "Significant" by the WCAB, while not binding in workers compensation proceedings, are intended to augment the body of binding appellate court and en banc decision and is limited to panel decisions involving (1) issue(s) of general interest to the workers' compensation community, especially a new or recurring issue about which there is little or no published case law; and (2) upon agreement en banc of all commissioners on the significance and importance of the issues presented and resulting decisions. (See Elliot v. WCAB (2010) 182 Cal.App. 4th 355, 361, fn. 3, 75 CCC 81; Larch v. WCAB (1999) 64 CCC 1098, 1099-1100 (writ denied).

Yu Qin Zhu v. Department of Social Services IHSS, 2016 Cal. Wrk. Comp. P.D. LEXIS 513 (BPD)

Applicant, a caregiver with IHSS, on her way to a second client, travelling by bicycle, was hit by a motor vehicle at approximately noon. At trial the Applicant testified that she was hired by the State of California after applying to work as a caretaker in 2003; Was paid by the State of California once every two weeks, and no money or salary from the clients for whom she worked. She did not stop to have lunch between clients. On the date of the accident, she would eat her lunch at the house of the second patient before she started working. Applicant was not compensated for her transportation time between the clients' houses. Defendant denied the claim AOE/COE. The WCJ found for the applicant. Defendant sought reconsideration.

In reversing the WCJ by split panel decision, the WCAB focus on the traditional tests of "control and right to control" and "benefit conferred". The WCAB first noted the existence of a "dual employment relationship" with applicant employed by both the State of Californian and the clients for which the applicant was a caregiver. Discussing but distinguishing *Hinojosa v. Workers' Comp. Appeals Bd.* (1972) 8 Cal.3d. 150, 158–159 [37 Cal.Comp.Cases 734] (*"Hinojosa"*)) and *Smith v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 814 [33

See also, Rowe v. Road Dog Drivers, LLC, Insurance Company of the State of Pennsylvania, 2016 Cal. Wrk. Comp. P.D. LEXIS 622 (BPD), holding that motor vehicle accident not barred by "Going and Coming Rule" where applicant's travel to co-worker's home was not ordinary commute to fixed place of business, was undertaken for employer's benefit and to save employer costs of reimbursing two separate trips; Discussion on 'Special Mission' exception to 'Going and Coming'. Rowe v. Road Dog Drivers, LLC, Insurance Company of the State of Pennsylvania, 2016 Cal. Wrk. Comp. P.D. LEXIS 622 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.157; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.05[3][d][iv], [8]. Sullivan on Comp, Section 5.48, Special Mission – Special Errand.]

See also, Carrillo v. LLG Corporation, dba Fresco II, Employers Compensation Insurance Company, 2016 Cal. Wrk. Comp. P.D. LEXIS 658 (BPD), holding that injury as result of MVA not compensable where occurring after consumption of alcohol when applicant returned to his workplace following end of his shift, and applicant contended that basis for liability was permissive use of alcohol condoned by employer such that alcohol use became "customary incident to employment," held that where drinking occurred after his shift was completed, at restaurant/bar open to public, was not employer condoned drinking on job, applicant was not called back to work, owner not present, and no special meeting, event or party, nor performing service for employer, and no reasonable belief per Labor Code § 3600(a)(9) and Ezzy v. W.C.A.B. (1983) 146 Cal. App. 3d 252, 194 Cal. Rptr. 90, 48 Cal. Comp. Cases 611. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.20, 4.25; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, §§ 10.03[1], 10.05[6]. Sullivan on Comp, Section 5.22, Intoxication] See also, Hansen v. Par Electrical Contractor, Inc. 2016 Cal.Wrk.Comp. P.D. LEXIS 661 holding evidence of acute alcohol intoxication held substantial and proximate cause of accident as and when it occurred and bar to recovery.

Cal.Comp.Cases 771], wrote "this case is different from *Hinojosa* and *Smith*. Here, applicant suffered injury while commuting between the homes of clients whom applicant had selected and with whom she had chosen her work hours. Unlike the ranch workers in *Hinojosa*, applicant chose her own clients and work locations and hours. In essence, applicant merely used defendant to obtain client referrals. Applicant also chose the means of transport to her clients. As with any employee who drives to work or takes some other form of transit in a "normal" commute, in this case it did not matter to defendant how applicant got to work. Applicant's travel to her clients' houses by bicycle was for her own convenience and benefit. This case also is different from *Smith* because defendant did not require applicant to have a car or bicycle. Again, there was an implied requirement that applicant get herself to work, but this is no different from the vast number of employers who implicitly require their employees to transport themselves to work by whatever means of conveyance they choose. In the end the WCAB was not persuaded that this case comes within any exception to the going and coming rule as the defendant did not have control over applicant's commute, and the benefit to defendant as a result of applicant's self-transport was indirect and minimal compared to the ease and convenience realized by applicant.

On Writ of Review, the Court of Appeal reversed holding that applicant within course and scope of employment during bicycle commute between two clients' homes, the employer knew applicant provided care to more than one home each day, and employer impliedly required the applicant to provide her own transportation which provided a direct benefit to employer, and was thus 'part and parcel' of job. Zhu v. Workers' Compensation Appeals Board (2nd Appellate District) 12 Cal. App. 5th 1031; 82 Cal. Comp. Cases 692; 2017 Cal. App. LEXIS 564; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.155[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.05[3][d][ii]. Sullivan on Comp, Section 5.45, Transportation Controlled by Employer]

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"Vaught v. State of California (2007) 157 Cal.App.4th 1538, 1545 [69 Cal. Rptr. 3d 605] (Vaught), which summarized the bunkhouse rule as follows: "When an employee is injured while living on the employer's premises, the course of employment requirement in [Labor Code] section 3600, subdivision (a), is satisfied if the employment contract of the employee contemplates, or the work necessity requires, the employee to reside on the employer's premises." Here, by contrast, Wright was not required to live in the State-owned housing, and his employment contract did not contemplate he would do so. Thus, he contended, he did not fall within the bunkhouse rule and, consequently, was not injured in the course of employment

"...injuries sustained by an employee while commuting to and from work are not compensable under the workers' compensation system. This rule, known as the going and coming rule, bars workers' compensation injuries that occur "during a local commute enroute to a fixed place of business at fixed hours in the absence of special or extraordinary circumstances..."

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Applicant/Plaintiff was a correctional officer at San Quentin Prison, and lived on the prison premises leasing a house from his employer, the State of California. The Plaintiff was injured during his walk from his house to the specific location of his work. Applicant/plaintiff sought and received workers' compensation benefits. Plaintiff/applicant then sought recovery against the State of California under premise liability for defective construction and failure to maintain. Defendant moved for summary judgment asserting the exclusive remedy afforded Plaintiff is workers' compensation. Defendant argued that under the "premises line" rule applicant was within the course and scope of employment at the time of injury. The "premise line" rule for the purpose of the "going and coming rule holds the employment relationship begins when the employee enters the employer's premises. . .after entry, injury is generally presumed compensable as arising in the course of employment." Plaintiff's counsel argued that the "premises line rule" did not apply, instead sought to apply the "Bunkhouse rule" which provides that "when an employee is injured while living on the employer's premises, the course of employment requirement in Lab. Code, § 3600, subd. (a), is satisfied if the employment contract of the employee contemplates, or the work necessity requires, the employee to reside on the employer's premises." Plaintiff argued that Wright was not required to live in the State-owned housing, and his employment contract did not contemplate he would do so. Plaintiff argued that a (1) the applied and presented triable issues of material fact which precluded summary judgment; (2) that the lease agreement demonstrated that the State did not intend the Plaintiff to be covered by workers' compensation while residing in the residence; and (3) that no double recovery would occur as the State would be entitled to full credit for overlap between any tort recovery and workers' compensation previously received. The Trial Judge granted Defendant's motion for summary judgment from which Plaintiff sought appeal.

See also, Lantz v. WCAB 79 CCC 488, which provided an excellent discussion on the exceptions to the "going and coming" rule which include "special mission exception" which requires that the activity (1) be within course of employee's employment, (2) undertaken at the express or implied request of the employer and for the employer's benefit; and (3) that the activity is extraordinary in relation to the employee's routine duties.

"'The requirement of Labor Code section 3600 is twofold. On the one hand, the injury must occur "in the course of the employment." This concept "ordinarily refers to the time, place, and circumstances under which the injury occurs." 'On the other hand, the statute requires that an injury "arise out of" the employment ... It has long been settled that for an injury to "arise out of the employment" it must "occur by reason of a condition or incident of [the] employment. ... " [Citation.] That is, the employment and the injury must be linked in some causal fashion.'" (LaTourette v. Workers' Comp. Appeals Bd. (1998) 17 Cal.4th 644, 651 [72 Cal.Rptr.2d 217, 951 P.2d 1184] (LaTourette), quoting Maher v. Workers' Comp. Appeals Bd. (1983) 33 Cal.3d 729, 733–734 [190 Cal.Rptr. 904, 661 P.2d 1058] (Maher).) The applicant for workers' compensation benefits has the burden of establishing the 'reasonable probability of industrial causation..."

".....The question here is the required nature and strength of the causal link between the industrial injury and death. Tort law and the workers' compensation system are significantly different. One result of the difference is the role and application of causation principles. "[A]lthough Labor Code section 3600 refers to 'proximate cause,' its definition in workers' compensation cases is not identical to that found in the common law of torts. [Citation.] 'In fact, the proximate cause requirement of Labor Code section 3600 has been interpreted as merely elaborating on the general requirement that the injury arise out of the employment.' [Citation.] The danger from which the employee's injury results must be one to which he was exposed in his employment. [Citation.] '"All that is required is that the employment be one of the contributing causes without which the injury would not have occurred."' [Citation.]" (LaTourette, supra, 17 Cal.4th at p. 651, fn. 1, quoting Maher, supra, 33 Cal.3d at p. 734, fn. 3.)

... Legal causation in tort law has traditionally required two elements: cause in fact and proximate cause. "An act is a cause in fact if it is a necessary antecedent of an event." (PPG Industries, Inc. v. Transamerica Ins. Co. (1999) 20 Cal.4th 310, 315 [84 Cal.Rptr.2d 455, 975 P.2d 652].) This has traditionally been expressed as the "'but for'" test, i.e., if the injury "would have happened anyway, whether the defendant was negligent or not, then his or her negligence was not a cause in fact." (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1185, p. 552; see Viner v. Sweet (2003) 30 Cal.4th 1232, 1239–1240 [135 Cal.Rptr.2d 629, 70 P.3d 1046].) "California has definitively adopted the substantial factor test of the Restatement Second of Torts for cause-in-fact determinations. [Citation.] Under that standard, a cause in fact is something that is a substantial factor in bringing about the injury." (Rutherford v. Owens-Illinois, Inc. (1997) 16 Cal.4th 953, 968–969 [67 Cal.Rptr.2d 16, 941 P.2d 1203].) "[T]he 'substantial factor' test subsumes the 'but for' test." (Mitchell v. Gonzales (1991) 54 Cal.3d 1041, 1052 [1 Cal.Rptr.2d 913, 819 P.2d 872]; see Viner, at p. 1240.) "'The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical.' [Citation.] Thus, 'a force which plays only an "infinitesimal" or "theoretical" part in bringing about injury, damage, or loss is not a substantial factor' [citation], but a very minor force that does cause harm is a substantial factor [citation]. This rule honors the principle of comparative fault." (Bockrath v. Aldrich Chemical Co. (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398]; see 6 Witkin, Summary of Cal. Law, supra, Torts, § 1193, p. 568.)

In reversing the trial court, the Court of Appeal first noted the liberal construction requirements under LC 3202 played a role in the State accepting liability for the workers' compensation claim. The Court also noted that the applicant paid fair market value for the house, and the lease was purely voluntary on the part of the plaintiff. In the end the Court found a triable issue as to application of the bunkhouse rule.

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Applicant was severely injured as a result of a motor vehicle accident which occurred on his way to a facility in a relatively remote area. The facility was staffed by nine officers, three per shift, three shifts per day. The officers regularly swapped shifts to ensure full staffing and avoid overtime costs. The officers were permitted to swap shifts without first obtaining approval. The accident occurred while applicant was on his way to work a "swapped" shift. The WCAB found that the "special mission" exception to the "going and coming" rule applied and therefore the accident and resulting injuries were compensable.

On review, the Court of Appeal discussed at length that had the shift "swap" not occurred, and the accident occurred to the originally scheduled employee, that event would not have been compensable. Further, the Court noted that the "special mission" exception to the "going and coming" rule requires proof that the underlying activity was (1) special, that is extraordinary in relation to the employee's routine duties; (2) within the course of the employee's employment, and (3) the activity was undertaken at the express or implied request of the employer and for the employer's benefit. Although the Court found that shift swapping was clearly to the benefit to the employer, the Court could not conclude that applicant was rendering extraordinary service to the employer noting that shifts rotated every three months, that shift swapping was a generally accepted practice, and was consistent with the customary manner in which the facility operated, Further, the duties performed were routine and the location of work the same. Therefore, the "special mission" exception did not apply and the Order of the WCAB was annulled.

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Applicant was directed by his boss to drop off payroll checks to several employees. Prior to delivering the last check the applicant met a friend for dinner. After dinner the applicant's boss called and requested the applicant wait in the parking lot so that the last employee could pick up his check. After waiting and delivering the final check, the applicant was rear-ended while driving home. Applicant filed a claim for injuries sustained as a result of the accident on an industrial basis.

> *". . . The special mission exception requires three factors to be met, (1) the activity is extraordinary in relation to the employee's routine duties, (2) the activity is within the course of the employee's employment, and (3) the activity was undertaken at the express or implied request of the employer and for the employer's benefit.".*
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WCJ found that the applicant's injuries were not compensable as precluded by the "going and coming" rule. Applicant filed a Petition for Reconsideration contending that his injury fell within the special mission exception to the "going and coming" rule. Applicant argued that his injury occurred within a reasonable time and space from the employment so as to render the injury compensable.

WCAB denied reconsideration, agreeing with the WCJ that applicant has not met his burden of establishing that he was on a special mission. The applicant had been injured while he was driving home after his work day was over. The applicant's injury was not compensable under the "going and coming" rule as the employee's special mission certainly ended once the last check was delivered. At the point when the applicant left the parking lot of the restaurant he fell squarely within the "going and coming" rule. Writ denied.

American Home Assurance v. WCAB (Wuertz) (2009, 5th Appellate District) 74 CCC 1015 (Not Certified for Publication)

Applicant was employed as a printing press operator. A special meeting was called by the employer which resulted in shutting down the entire production line. During the commute to this meeting at the employer's worksite, the applicant was involved in a motorcycle accident. **Meetings** such as these occurred only a few times each year, and generally resulted in a complete shut down of the plant. Defendant denied the claim as occurring within the "going and coming" rule as part of applicants regular commute. Applicant asserted that the injury occurred while applicant was engaged in "a special mission" for the employer, an exception to the "going and coming rule". The WCJ, and WCAB on reconsideration, both concluded the applicant was on a "special mission" and therefore the injury was compensable. Defendant sought review.

Editor's comments: This case was reported upon merely because it was discussed at length during the 2010 winter CAAA conference. It is this Editor's belief that this decision may well reflect the seriousness of the applicant's injuries more so that an accurate interpretation and application of the law involving the "special missions" exception to the "going and coming rule". Please note that this decision was not certified for publication and therefore not citable.
Although rejected, a better discussion of what is required to establish a "special mission" exception to the "going and coming rule" is contained in City of San Deigo v. WCAB (Molnar) (2001) 66 CCC 692 which involved an auto accident which occurred when a police officer was driving from his home to court to testify. Determined not to fall within the "special missions" exception.

See also, Esquivel v. WCAB (2009) 74 CCC 1213, 37 CWCR 245 in which injury was determined not to be compensable where the accident occurred while applicant was on her way to a PT session for the treatment of an industrial injury, when accident occurred just a few miles from applicant's mother's home which was located over one-hundred and forty miles from the PT's office. Found to have occurred "outside a reasonable geographic area".

The Court of Appeal upheld the Board determination that the injury was compensable as the accident occurred while the applicant was engaged in a "special mission" at the time of the accident. The Court discussed factors which should be considered in determining whether the applicant was engaged in a "special mission". The Court listed factors to include (1) whether the activity was extraordinary in relation to the employee's routine duties; (2) whether the activities are within the course of employee's employment; and (3) whether the act undertaken is at the expressed or implied request of the employer and for the employer's benefit; (4) whether the activity was not an integral and routine part of the applicant's job duties. The Court ultimately concluded that the meeting was not an integral and routine part of the applicant's job duties and therefore what may have otherwise been a regular commute, was converted into a "special mission" exception to the "going and coming rule".

American Chem-Tech v. WCAB (Delatorre) (2003 4th Appellate District) 68 CCC 1033, 31 CWCR 201.

Decedent was killed at 4:00 Saturday morning in Las Vegas when the van he was driving crashed. Decedent was accompanied by three teenage men, none of whom apparently worked with the decedent. The van was owned by his employer. Evidence was conflicting as to whether the decedent, whose family lived in Ontario, was permanently or temporarily assigned to work in Las Vegas. Decedent was living in a motel paid by his employer at the time of his death. The WCJ found for applicant applying the "commercial travelers" rule.

Although the WCAB upheld the WCJ, the Court of Appeal reversed and remanded. The Court found the "commercial traveler" rule to apply, but reaffirmed even for a "commercial traveler", an injury is not compensable if the employee's activities amounted to a purely personal undertaking". Stated alternatively, a causal connection between the employment and injury is required. In this case, the Court found no evidence that the decedent was engaging in his employer's business at the time of his death.

". . .The commercial traveler rule provides that when an employee is temporarily assigned to a work site away from home, he is considered to be in the course of his employment at all times during the assignment. . .even for a "commercial traveler" an injury is not compensable if the employee's activities amounted to a purely personal undertaking. . .in the case of a commercial traveler, workers' compensation coverage applies to the travel itself and also to other aspects of the trip reasonably necessary for the sustenance, comfort, and safety of the employee. . . It does not, however, apply to any and all activities. Personal activity not contemplated by the employer may constitute a material departure from the course of employment. . .it was [applicant's] burden to provide at least some evidence that Decedent was engaged in Employer's business when he began his fatal journey. No such competent evidence was introduced, and the award cannot stand. . .

American Chem-Tech v. WCAB (Delatorre) 68 CCC pgs. 1038-1040.

See also, Swift Transportation v. WCAB (Coon) 79 CCC 1576, 2014 Cal.Wrk.Comp. LEXIS 168, where long haul truck driver beaten by unknown assailant while on dinner break held within AOE/COE under "commercial travelers doctrine" and "personal comfort doctrine".

Editor's Comments: This opinion has been criticized in that it seems to require that the applicant prove that the death arose out of the employment, yet in circumstances where the actual cause of death is unknown and the decedent was brought to the place of death by his employment, it is presumed to have arisen out of employment, shifting the burden to defendant to show it did not. (See Clemmens v. WCAB (1968) 33 CCC 186). Further, it might have been argued in this case that the "incident to employment" requirement was satisfied by the fact that the decedent was authorized to use the van, and the condition was incident to the employment and therefore arose out of the employment. (See Employers Mutual Liability Ins. v. IAC (Gideon) (1953) 41 Cal.2nd 676, 18 CCC 286).

2018 Cal. Wrk. Comp. P.D. LEXIS 314

Copy Citation

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion June 1, 2018

W.C.A.B. No. ADJ10148520—WCAB Panel: Commissioner Razo, Deputy Commissioner Schmitz, Commissioner Lowe (participating, but not signing)

Reporter
2018 Cal. Wrk. Comp. P.D. LEXIS 314 *

Fernando Lopez Chang, Applicant v. JLS Environmental Services, ACE American Insurance Company, adjusted by Barrett Business Bureau, Defendants

Status:

CAUTION: This decision has not been designated a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236]. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Disposition: [*1]

Reconsideration is *granted*, and the July 25, 2017 Findings and Order is *affirmed*, except that Finding of Fact number 1 is *amended*.

Core Terms

terminate, notice, workers' compensation, injury claim, preponderance of evidence, cumulative trauma, shoulder,

layoff, reconsider, panel decision, right shoulder, neck, date of injury, credible, shin

Headnotes

HEADNOTES

Post-Termination Claims-Exceptions-WCAB affirmed WCJ's finding that applicant plasterer's claim for 8/22/2015 right shoulder injury was barred under Labor Code § 3600(a)(10) based on applicant's failure to report claim until after his termination from employment, when preponderance of evidence did not demonstrate that defendant had notice of applicant's claimed injury prior to his termination nor did applicant's medical records existing prior to his termination contain evidence of claimed injury for purpose of applying exception to post-termination bar, and WCAB found that even if applicant claimed cumulative trauma, preponderance of evidence did not demonstrate that date of injury, as specified in Labor Code § 5412, was subsequent to date of applicant's termination, and that, despite applicant's assertion, nothing in language of Labor Code § 3600(a)(10) indicates that post-termination bar is inapplicable where claimed injury is reported "at the first opportunity." [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 11.02[3][a], **[*2]** 21.03[1][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.03[7].]

Counsel

For applicant—Hodson & Mullin

For defendants—Roy Park Law Firm

Opinion By: Commissioner Jose H. Razo

Opinion

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board previously granted reconsideration to allow further study of the factual and legal issues. This is our Decision After Reconsideration.

In the Findings and Order of July 25, 2017, the workers' compensation judge (WCJ) found that applicant, while employed by JLS Environmental Services as a plasterer on August 22, 2015, sustained industrial injury to his right shoulder. In addition, the WCJ found that applicant did not report the injury to his employer until after he was terminated on September 25, 2015, and that because the injury was reported after his termination, applicant is barred from receiving compensation pursuant to Labor Code section 3600(a)(10).

Applicant filed a timely petition for reconsideration of the WCJ's decision. Applicant contended that he did report the claimed injury to his supervisor before his termination, and that the WCJ erred in applying section 3600(a)(10) to bar compensation because applicant did report his injury "at the first **[*3]** opportunity."

Defendant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

Based on our review of the record and applicable law, we will affirm the WCJ's decision, but with the injury date amended to September 22, 2015. [1]

We begin by noting that Labor Code section 3600(a)(10) provides, in relevant part, as follows:

(10) Except for psychiatric injuries governed by subdivision (e) of Section 3208.3, where 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:

(A) The employer has notice of the injury, as provided under Chapter 2 (commencing with Section **[*4]** 5400), prior to the notice of termination or layoff.

(B) The employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury.

(C) The date of injury, as specified in Section 5411, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.

(D) The date of injury, as specified in Section 5412, is subsequent to the date of the notice of termination or layoff."

In this case, applicant first contends that condition (A), above, saves his claim from being barred under the statute. Applicant alleges, at page 2:1–2 of his petition herein, that he tried to report his injury to his supervisor the day before the employer terminated him, but the supervisor ignored him. However, we agree with the WCJ that the preponderance of evidence does not lend credence to this allegation.

At trial, applicant unequivocally testified upon cross-examination that although he "worked with his foreman, Elpidio, on the days of September 22 to September 24[,] [h]e did not report any injury to Elpidio at that time because he was deciding to wait to see how he felt, and he wanted to preserve his job." (Summary **[*5]** of Evidence, 6/14/17, p. 8:3–5.) Applicant also testified he did not report any injury, even though he "did have a previous workers' compensation claim and knew the procedures." (Summary of Evidence, 6/14/17, p. 6:12–13.)

We also agree that in order to qualify for condition (A), and thereby save a post-termination claim from being barred, the employer must have notice of the employee's claimed injury before the employee's termination, not at the same time. Furthermore, we find no basis to second-guess the WCJ's factual determination that applicant reported the injury after he was terminated, not at the same time. On this issue, we adopt and incorporate the following discussion from the WCJ's Report:

Applicant's first contention is that his reporting of the injury was contemporaneous with his termination such that his claim should not be barred by California Labor Code section 3600, subdivision (a)(10). That contention is not borne out by substantial evidence. Even applicant's own testimony indicates he reported the injury right after his termination. That evidence is backed up further by the testimony of Mr. Lesher, who was very definite that applicant reported the injury after his **[*6]** termination. Mr. Lesher is considered a particularly credible witness because he was certain of facts and his testimony was uncontradicted and unimpeached. It is improper to reject such testimony as lacking substantial evidentiary value (*LeVesque v. WCAB* (1970) 1 Cal.3d 627, 639, 35 Cal.Comp.Cases 16, *Lamb v. WCAB*(1974) 11 Cal.3d 274, 283, 39 Cal.Comp.Cases 310). In contrast, applicant's testimony was not as credible given contradictions between deposition testimony and trial testimony (see MOH, p. 7, lines 17–24). The WCALJ's credibility determination [ordinarily should be] accorded great deference as he was in the best position to make such a determination, having had a chance to observe the witnesses and compare their testimony with their manner on the stand (*Bracken v. WCAB* (1989) 214 Cal.App.3d 246, 256, 35 Cal.Comp.Cases). Reversal of the findings of fact based on credibility should take place only in the face of contrary evidence of considerable substantiality (*Garza v. WCAB*(1970) 3 Cal.3d 312, 319, 35 Cal.Comp.Cases 500). Thus, factually there is not substantial evidence to support reversal on the grounds that the injury report was contemporaneous with the termination.

Applicant's **[*7]** second contention is that it is unjust to bar his claim under section 3600(a)(10), because he reported his claimed injury of September 22, 2015 "at the first opportunity."

As a matter of statutory interpretation, we disagree because nothing in the language of section 3600(a)(10) indicates that it is inapplicable where the claimed injury is reported "at the first opportunity." 2 Furthermore, we explained above that the preponderance of evidence does not support applicant's allegation that he reported his claimed injury "at the first opportunity." Applicant had three working days to report the injury to his supervisor, but applicant testified upon cross-examination that he failed to do so. In addition, applicant testified that his employer called him at home on September 24, 2015, telling him to go to the employer's office the next day rather than the job site. (Summary of Evidence, 6/14/17, p. 6:13–17.) This phone call was another opportunity for applicant to report the injury before his termination, but he did not take it.

On page seven of his petition for reconsideration, applicant seems to raise a red herring, curiously referring to his claimed injury as an "overuse" injury that "took two days to manifest." Although the WCJ found applicant not to be a credible trial witness, some of his testimony does suggest he had right shoulder problems starting on September 22, 2015, and that they continued, intermittently, through September 24, 2015.

We also note that joint exhibit F shows Dr. Lang, the panel **[*9]** Qualified Medical Evaluator (PQME), noted in his report dated March 23, 2016 (p. 31) that applicant had seen Dr. Shin for neck, thoracic and back pain on August 31, 2015. This was three weeks before applicant's claim of specific injury on September 22, 2015. Although Dr. Shin evidently did not see applicant for his right shoulder on August 31, 2015, Dr. Lang stated at page 33 of his March 23, 2016 report that "cumulative trauma is going to have to be considered with Mr. Lopez-Chang's shoulder." Later, in a comprehensive follow-up evaluation dated February 17, 2017 (p. 9), Dr. Lang discussed the possibility that applicant had sustained a cumulative trauma injury:

[Applicant] certainly was having three months of indication of having significant shoulder function prior to this injury. It is probable the injury does have a cumulative trauma component to it, considering the number of years he has done plastering, certainly the type of activity with overhead use and constant movement and lifting that would place definite stress on the shoulder.

The only possible way of getting additional information would be to actually see if Dr. Shin can provide more information as to his overall condition, **[*10]** whether the shoulder seemed to be a problem along with his neck. Often, the neck problems blend in with shoulder problems but he does have excellent results from his neck surgery.

Certainly, the records show that he was receiving significant pain medication by Dr. Shin prior to this September 22, 2015, incident. Even though there had been little note of the shoulder prior to his neck surgery, Dr. Levin on two occasions did appear to show actual decrease shoulder range of motion bilaterally prior to this September 22, 2015 incident.

Considering the history, it is probable there is causation with the incident on September 22, 2015, significant cumulative trauma with the work that he did for a number of years and quite possibly with his previous significant industrial injury.

Even if the above evidence may provide a basis to amend applicant's specific injury claim to a cumulative trauma—a question we need not decide—applicant still does not avoid application of section 3600(a)(10) to bar his claim. This is because the preponderance of evidence does not support any of the relevant conditions - (A), (B) or (D) - that might save his claim.

In reference to condition (A), we have already explained **[*11]** our agreement with the WCJ's factual determination that the employer did not have notice of the claimed injury, whether specific or cumulative, prior to applicant's termination on September 25, 2015.

In reference to condition (B), applicant testified that he was hired by JLS on August 25, 2015, and we noted above that on August 31, 2015, applicant was seen by Dr. Shin for neck, thoracic and back pain. This is not evidence of the injury claimed herein, to applicant's right shoulder, right upper extremity, groin and right hip.

Finally, in reference to condition (D), applicant testified that he had a prior workers' compensation claim and "knew the procedures." Applicant's testimony also demonstrates he knew that the right shoulder problems that began on September 22, 2015 were caused by his job. Therefore, the date of cumulative trauma injury would not have extended past September 24, 2015, applicant's last day of work. 3 Thus, the preponderance of evidence does not establish that condition (D) applies, because the date of cumulative trauma injury, as specified in Labor Code section 5412, is not subsequent to the date of applicant's termination.

In summary, the preponderance of evidence does not demonstrate that the employer had notice of applicant's claimed injury of September 22, 2015 prior to his termination on September 25, 2015. Similarly, the preponderance of evidence does not demonstrate that applicant's medical records, existing prior to his termination, contain evidence of the claimed injury. Even if applicant had claimed a cumulative trauma injury, the preponderance of evidence likewise does not demonstrate that the date of injury, as specified in section 5412, is subsequent to the date of applicant's termination. **[*13]** For these reasons, the injury claimed herein does not qualify for any statutory condition to avoid the bar on compensation of post-termination claims under section 3600(a)(10). Therefore, we will affirm the WCJ's decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order of July 25, 2017 is **AFFIRMED**, except that Finding of Fact number 1 is **AMENDED** to read as follows:

FINDINGS OF FACT

1. Applicant Fernando Lopez-Chang, while employed as a plasterer by JLS Environmental Services on September 22, 2015, sustained injury to his right shoulder arising out of and in the course of employment.

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Jose H. Razo

I concur,

Deputy Commissioner Anne Schmitz

Commissioner Deidra E. Lowe (participating, but not signing)

Footnotes

- 1↑

  The Minutes of (Trial) Hearing on June 14, 2017 show that applicant's claimed date of injury to his right shoulder, right upper extremity, groin and right hip is September 22, 2015, not August 22, 2015 as found by the WCJ. In our Decision After Reconsideration, we will amend the date of injury to the correct date, September 22, 2015.

- 2↑

  One Court of Appeal has stated that the purpose of section 3600(a)(10) is "to protect employers and insurers from spurious claims first filed by disgruntled employees **[*8]** after being fired or laid off. (*CJS Co. v. Workers' Comp. Appeals Bd. (Fong)* (1999) 74 Cal.App.4th 294 [64 Cal.Comp.Cases 954, 955], citing with approval *Mabe v. Mikes Trucking* (1998) 63 Cal.Comp.Cases 1394 (writ den.).) According to applicant's trial testimony herein, when he realized he was being terminated during the meeting with his employer on September 25, 2015, he

replied, "you are firing me because I told Elpidio that my arm was hurting and that's why you are firing me?" Then applicant refused to sign forms provided by the employer, and it appears he went to the emergency room at Sutter Roseville Hospital for medical treatment immediately after the meeting. (Summary of Evidence, 6/14/17, p. 6:20–25.)

- 3

For purposes of determining the date of **[*12]** a cumulative trauma injury under section 5412, "an applicant will not be charged with knowledge that his disability is job related without medical advice to that effect unless the nature of the disability and applicant's training, intelligence and qualifications are such that applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability." (*County of Riverside v. Workers' Comp. Appeals Bd. (Sylves)* (2017) 10 Cal.App.5th 119, 124–125 [82 Cal.Comp.Cases 301], quoting *City of Fresno v. Workers' Comp. Appeals Bd.* (1985) 163 Cal.App.3d 467, 473.)

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LEAMON PERKINS, *Applicant,* vs. DON L. KNOX; DLK CAPITAL, INC.; AMERICAN MODERN INSURANCE COMPANY, *Defendants.*	Case No. ADJ10183569 (Los Angeles District Office) OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendants seek reconsideration of the Findings and Orders issued on July 30, 2018 (F&O) by a workers' compensation administrative law judge (WCJ) wherein the WCJ found in pertinent part that: "1. APPLICANT . . . while employed at Long Beach, California sustained injury arising out of and in the course of said employment . . . [and] 2. At the time of injury, the Applicant was an employee of DON LUIS KNOX, an individual, and DLK CAPITAL, Inc., a corporation."

Defendants contend that: (1) the WCJ erroneously applied *Dynamex Operations West, Inc., v. Superior Court* (2018) 4 Cal.5th 903 [83 Cal.Comp.Cases 817] (*Dynamex*) to determine that applicant was an employee of defendants; and (2) under *S. G. Borello & Sons, Inc. v. Dept. of Ind. Relations* (1989) 48 Cal.3d 341[54 Cal.Comp.Cases 80] (*Borello*), the evidence establishes that applicant was an independent contractor.

We received an answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) on September 14, 2018. The Report recommends that the petition be denied. Alternatively, the Report recommends that the matter be returned to the trial level to develop the record based upon analysis of the factors set forth in *Borello*.

We have considered the allegations of the petition, the answer, and the contents of the Report. Based on our review of the record, and as discussed below, we will grant reconsideration, and as our

decision after reconsideration, we will rescind the F&O, substitute new Findings of Fact that defer the issue of employment and restate Findings 4 through 8, and return this matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

Applicant claims to have sustained injury to his head, neck, both upper extremities and both arms on September 11, 2015 while employed as a laborer/handyman by defendants. (Minutes of Hearing and Summary of Evidence, March 21, 2018, p. 2.) As relevant here, the parties raised the issue of employment. (*Id.*)

Trial was held on March 21, 2018 and June 13, 2018. The WCJ admitted into evidence two checks from defendant DLK Capital payable to applicant, applicant's recorded statement, and defendant Knox's recorded statement. (Joint Exhibit X, Check Dated 2 SEPT 2015; Joint Exhibit Y, Check Dated 18 SEPT 2015; Defendant American Modern's Exhibit A, RECORDED STATEMENT, 9 PAGES, DATED 6 OCT 2015; Defendant American Modern's Exhibit B, RECORDED STATEMENT, 3 PAGES, DATED 22 SEPT 2015.)

Applicant testified that he had worked as a laborer for defendant Knox for approximately one year before his injury. (Minutes of Hearing and Summary of Evidence, March 21, 2018, p. 3:16-17.) On the date of injury, applicant was engaged in demolition activity at defendants' Long Beach property when he was struck in the head by cedar wood and became unconscious. (*Id.*, p. 3:12-16.) Defendant Knox was in the business of purchasing and remodeling homes. (*Id.*, p. 4: 5-6.) Applicant did not participate in the purchasing of homes for remodeling and lacked any professional licenses. (*Id.*, p. 4:6-9.) Defendant Knox supplied applicant's tools, except for a hammer, screw driver, ladder and skill saw. (*Id.*, p. 6:17-18.) Applicant was paid $120 to $125 per day, sometimes in cash or by wire transfer from defendant Knox. (*Id.*, p. 5:15-22.)

Defendant Knox testified that he owns defendant DLK Capital and is engaged in the business of buying, rehabilitating and selling properties. (Minutes of Hearing and Summary of Evidence, June 13, 2018, p. 2:6-7.) Defendant DLK Capital owned the property on which applicant was injured. (*Id.*, pp. 2:8-10, 5:12.) Defendant Knox signed the checks admitted into evidence as payment for applicant's

work, but the September 2, 2015 check was issued on behalf of a third party for work unrelated to defendants' properties. (*Id.*, pp. 3:3-9, 5:12-19.)

In his Report, the WCJ stated:

> While the undersigned used the Dynamex test, one could argue the Borello factors for either side. With respect to factor (a) . . . it is difficult to say whether applicant had an independent handy man business or simply worked for KNOX/DLK.
> With respect to factor (b) the Applicant was definitely a general laborer and not a specialist but no one explained with evidence whether such work is usually supervised or not. . .
> The skill level in factor (c) is an argument for a finding of employment as applicant's services required no special skill.
> Factor (d) also militates in favor of Applicant as defendant provided most of the tools . . . and all of the work sites.
> Factor (e) also militates in favor of applicant as the Applicant's testimony that he worked for defendants from June or July 2014 to 11 September 2015 was more credible than the defendant's interpretation of the 02 September 2015 check. . . .
> With respect to factor (f) the defendant paid by the day, not by the job, which, again, favors the Applicant's argument . . .
> Factor (g) asks whether the work is part of the regular business of the principal. Here the defendant is in the regular business of flipping houses which necessarily includes demolition work. Factor (h) focuses on the intent of the parties. Here, the principal claims that he intended to create an independent contractor relationship. When asked what he believed the difference was he said if there is a W-2 that is employment, otherwise it is an independent contractor relationship. This is not persuasive evidence under factor (h.) . . .
> If Borello applies, the undersigned could either weigh the existing evidence using the above factors or develop the record on factors (a)(b) and (e.)
> . . . If Dynamex applies, the undersigned would find for the Applicant.
> (Report, pp. 4-6.)

By the F&O, the WCJ found that: (1) applicant, while employed at Long Beach, California, sustained injury arising out of and in the course of employment on September 11, 2015; (2) applicant was an employee of defendants at the time of injury; (3) applicant was not a household employee for purposes of Labor Code sections 3352(h) and 3354;[1] (4) applicant filed his claim fifty-six days after the date of injury; (5) there is no evidence that defendants served applicant with a claim form as required by section 5401(a), thus tolling the statute of limitations; (6) there is no evidence of prejudice to the defendant

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

shown per section 5403; (7) applicant timely filed his claim pursuant to sections 5400 through 5403; and (8) this is an interim award, and jurisdiction over the liens is reserved and the issue deferred. (F&O, pp. 1-2.) The WCJ ordered that: (1) the parties adjust or pay benefits to applicant; and (2) the parties and lien claimants not file a Declaration of Readiness regarding the liens until after a final decision in this matter. (F&O, p. 2.)

DISCUSSION

An "employee" is defined as "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed." (§ 3351.) Further, any person rendering service for another, other than as an independent contractor or other excluded classification, is presumed to be an employee. (See § 3357.) Once the person rendering service establishes a prima facie case of "employee" status, the burden shifts to the hirer to affirmatively prove that the worker is an independent contractor. (*Cristler v. Express Messenger Sys., Inc.* (2009) 171 Cal.App.4th 72, 84 [74 Cal.Comp.Cases 167] (*Cristler*); *Narayan v. EGL, Inc.* (2010) 616 F.3d 895, 900 [75 Cal.Comp.Cases 724] *(Narayan)*.) Thus, unless the hirer can demonstrate that the worker meets specific criteria to be considered an independent contractor, all workers are presumed to be employees.

Here, defendants argue that *Borello*, and not the more recent *Dynamex*, provides the applicable standard for determining applicant's employment or independent contractor status with respect to the requirement of an employer to provide workers' compensation insurance. The question presented in *Borello* was whether a cucumber grower, who had hired migratory workers to harvest its crop on the basis that the workers managed their own labor and shared in the profits of the harvested crop, was required to obtain workers' compensation coverage. The Court found that, although the grower purported to relinquish supervision of the harvest work, it retained overall control of the production and sale of the crop and, therefore, the migratory workers were employees entitled to workers' compensation coverage as a matter of law.

In deciding the case, the Court made clear that the hirer's degree of control over the details of the work is not the only factor to be considered in deciding whether a hiree is an employee or an independent

contractor. (*Borello, supra*, at p. 350.) Unlike the common law principles used to distinguish between employees and independent contractors, the policies behind the Workers' Compensation Act are not concerned with "an employer's liability for injuries caused by his employee." (*Borello, supra,* at p. 352.) Instead, they concern "which injuries to the employee should be insured against by the employer." (*Id.*) Accordingly, in addition to the "control" test, the question of employment status must be decided with deference to the "purposes of the protective legislation." (*Id.* at p. 353.) In this context, the Court observed that the control test cannot be applied rigidly and in isolation, and "secondary" indicia of an employment relationship should be considered:

> "Additional factors have been derived principally from the Restatement Second of Agency. These include (a) whether the one performing services is engaged in a distinct occupation or business (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision (c) the skill required in the particular occupation (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work (e) the length of time for which the services are to be performed (f) the method of payment, whether by the time or by the job (g) whether or not the work is a part of the regular business of the principal and (h) whether or not the parties believe they are creating the relationship of employer-employee." (*Id.*, at p. 351.)

The Court further stated that these factors "may often overlap those pertinent under the common law," that "[e]ach service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case," and "all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law." *(Borello, supra,* at pp. 354-355.)

By contrast, the issue presented in *Dynamex* was whether, in a wage and hour class action in which the plaintiffs alleged they had been misclassified as independent contractors when they should have been classified as employees, certification of the plaintiffs' class was to be based on the Industrial Welfare Commission (IWC) wage order definitions of 'employ' and 'employer' as construed in *Martinez v. Combs* (2010) 49 Cal.4th 35 [75 Cal.Comp.Cases 430], or instead, upon application of the factors in *Borello*. (*Dynamex, supra,* at pp. 941-942.) The Court held that a worker may be classified as an independent contractor only if the hirer can demonstrate that the worker: (a) is free from the control and

direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; (b) performs work that is outside the usual course of the hiring entity's business; and (c) is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. (*Id.*, at pp. 955–956.)

Significantly, the *Dynamex* Court stated that this "ABC" standard was to be applied only in one specific context: i.e., determination of the question of "whether workers should be classified as employees or independent contractors for purposes of California wage orders, which impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions." (*Id,.* at pp. 955, 913-914.) The Court also stated that it was not deciding the applicable standard for determining whether a worker is properly considered an employee or an independent contractor for claims arising out of obligations not governed by wage orders. (*Id.*, at pp. 915–16, fn. 5.) Since the *Dynamex* Court did not overturn the *Borello* standard for determining an applicant's employment status with respect to the requirement of providing workers' compensation benefits, and expressly limited the application of the ABC test to the determination of employment status with regard to wage orders, we conclude that the *Borello* standard applies here. Accordingly, the WCJ erred in applying the *Dynamex* standard to determine that applicant was employed by defendants.

Turning to defendants' contention that the evidence in the record establishes that applicant was an independent contractor, we agree with the WCJ that the record requires further development regarding the evidence necessary for analysis of the *Borello* factors. In particular, as noted by the WCJ in his Report, the record appears to be incomplete as to whether and to what extent applicant was independently engaged in a handyman/laborer business, applicant was subject to supervision in the tasks he performed, and applicant or defendants can present corroborative evidence in support of their respective contentions regarding the length of time applicant performed services for defendants. We will therefore order further development of the record as to the issue of whether applicant was an employee or an independent contractor. (See, e.g., *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924] (finding that the Appeals Board has the discretionary authority to develop the

record when appropriate to provide due process or fully adjudicate the issues); see also *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; §§ 5701, 5906.)

Accordingly, we will grant the Petition for Reconsideration, and as our Decision After Reconsideration, we will rescind the F&O, substitute new Findings of Fact that defer the issue of employment and restate Findings 4 through 8, and return this matter to the WCJ for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, that the Petition for Reconsideration of the Findings and Orders issued on July 30, 2018 be, and hereby is, **GRANTED.**

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Orders issued on July 30, 2018 are **RESCINDED,** and the following is **SUBSTITUTED** in their place:

FINDINGS OF FACT

1. Leamon Perkins, born 1 April 1979, while allegedly employed on September 11, 2015 as a laborer/handyman at Long Beach, California, claims to have sustained injury arising out of and in the course of employment to his head, neck, both upper extremities and both arms.

2. The issue of employment is deferred.

3. Applicant filed his claim fifty six days after the injury occurred.

4. There is no evidence that Defendants ever served Applicant with a claim form as required by Labor Code section 5401(a) thus tolling the statute of limitations under section 5400.

5. There is no evidence of prejudice to the defendant shown per Labor Code section 5403.

6. Applicant timely filed his claim under Labor Code sections 5400 – 5403.

7. The liens were bifurcated at trial. Jurisdiction over the liens is reserved and the issue deferred.

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IT IS FURTHER ORDERED THAT this matter is hereby **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

KATHERINE ZALEWSKI **CHAIR**

I CONCUR,

JOSE H. RAZO

CONCURRING, BUT NOT SIGNING

DEIDRA E. LOWE

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCT 23 2018

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

FENSTEN & GELBER
LEAMON PERKINS
LAW OFFICES OF MARVIN L. MATHIS

SRO/oo

Psychiatric Injuries:
Victims of Violent Acts/Catastrophic Injuries

Julius Young, Esq
Boxer & Gerson

Richard Jacobsmeyer, Esq
Shaw, Jacobsmeyer, Crain & Claffey

Compensable Consequence and Psychiatric Injuries Post SB-863

This presentation will discuss at length the impact which SB-863 and in particular LC 4660.1 will have on the Law of "Compensable Consequences" generally and psychiatric injuries specifically. The written material and lecture will include a thorough discussion of the law of "Compensable Consequence Injury v. Compensable Consequences of Injury", "Causation of Injury vs. Causation of Disability" including LC 4663 Apportionment to Causation, and the difference between a "temporary exacerbation" v. "permanent aggravation" for the purpose of determining the existence of a "compensable consequence" physical and psychiatric injury. The presentation will conclude with a thorough review and discussion of the application, and legal strategies for LC 4660.1 from both the defense and applicant's perspective.

Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236]. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]. Panel Decisions which are designated as "Significant" by the WCAB, while not binding in workers compensation proceedings, are intended to augment the body of binding appellate court and en banc decision and is limited to panel decisions involving (1) issue(s) of general interest to the workers' compensation community, especially a new or recurring issue about which there is little or no published case law; and (2) upon agreement en banc of all commissioners on the significance and importance of the issues presented and resulting decisions. (See Elliot v. WCAB (2010) 182 Cal.App. 4th 355, 361, fn. 3, 75 CCC 81; Larch v. WCAB (1999) 64 CCC 1098, 1099-1100 (writ denied).

I. Legal Concepts and Definitions

"COMPENSABLE CONSEQUENCE INJURY" occurs only from the result of (1) Non-Industrial Activities, Events, or Conditions or (2) from industrial medical treatment relating back to the original industrial injury. "Compensable Consequence Injuries" involves not only a potential entitlement to TD and Medical Treatment but also **PERMANENT DISABILTIY**. The careful practitioner must understand the difference between "compensable consequence injuries" and "compensable consequences of injury". While "compensable consequence injury" involves an analysis of entitlement to all benefits including PD, "compensable consequences of injury" is limited to the entitlement and scope of medical treatment and may extend periods of industrial TD, but does not include PD. *(See Laines v. WCAB (1975) 48 Cal.App.3rd 872, 40 CCC 365; Fitzpatrick v. Fid. & Cas. Co. (1936) 7 Cal. 2nd 230; The Emporium v. WCAB (Whitney) (1981) 46 CCC 417 (Writ Denied))*

Generally, in a "Compensable Consequence Injury" additional liability is created where it is established that an additional part of body or condition, not injured in the original injury, is found to be a "permanent aggravation" due to the industrial injury, i.e. without a return to pre-injury baseline. The classic examples for a "Compensable Consequence Injury" would be (1) an injury to alternate part of body; e.g injury to knee causing an altered gait leading to low back injury as a compensable consequence, or overuse of an uninjured part of body to compensate for injured part of body; or (2) where an otherwise non-industrial condition is created/caused and/or aggravated by an industrial injury; e.g. injury to back resulting in reduced activity, weight gain, leading to hypertension, or diabetes; Psychiatric disability and need for psychiatric treatment due to pain resulting from a physical industrial injury (Pre SB 863 *Only*), "catastrophic physical injury" (post SB 863, DOI on/after 1/1/13, LC 4660.1); and (3) where an otherwise non-industrial event gives rise to further injury; e.g. an auto or other accident on the way to or from medical treatment/examinations; further injury resulting from physical therapy, examinations or other modality of treatment; or further injury due to fall/twist from industrially caused instability or weakness. In this scenario a "compensable consequence injury" will be found to have occurred. (The reader of this article should

carefully consider the implications which the recent decision of *Hikida v. WCAB, Costco (2nd Appellate District) 12 Cal. App. 5th 1249; 219 Cal. Rptr. 3d 654; 82 Cal. Comp. Cases 679; 2017 Cal. App. LEXIS 572,* may have on the forgoing analysis.

"COMPENSABLE CONSEQUENCE OF INJURY" applies generally to that situation where a non-industrial condition is treated on an industrial basis increasing the defendant's scope and liability for **medical treatment** and thereby potentially extending the period of TD. In this situation, a non-industrial event/injury and resulting condition or pre-existing condition must be treated as part of the industrial treatment. The treatment is said to be a "compensable consequence of injury" as "reasonable and necessary to cure or relieve" pursuant to LC 4600. Please note that such treatment remains subject to the UR/IMR process. *(See Bell v. Samaritan Medical Clinic Inc. (1976) 60 Cal.App.3rd 486, 41 CCC 415; Interventional Pain Management et al. v. WCAB (Stratton) 66 CCC 1472 (Unpub. CA-2001); Grom v. Shasta Wood Products, SCIFW (2004) 69 CCC 1567, 2004 Cal.Wrk. Comp. LEXIS 379 (BPD).*

Classic examples of *"Compensable Consequence of Injury"* include treatment to stabilize or improve a pre-existing non-industrial medical condition such as hypertension, diabetes, or reduced obesity prior to an industrially required course of treatment such as a surgery. In this situation, the non-industrial condition would not be industrial, but the treatment would be provided on an industrial basis. In this scenario, the treatment and potential extension of TD would be a "compensable consequence of injury". Again, a permanent aggravation of a non-industrial condition could change a "compensable consequence of injury" into a "compensable consequence injury", which would potentially include an award of permanent disability.

"AGGRAVATION vs. EXACERBATION" and **"ACCELERATION"** are legal concepts related to the threshold issues in the analysis and determination of whether the event gave rise to a "compensable consequence injury". This issue is generally resolved on establishing "**PERMANENCY**"; i.e. whether there has been a "temporary exacerbation or permanent aggravation" of the condition and is generally demonstrated by the level or degree of treatment and resulting disability. This analysis will turn on whether or not the subject condition and related need for medical treatment or level of PD has returned to a pre-industrial injury baseline. As a general rule, a return to pre-injury baseline will not evidence permanency, but only a "temporary exacerbation" of the subject condition, and therefore will not constitute a "compensable consequence injury". Where the condition does not return to pre-injury baseline it will be said to have resulted in a "permanent aggravation" and therefore a "compensable consequence injury" is likely to have occurred.

Also under the discussion of **"aggravation"** of a pre-existing non-industrial condition due to the industrial injury or treatment, is the concept of injury due to **"acceleration"** of a non-industrial condition. Where the condition is progressive but the progression is "accelerated" by the industrial injury or related treatment, an injury by way of "acceleration" will have occurred. In this situation, the baseline which was progressing accelerates, i.e. results in a permanent progressive acceleration, permanent increase to the rate of worsening as a consequence of the industrial injury. *(See City of Gardena v. WCAB (Moreno) (2000, Second Appellate District) 65 CCC 714, 2000 CWC. Lexis 6348; Gamble v. WCAB (Buckalew) (1995, 3rd Appellate District) 60 CCC 160; California etc. Exchange v. Ind. Acc. Com. (1946) 76 Cal.App.2d 836, 840 [174 P.2d 680])*

"CAUSATION OF INJURY" is that threshold issue which defines the scope of the initial benefits, primarily involving NATURE AND EXTENT OF MEDICAL TREATMENT, and PERIOD OF TEMPORARY DISABILTIY. "Causation of Injury" is often broader than the scope of "Causation of Disability" since "Causation

The principles of "Causation of Injury vs. Causation of Disability" is discussed and explained at length in the following decisions: Grimaldo v. WCAB (2009, 2nd District Court of Appeal) 74 CCC 324, 37 CWCR 63, 2009 Cal. App. Unpub, LEXIS 2248 (Not Certified for Publication); Rolda v. Pitney Bowes (2001) 66 CCC 241 (En Banc); Sonoma State University v. WCAB (Hunton) (2006) 71 CCC 1059; Reyes v. Hart Plastering (2005) 70 CCC 223.

of Injury" may involve conditions and parts of body which, after completing treatment, may not produce any residual permanent disability. An industrial injury is established where an industrial event, activity or exposure contributes "something greater than zero", a "mere contribution". *(See, South Coast Framing, Inc. v. Workers' Comp. Appeals Bd. (2015) 61 Cal.4th 291 [188 Cal. Rptr. 3d 46, 349 P.3d 141]; Guerra v. WCAB (Porcini Inc.) (2016 2nd Appellate District) 246 Cal. App. 4th 1301; 201 Cal. Rptr. 3d 623; 81 Cal. Comp. Cases 324; 2016 Cal. App. Lexis 337.)*

"CAUSATION OF DISABILTY" deals with the principle of "Direct Causation" of disability, i.e. the strict legal apportionment of disability pursuant to LC 4663. This issue arises only after the applicant becomes P&S and is relevant only to the award of PD. The Doctrine of Direct Causation provides that the employer is only liable for that portion of the permanent disability which is directly, causally, and exclusively resulting from the injurious industrial event, activity or exposure. That portion of the Permanent Disability which is caused by either non-industrial causation, prior or subsequent industrial causation is subject to being apportioned.

Apportionment of Causation of Permanent Disability under LC 4663 requires a medical opinion which constitutes substantial evidence. This requires generally that the medical opinion be (1) based upon a FULL, COMPLETE, and ACCURATE MEDICAL HISTORY, with a PROPER DIAGNOSIS; (2) The medical opinion is expressed in terms of REASONABLE MEDICAL PROBABILITY based upon the reporting physician's EDUCATION, TRAINING AND EXPERIENCE and UNDERSTANDING OF THE FACTS INVOLVED IN THE CASE OR PRESENTED BY WAY OF A HYPOTHETICAL; and (3) last, that the opinion provide the "HOW AND WHY", a "considered and reasoned analysis", "connects the dots", explain logically the basis and rationale for the opinion. *(See Escobedo v. WCAB (2004) 70 CCC 604, 70 Cal.Comp.Cases 1506 (En Banc Decision)*.

A. Causation of Injury v. Causation of Disability – Case Authority

Grimaldo v. WCAB (2009, 2nd District Court of Appeal) 74 CCC 324, 2009 Cal.Wrk.Comp.LEXIS 82, 37 CWCR 63 (Not Certified for Publication)

Applicant sustained injury when a 60 pound metal grate landed on his foot. The applicant continued to work as the injury appeared minor. About a month later, when the injury failed to heal, the applicant sought treatment. At the time of injury, the applicant suffered from undiagnosed diabetes.

The injury led to an altered gait causing off side pressure in the foot which contributed to the wound being slow to heal which became infected in part due to uncontrolled diabetes.

Subsequently the applicant developed osteomyelitis ultimately resulting in amputation

"Well established authority holds 'that the acceleration, aggravation or lighting up' of a preexisting disease is an injury in the occupation causing the [injury]. . .the rationale for the doctrine is that the employer takes the employee subject to his medical condition when he begins employment, and that compensation should not be denied because the employee's medical condition caused a disability from an injury that ordinarily would have caused little or no problems to a person who had no such condition. Thus, even though an employee's underlying disease was not caused by his or her employment, the employee's disability or death is compensable as an injury arising out of and in the course of the employee's work. So also, the acceleration or aggravation of a preexisting disease by an industrial injury is compensable as an injury arising out of and in the course of employment, if the aggravation is reasonably attributable to an industrial accident."

Grimaldo v WCAB 74 CCC at pg. 328.

Editor's comments: This decision involves the classic battle between "Causation of Injury" and "Causation of Disability", two doctrines which are often confused. While permanent disability attributable to complications resulting from the non-industrial diabetes would be apportioned as non-industrial, this would not prevent the medical treatment and TD associated with the non-industrial diabetes from being determined industrial and benefits provided. "Causation of Injury" will allow treatment and TD to be determined as compensable where, as in Grimaldo the non-industrial condition is "lit-up" or aggravated by an industrial injury. This should not be confused with "Causation of Disability", i.e. apportionment which would allow the non-industrial condition to be apportioned from the overall PD to result in an award of only that portion of the PD directly caused by the industrial injury.

See also, accord, Abrego v. Harland Braun & Company, State Compensation Insurance Fund and Everest National Insurance Company, 2016 Cal. Wrk. Comp. P.D. LEXIS 387 (BPD) holding that applicant's toe amputation was compensable industrial injury based on treating physician's opinion that amputation was necessary due to applicant's working throughout day with wet sock resulting in blister on toe which turned gangrenous due to applicant's diabetes, where treater's opinion found more persuasive than opinion of panel qualified medical evaluator that applicant's need for toe amputation was caused by natural progression of his nonindustrial diabetes. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.05[2][a], [d], [3][a], 27.01[1][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.01[4].]

of the left leg. Defendant admitted injury to foot, but denied the osteomyelitis, amputation and diabetes. Applicant proceeded to trial claiming that the diabetes was "lit up" by the industrial injury to foot.

The WCJ found for the applicant. Consistent with the Applicant's QME, the WCJ held that the work injury "set in motion the events that eventually led to the osteomyelitis and resulting amputation."

The WCJ concluded that the injury "lit up" the applicant's pre-existing asymptomatic diabetes. The WCJ stated that but/for the injury which aggravated the diabetes, the osteomyelitis and resulting amputation of the left leg would not have occurred.

Defendant sought reconsideration. The WCAB reversed holding that the diabetes was a pre-existing non-industrial condition which merely acted to complicate the healing of the industrial injury, and that the diabetes did not arise out of or occur in the course of employment.

The Court of Appeal reversed reinstating the decision of the WCJ that the industrial injury had "lit up" the diabetes, and combined to cause osteomyelitis and the resulting amputation. The Court of Appeal however was careful to include as part of the industrial injury the resulting amputation. This decision did not address causation of disability, i.e. apportionment to causation under LC section 4663.

SCIF v. WCAB (Dorsett) (6th District Court of Appeal, 2011) 76 CCC 1138

Applicant sustained a specific injury to cervical spine on 3/21/00 while working for South Valley Glass and CT injury to cervical spine for the period ending 6/8/04 while working for A-Tek. Both were insured by SCIF. The AME wrote that in the absence of the specific injury in 2000, the subsequent activities with the second employer would not have been injurious and therefore the subsequent CT would not have occurred. At deposition the AME testified "if the initial [injury] doesn't happen...the second [injury] can't happen because there's no indication medically that he would have had any disability in 2004 absent the first injury of 2000." Even so, the AME apportioned the disability equally as between the two injuries. Based upon the opinion of the AME, the WCJ made a 100% award, refusing to apportion, finding only a single injury in that the second injury was a compensable consequence of the original injury. Defendant sought reconsideration and after denial, a Writ of Review.

The Court of Appeal discussed at length whether a subsequent injurious industrial activity can be a compensable consequence of a prior injury for avoidance of liability by the

". . .Employers must compensate injured workers only for that portion of their permanent disability attributable to a current industrial injury, not for that portion attributable to previous injuries or to nonindustrial factors. . .Apportionment is now based on causation. . .the new approach to apportionment is to look at the current disability and parcel out its causative sources – nonindustrial, prior industrial, current industrial – and decide the amount directly caused by the current industrial source. . . Therefore, evaluating physicians, WCJ and WCAB must make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of the [industrial injury]. . .and caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries. . .

There may be limited circumstances. . . when the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentage to which each distinct industrial injury causally contributed to the employee's overall permanent disability. In such limited circumstances, when the employer has failed to meet its burden of proof, a combined award may still be justified. . .the burden of proof falls on the employer for it is the employer who benefits from apportionment.

SCIF v. WCAB (Dorsett) 76 CCC at pg. 1144.

See also, Pruitt v. California Department of Corrections, SCIF 2011 Cal. Wrk. Comp, P.D. Lexis 553(Panel Decision) (involving injury to inmate/firefighter jumping 6 feet to flee fire) in which the decision of WJC finding no apportionment was reversed where the finding was based upon the opinion of the PTP who noted "in this case, there is nothing in the medical records that shows that the patient had any problem with her bilateral knees prior to her industrial injury. . .[for that] absent her industrial injury [the applicant would have any disability] . . . Therefore, apportionment to pre-existing or other factors is not warranted." The WCAB in reversing found that the medical opinion relied upon was premised on an incorrect legal theory and did not, therefore, constitute substantial medical evidence.

Editor's Comments: It should be noted that the Dorsett decision is also valuable on the issue of whether the defendant on a subsequent injury may avoid liability arguing that the second injury is merely a compensable consequence of the original injury (prior) industrial injury. Traditionally, the principle of "Compensable Consequence" has been limited to non-industrial conditions or activities which result in an increase in the need for medical treatment, extend periods of TD and/or an increase in PD. Where the subsequent activity is industrial, so too is the injury. The rationale for this is (1) the employer takes the employee as he finds him, and (2) will be only responsible for that portion of PD which is directly and causally related to an injurious industrial activity or exposure. Under Dorsett it does not appear that a subsequent employer may avoid liability through the argument that a subsequent injurious industrial activity is as compensable consequence of a prior industrial injury, thus limiting "compensable consequence" to subsequent non-industrial events/activities/exposures, but not subsequent industrial events/activities/exposures, although both apportionment of disability and liability between co-defendants would be applicable.

subsequent defendant though apportionment under LC 4663. In the end the Court reversed holding that separate injuries had occurred and since the AME had been able to apportion as between these injuries, the WCJ was compelled to find apportionment. The Court also seemed to stress that it would be a rare situation where apportionment would not exist where successive injuries are involved.

II. Psychiatric Injury (LC 3208.3 & 4660.1)

§ 3208.3. Compensable psychiatric disorders

(b) ***(1)*** *In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury.*

(2) *Notwithstanding paragraph (1), in the case of employees whose injuries resulted from being a victim of a violent act or from direct exposure to a significant violent act, the employee shall be required to demonstrate by a preponderance of the evidence that actual events of employment were a substantial cause of the injury.*

(3) *For the purposes of this section, "substantial cause" means at least 35 to 40 percent of the causation from all sources combined.*

(c) *It is the intent of the Legislature in enacting this section to establish a new and higher threshold of compensability for psychiatric injury under this division.*

(d) *Notwithstanding any other provision of this division, no compensation shall be paid pursuant to this division for a psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months. The six months of employment need not be continuous. This subdivision shall not apply if the psychiatric injury is caused by a sudden and extraordinary employment condition. Nothing in this subdivision shall be construed to authorize an employee, or his or her dependents, to bring an action at law or equity for damages against the employer for a psychiatric injury, where those rights would not exist pursuant to the exclusive remedy doctrine set forth in Section 3602 in the absence of the amendment of this section by the act adding this subdivision.*

(e) *Where the claim for compensation is filed after notice of termination of employment 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 actual events of employment were predominant as to all causes combined of the psychiatric injury and one or more of the following conditions exist:*

(1) *Sudden and extraordinary events of employment were the cause of the injury.*

(2) *The employer has notice of the psychiatric injury under Chapter 2 (commencing with Section 5400) prior to the notice of termination or layoff.*

(3) *The employee's medical records existing prior to notice of termination or layoff contain evidence of treatment of the psychiatric injury.*

(4) *Upon a finding of sexual or racial harassment by any trier of fact, whether contractual, administrative, regulatory, or judicial.*

(5) *Evidence that the date of injury, as specified in Section 5411 or 5412, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.*

(f) *For purposes of this section, an employee provided notice pursuant to Sections 44948.5, 44949, 44951, 44955, 44955.6, 72411, 87740, and 87743 of the Education Code shall be considered to have been provided a notice of termination or layoff only upon a district's final decision not to reemploy that person.*

(g) *A notice of termination or layoff that is not followed within 60 days by that termination or layoff shall not be subject to the provisions of this subdivision, and this subdivision shall not apply until receipt of a later notice of termination or layoff. The issuance of frequent notices of termination or layoff to an employee shall be considered a bad faith personnel action and shall make this subdivision inapplicable to the employee.*

(h) *No compensation under this division shall be paid by an employer for a psychiatric injury if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action. The burden of proof shall rest with the party asserting the issue.*

(i) *When a psychiatric injury claim is filed against an employer, and an application for adjudication of claim is filed by an employer or employee, the division shall provide the employer with information concerning psychiatric injury prevention programs.*

(j) *An employee who is an inmate, as defined in subdivision (e) of Section 3351, or his or her family on behalf of an inmate, shall not be entitled to compensation for a psychiatric injury except as provided in subdivision (d) of Section 3370.*

*Labor Code Section 4660.1(c)(1) provides ". . .Except as provided in paragraph (2), there shall be no increases in impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury. Nothing in this section shall limit the ability of an injured employee to obtain treatment for sleep dysfunction, sexual dysfunction, or psychiatric disorder, if any, that are a consequence **of** an industrial injury".*

Labor Code Section 4660.1(c)(2) provides ". . .an increase impairment rating for psychiatric disorder shall not be subject to paragraph (1) if the compensable psychiatric injury resulted from either of the following:
Being a victim of a violent act or direct exposure to a significant violent act within the meaning of 3208.3 . . .A catastrophic injury, including, but not limited to, loss of a limb, paralysis, severe burn, or severe head injury. . ."

A. Elements of Psychiatric Injury

Psychiatric Injury Arising out of "Actual Events of Employment"

For a LC 3208.3 psychiatric injury to be compensable, the following elements must be satisfied:

(1) SIX MONTHS AGGREGATE EMPLOYMENT unless it is the result of a "sudden and extraordinary" event/act;

(2) the psychiatric injury CANNOT have been SUBSTANTIALLY CAUSED BY A LAWFUL, NONDISCRIMINATORY, GOOD FAITH PERSONNEL ACTION; and

(3) results in a DIAGNOSED MENTAL DISORDER which causes disability or the need for medical treatment; and

(4) The injury arose out of **ACTUAL EVENTS OF EMPLOYMENT** which are PREDOMINATE AS TO ALL CAUSES COMBINED, or a substantial cause (greater than 35%) where the actual events of employment involve the applicant being the victim of a violent act or direct exposure to a significant violent act.

Psychiatric Injury as a "Compensable Consequence" of Physical Injury

For a Labor Code 3208.3 and 4660.1 psychiatric injury as a compensable consequence of a physical injury the following elements must be satisfied:

(1) SIX MONTHS AGGREGATE EMPLOYMENT unless it is the result of a "sudden and extraordinary" event/act;

(2) the psychiatric injury CANNOT have been SUBSTANTIALLY CAUSED BY A LAWFUL, NONDISCRIMINATORY, GOOD FAITH PERSONNEL ACTION; and

(3) results in a DIAGNOSED MENTAL DISORDER which causes disability or the need for medical treatment; and

(4) Is the psychiatric injury **PREDOMINATE** as to all causes industrial?

(5) If the psychiatric disorder is a compensable consequence of a compensable physical injury, and predominate as to all causes industrial, then is the compensable consequence psychiatric injury the result of a **CATASTROPHIC PHYSICAL INJURY** or from being the **victim of a violent act**?

A. Miscellaneous Issues

1. Application of LC 4660.1

LC 4660.1 applies only to injuries on or after 1/1/13 (both specific occurring and CTs ending after 1/1/13) and Only precludes an increase in the impairment rating (PD) resulting from: (1) sleep or sexual dysfunction or (2) psychiatric disorder arising out of a compensable physical injury, "compensable consequence injury".

2. "Arising Out of A Compensable Physical Injury"

Narrow Interpretation: Limited only to a **subsequent** manifestation of a sleep, sexual dysfunction or psychiatric disorder as a compensable consequence of a physical industrial injury. This would not include injury resulting in sleep/sexual dysfunction or psychiatric disorder occurring directly and concurrently with the industrial injury, but only that occurring subsequently. A narrow interpretation of the exclusion/limitation would be to the benefit of the applicant as it would limit application of the prohibitions of 4660.1(c).

*Labor Code Section 4660.1(c)(1) provides ". . .Except as provided in paragraph (2), there shall be no increases in impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury. Nothing in this section shall limit the ability of an injured employee to obtain treatment for sleep dysfunction, sexual dysfunction, or psychiatric disorder, if any, that are a consequence **of** an industrial injury".*

Labor Code Section 4660.1(c)(2) provides ". . .an increase impairment rating for psychiatric disorder shall not be subject to paragraph (1) if the compensable psychiatric injury resulted from either of the following:

Being a victim of a violent act or direct exposure to a significant violent act within the meaning of 3208.3 . . .A catastrophic injury, including, but not limited to, loss of a limb, paralysis, severe burn, or severe head injury. . ."

Broad Interpretations: Applies to any and all **concurrent or subsequent** manifestation of physical industrial injury resulting from of a sleep/sexual dysfunction or psychiatric disorder.

Editor's Comments: It must be noted that LC 4660.1 specifically lists examples of "catastrophic" injuries, all of which are example of the physical result of the injury. ("…loss of a limb, paralysis, severe burn, or severe head injury"). This might suggest that the resulting disability may be either the significant or perhaps determinative factor on the issue of whether the injury was "catastrophic".

While legislature gave lip service to their intent through enacting LC 4660.1 to limit the compensability of compensable consequence psychiatric injury claims, they may have failed to some extent. First, and most obvious LC 4660.1 expressly does nothing to reduce defendant's liability for reasonable and necessary medical treatment for sleep/sex/psyche injuries pursuant to LC 4600. Subject to L.C 4610. Second, LC 4660.1 only prohibits an award of PD due to psychiatric injury occurring as a compensable consequence, and has no impact on injuries which arise pursuant to LC 3208.3 as out of actual events of employment which are predominate as to all causes combined. Next, it is anticipated that the applicant attorney may attempt to do an end run around 4660.1 though application of Guzman. In this scenario while sleep/sex/psyche could not be used to directly increase the WPI, these factors however could be used to the extent that they affect ADLs to support the basis for demonstrating that the Standard AMA rating is not accurate, i.e. not complete and justify application of Guzman, and a rating under an alternate method, chapter or table. This editor believes this is a weak theory and will not be successful. Last, it is likely that as the physical WPI increases, so to will the likelihood that the injury will be determined to be "catastrophic" and thereby allow an increase in PD due to a psychiatric injury as a compensable consequence. (See Torres v. Greenbrae Management/SCIF (July 2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 230, 82 Cal.Comp.Cases 952, 45 CWCR 152 (WD) Last, careful attention should be paid to "victim of a violent act" an exception/alternative to the "catastrophic" injury requirement.

Thus to summarize, LC 4660.1 does nothing to change existing law under LC 3208.3(psychiatric injury arising out of actual events of employment), scope of medical treatment under LC 4600 (treatment for sleep/sex/psyche), creates a "victim of violent act" exception/alternative to the "catastrophic" injury requirement, and probably will only act as a bar to only minor injuries resulting in low level of PD, i.e. Where physical injury is not "catastrophic" (perhaps those below 20%).

3. Where Psychiatric Injury and Medical Treatment Survives

LC 4660.1 expressly does not preclude an award of medical treatment for sleep or sexual dysfunction, or psychiatric disorder reasonable and necessary to cure or relieve the effects of a compensable industrial injury. *(Labor Code 4660.1(c)(1); Labor Code 4600)*

4. Substantial Evidence and Burden of Proof

Radiator USA v. WCAB (Kang) 2015 Cal. App. Unpub. LEXIS 1089; 80 Cal. Comp. Cases 79 *(Court of Appeal, not published)*

The applicant claimed psychiatric injury as a compensable consequence of an admitted orthopedic injury. The WCJ found industrial causation of applicant's psychiatric injury and sleep disorder relying on a treating psychiatric physician, the sole medical opinion/evidence from a psychiatrist on causation.

The rheumatologist opined the applicant was severely fatigued and suffering from significant depression. The treating psychiatric opined that the applicant's psychiatric condition was the result of his orthopedic injuries. However, the treating psychiatrist was completely unaware of the fact that the orthopedist had apportioned 50% of the orthopedic injury to non-industrial pre-existing bone disease. The WCJ found industrial causation of applicant's psychiatric injury and sleep disorder relying on a treating psychiatric physician, the sole medical opinion/evidence from a psychiatrist on causation. The opinion of the WCJ was upheld on reconsideration with defendant seeking review asserting that the opinion of the treating psychiatric was not substantial evidence as it was based on an incomplete medical history.

The Court of Appeal first noted and reaffirmed the holdings of *West v. Industrial Acci. Com*. (1947) 79 Cal. App. 2d 711, 719 [180 P.2d 972]; *Lundberg v. Workers' Comp. Appeals Bd*. (1968) 69 Cal. 2d 436, 440 [71 Cal. Rptr. 684, 445 P.2d 300] *Kuykendall v. Workers' Comp. Appeals Bd*. (2000) 79 Cal. App. 4th 396, 404 [94 Cal. Rptr. 2d 130] *M/A Com-Phi v. Workers' Comp. Appeals Bd*. (1998) 65 Cal. App. 4th 1020, 1025 [76 Cal. Rptr. 2d 907]; *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal. App. 4th 1117, 1120 [72 Cal. Rptr. 2d 898].) (*Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal. App. 4th 389, 394 [65 Cal. Rptr. 2d 431]; applying Labor Code Sections 5906, 5701, which allow the WCAB to develop the evidentiary record.

Court of Appeal ultimately annulled the decision of WCAB, holding that no substantial evidence supported WCAB decision that applicant had sustained industrial injury to his psyche in form of sleep disorder. The Court noted that where the sole medical evidence of industrial causation of injury to psyche came from secondary treating physician in psychology without a complete medical history in that (1) that she would defer making apportionment determination until she received all medical records; and (2) among medical records this treating physician had not received was report of agreed medical evaluator in orthopedics, who apportioned 50 percent of applicant's orthopedic injury to preexisting nonindustrial causes; and (3) that this absence from materials considered by treating physician in psychology in forming her opinion that applicant's psychiatric condition was result of his orthopedic injuries meant that record contained no evidentiary foundation for that opinion/substantial evidence did not exist to support that the applicant had sustained industrial injury to his psyche in form of sleep disorder. Reversed and remanded.

See also, *Rockefeller v. Department of Northern Transportation, 2018 Cal.Wrk.Comp. P.D. LEXIS 273 (BPD)* holding suicide not compensable injury, where decedent's widow alleged that suicide was precipitated by work stress, but failed to establish that decedent suffered industrial psychiatric injury under Labor Code § 3208.3 and Rolda v. Pitney Bowes, Inc. (2001) 66 Cal. Comp. Cases 241 (Appeals Board en banc opinion), or any other industrial injury contributing to suicide. Further, because suicide was not industrially-related, the affirmative defenses of intentional infliction of injury and willful and deliberate causation of death under Labor Code § 3600(a)(5) and (6) is moot.;[See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.21; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.03[2]. SOC, Section 5.24, Suicide.]

Testequity v. WCAB 78 CCC 363 (Writ Denied)

Applicant alleged CT injury to internal and psyche which was timely denied by defendant. The matter proceeded to trial AOE/COE with the only evidence that of a medical report of the PTP. The WCJ initially found for applicant but later rescinded that order when defendant sought reconsideration which pointed out that the report of the PTP was based on an incomplete and therefore inadequate history in that it failed to include applicant's history of marijuana use. At subsequent conference the WCJ ordered the parties to develop the medical record on the issue of causation of injury. Defendant sought review by removal.

The WCAB upheld the WCJ's order to the parties to develop the evidentiary record. The WCAB first discussed that LC 5502 provides that discovery generally closes at the MSC. However, the WCJ does have the authority and duty to develop the medical record pursuant to LC 5906 and 5701 and the cases of *Tyler v. WCAB 62 CCC 924 and McClune v. WCAB 63 CCC 261.* Citing *San Bernadine Community Hospital v. WCAB (McKernan) 64 CCC 986.* The WCAB noted that while the WCJ may not "bail out" a party who fails to prepare, the WCJ has the duty to develop the records where neither side presented substantial evidence on which the decision may be based.

> *"The WCAB granted Defendant's Petition for Reconsideration and, reversing the WCJ, held that Applicant did not sustain psychiatric injury. In its Decision After Reconsideration, the WCAB explained that, under Labor Code § 3208.3(b)(1), to establish the compensability of a psychiatric injury an employee must show by a preponderance of the evidence that actual events of employment were predominant (greater than 50 percent) as to all causes of the psychiatric injury. If an employee's alleged psychiatric injury was caused by a violent act, as Applicant claimed hers was, Labor Code § 3208.3(b)(3) requires the employee to prove that actual events of employment were a "substantial cause" (at least 35 to 40 percent) of the injury. In light of Dr. Larsen's reporting, which the WCAB found to be substantial evidence, the WCAB did not agree that Applicant established that her psychiatric injury was industrially caused…*
>
> *… At all times, and in detail, Dr. Larsen has opined that applicant's psychiatric injury was not work-related; that applicant was an "unreliable historian" as to the events surrounding her injury; that applicant had a significant underlying mental illness that was not and could not be caused by the events of her employment; and that he could not state, with reasonable medical probability, that the events of applicant's employment were predominant as to all causes combined of her psychiatric condition. Dr. Larsen also opined that "perhaps a quarter," or 25% of the responsibility for applicant's psychiatric condition was attributable to the events of applicant's employment."*
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> *Clacher v. WCAB (The Call Center) (2015) 80 CCC at pg. 186.*

Clacher v. WCAB (The Call Center) (2015) 80 CCC 182, 2015 Cal.Wrk.Comp.LEXIS 4

The applicant claimed to have sustained physical and psychiatric injury as the result of an alleged violent assault. Applicant claimed that a co-worker physically assaulted her hitting her once and knocking her down and hitting her a second time while on the ground. There appeared to be no witness nor was there any corroborating evidence establishing that the incident occurred as alleged.

The parties proceeded to AME's for both the physical and psychiatric component of the injury. The issue was whether the opinion of the Psychiatric AME was substantial evidence on the issue whether the applicant had sustained an industrial psychiatric injury either "predominate as to all causes" from actual events of employment or was a "substantial cause" where a violent act is involved. The WCJ after trial relying primarily on the applicant's testimony and selected parts of the Psych AME's opinion found for the applicant.

The WCAB reversed holding that, given the question of whether the event even happened and conflicting and equivocal medical evidence, that the applicant had not met their burden of proof and that Psych AME's opinion did not constitute substantial evidence. Writ Denied.

I. "CATASTROPHIC" PHYSICAL INJURY

"CATASTROPHIC" PHYSICAL INJURY will likely be found where based on the **TOTALITY OF THE CIRCUMSTANCES, SUBSTANTIAL EVIDENCE** exists to support such a finding by the trier of fact. Although no case addresses this issue, consideration should be given to (1) mechanism of injury, (2) course of treatment, and (3) resulting impairment/disability. The consideration should be given both subjective and objective standards, i.e. both a reasonable person standard, as well as the impact on the applicant specifically.

"Catastrophic Injury" has been defined as "consequences of an injury that permanently prevent an individual from performing any gainful work."(42 USCS § 3796b).

The California Education Code defines "Catastrophic Illness" or" Injury" as "an illness or injury that is expected to incapacitate the employee for an extended period of time, or that incapacitates a member of the employee's family which incapacity requires the employee to take time off from work for an extended period of time to care for that

family member, and taking extended time off work creates a financial hardship for the employee because he or she has exhausted all of his or her sick leave and other paid time off." (Ca. Ed. Code 44043.5. Catastrophic leave program; Requirements; Adoption of regulations). (Note also that Labor Code 3208.3(f) cites to the Education Code for the purpose of describing what constitutes "notice" of decision by a district not to "reemploy".)

Consider the following in your analysis on the issue as to whether the physical injury was "catastrophic":

A **"Subjective"** standard based upon whether the applicant subjectively in terms of impact found/believed the injury to be "catastrophic" in terms of mechanism of injury, course of treatment, and resulting impairment, or a combination thereof.

An **"Objective"** standard, i.e. whether a reasonable person in a like or similar situation would find the injury to be "catastrophic" in terms of mechanism of injury, course of treatment and resulting impairment, or a combination thereof.

"Subjective/Objective" based on a totality of the circumstances, (mechanism of injury, past/present/future medical treatment, and resulting impairment) in that both the applicant and a reasonable person would find the injury to be "catastrophic".

A safe conclusion would be that generally, as the WPI increases, so too will the likelihood that the injury will be determined to be a "catastrophic" physical injury. Note that LC 4660.1 provides *that "A catastrophic injury, including, but not limited to, loss of a limb, paralysis, severe burn, or severe head injury. . .*" with the clear implications that physical impairment/disability is an expressed consideration on determining whether the physical injury was "catastrophic".

I. Relevant Case Involving Psychiatric Injury -- LC 3208.3

A. "Direct Result" and Physical vs. Mental Injury

Several cases have struggled with the issue of whether a "physical" manifestation, for example a heart attack, headaches or gastrointestinal problems, might be barred as arising out of a psychiatric injury. Two decisions worth reviewing on this issue are *McCoy v. County of San Bernardin, 2011 Cal. Wrk. Comp. P.D. LEXIS 225,* and *May Company v. WCAB (Hull) (2001) 66 Cal. Comp. Cases 1378.* Both suggest that where the job is of a "stressful nature" and the stress results in an onset of gastrointestinal injury *(May Company)* or headaches *(McCoy)*, neither are (1) within the definition of psychiatric injury as described in Labor Code 3208.3(a), and thus are not barred by the "good faith personnel action defense (LC 3208.3(h)); (2) and appear to be compensable without a finding of "predominantly caused" where the employment "brought about the onset" and thus contributed to the manifestation of the physical condition. (For standard required for establishing "causation of injury", see *South Coast Framing, Inc. v. Workers' Comp. Appeals Bd. (2015) 61 Cal.4th 291 [188 Cal. Rptr. 3d 46, 349 P.3d 141], and Guerra v. WCAB (Porcini Inc.) (2016 2nd Appellate District) 246 Cal. App. 4th 1301; 201 Cal. Rptr. 3d 623; 81 Cal. Comp. Cases 324; 2016 Cal. App. Lexis 337.*

See also, Xerox Corporation v. WCAB (Schulke)(2nd Appellate District) 82 Cal. Comp. Cases 273, 2017 Cal.Wrk.Comp. LEXIS 13, holding that a heart attack resulting in death caused by 10% industrial stress was industrial where WCAB reasoned that when stress causes physical injury, that Labor Code § 3208.3 does not apply, that Labor Code § 3208.3 applies only to physical injuries that are solely caused by psychiatric injury as described in County of San Bernardino v. WCAB (McCoy) (2012) 203 Cal.App. 4th 1469, 138 Cal.Rptr. 3d 328, 77 Cal.Comp.Cases 219. Pursuant to McCoy defendant has burden of proof of establishing that applicant's heart attack was caused solely by non-compensable psychiatric injury so as to avoid liability for death benefits.; See also, accord, Wang v. Southern California Edison (2015) 2015 Cal.Wrk.Comp. P.D. LEXIS 511 (BPD) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3], 4.68[1]-[3], 4.69; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, §§ 10.04[1], 10.06[3][d].]

See also, accord Wang v. Southern California Edison (2015) 2015 Cal.Wrk.Comp. P.D. LEXIS 511 (BPD), providing ". . . .Section 3208.3 clearly limits its application to psychiatric injuries. Generally, psychiatric injuries are those injuries that are diagnosed by the DSM-IV. Heart conditions are not diagnosed under DSM-IV. Thus, heart conditions by legal definition cannot be psychiatric injuries; they are physical injuries. In order for a heart condition to fall within the "mental-physical" definition of a psychiatric injury, the evidence must establish that industrial causation of the heart condition flows entirely from the psychiatric injury.

Defendant argues that the holding in McCoy should apply to the facts of this case. In McCoy, applicant pled an underlying psychiatric injury and pled headaches as a compensable consequence of the psychiatric injury. The court held: "[T]hat section 3208.3, subdivision (h), precludes recovery for physical manifestations that are directly and solely resulting from the psychological injury suffered as a result of good faith personnel actions." (McCoy, supra, 203 Cal.App.4th at 1474 (emphasis in original).) McCoy expressed a limited exception for conditions that are solely the compensable consequence of a psychological injury, which is then found to be non-compensable. McCoy is factually distinguishable from this case because neither applicant nor defendant has pled a psychiatric injury under section 3208.3 and even if it were pled, defendant has not proven on this record that applicant's claimed heart injury was caused solely by a psychiatric injury, later found to be non-compensable.

> *Section 3208.3 is only applicable to psychiatric injuries. Where in cases like McCoy, a defendant contends that applicant's claimed physical condition is the sole result of a non-compensable psychiatric injury, defendant must prove that:*
> *1) Applicant suffered a psychiatric injury; and*
>
> *2) The psychiatric injury is not compensable pursuant to section 3208.3; and,*
>
> *3) The psychiatric injury was the sole industrial cause of the physical condition.*

Here, applicant's claimed injury to his heart is not defined as a psychiatric injury in the DSM-IV and therefore it is not per se a psychiatric injury within the parameters of section 3208.3 and, on this record, defendant has not met its burden of proving that applicant's heart injury is a "mental-physical" psychiatric injury, using the three-pronged analysis above."

Montenegro v. City of Los Angeles, PSI, 2016 Cal. Wrk. Comp. P.D. LEXIS 129 (Panel Decision)

Applicant was a firefighter who sustained industrial prostate cancer which resulting in removal of his prostrate resulting in sexual dysfunction. The parties stipulated that the rating with sexual dysfunction would rate 78% and 74% without. Defendant argued that applicant was precluded from an impairment rating for sexual dysfunction pursuant to Labor Code § 4660.1(c)(1). The matter proceeded to MSC with the parties stipulating that the rating with sexual dysfunction would rate 78% and 74% without. The WCJ found for the applicant awarding 78% PD reflecting erectile dysfunction.

> *"It is well settled law that an evaluating or treating physician must find the most accurate rating in a given case. In fact, under Labor Code § 4660.1(h), the legislature specifically addressed the limitations of other sub-sections in § 4660.1 by stating: "In enacting the act adding this section 4660.1, it is not the intent of the legislature to overrule the holding in Milpitas Unified School District v. WCAB (Guzman) (2010) 187 Cal.App. 4th 808." The facts of the instant case reflect that legislative mandate. Dr. Agatstein utilized the four corners of the AMA Guides to assign the most accurate ratings for the Applicant's prostate cancer and the devastating effects the surgery for that cancer caused in terms of surgical physical damage to the reproductive system and the direct consequences of that damage—the resulting sexual dysfunction. This case falls under the legislative exception to § 4660.1(c)(1) which is enunciated under § 4660.1(h).*
>
> *The Defendant contends that Applicant's sexual dysfunction resulted from medical treatment for the underlying industrial injury to the prostate; thus the outcome, the lack of a prostate, is nothing more than a "compensable consequence." However, an injury to the prostate, in terms of sexual dysfunction, cannot be considered compensatory by the very definition of the word. The prostate is described as part of the internal organs of the male reproductive system, also called accessory organs. The prostate gland is a walnut-sized structure that is located below the urinary bladder in front of the rectum. The prostate gland contributes additional fluid to the ejaculate. Prostate fluids also help to nourish the sperm. The urethra, which carries the ejaculate to be expelled during orgasm, runs through the center of the prostate gland. (Emphasis added) It is for those reasons that the Defendant's contention must fail."*
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> *Montenegro v. City of Los Angeles, PSI, 2016 Cal. Wrk. Comp. P.D. LEXIS at p. 130.*

In upholding the WCJ, the WCAB relied in part of *Guzman* and LC 4660.1(h). Next the WCAB analyzed "compensable consequence" finding that this case involved a direct injury to the prostate that resulted in a prostatectomy. It was the removal of the prostate gland which made ejaculation more difficult noting the urethra runs though the center of the prostate gland. This matter the WCAB held involved a direct not a compensable consequence injury.

Thus, Labor Code § 4660.1(c)(1) does not preclude increased impairment rating for sexual dysfunction caused by removal of his prostate to treat his industrial prostate cancer, where sexual dysfunction was direct result from physical injury and not simply a derivative/consequential effect of physical injury noting that impairment should be assessed within four corners of AMA *Guides* to achieve most accurate rating of injured employee's permanent disability.; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], [4][a], 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.11, 7.12; The Lawyer's Guide to the AMA *Guides* and California Workers' Compensation, Chs. 3, 8; Sullivan On Comp, 10.16, Use of 2013 Permanent Disability Schedule.]

B. "Six Months Aggregrate Employment"

A claim of psychiatric injury requires six months aggregate employment. See the decision of Martinez v. Mass Precision, CompWest Insurance Company 2014 Cal.Wrk.Comp.P.D. LEXIS 577, which held that the 6 months requirement under LC 3208.3(d) is satisfied where applicant worked in "dual capacity", includes all periods with both the general and special employers.". See also, Bayajargal v. WCAB (Cul Bees Construction Co.) (2006) 71 CCC 1829; Romero v. Cal.Ins. Guarantee Assn. (2005) 33 CWCR 75; Diaz v. WCAB 69 CCC 618 (Writ Denied) for explanation and analysis.

C. Substantially Caused By A Lawful, Nondiscriminatory, Good Faith Personnel Action

> *Labor Code Section 3208.3 provides, ". . .No compensation. . .shall be paid by an employer for a psychiatric injury if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action. . .'Substantial cause' means at least 35 to 40 percent of the causation from all sources combined. . ."*
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> *Editor's Comments: The Court of Appeal in reversing the WCAB merely*

Northrop Grumman Corp. v. WCAB (2002, 2nd Appellate District) 67 CCC 1415

held that the investigation was a 'lawful, nondiscriminatory, good faith personnel action" with the case remanded with the trial court directed to decide the issue of whether the investigation and resulting stress was "substantial cause", i.e. 35-40% responsible for the applicant's psychiatric injury.

Applicant was accused by an African-American subordinate of giving preferential treatment to Caucasian employees. A second employee also accused the applicant of treating the complaining African-American employee harshly. The employer conducted an investigation regarding the allegations of discrimination, as required by both state and federal law. Although the report confirmed that the applicant was treating certain employees differently than others, it stopped short of confirming the race discrimination allegations. The applicant was warned and initially punished, but the employer later reversed the punishment. As a consequence of these events, applicant claimed a psychiatric injury.

The WCJ at trial found for the applicant, and was upheld by the WCAB.

Defendant sought review, arguing that any injury that occurred was barred by Labor Code §3208.3(h), as "substantially caused by a lawful, nondiscriminatory, good faith personnel action." In reversing the decision of the lower court, the Court of Appeal found the decision not to be supported by substantial evidence. The Court relied on *City of Oakland v. WCAB 99 Cal.App.4th 261* for direction, and in affirming the objective standard test wrote "the proper inquiry…is: was the factual basis, on which the employer concluded a dischargeable act had been committed, reached honestly after an appropriate investigation and for reasons that are not arbitrary or pretextual…" The Court noted that state and federal law, as well as public policy, required the employer to conduct the investigation and therefore, once the court determined that a factual basis existed for the investigation (here allegations of race discrimination), any psychiatric injury arising from the investigation would be barred by L.C. §3208.3(h). The Court left unresolved whether the investigation and related stressor were the "substantial cause" for the injury. The case was remained for further proceedings.

City of Oakland v. WCAB (Gullet) (2002 1st Appellate District) 67 CCC 705

Applicant was employed as a supervisor with the City Parks and Recreation Department. Due to budgetary cutbacks, the applicant feared his position would be eliminated. The Parks and Recreation Director advised the applicant to take an alternate position, to avoid demotion or elimination of his position. Despite taking the alternative position, the applicant was still demoted. This demotion allegedly caused psychological injury. The WCJ found injury, determining that the applicant's demotion did not qualify as "good faith" personnel action, because management had misled the applicant.

"…[good faith requires] honesty in fact in the conduct or transaction concerned" and that "any analysis of good faith issue, therefore, must look at the totality of the circumstances, not a rigid standard, in determining whether the action was taken in good faith. To be in good faith, the personnel action must be done in a manner that is lacking outrageous conduct, is honest and with a sincere purpose, is without an intent to mislead, deceive, or defraud, and is without collusion or unlawful design."

City of Oakland v. WCAB (Gullet) (2002 1st Appellate District) 67 CCC at p. 709.

The Court of Appeal reversed, citing *Larch v. Contra Costa County (1998) 63 CCC 831*. The court noted that the employer has the burden of proof on the defense of "good faith personnel action." In this case, there was no evidence that the employer intended to mislead, deceive, or defraud the applicant. Further, there was no evidence that the employer's conduct was outrageous or that bad intent was shown. The Court of Appeal also discussed that the Board appeared to have applied a "no fault" standard. Under the Board's rationale, even if it were established that the employer was trying to do its best by its action for the employee, such actions would not be in good faith if they failed in their purpose or goal, and thus caused psychiatric injury. The Court of Appeal therefore reversed the decision of the Board.

San Francisco USD v. WCAB (Cardozo), (2010, First Appellate District) 75 CCC 1251.

> *Labor Code 3208.3(h) provides "No compensation under this division shall be paid by an employer for a psychiatric injury if the injury was substantially caused by lawful, nondiscriminatory, good faith personnel action. The burden of proof shall rest with the party asserting the issue. . ."*
>
> *Labor Code 3208.3(b)(3) provides "for the purpose of this section, 'substantial cause' means at least 35 to 40 percent of the causation from all sources combined."*

Applicant claimed a CT psychiatric injury through 6/2006 arising out of her employment as a bilingual elementary school teacher. The applicant claimed the injury was the result of stress from teaching two grades, two languages, and difficulties with her principal. The WCJ selected an IME primarily to address the issue of causation of injury as between industrial, and nonindustrial, including the issue of good-faith nondiscriminatory personnel actions.

The IME opined on the issue of causation of injury that 15% was nonindustrial and 85% was related to the applicant's work setting. Of the 85% related to the work setting, the IME concluded that 60% was related to CT from her daily teaching assignment over 20 years and 40% associated with nondiscriminatory good-faith personnel action, including performance evaluations, future training plans, as well as reprimands. The IME then concluded the psychiatric injury was predominant as to all causes in that 51% of the cause of applicant's injury was industrial (multiplying 60% -- daily teaching assignment, by the 85% -- overall work related stress – producing 52.7%). The WCJ held for the applicant, noting that the injury was predominant as to all causes, greater than 50% industrial related, and not "substantially caused" by good faith personnel actions, which requires 35% or greater be caused by good-faith nondiscriminatory personnel actions (85% multiplied by 40% equals 34%).

> *Editor's Comment: The harshness of this decision is evidenced by application of the same figures except increasing the non-industrial causation in the Cardoza decision from 15% to 40%. In this example, you would multiply 60% (overall work related cause) by 40% (good-faith lawful nondiscriminatory personnel action) which produces only 24% level which does not meet the "substantial cause" requirement to find no psychiatric injury. Thus, the higher the nonindustrial component, the less likely the defendant will be able to meet the threshold requirement that the psychiatric injury was "substantially caused" by good-faith lawful, nondiscriminatory personnel action as a basis to avoid psychiatric liability. Note that the "substantially caused by lawful, nondiscriminatory, good faith personnel action" goes on the industrial side of the equation. In that regard the holding in Cordoza regarding "PREDOMINATE AS TO ALL CAUSES COMBINED" is wrong in that calculation for industrial should have been 85% rather than 51%. (Lecturers Comments: Please carefully review this case and determine whether you agree with my analysis.)*

On reconsideration and before the Court of Appeal, defendant argued that the calculation should be without nonindustrial factors noting that the higher the nonindustrial factors, the more difficult it would be for the defendant to meet the "substantial cause" requirement. Reconsideration denied. Review denied.

County of Sacramento v. WCAB (Brooks) (2013 3rd District Court of Appeal) 78 CCC 379, 215 Cal.App.4th 785.

> *See also, Larch v. Contra Costa County 63 CCC 831; Stockman v. State of California 63 CCC 1042, both accord on the definition of what causes a "lawful, nondiscriminatory good faith personnel action". "Personnel Action" is "conduct attributable to management and involving managing its business, including such things as reviewing, criticizing, demoting, transferring or disciplining an employee"..*

Applicant was a supervisor with the probation department who reported what he believed to be was a violation of protocol by a team member. The applicant was advised by the assistant chief deputy that an internal affair investigation was underway. The applicant responded by requesting either a reassignment or to be placed on administrative leave pending completion of the investigation. Both requests were denied, but the applicant was provided with a shift change to allow the applicant to avoid working with the team member who he alleged had violated protocol. Later, however, the applicant upon arriving to work learned that the subject team member was scheduled to work. As a result of having to work with the subject team member, the applicant became too upset to work and filed a claim alleging psychiatric injury.

Defendant denied the claim asserting that the psychiatric injury was barred as substantially caused by a good faith personnel action pursuant to L.C. 3208.3. Ultimately the parties proceeded to an AME on the issue of causation of injury. Addressing the issue of causation, the AME found the applicant's disorder was caused by (1) the internal affairs investigation; (2) the subject team member's complaint; and (3) the applicant's feelings that his supervisors were not supporting him. On this record, after trial the WCJ found for the applicant that the psychiatric injury was not substantially caused by good faith personnel action. On reconsideration, the decision of the WCJ was reversed and remanded for further development on the issue of good faith personnel action. Although

confusing, the AME clearly stated by supplemental report and at deposition that one-third of the psychiatric condition was caused by the internal affairs investigation. Further applicant did not challenge whether or not the internal affairs investigation constituted a personnel action. After further hearing the WCJ again found for the applicant finding that the good faith personnel action component was only one-third responsible for the psychiatric condition and thus not substantially caused by "good faith personnel action". The WCJ's decision was upheld by split panel decision on reconsideration.

On petition for review, the Court of Appeal reversed and remanded for further development of the medical record. In doing so the Court first noted that a "personnel action" is "conduct attributable to management and involving managing its business, including such things as reviewing, criticizing, demoting, transferring or disciplining an employee". Further, although the issue of causation of injury must be established by expert medical opinion, and the opinion of the expert is not better than the facts relied on in the formulation of that opinion. In this case the Court noted that it was uncontroverted that 33% of the applicant's condition was caused by a good faith personnel action related to the internal affairs investigation. The Court noted that only an additional 2% was needed to establish defendant's defense that the claim was barred as "substantially caused" by a "good faith personnel action". The Court further noted that the AME's opinion was confusing and therefore did not constitute substantial evidence on the issue of the "Good Faith Personnel Action" defense. The Court therefore reversed and remanded the matter back for further development of the medical record.

D. "<u>Predominate as to All Causes</u>"

Lockheed Martin v. WCAB (McCullough) (2002, 1st Appellate District) 67 CCC 245

*Editor's Comments: Many defense attorneys are incorrectly arguing that this decision operates as a bar to all species of benefits, including medical treatment and temporary disability. Recall that the defendant is required pursuant to L.C. 4600 to provide all medical care "reasonable or necessary to cure or relieve" the effects of an industrial injury. Therefore even where a psychiatric injury pled as a compensable consequence is barred as not established "predominate as to all causes", the defendant may be required to provide psychiatric treatment as a means to "cure or relieve" the admitted physical injury. Also be reminded that LC 4660.1 expressly provides, "<u>Nothing in this section shall limit the ability of an injured employee to obtain treatment</u> for sleep dysfunction, sexual dysfunction, or psychiatric disorder, if any, that are a consequence **<u>of</u>** an industrial injury". Last,, defendant may also be required to provide TD during such ongoing treatment should the applicant be determined to not be P&S during said treatment.*

Applicant sustained an injury to left forearm in 1986, arising out of her employment with GE, and was awarded 35.2% PD. In 1988, she filed a CT injury claim, alleging injury to pulmonary and internal injury due to toxic exposure, and later amended this claim to allege psychiatric injury as a compensable consequence. A further cumulative injury for the period ending April 1996 to right upper extremity and neck was also alleged and admitted by defendant. Applicant also amended the third claim to allege a psychiatric injury as a compensable consequence.

The WCJ found no psychiatric injury determining that the injury was not "predominate as to all causes" under Labor Code §3208.3, which applied to all claims of psychiatric injury, including those pled as a compensable consequence. On reconsideration, the applicant relied on *Rebelo v. Washington Hospital (1999) 27 CWCR 159*, which held a that a psychiatric injury pled as a compensable consequence requires only that there be a "mere contribution" to establish the injury a compensable.

After an extensive discussion of applicable case authorities, and legislative history, the Court of Appeal concluded that the legislature intended the "predominate as to all causes" standard to be applied to all claims of psychiatric injury, even where pled as a compensable consequence.

Trugreen Landcare, Zurich North America, Petitioner v. WCAB (Carlos Gomez), (2010, Second Appellate District) 75 CCC 385 (Writ Denied)

". . .the WCJ issues a Joint FA&O, finding that Applicant sustained two specific injuries- one to his back and psyche on 12/13/05 and a separate injury to his psyche on 11/29/05. The WCJ also found….it was predominately caused by the combined result of seeing his co-worker's dead body and his back injury . . ."

* * *

". . .Thus, actual events of employment combined were more than 50% responsible for injury to the psyche."

Trugreen Landcare v. WCAB, 75 CCC pgs. 386-387.

Editor's Comments: First, note that this is a pre-1/1/13 date of injury and therefore the requirement that the physical injury be "catastrophic" was not a requirement as it relates to

the back injury of 12/13/05. Second, this decision is an analysis of "causation of injury" rather than "causation of disability," an issue not evidently understood by the defendant. The court's decision correctly identified and analyzed this issue as involving "causation of injury". This decision might be criticized when one considers how this holding might be useful to the defendant if one of the injuries were barred by the statute of limitations, or involved different employers?

It might be suggested that Trugreen stands for the proposition that separate and successive industrial injuries may be combined to establish an industrial psychiatric injury as a compensable consequence in meeting the industrially predominant as to all causes standard. This editor however believes that the holding merely turns on the "causation of injury" analysis.

Applicant filed claims alleging a specific injury to his back and a compensable consequence psychiatric injury on 12/13/05 and a second specific on 11/29/05 as a result of seeing his co-worker and friend run over by a car and killed. The QME Dr. Greenzang found that the applicant's psychiatric condition was 40% caused by the 11/29/05 specific injury, 40% by the specific 12/13/05 injury and the remaining 20% was caused by non-industrial factors. The WCJ issued a Joint F&A, finding that Applicant sustained two specific injuries – one to his back and psyche on 12/13/05 and a separate injury to his psyche on 11/29/05. The WCJ also found that Applicant's psychiatric injury was compensable on an industrial basis pursuant to LC 3208.3(b)(1) since it was predominately caused by the combined result of seeing his co-worker's dead body and his back injury. Defendant filed a Petition for Reconsideration contending in relevant part that the WCJ improperly merged the dates of injury to meet the predominant cause requirement. They further contended that since only 40% was attributable to each separate date of injury, the predominant cause requirement for each injury could not be met.

The WCJ recommended that the Petition be denied indicating that using LC 4663 to try to apportion the injury was contrary to the Board's decision in *Reyes v. Hart Plastering, 70 CCC 223,* which held that whether an injury arises out of and occurs in the course of employment is governed by LC 3600 and 3208.3 (causation of injury) not LC 4663 (causation of disability). The apportionment by QME Dr. Greenzang related to Applicant's PD disability and not the injury itself. Thus, actual events of employment combined were more than 50% responsible for injury to the psyche. WCAB denied reconsideration. Defendant filed a Petition for Writ of Review which was denied.

E. "Sudden and Extraordinary"

Aresco v. WCAB (Marine World Africa USA) (2014) 79 CCC 1188, 2014 Cal.Wrk. Comp. LEXIS 119

Editor's Comments: Although the court did not expressly forbid consideration being given to whether the resulting "consequences" of the injury might be considered in an overall analysis of whether the event was "sudden and extraordinary", the focus of this analysis must be on whether the mechanism of injury was uncommon, unexpected or unusual. This editor believes that this analysis turns on whether the mechanism of injury was a risk associated with the occupation or job/services being performed. See also Matea v. WCAB (2006) 144 Cal.App. 4th 1435, 71 CCC 1522; State Compensation Ins. Fund v. WCAB (Garcia) (2012) 204 Cal.App.4th 766, 77 CCC 307.

But see also, in a somewhat confusing opinion by WCAB Panel, Aguirre v. Ekim Painting North 2014 Cal.Wrk.Comp. P.D. LEXIS 488, injury determined to be "sudden and extraordinary" where applicant/painter who fell from a ladder, and unrebutted testimony from applicant was that in 9 years of working as a painter he had never lost his footing or fell.

Applicant, while employed as a maintenance worker with Marine World was diagnosed with Guillain-Barre Syndrome, a bacterial infection contracted at his workplace and therefore determined to be industrial. In addition to the physical injury applicant claimed a psychiatric injury as a compensable consequence. Defendant denied the psychiatric component under LC 3208.3(b) as applicant had been employed fewer than six months at the time of industrial injury. Applicant pursued the psychiatric component asserting that the psychiatric injury was the result of a "sudden and extraordinary" employment condition. The matter proceeded to trial AOE/COE on the psychiatric claim. The WCJ concluded that the severity or consequence of the debilitating symptoms of Applicant's Guillain-Barre Syndrome, coupled with

*See also, Production Framing Systems v. WCAB (Dove) 77 CCC 756, in which the WCAB wrote, ". . . sudden and extraordinary condition as including. . .the type of events that would naturally be expected to cause psychic disturbances even in a diligent and honest employee. . ." ". . .an employment event is sudden and extraordinary if it is 'something other than a regular and routine employment event or condition,' that is, that the event was uncommon, unusual, and occurred unexpectedly. . ." * * *". . Liberty Mutual presented no evidence that a falling balloon wall was a common, usual, regular, or routine employment condition. Moreover, there was no evidence that a balloon wall falling on a worker is not the type of event that would naturally be expected to cause psychic disturbances even in a diligent and honest employee. . ."*

Production Framing Systems v. WCAB (Dove) 77 CCC at pg. 760 & 762.

the totally unexpected nature and uncertain outcome of the condition, was sufficient to exempt applicant's psychiatric claim from the six-month employment rule.

On reconsideration, defendant argued that nothing uncommon, unexpected or unusual had occurred and therefore the "sudden and extraordinary" employment conditions were not met to establish the exception to the six-month employment requirement for maintaining a psychiatric injury. The WCJ responded in her Report and Recommendation, that "sudden and extraordinary" not only applies to the mechanism of injury but also the circumstances and consequences flowing from the injury. The WCAB reversed the WCJ, writing that "extraordinary event" is an event which is "unusual, uncommon, and occurred unexpectedly". Further, the WCAB was not persuaded that "sudden or extraordinary" was satisfied by consequences or circumstances flowing from the injury. Writ Denied.

Travelers Casualty & Surety Company v. Workers' Compensation Appeals Board (Dreher) 246 Cal.App. 4th 1101,2016 Cal. App. Lexis 321

Applicant was employed as a live-in maintenance supervisor for an apartment complex. As he was walking in the rain to another building in the complex, applicant slipped and fell on a slippery concrete walkway. He had worked for the apartment complex less than 6 months at the time of injury. Applicant fractured his pelvis and claimed injuries to his neck, right shoulder, right leg, and knee; He also suffered gait derangement, a sleep disorder, headaches and ultimately psychiatric injury arising from the accident. Applicant was evaluated in June 2011. The evaluator concluded that applicant suffered a psychiatric disability as a result of the accident, including depression, difficulty sleeping, and panic attacks. After hearing, the WCJ found the claim barred by LC 3208.3 as applicant did not have an aggregate of 6 months of employment at time of injury. On reconsideration, the WCJ was reversed, with the WCAB finding that the injury was caused by an extraordinary employment condition and thus was not barred by section 3208.3(d). Defendant sought writ of review.

The Court of Appeal annulled the WCAB's decision and remanded the matter. The court concluded that (1) it is the applicant who has burden of proof to establish accident was "sudden and extraordinary" as an exception to six month employment requirement Lab. Code, § 3208.3, and (2) where activity was "routine, and not uncommon, unusual, or a totally unexpected event" and thus one which could "reasonably be expected to occur".. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.02[3]d]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[3][c].], 2016, Sullivan On Comp, Chapter 5, Section 5.31.

". . . the claimant's accident was not 'extraordinary' within the meaning of Lab. Code, § 3208.3. The evidence showed that the claimant routinely walked between buildings on concrete walkways at the work site and that he slipped and fell while walking on rain-slicked pavement. The claimant's testimony that he was surprised by the slick surface of the walkway because the other walkways had a rough surface, and his further testimony that the walkway was later resurfaced, did not demonstrate that his injury was caused by an uncommon, unusual, or totally unexpected event. The claimant's slip and fall was the kind of incident that could reasonably be expected to occur. Because the injury was not the result of a sudden and extraordinary event, the claimant's psychiatric injury claim was barred under § 3208.3, subd. (d). . ."

Travelers Casualty & Surety Company v. Workers' Compensation Appeals Board (Dreher) 2016 Cal. App. Lexis at pg. 324

Editor's Comments: The Dreher decision is a simple application of the requirement the injurious activity or event causing injury must not be "a risk inherent in the employment activity", "routine or common" or an "expected event" for it to be "extraordinary" under LC 3208.3. Further, of course it is the applicant who has the burden of proof on the issue of establishing "sudden and extraordinary" as it is the applicant "who benefits from the affirmative of the issue."

See also, SIMIC v. Lowe's Home Center, 2016 Cal.Wrk.Comp. P.D. LEXIS 214 (BPD), in which applicant was moving refrigerator down stairs and fell, with refrigerator landing on top of him, psych injury was not barred by six-month employment requirement where refrigerator falling down stair was determined to be "sudden and extraordinary". [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.02[3][d]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[3][c].], 2016, Sullivan On Comp, Chpter 5, Section 5.31.

See also, accord, Docena v. Layne Christensen Co., 2016 Cal.Wrk. Comp. P.D. LEXIS 393, that jumping to avoid a large wrecking ball when cable holding snapped held "sudden and extraordinary under LC 3208.3 as exception to six month rule.[See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.02[3][d]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[3][c].]; Sullivan on Comp, Section 5.31, Psychiatric Injury – Six Month Rule.

See also, State of California, Department of Corrections and Rehabilitation (California Men's Colony), v. Workers' Compensation Appeals Board, (Van Dyk) (Court of Appeal, 2nd Appellate District) 81 Cal. Comp. Cases 458; 2016 Cal. Wrk. Comp. LEXIS 51 (Writ of Review Denied), which held that successive injuries may be combined to meet burden predominant cause of psychiatric injury, despite the fact that the second injury alone did not meet 51 percent predominant causation standard, where two injuries combined amounted to the requisite greater than 50% industrial cause.

Lira, v. Premium Packing, PSI, administered by Sedgwick CMS, 2015 Cal. Wrk. Comp. P.D. LEXIS 299.

Applicant/truck driver was struck by a train while crossing railroad tracks on September 24, 2011. The employer was informed about the accident, and an employee representative observed the accident scene and talked to applicant about the accident. After the accident, the employer took the applicant to a company doctor. When applicant was examined by the doctor, he told the doctor about pain in his low back. The doctor told him there was nothing wrong with him. On cross-examination, applicant stated that the employer terminated him for failing to look both ways before crossing the railroad tracks. Applicant admitted that he did not have any anxiety or depression or sadness before he was terminated.

> *" The issue of what constitutes an 'extraordinary' employment condition for purposes of Labor Code section 3208.3(d) was addressed in numerous cases. In Matea, supra, for example, the injured worker sustained an admitted injury while working in a Home Depot store when a rack of lumber fell on his left leg. Matea also alleged a psychiatric injury as a compensable consequence. He had not been employed for six months when the injury occurred, so the employer denied the psychiatric aspect of the injury, contending that the injury was not a sudden and extraordinary employment condition. (Matea, supra, at p. 1438.) The Matea court referred to the definition of extraordinary from Webster's Third New International Dictionary (1993) as "going beyond what is usual, regular, common, or customary" and "having little or no precedent and usually totally unexpected" (Webster's 3d New Intemat. Dict., supra, at p. 807) and concluded that lumber falling from a rack and injuring the applicant at a Home Depot store constituted an extraordinary employment condition, justifying an award of benefits for the ensuing psychiatric injury."*
>
> *Lira, v. Premium Packing, PSI, administered by Sedgwick CMS, 2015 Cal. Wrk. Comp. P.D. LEXIS at pg. 300*
>
> *Editor's Comments: In determining whether the psychiatric injury was caused by "sudden and extraordinary events of employment" as an exception to the bar of post-term and 6-months aggregate employment in psychiatric injury, the test appears to be whether the event was "uncommon, unusual and totally unexpected" and "occur under extremely unusual circumstances" so that the likelihood of the claim being invalid is substantially reduced. In addressing this issue both parties would be best served to put on evidence that the events are or are not "uncommon, unusual and totally unexpected" and "occur under extremely unusual circumstances". The focus seems to be on the legislative intent behind the defenses of psych post-term and the requirement of 6-months aggregate employment that is to limit fraudulent/invalid psychiatric claims. Last, it is noteworthy that in this Panel decision the WCAB rejected defendant's suggestion that Labor Code § 3208.3 requires workplace event or condition to be unforeseeable, in order to qualify for application of "sudden and extraordinary" exception.*

Applicant was examined by the QME who identified three stressors which caused applicant's psychiatric injury as follows: (1) 60% to the tractor-train collision; (2) 25% to applicant's termination and financial problems; and (3) 15% to chronic physical problems from the injury. The QME concludes that the psychiatric injury is an industrial injury. The defendant argued that the claim was barred as post-termination and the exception of "sudden and extraordinary events of employment were the cause of injury" did not apply (LC 3208.3(e)). The WCJ found for the applicant based on the opinion of the QME and that the psychiatric injury was the result of a "sudden and extraordinary events of employment".

> *But recall also, Dreher v. Alliance Residential (2015) 2015 Cal.Wrk.Comp. P.D. LEXIS 345 (Split Panel Decision) where fall on "slippery" walkway was held "extraordinary".*
>
> *See also, Matea v. WCAB (2006) 144 Cal.App.4th 1435, 51 Cal.Rptr. 3d 314, 71 Cal.Comp.Cases 1522, holding that "sudden and extraordinary" employment events are those events that are "uncommon, unusual and totally unexpected," and although motor vehicle accidents are generally not extraordinary events, accidents that occur under extremely unusual circumstances, citing California Insurance Guarantee Association . WCAB (Tejera) (2007) 72 Cal.Comp.Cases 482 (WD) , may be interpreted as extraordinary, since the type of accident where train collides with tractor is not routine or ordinary but rather was uncommon and unexpected so as to fall within "sudden and extraordinary" exception.*

On reconsideration defendant argued that (1) the employer had no notice of a psychiatric injury prior to applicant's termination; and (2) applicant's claim of psychiatric injury is barred pursuant to section 3208.3(e)(2) because applicant did not report his psychiatric injury prior to his termination.

The WCAB began with a detailed review of the case law involving the definition of "sudden and extraordinary" involving an exception to the requirements of 6 months aggregate employment under Labor Code § 3208.3(d). In the end the WCAB upheld the WCJ in determining the psychiatric injury was caused by "sudden and extraordinary events of employment" as an exception to the bar of post-term and 6-months aggregate employment in psychiatric injury. The WCAB held that the test appears to be whether the event was "uncommon, unusual and totally unexpected" and "occur under extremely unusual circumstances". Although an automotive accident is not extraordinary, an accident between a train and a truck is extraordinary in that it is "uncommon, unusual and totally unexpected" in that it occurred under extremely unusual circumstances. Last, the WCAB rejected defendant's suggestion that Labor Code § 3208.3 requires workplace event or condition to be unforeseeable, in order to qualify for application of "sudden and extraordinary" exception.

F. The "Violent Act" Exception

Larsen v. Securitas Security Services, 2016 Cal. Wrk. Comp. P.D. LEXIS 237 (Board Panel Decision)

Applicant, a security guard sustained an accepted industrial injury to her neck, back, and bilateral shoulders from being hit by a car while walking through a parking lot on February 21, 2013. Applicant also alleged injury to her psyche as a result of the accident. Applicant sought PD for physical and psychiatric injury as a compensable consequence arguing that the accident constituted a "violent act", an exception to the LC 4660.1 prohibition to PD resulting from psychiatric injury as a compensable consequence of the physical industrial injury. The WCJ found that applicant's psychological permanent disability resulted from a "violent act" in accordance with Labor Code section 4660.1(c) and thus was compensable. Defendant sought reconsideration.

> *". . . Black's Law Dictionary defines 'violent' as follows:*
> *1. Of, relating to, or characterized by strong physical force (violent blows to the legs).*
> *2. Resulting from extreme or intense force (violent death).*
> *3. Vehemently or passionately threatening (violent words). (Black's Law Dictionary (7th ed. 1999).)*
>
> *. . . Here, applicant was struck by a car in a parking lot where she was conducting a walking patrol as a security guard. Furthermore, the evidence establishes that applicant was hit from behind with enough force to cause her to fall, hit her head, and lose consciousness. Being hit by a car under these circumstances constitutes a violent act. Applicant was therefore a victim of a 'violent act' within the definition of section 3208.3(b). Thus, applicant is entitled to additional permanent disability for her psychological injury as an exception to section 4660.1(c). . .*
>
> *"To perpetrate" is defined as: "To commit or carry out (an act, especially a crime)[.]" (Black's Law Dictionary (7th ed. 1999).) The Legislature has indicated a requirement that a violent act be 'perpetrated' upon the victim within numerous other statutes, but has omitted such language from section 3208.3. Thus, we conclude that for purposes of section 3208.3, a "violent act" is not limited solely to criminal or quasi-criminal activity, and may include other acts that are characterized by either strong physical force, extreme or intense force, or are vehemently or passionately threatening.*
>
> *Larsen v. Securitas Security Services, 2016 Cal. Wrk. Comp. P.D. LEXIS at pg. 241*

The WCAB upheld the WCJ finding that Labor Code § 3208.3(b), "violent act" is not limited solely to criminal or quasi-criminal activity, and may include other acts that are characterized by either strong physical force, extreme or intense force, or are vehemently or passionately threatening, including being hit by car from behind with enough force to cause lose consciousness. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3][a], [b], [f], 4.69[1], [3][a], 8.02[4][c][ii], [5], 32.02[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.05[3][b][i][ii], 7.06[6], Ch. 10, § 10.06[3][a], [b][i]. 10.16; Sullivan On Comp, 10.16, Use of 2013 Permanent Disability Schedule.]

Torres v. Greenbrae Management/SCIF (July 2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 230, 82 Cal.Comp.Cases 952, 45 CWCR 152 (WD).

Applicant, a tree trimmer fell 20 feet landing on his head. Applicant claimed injury to various parts of body including injury to psyche as a compensable consequence. Applicant also sought compensation under the Guzman Doctrine for sexual and sleep disorder contrary to LC 4660.1.

The WCJ ruled that the psychiatric disability was excluded by the 2013 enactment of LC 4660.1 which excluded psychiatric injuries as a compensable consequence of a work injury.

The applicant petitioned for reconsideration arguing that: (1) the psychiatric injury was a "direct result of the injury", (2) the injury was a "violent act" exception and (3) the injury was "catastrophic" as exceptions to § 4660.1. The applicant also argued that § 4660.1 did not apply where the PD increase involving sleep and sexual disorders where it is assessed pursuant to *Almaraz/Guzman* Doctrine.

The WCAB held that the injury was a "direct cause" of the disability and therefore the "violent act" exception under § 4660.1(c) (2) (A) applied. The panel cited *Larsen v. Securitas Security Services* (2016) 44 CWCR 111 and *Madson v. Michael J. Covaletto Ranches* (Zenith Ins. Co.) (2017) 45 CWCR 65 observing that the fall from the tree and the resulting psychiatric disability, post- traumatic stress syndrome, was a "direct" cause of the injury and not a compensable consequence. Further, the panel held that the "*violent act*" exception applied because the accident was (1) characterized by a strong physical force; (2) characterized by extreme or intense force, or (3) vehemently or passionately threatening. The panel observed that all three exceptions applied to this accident. The panel never addressed whether the injury was a "catastrophic injury" because the "violent act" exception applied and made the claim compensable. The panel also held that § 4660.1 prohibited the add-on of sleep and sexual

dysfunctions to ratings. The panel found that it was a legislative intent, to exclude sleep and sexual dysfunction as an add-ons. To allow add-ons under *Almaraz/Guzman* analysis would circumvent the intent of § 4660.1. The panel also noted that the sleep and sexual dysfunctions are incorporated into the activities of daily living (ADL) under calculation at *Table 1-2* of the AMA Guides. To allow sleep and sexual disorder add-on would duplicate the rating for the same condition.

See also, accord Madson v. Cavaletto Ranches 45 CWCR 65 involving truck roll over pining applicant upside down held "violent act" citing Larson v. Securitas Security 44 CWCR 111.

Allen v. Carmax, 2017 Cal. Wrk. Comp. P.D. LEXIS 303(BPD)

Applicant was employed as a satellite service manager when on 5/22/2014 he sustained injury to his low back, right shoulder, neck, knees, and psyche, when brakes failed on car applicant was test-driving, causing car to hit cement pillar.

The WCAB upheld the WCJ finding that (1) Labor Code § 4660.1(c) does not preclude permanent disability award for psychiatric impairment caused by direct events of employment, and based on opinion of psychiatric qualified medical evaluator in this case, 20 percent of applicant's psychiatric impairment directly resulted from events of employment and would be compensable regardless of whether applicant's injury constituted violent act, and (2) WCJ correctly found that applicant was not precluded under Labor Code § 4660.1(c) from receiving increased permanent disability for psychiatric injury because applicant's mechanism of injury constituted "violent act" as described in prior panel decisions as act that is characterized by either strong physical force, extreme or intense force, or act that is vehemently or passionately threatening. Citing and discussing Lopez v. General Wax Co, 2017 Cal.Wrk.Comp.P.D. LEXIS 291 (BPD), Partial amputation of finger after becoming stuck in machine constituted "violent act"; Guerrero v. Ramcast Steel Fabrication, 2017 Cal.Wrk.Comp. P.D. LEXIS 285, 82 Cal.Comp.Cases 1222 (BPD), tool mechanic's fingers amputated by machine held 'violent act' and also 'catastrophic injury'; Labor Code Section 4660.1(c); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3][a], [b], [f], 4.69[1], [3][a], 8.02[4][c][ii], [5], 32.02[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.05[3][b][i][ii], 7.06[6], Ch. 10, § 10.06[3][a], [b][i].]

See also, Lopez v. General Wax Co., 2017 Cal Wrk Comp PD LEXIS 291(BPD), holding that LC §4660.1(c) does not preclude recovery of TD benefits. Award of 100% upheld to include psychiatric PD when applicant's finger was partially amputated after becoming stuck in machine, not precluded under LC §4660.1(c) from receiving increased permanent disability for psychiatric injury because applicant's mechanism of injury constituted "violent act" as defined in LC 3208.3(b) as "an act that is characterized by either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening," and, therefore, all of applicant's psychiatric impairment was compensable regardless of whether it was directly caused by getting her finger stuck in machine or whether it was caused as compensable consequence of her physical injuries. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.02[3][a], [b], [f], 4.69[1], [3][a], 8.02[4][c][ii], [5], 32.02[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.05[3][b][i][ii], 7.06[6], Ch. 10, § 10.06[3][a], [b][i].]

See also, Guerrero v. Ramcast Steel, 2017 Cal.Wrk.Comp. P.D. LEXIS 285, 82 Cal.Comp.Cases 1222, holding that fingers amputated by hydraulic punch press held within "violent act" and "catastrophic injury" exceptions to provision in Labor Code § 4660.1(c)(1) precluding increased permanent disability for psychiatric injuries arising out of compensable physical injuries. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3][a], [b], [f], 4.69[1], [3][a], 8.02[4][c][ii], [5], 32.02[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.05[3][b][i][ii], 7.06[6], Ch. 10, § 10.06[3][a], [b][i].]

See also, Zarifi v. Group 1 Automotive, 2018 Cal.Wrk.Comp.P.D. LEXIS 300 (BPD)Applicant was not entitled to PD resulting from compensable consequence psychiatric injury where injury to head (1) did not result in lose consciousness after striking his head, did not involve a fall, or immediate medical treatment, and force of incident was neither extreme nor intense for purposes of constituting "violent act pursuant to Labor Code § 3208.3," and (2) diagnosis of consciousness and cognitive disorders did not establish that applicant suffered "catastrophic injury" to his head as provided in Labor Code § 4660.1(c)(2)(B), where none of evaluating physicians characterized applicant's injury as severe and diagnosed only minor concussion. Zarifi v. Group 1 Automotive, 2018 Cal.Wrk.Comp.P.D. LEXIS 300 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3][a], [b], [f], 4.69[1], [3][a], 8.02[4][c][ii], [5], 32.02[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.05[3][b][i][ii], 7.06[6], Ch. 10, § 10.06[3][a], [b][i]; SOC, Section 10.16, Use of 2013 PD Schedule.]

See also, Gonzales v. Swift Transportation, 2018 Cal.Wrk.Comp. P.D. LEXIS 354 (BPD), holding CT psychiatric injury was not barred as post-termination (LC § 3208.3(e)), when medical evidence established first treatment was prior to termination, but not prior to suspension.); Further, psychiatric injury not barred by good faith personnel action defense (LC § 3208.3(h) where termination for drinking did not meet objective reasonableness standard as undertaken in good faith, where testing completely negative for alcohol and sole basis was that there were used and unused alcohol bottles in office shared by applicant with many employees. Last, defendant has burden of establishing good faith personnel action defense. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3][e], 4.65[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[3][e].] [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3][a], [b], [f], 4.69[3][a], [b], [d]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[3][b], [d].]

Orthopedic Medicine

The Medical-Legal Process

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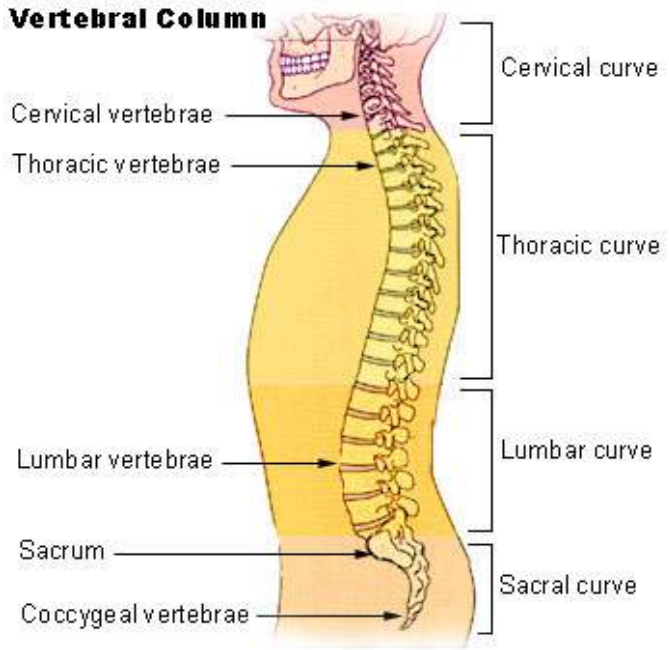
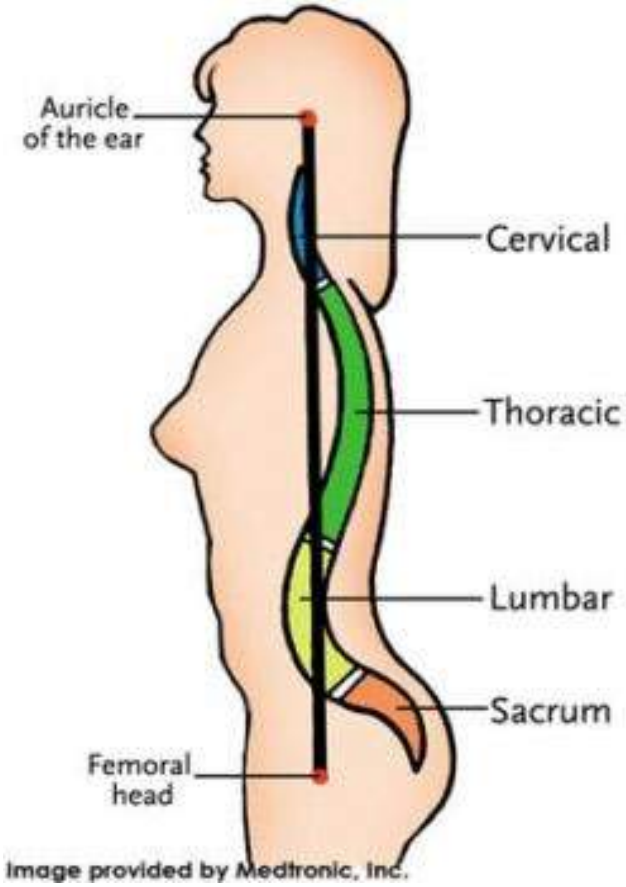
Jones Clifford, San Francisco

The Spine in Brief



Spinal Curves and Alignment



Orientation

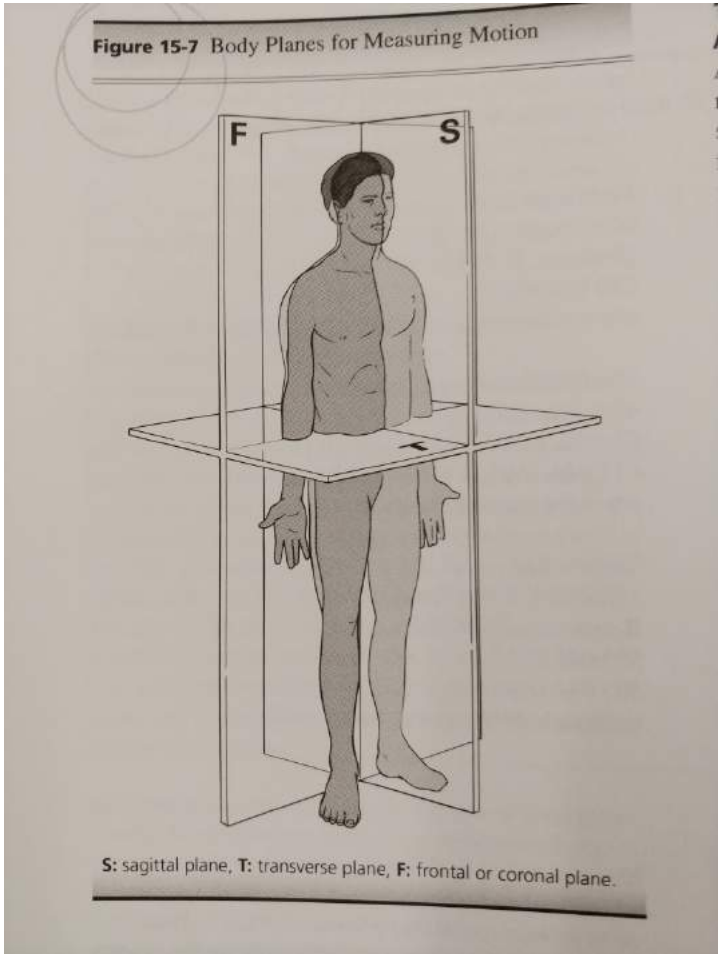


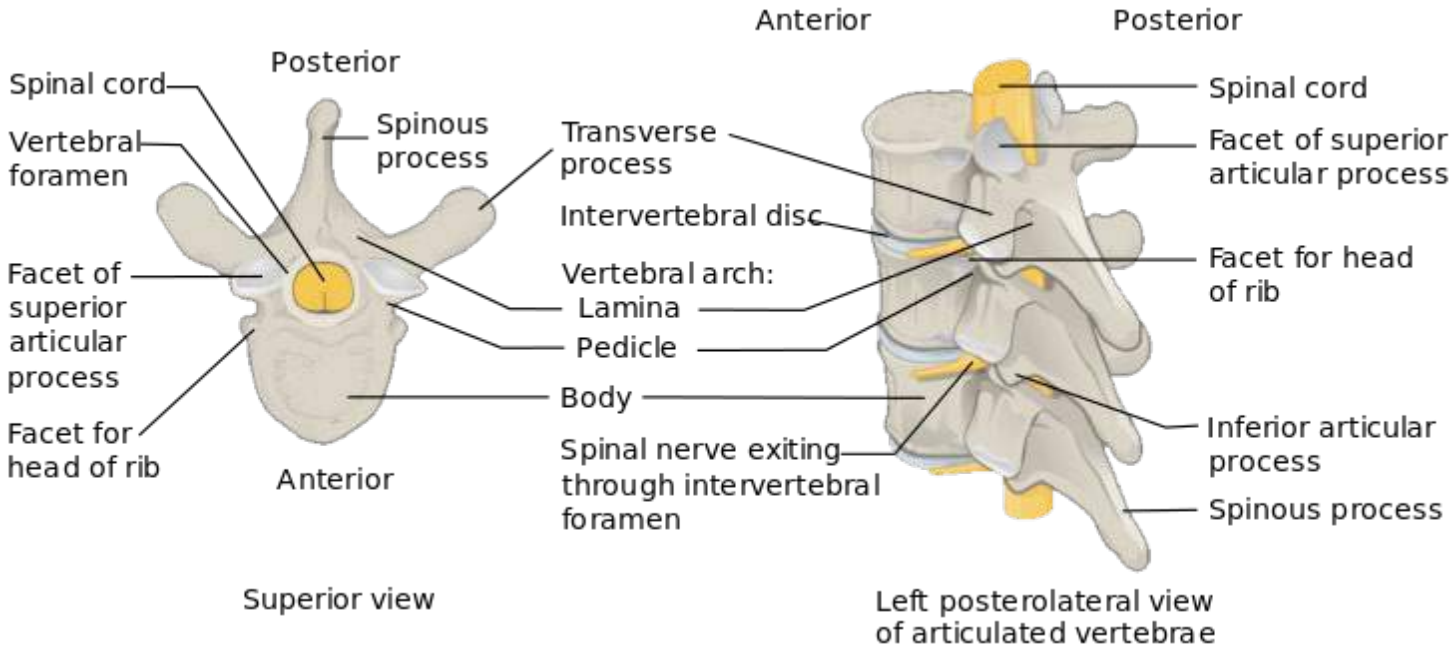
Figure 15-7 Body Planes for Measuring Motion

S: sagittal plane, **T:** transverse plane, **F:** frontal or coronal plane.

Functions

- Flexible support
- Conducts nerve tissue
- Protects abdominal organs
- Provides attachment for limbs
- Facilitates ambulation

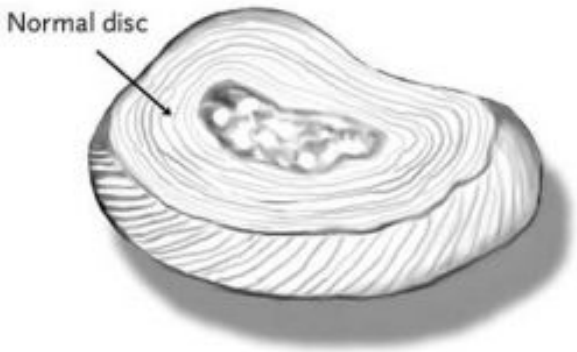
Structure

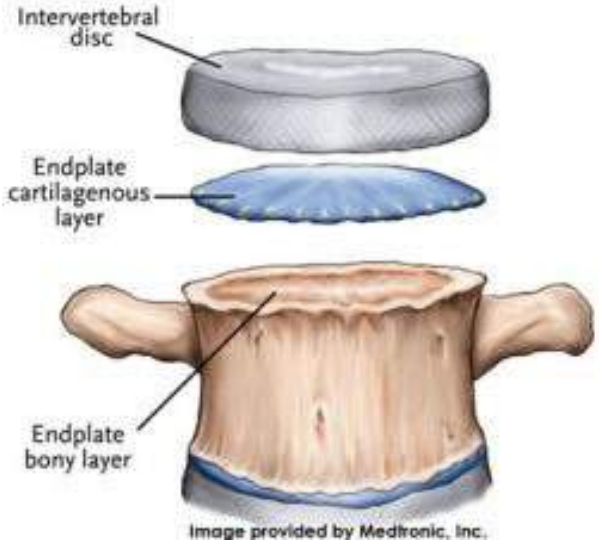

Posterior
Spinal cord
Vertebral foramen
Spinous process
Facet of superior articular process
Facet for head of rib
Anterior
Superior view
Anterior
Posterior
Transverse process
Intervertebral disc
Vertebral arch:
Lamina
Pedicle
Body
Spinal nerve exiting through intervertebral foramen
Spinal cord
Facet of superior articular process
Facet for head of rib
Inferior articular process
Spinous process
Left posterolateral view of articulated vertebrae

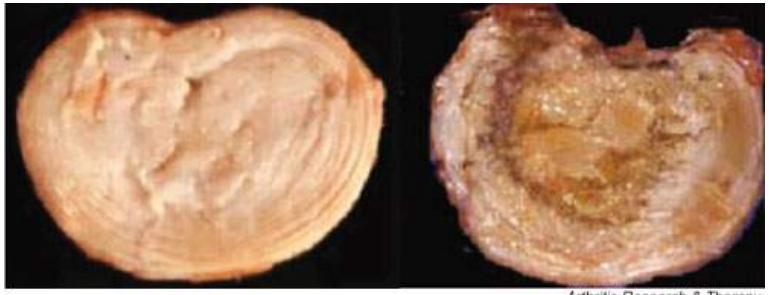
The Motion Segment

Image provided by Medtronic, Inc.

Discs

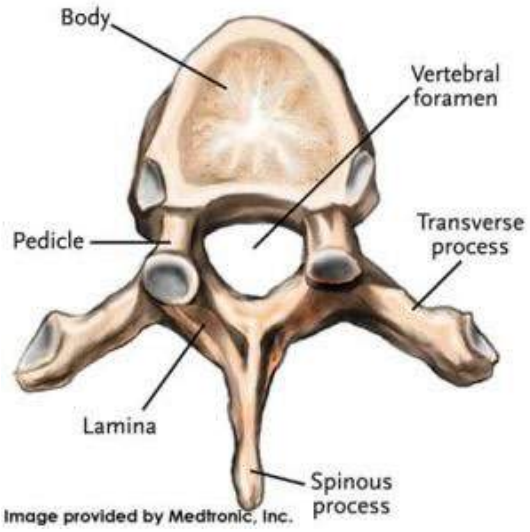


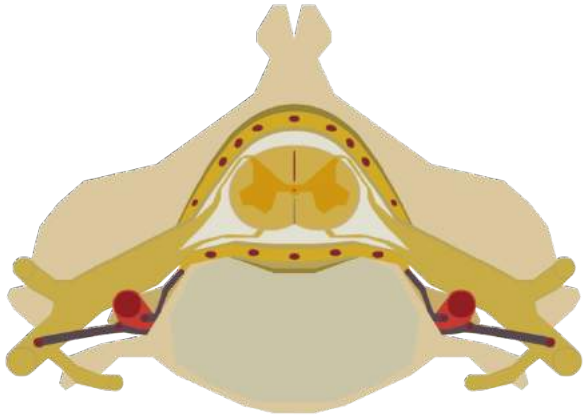


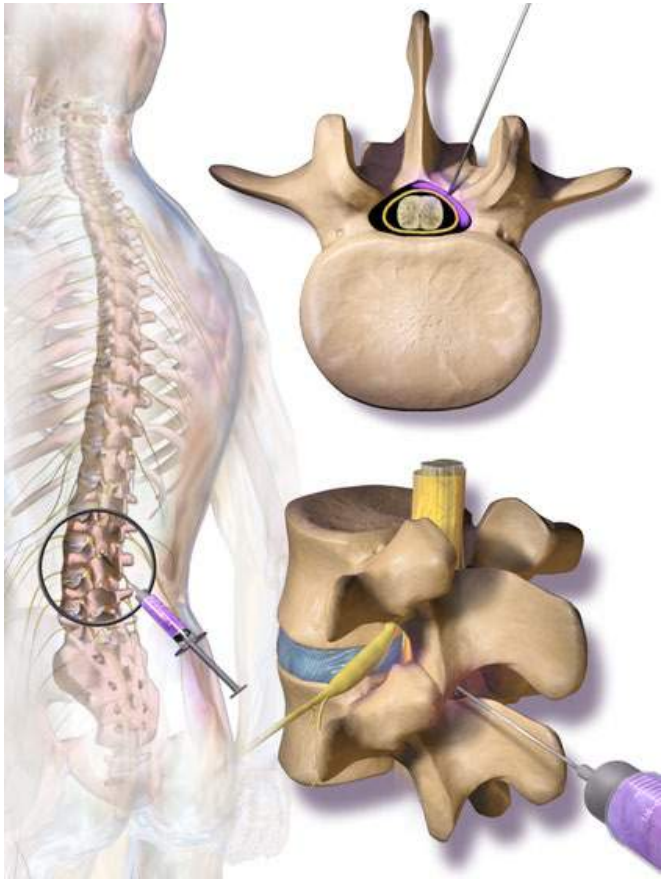


Arthritis Research & Therapy

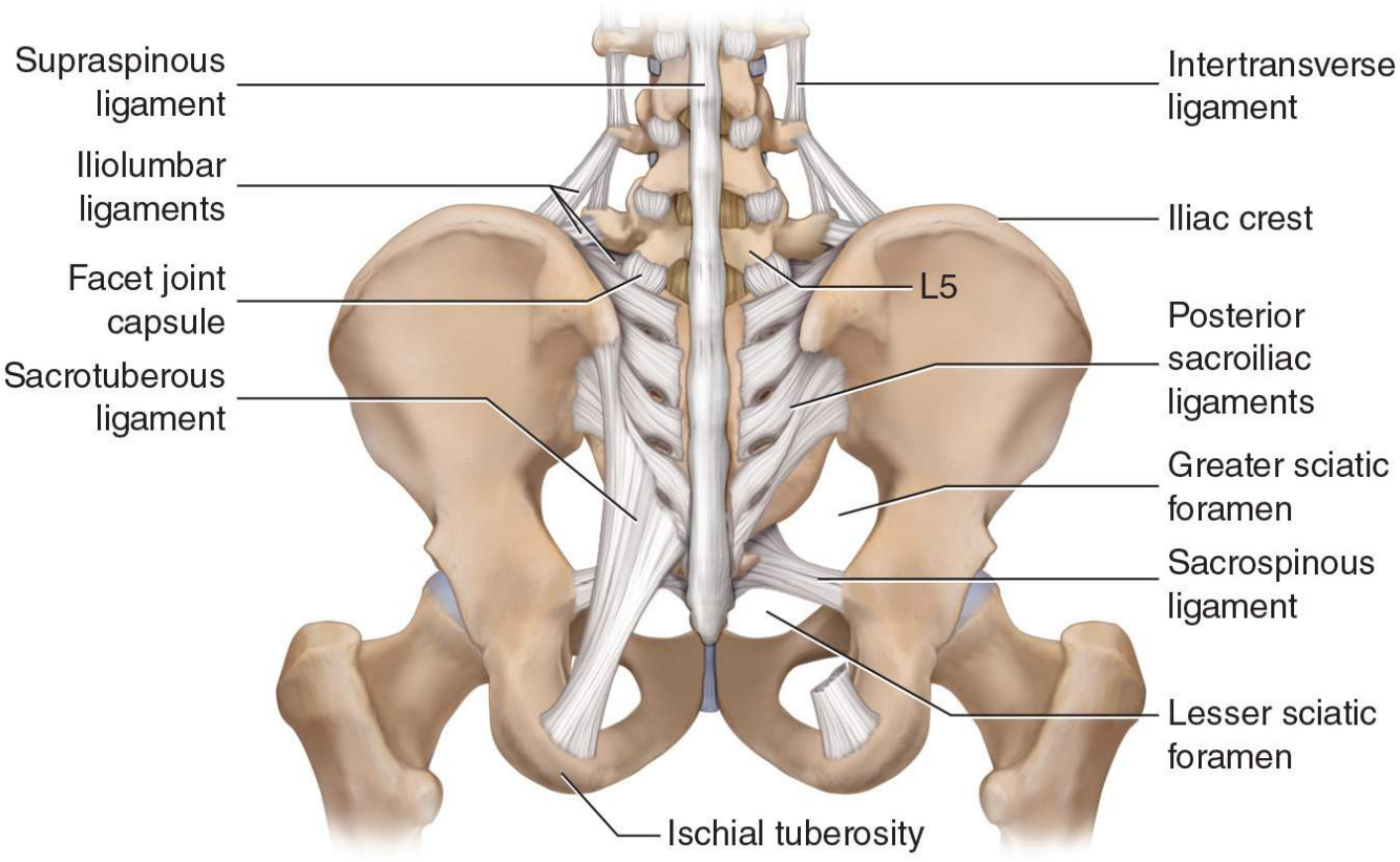
Vertebrae and Nerve Tissue



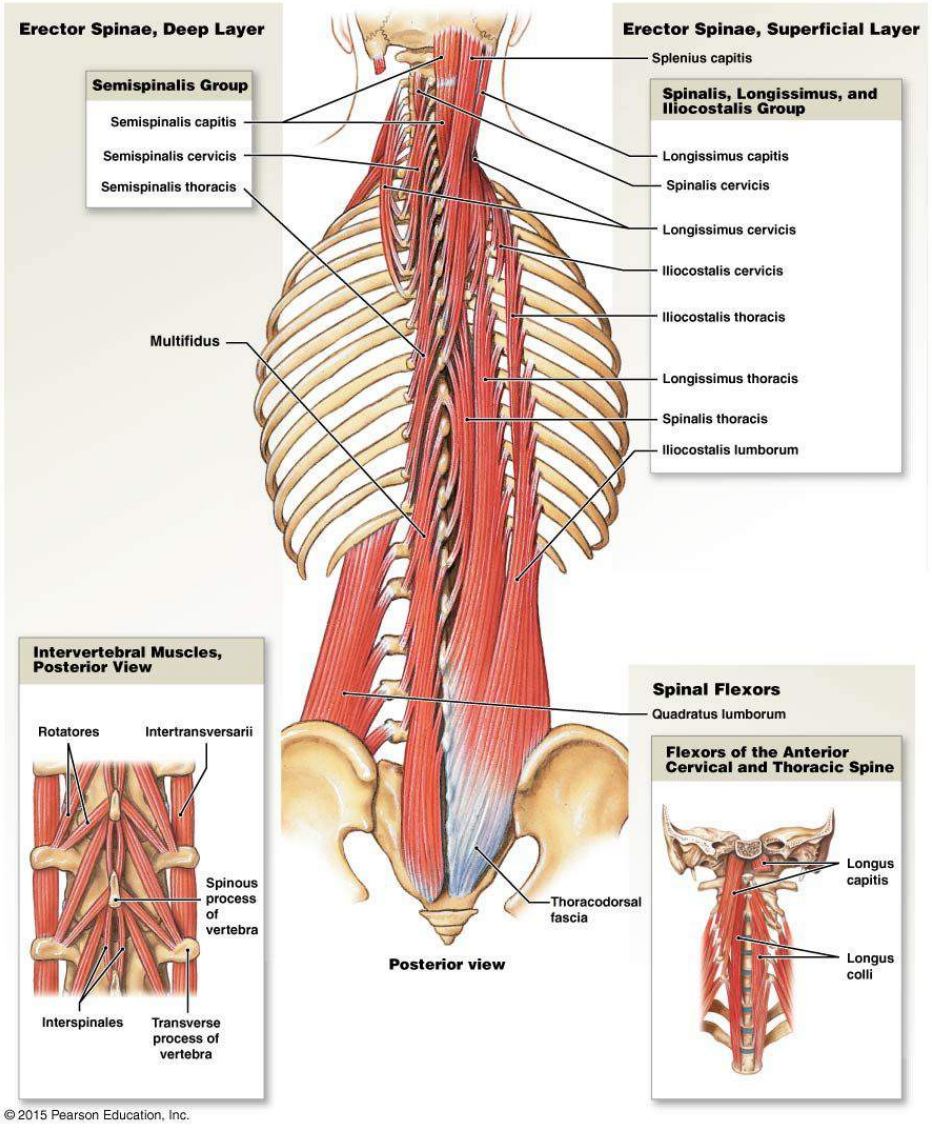




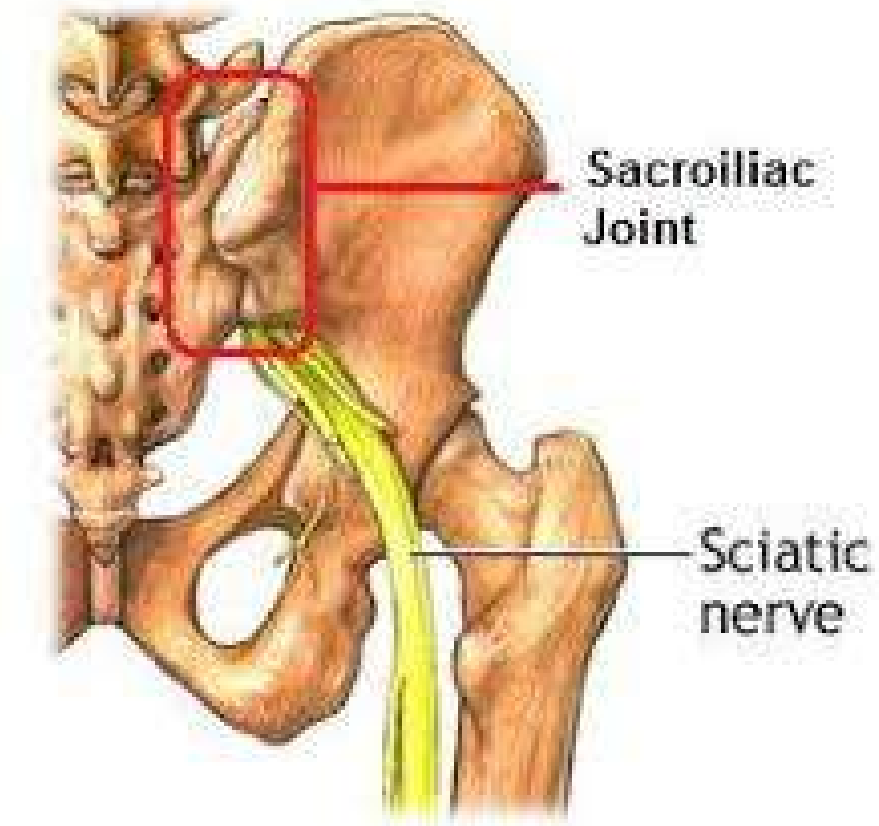
Ligaments



Muscles

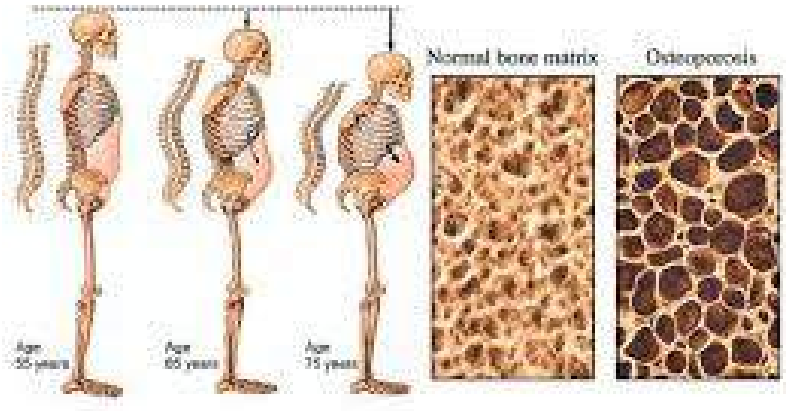


S-I Joint



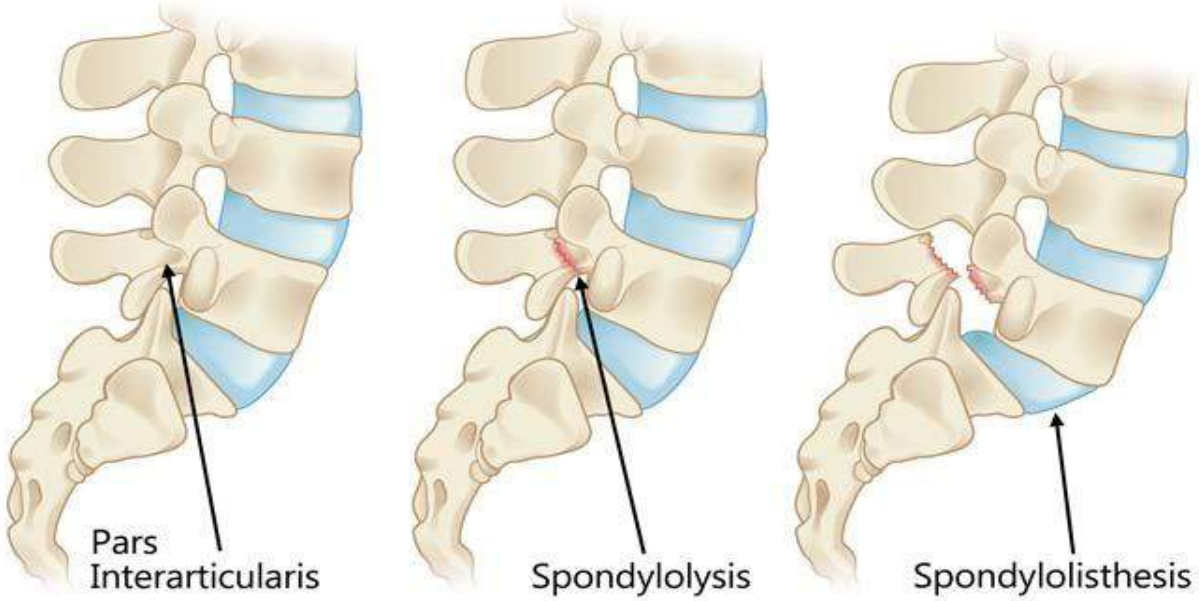
Causes of Spinal Pain

- Bone
  - Osteoporosis (reduced density = fragile)
  - Fracture
  - Tumor, etc



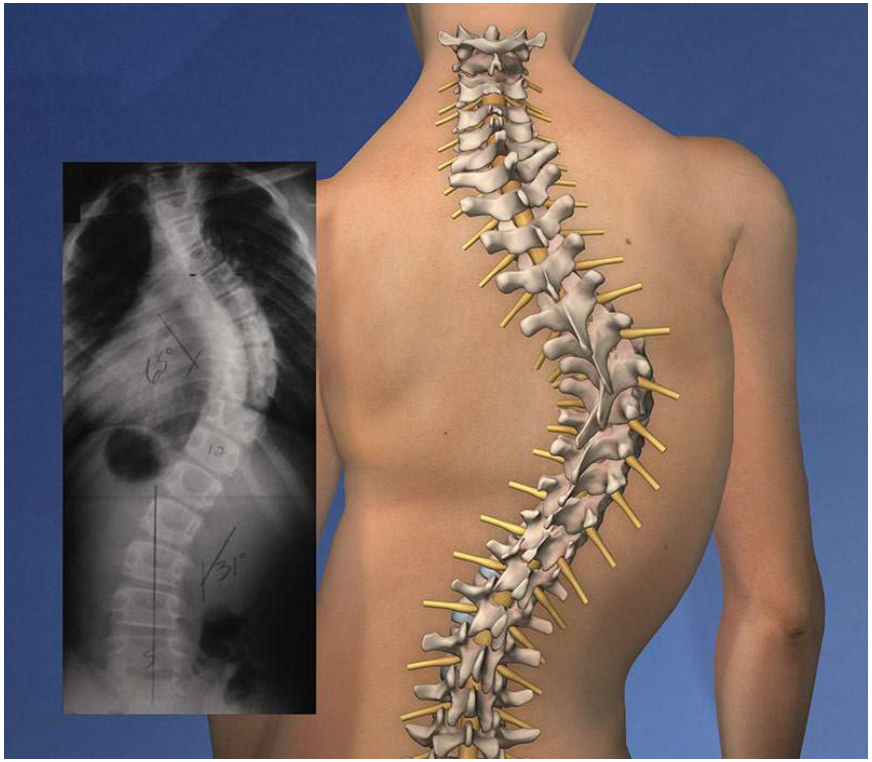
Causes of Spinal Pain

- Bone
  - Structural abnormality
    - Spondylolisthesis



Causes of Spinal Pain

- Bone
  - Structural abnormality
    - Scoliosis



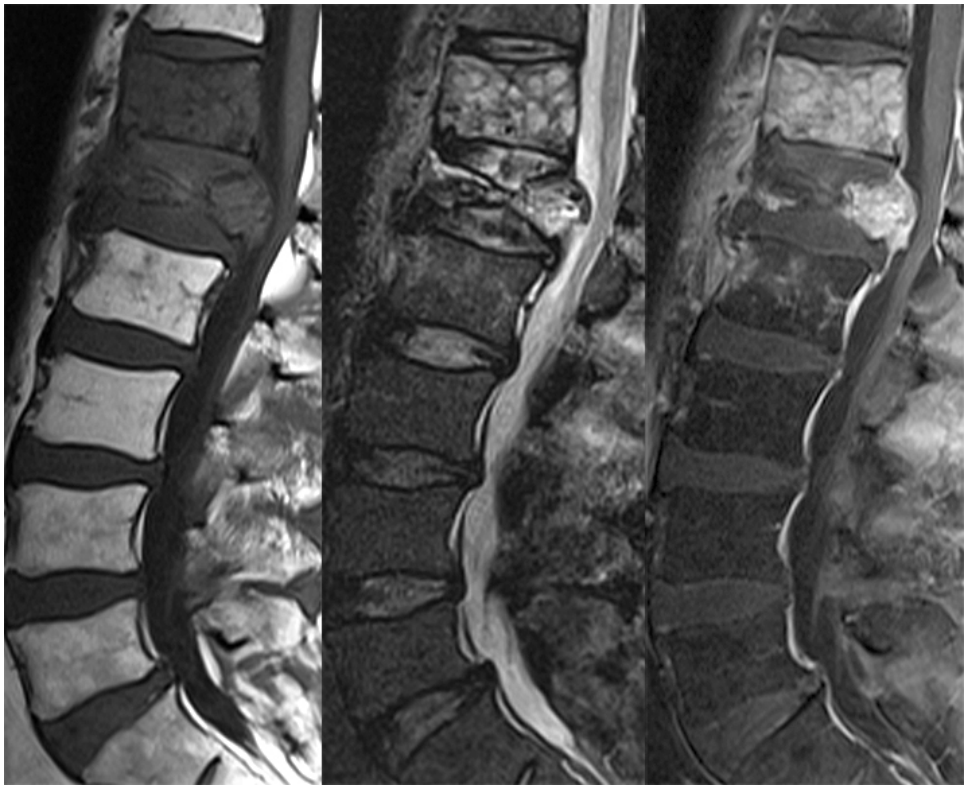
Cause of Spinal Pain

- Bone
  - Tumor (Benign Primary: Osteoid Osteoma)

Figure 5 - Magnetic resonance showing a sagittal section through the lumbar column in a T2 sequence, demonstrating the tumor niche and the sclerosis halo.

Cause of Spinal Pain

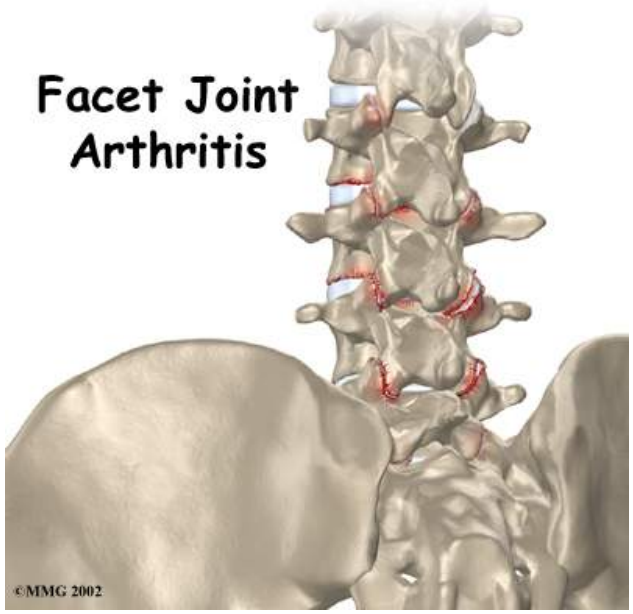
- Bone
  - Tumor: Cancer metastases (Renal clear cell CA)



Causes of Spinal Pain

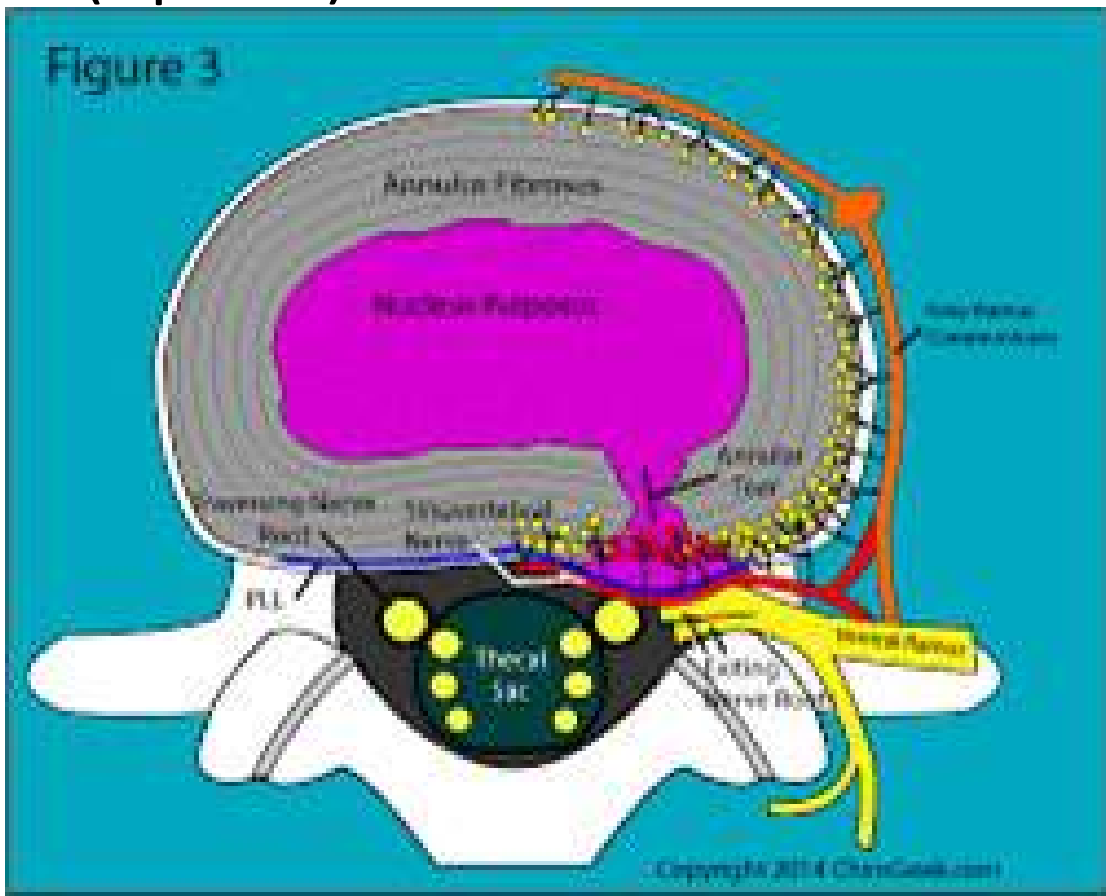
Joint

- Facet arthritis ("Facet Syndrome")
  - Degenerative OA due to disk degeneration
  - Other arthritis (gout, inflammatory like RA, etc)



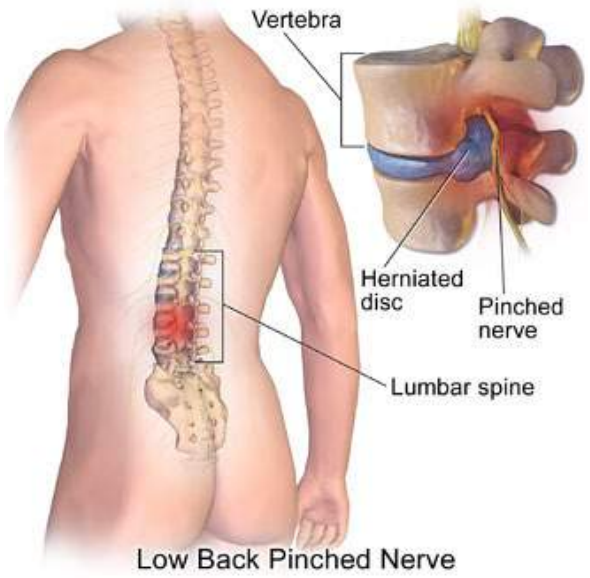
Cause of Spinal Pain

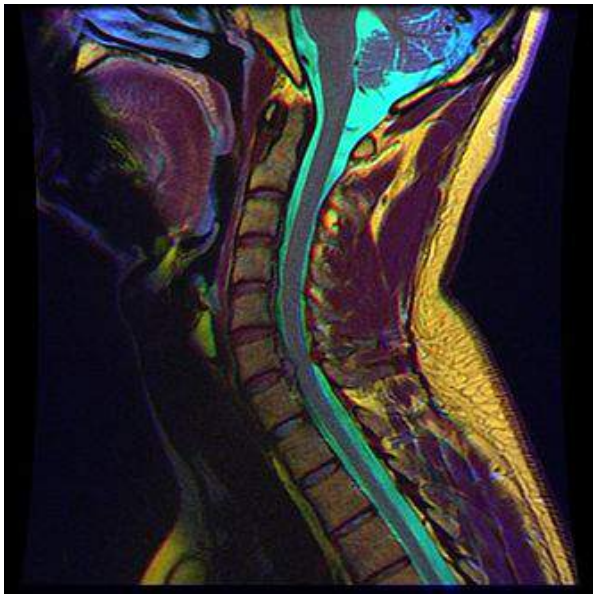
- Disk Pathology
  - Minor degeneration (‘sprain’)
  - Annular tears



Cause of Spinal Pain

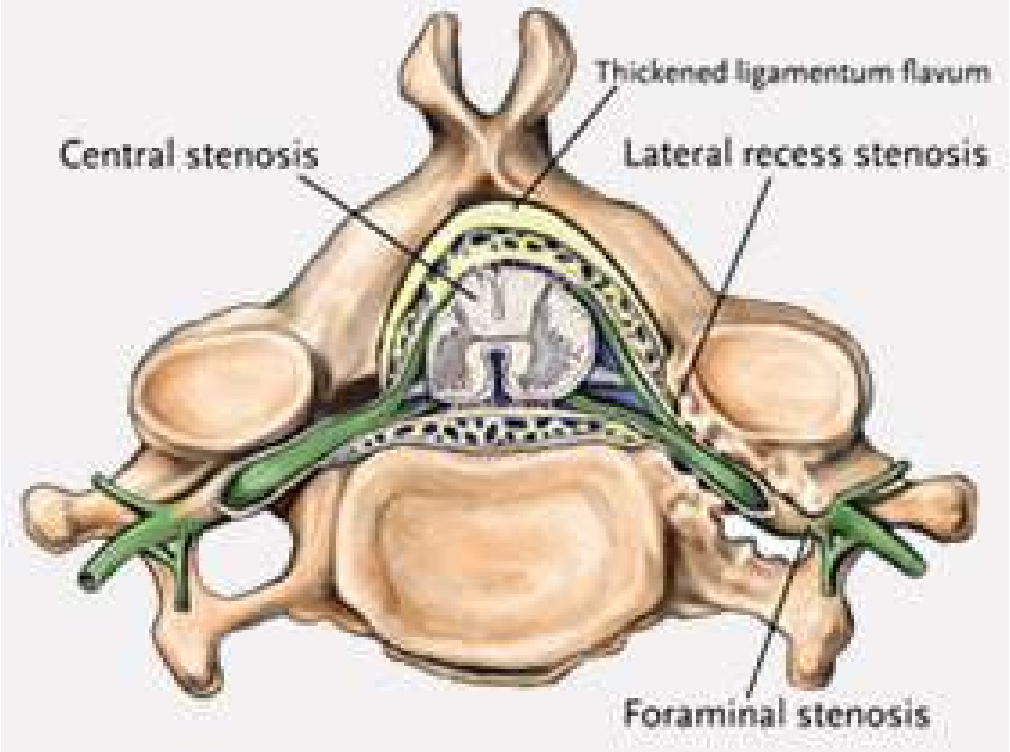
- Disc Herniation/Protrusion/Etc



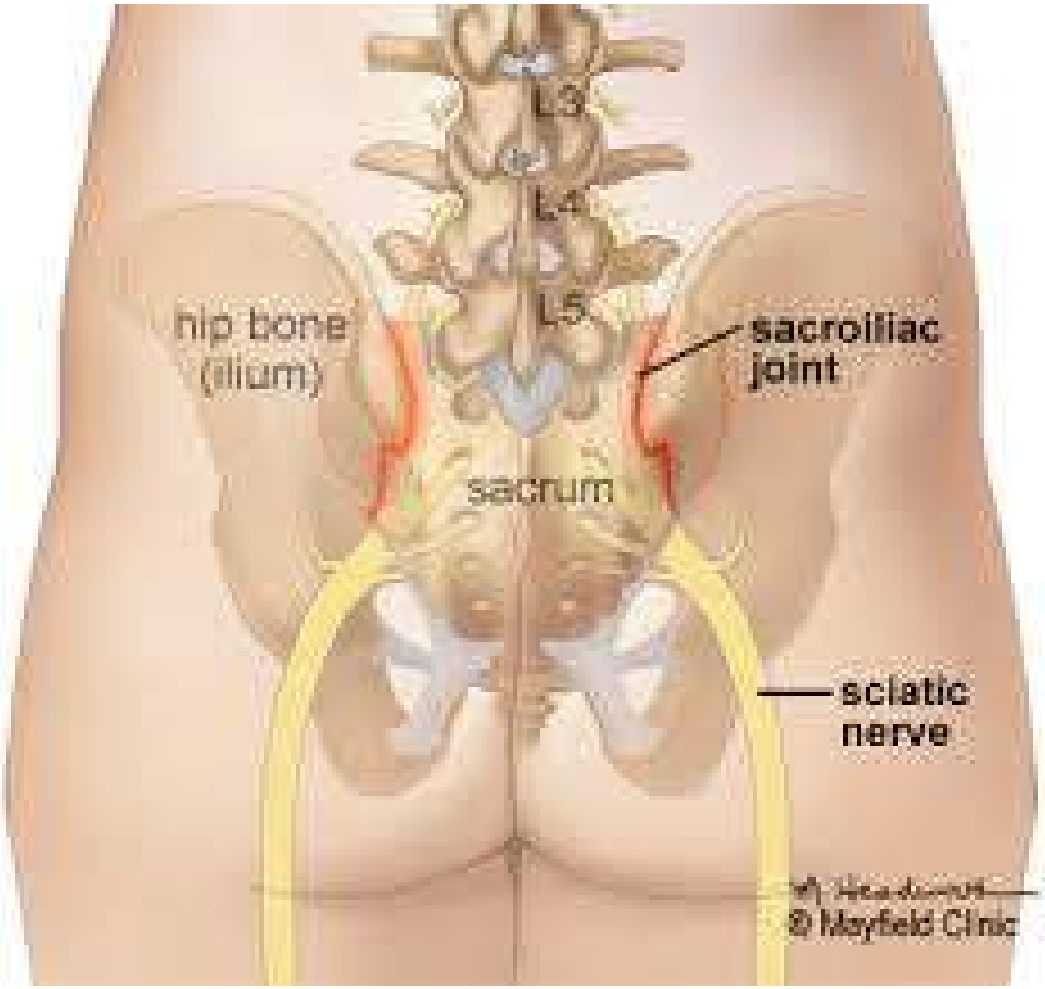


Cause of Spinal Pain

- Central and/or Foraminal Stenosis



Cause of Spinal Pain: S-I Joint



Diagnostic Procedures

- History

- Exam

Diagnostic Procedures

- Imaging
  - Bone Scan
    - Gauges activity of bone formation (recency of fx)
  - Xray
    - AP & Lateral with patient standing for L-S
    - flex/ext if concern for instability
  - MRI
    - Gives best information for nerve, disc and many bone conditions
  - CT
    - Gives better bone detail in some cases

Diagnostic Procedures

- Electrodiagnostics
  - NCV (NCS) measures speed, strength of sensory impulse traveling in nerve
  - EMG **measures** muscle response or electrical activity in response to a nerve's stimulation of the muscle
  - Many nerves conduct in two directions; EMG only measures the direction from spinal cord to muscle (motor) so will not detect abnormality of direction from periphery to spinal cord (sensory)

Diagnostic Procedures

- Injections, Diagnostic and Therapeutic
  - MBB: anesthetic injection to sensory nerve from facet; if reduces pain, supports reason for RFA
  - Facet: anesthetic(and steroid) injection into facet joint to ease pain of arthritis there
  - SNRB: selective nerve root block with anesthetic to prove if that nerve is pain generator
  - ESI: epidural injection with anesthetic and steroid; effect can be over more than one nerve root; contrast often used to see contour of nerve root
  - RFA: radio frequency ablation of facet innervation (a type of facet rhizotomy)
  - S-I: anesthetic (possible steroid also) into S-I joint

Spine Diagnostic Procedures

- Blood Tests
  - CBC, uric acid, RA, ANA, ESR, CRP, HLAb-27
    - Used to R/O spondylarthropathy (inflammatory disease of spinal joints) like ankylosing spondylitis

Treatment of Spinal & Radicular Pain

- Time, Gentle Motion, Light Duty, Education
- Meds: NSAIDs, Analgesics, Relaxants
- Manual: OMT, DC, PT, HEP, TENS (Massage, AcuP)
- Injection: reduce inflammation/help mobility
  - Nerve ablation
- Surgery:
  - Decompression
  - Fusion when necessary
  - Disc replacement

Treatment of Spinal & Radicular Pain

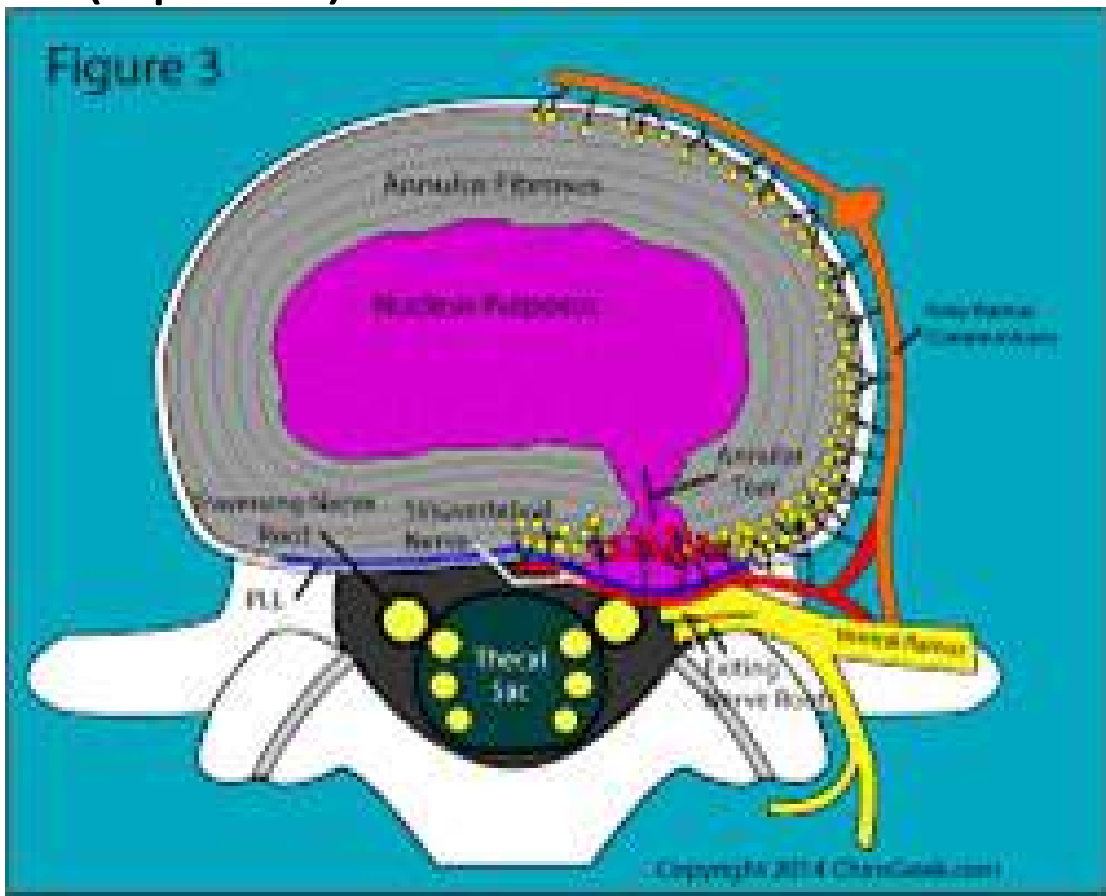
- Spinal Cord Stimulation (SCS)
  - Electrode placed over spinal cord produces signals which, in the brain, mask pain signals from site of noxious stimuli (works better for radicular than axial pain)
  - Small battery and computer implanted in subcutaneous tissues to power the electrode; this can be programmed by manufacturers technicians
  - Is preceded by trial implantation to prove efficacy

MAS Concept of Common Acute LBP

- 1) It's not a 'pulled muscle'
- 2) With reasonable medical probability, the pathology is injury to fibers of the annulus, much like an ankle sprain
- 3) An inflammatory environment is caused
- 4) This inflammation causes irritation of adjacent nerves
    - Those that innervate the outer annulus (back ache)
    - And nerve roots, causing
        - Spasm in lumbar muscles supplied by dorsal branch of n root
        - Radicular pain into lower limb

Cause of Spinal Pain

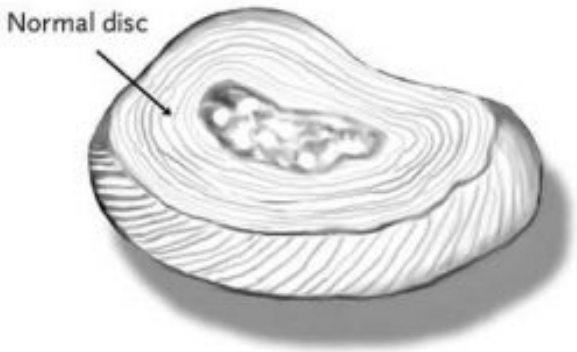
- Disk Pathology
  - Minor degeneration (‘sprain’)
  - Annular tears

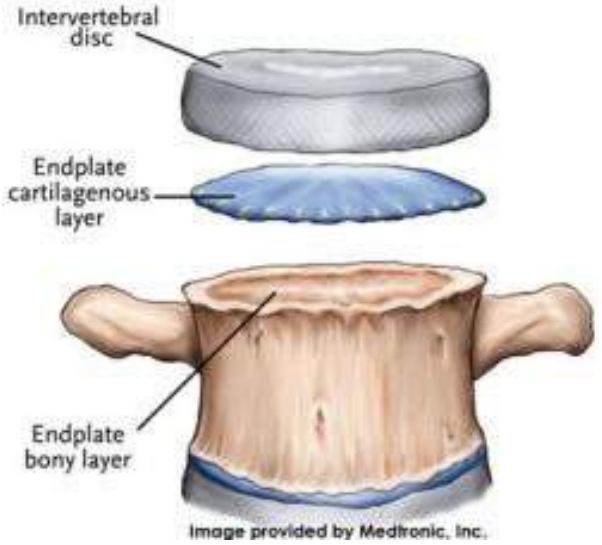


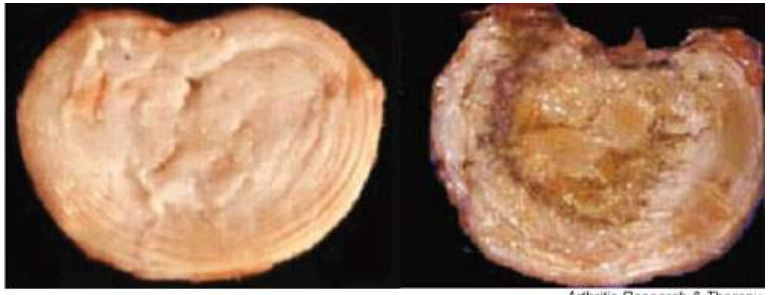
MAS Concept of Common Acute LBP

- 5) Spasm reduces movement in the motion segment; this impairs nutrition to tissues of the disc which slows healing
- 6) Gentle movement of the spine enhances disc nutrition; reducing spasm does the same
- 7) Remaining active, resting frequently (supine), and having manual treatment to reduce spasm (DC, OMT, HEP, ice & stretch, pills) speed healing
- 8) Healing usually takes several weeks, the same as for moderately severe ankle sprain

Discs







Arthritis Research & Therapy

Medical-Legal Procedures
LC 4060, 4061, 4062, 4062.1, 4062.2

The following represents a summary and analysis of some of the most recent case decisions issued by the California Supreme Court, California Court of Appeal, and the Workers' Compensation Appeals Board, and Statutes which the Editor believes is significant to the Medical-Legal process, as well as the practice of Workers' Compensation law generally. The summaries are only the Editor's interpretation, analysis, and legal opinion, and the reader is encouraged to review the original case decision in its entirety.

Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236]. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]. Panel Decisions which are designated as "Significant" by the WCAB, while not binding in workers compensation proceedings, are intended to augment the body of binding appellate court and en banc decision and is limited to panel decisions involving (1) issue(s) of general interest to the workers' compensation community, especially a new or recurring issue about which there is little or no published case law; and (2) upon agreement en banc of all commissioners on the significance and importance of the issues presented and resulting decisions. (See Elliot v. WCAB (2010) 182 Cal.App. 4th 355, 361, fn. 3, 75 CCC 81; Larch v. WCAB (1999) 64 CCC 1098, 1099-1100 (writ denied).

I. General Discussion.

Resolving issues involving **MEDICAL LEGAL PROCEDURES** starts with three questions: (1) What is the Date Of Injury; (2) Is Applicant Unrepresented or Represented; and (3) What is the Issue Being Contested, (AOE/COE, PD, TD/ Entitlement to Job Displacement Benefits).

This presentation is limited to DOI post 1/1/05. However, with regards to pre-1/1/05 DOI, the procedures will depend on the DOI to determine the applicable statutory procedures.

Admissible medical opinions are limited to those of the Treater and PQME/AME pursuant to the procedures contained in Labor Codes 4060, 4061, 4062, 4062.1, 4062.2, 4610, AD Rule 32(b) and other applicable AD Rules. Issues involving medical treatment are limited to the UR/IMR process. (See generally, UR/IMR Outline, and *Lab. Code §§4610, 4610.1, 4610.5, 4610.6, 4616.3, 4616.4)*

A. Admissible Evidence

Procedures to obtain admissible evidence to establish an entitlement to PD/TD or medical treatment has been the subject of considerable litigation during the past decade. Now in large part due to the decisions of (1) *Batten v. WCAB (2015) 241 Cal. App. 4th 1009; 194 Cal. Rptr. 3d 511; 80 Cal. Comp. Cases 1256; 2015 Cal. App. LEXIS 964 (Court of Appeal Published), (2) Dubon v. World Restoration Inc., SCIF (2014) 79 CCC 1298, 79 CCC 566, 79 CCC 313, 42 CWCR 219 (En Banc Decision), and (3) Navarro v. City of Montebello (2014) 79 Cal. Comp. Cases 418; 2014 Cal. Wrk. Comp. LEXIS 41 (En Banc Decision)* many of these issues have been resolved.

The law appears clear that the only medical evidence from the treating physician or secured through medical-legal procedures (LC 4060, 4061, 4062, et seq,) are admissible to establish applicant entitlement to PD/TD, and to establish injury. Labor Code sections 4050, 4064(d), 4605 and 5701 do <u>not</u> provide an alternate procedure for a party to obtain admissible medical evidence.

Batten v. WCAB (2015) 241 Cal. App. 4th 1009; 194 Cal. Rptr. 3d 511; 80 Cal. Comp. Cases 1256; 2015 Cal. App. LEXIS 964 (Court of Appeal Published)

See also, Tenet/Centinela Hospital Medical Center v. WCAB (2000) 65 CCC 477, treatment dispute involving discharged and need for further care required applicant to follow medical-legal procedures pursuant to LC 4061/62 in effect in 2000.

See also, accord, Ward v. City of Desert Hot Springs (2006) 34 CWCR 266, 71 CCC 1313 (WCAB Significant Panel Decision) where the WCAB upheld the WCJ noting the limiting language contained in LC 4060(c) and 4062.2(a) which provides that medical evaluations "shall be obtained only" by the procedures contained in 4060 & 4062.2, without mention of 4064. The WCAB noted the conflict between 4064(d) and 4062.2 was irreconcilable and therefore the newly amended sections of 4060 and 4062.2 must prevail over the older section of 4064.

See also, Cortez v. WCAB (2006) 136 Cal.App.4th 596, 71 CCC 155 in which applicant attempted to secure medical-legal opinions under LC sections 4050 and/or 5701, and both held improper and therefore reports inadmissible on a pre-SB-899 med-legal case. The only way in which to obtain an admissible med-legal report is pursuant to LC 4062 et. seq.

The Board noted that section 4605 is contained in article 2 of chapter 2 of part 2 of division 4 of the Labor Code, which is titled "Medical and Hospital Treatment." Considering this context, the Board concluded that the term "consulting physician" in section 4605 means "a doctor who is consulted for the purposes of discussing proper medical treatment, not one who is consulted for determining medical-legal issues in rebuttal to a panel QME." We agree with the Board. Section 4605 provides that an employee may "provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires." When an employee consults with a doctor at his or her own expense, in the course of seeking medical treatment, the resulting report is admissible." Batten v. WCAB (2015) 241 Cal. App. 4th 1009; 194 Cal. Rptr. 3d 511; 80 Cal. Comp. Cases 1256; 2015 Cal. App. LEXIS 964 (Court of Appeal Published)

Editor's Comments: While the holding in Batten appears to put to rest securing a privately retained medical-legal report not secured pursuant to Labor Code Sections 4060, 4061, 4062, 4062.1 4062.2 for the purpose of establishing injury and arguably entitlement to PD, Batten left unaddressed securing a medical report for purposes of discussing proper medical treatment, but see infra, Catin v. J.C. Penney, Inc., American Home Assurance, 2017 Cal. Wrk. Comp. P.D. LEXIS 106 (BPD), which put to rest securing a medical report" for purposes of addressing issues involving medical treatment. See also, Dubon v. World Restoration Inc., SCIF (2014) 79 CCC 1298, 79 CCC 566, 79 CCC 313, 42 CWCR 219 (En Banc Decision), and Navarro v. City of Montebello (2014) 79 Cal. Comp. Cases 418; 2014 Cal. Wrk. Comp. LEXIS 41 (En Banc Decision)

Therefore, LC section 4050, 4064(d), 4605 and 5701 all appear to be without consequence and of no real value post Batten which limits admissible medical evidence to that secured from the PTP and through the med-legal process, and as supplemented by VR evidence in establishing WPI and the resulting award of PD. But note that the holding in Batten appears to be in direct conflict with the Supreme Court's decision in Valdez v. WCAB (11/14/13, Cal. Supreme Court) 57 Cal.4th 1231, 78 CCC 1209.

Applicant sustained injury to her jaw, shoulders, knees, neck, and low back arising out of and occurring in the course of her employment as a registered nurse. She also claims she sustained a psychiatric injury as a result of the physical injuries. The parties selected an Agreed Medical Evaluator in psychiatry. The physician found the applicant's psychiatric injury was not predominantly caused by her employment. The Worker's Compensation Judge authorized the applicant to obtain their own qualified expert in psychology at her own expense pursuant to section 4064(d). The physician selected by the applicant opined that 51% of applicant's psychiatric condition was due to work-related injuries and therefore that the applicant had sustained an industrial psychiatric injury. The matter proceeded to trial with the WCJ finding the medical report of the physician obtained pursuant to LC 4064(d) to be admissible, the better reasoned and more persuasive report, and that therefore the applicant had sustained a psychiatric injury. Defendant filed a petition for reconsideration arguing the report was not admissible as not secured pursuant to medical-legal procedures pursuant to Labor Code Sections 4060, 4061, 4062, 4062.1 4062.2.

The WCAB granted reconsideration and issued an opinion and decision concluding the report was not admissible and the WCJ should have relied on the report of the Agreed Medical Evaluator. The board concluded that LC 4064 (d) provides that medical legal evaluations obtained outside the procedures of 4060, 4061, 4062, 4062.1 4062.2 are not admissible. Applicant filed a petition for writ of review.

Court of Appeal, affirming WCAB decision, held that medical evaluations from physician retained by applicant at applicant's own expense pursuant to Labor Code § 4064(d) are (1) inadmissible before WCAB pursuant to Labor Code § 4061(i); and (2) that "plain and unambiguous language" of

Labor Code § 4061(i) bars admissibility of privately retained physicians; and (3) that Labor Code § 4605 authorizing employees to obtain at their own expense "a consulting physician or any attending physicians whom he or she desires" refers to physician consulted for purposes of discussing proper medical treatment, whose reports are, therefore, admissible, but does not permit admission of report by physician retained solely for purpose of rebutting opinion of agreed medical evaluator as to injury or disability.

Catlin v. J.C. Penney, Inc., American Home Assurance, 2017 Cal. Wrk. Comp. P.D. LEXIS 106 (BPD)

Applicant sustained injury which was ultimately resolved via C&R with open med. An issue arose over medical treatment with defendant seeking to return the applicant for re-examination to the AME pursuant to LC 4050. The WCJ agreed by minute order.

On removal, the WCAB held that Applicant may not be compelled to attend 4050 consultation re-examination with AME post C&R with open med, as the original purpose of Labor Code § 4050 was subsumed by more specific statutes, including Labor Code §§ 4060, 4061, 4062, and 4610. Labor Code § 4050 cannot circumvent process set forth in these provisions, in the absence of additional issues beyond medical treatment justifying further examination pursuant to including Labor Code §§ 4060, 4061, 4062. The Court provided an excellent discussion and analysis citing Nunez v. Workers ' Comp. Appeals Bd., 136 Cal.App.4th 584 [71 Cal.Comp.Cases 161]; Cortez v. Workers' Compensation Appeals Bd., 136 Cal.App.4th 596 [71 Cal.Comp.Cases 155]; Batten v. Workers' Comp. Appeals Bd. (2015) 241 Cal.App.4th 1009, 1015. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 22.06[1], 22.07[2][a], 22.11[11], 24.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03, Ch. 16, §

Editor's Comments: While the holding in Batten puts to rest securing a privately retained medical-legal report not secured pursuant to Labor Code Sections 4060, 4061, 4062, 4062.1 4062.2 for the purpose of establishing injury and entitlement to PD, Catin also puts to rest securing a medical report" for purposes of addressing issues involving medical treatment.

See, Ventura v. The Cheesecake Factory, Zurich American Insurance Company, 2014 Cal. Wrk. Comp. P.D. LEXIS 417 (BPD) where matter dropped from calendar despite no objection by Defendant to applicant's DOR as Labor Code § 4061(i), as amended by SB 863, expressly requires evaluation by agreed or qualified medical evaluator before parties can file declaration of readiness to proceed on issue of permanent disability, and no waiver by Defendant because Labor Code § 4061contains no specific time limits for objection to treating physician's permanent disability findings, and defendant acted reasonably and timely in medical legal process.); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 22.06[1][a], [2], 22.11[7], 26.03[4], 32.06[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[2], Ch. 16, § 16.54[7]. Sullivan on Comp, Section 15.17, Declaration of Readiness to Proceed]

See also, Luisa Lopez v. County of San Joaquin, PSI, administered by Tristar Risk Management, 2017 Cal. Wrk. Comp. P.D. LEXIS 197, held that applicant entitled to QME/AME re-examination on petition to reopen pursuant Labor Code § 4062.3(k), as the report after re-examination is admissible on existence, prior to end of five-year period, of new and further disability. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.06[1][e], 32.06[1][f]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[4][f]. Sullivan on Comp, Section 14.52, Subsequent Evaluation and Additional Qualified Medical Evaluator Panels in Different Specialties]

See also, Yarbrough v. Southern Glazer's Wine and Spirits, 2017 Cal. Wrk. Comp. P.D. LEXIS 508 (BPD), holding Labor Code § 4062.2(f) only precludes withdrawal from agreed medical examiner after agreed medical examiner has conducted evaluation, but does not preclude unilateral withdrawal by party before submitting to evaluation. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 22.06[1][a], 22.11[11], 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[1], [2], Ch. 16, § 16.54[11], Ch. 19, § 19.37. Sullivan on Comp, Section 14.29, Medical-Legal Process – Represented Employee]

See also, Dorantes v, Dirito Brouthers and Insurance Co. of the West, 2017 Cal. Wrk. Comp. P.D. LEXIS 237 (BPD), holding that although 8 Cal. Code Reg. §38(i) creates guidelines for the timeline for supplemental QME report, the 60 day requirement when read with Labor Code §4062.5 does not mandate replacement QME Panel absent good cause such as that the delay would result in prejudice to the parties, and the issue of whether the QME report was substantial evidence was not grounds for replacement under 8 Cal. Code Reg. §31.5. See also, Garcia v. Child Development, Inc. 2017 Cal.Wrk.Comp.P.D. Lexis 112, Alvarado v. CR&R Inc, 2016 Cal.Wrk.Comp.P.D. LEXIS 112, Corrando v. Aquafine Corp. 2016 Cal.Wrk.Comp.P.D. LEXIS 318 [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.11[4], [6], 22.13; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[6], [14].]

16.54[11], Ch. 19, § 19.37.]

Valdez v. WCAB (11/14/13, Cal. Supreme Court) 57 Cal.4th 1231, 78 CCC 1209

Editor's Comments: During the pendency of this case, the Governor signed into law SB863 which modified LC 4605 to provide as follows: "Nothing contained in this chapter shall limit the right of the employee to provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires. Any report prepared by consulting or attending physicians pursuant to this section shall not be the sole basis of an award of compensation. A qualified medical evaluator or authorized treating physician shall address any report procured pursuant to this section and shall indicate whether he or she agrees or disagrees with the findings or opinions stated in the report, and shall identify the basis for this opinion."

Editor's Comments: Surprisingly no one appears to have argued that such an outcome would now allow an injured worker with the financial ability to 'game the system' through shopping for that doctor, a concern clearly apparent in the subsequent decision of Batten. One might also question what impact this decision will have under the Affordable Care Act which might provide the economic resources to allow an injured worker to secure an opinion from an alternate treating physician? Note too that the Valdez Court deferred the issue of whether the defendant would be financially liable for the cost of unauthorized treatment procured outside the MPN.

Applicant claimed injuries to a wide variety of body parts arising out of her employment as a demonstrator for Warehouse Demo Services for the period ending on 11/02/09. Defendant admitted injury to the back, right hip and neck. Applicant was sent for treatment to the employer's MPN. However, on referral from applicant's attorney, the applicant began treating with Dr. Nario, a non-MPN physician. Ultimately, the matter was set for hearing on the issue of TD.

At hearing, the applicant testified that her attorney had sent her to Dr. Nario because the treatment with Dr. Nagamoto (MPN physician) was not helping. There was however, no evidence that applicant had reported this complaint to either the claims examiner or defense counsel. Applicant further testified that she was receiving SDI benefits from April 7, 2010 through May 26, 2010 and continuing. Relying on the opinion of the non-MPN physician, the WCJ awarded TD from DOI through 2/10/10. In doing so, the WCJ expressly rejected defendant's argument that the "reports of the non-MPN doctors are inadmissible pursuant to Labor Code 4616.6."

The WCAB issued an en banc decision holding that where unauthorized treatment is obtained outside a (1) validly established, and (2) properly noticed MPN, that (3) reports from that non-MPN physician are inadmissible and therefore may not be relied upon.

On review the Court of Appeal reversed noting that had the legislature intended to exclude the reports of non-MPN physicians they could have so stated. Further, the Court noted that their decision was consistent with LC 4605, which authorizes an employee to provide, "at his own expense, a consulting physician or any attending physicians who he desires". The Court further stated that Labor Code 4616.6 was limited to independent medical review process within the MPN. The Court also wrote that a decision excluding a non-MPN physician would completely negate the employee's right to select his own treating physician pursuant to LC 4605. Further, the Court noted that defendant's reliance on *Tenet/Centinela Hospital Medical Center v WCAB (2000) 65 CCC 477* was misplaced as the holding in *Tenent* was not to exclude the report from review by the QME, but merely to require the applicant to comply with medical-legal procedures pursuant to LC 4061/62. The Court concluded that *Tenent* should be interpreted as one of inclusion not exclusion of evidence in that *Tenent* allowed the medical opinion of the prior PTP into evidence.

Thereafter, defendant sought review before the California Supreme Court. In affirming the Court of Appeal's decision, the California Supreme Court added that the legislative changes contained in SB-863 only served to confirm the limited application of LC 4616.6. Further, SB-863 did nothing to limit an employee's "right to seek treatment from doctors of their choice at their own expense, or to bar those doctors' reports from admission in disability hearings." Stated alternatively, SB-863 including specifically LC 4605 permits an employee to obtain consultation with privately retained physicians at their own expense and for the WCAB to consider that opinion in making an award of compensation.

B. Entitlement to Medical Treatment -- Limited to the UR/IMR Procedures.

Dubon v. World Restoration Inc., SCIF (2014) 79 CCC 1298, 79 CCC 566, 79 CCC 313, 42 CWCR 219 (En Banc Decision)

Editor's Comments: While Dubon I placed the burden on the defendant/claims adjuster to submit to the UR physician all relevant information necessary for UR physician to address the issue of medical necessity, Dubon II clearly places the burden on the applicant/applicant attorney to ensure timely submission by defendant, as well as that the defendant has submitted all relevant documentation/information to the UR physician and limits to review through the IMR process on the issue of medical necessity, absent an untimely UR submission by defendant.

But see, the dissenting opinion by Commissioner Sweeney who relying on the California Supreme Court decision of Sandhagen wrote "A treatment determination that does not comply with section 4610 is not a 'decision pursuant to section 4610,' and thus by definition is not a 'utilization review decision.' A utilization review decision is a necessary prerequisite for independent medical review, and by the terms of sections 4610 and 4610.5, only a dispute after a utilization review decision, i.e., a treatment determination that complies with section 4610, is resolved through independent medical review. Therefore, a dispute over a treatment determination without compliance with section 4610 is not a dispute over a utilization review decision pursuant to section 4610.5(a), and such a dispute is not subject to section 4610.5 independent medical review." Further, judicial review and decision based on substantial medical opinions is not contrary to the legislative intent behind the IMR process that medical necessity be determined by medical professionals rather than the judiciary. Succinctly, Commissioner Sweeney concluded her opinion writing "Section 4610 established a utilization review process with mandatory requirements. Section 4610.5 established a process of independent medical review of utilization review decisions. Treatment determinations that do not comply with section 4610 are not utilization review decisions and are not subject to independent medical review, controversies as to those determinations must be resolved by the WCAB pursuant to section 4604."

This editor is unaware of any Reg or Labor Code section that limits evidence/information that may be provided to the IMR physician to that which was available at the time the UR process was begun. The applicant therefore might be able to obtain/generate evidence after review of the UR determination to be used as rebuttal on IMR.

The applicant sustained successive injuries in 2003 and 2004 to various parts of body. The applicant underwent a course of treatment which included various diagnostic studies including EMG/NCV (positive for L4-5 radiculopathy), Lumbar MRI (positive for L4-5 disc protrusion) and a discogram (positive for L4-5 and L5-S1 discogenic pain). The PTP referred the applicant to Dr. Simpkins for evaluation regarding further treatment including the need for surgery. On July 1, 2013 Dr. Simpkins requested authorization for surgery. Defendant submitted the request for UR and thereafter the defendant's UR agent sent a denial letter to Dr. Simpkins. The evidence relied upon by the UR physician did not contain any report from the applicant PTP, only one report from the treating/evaluation surgeon Dr. Simpkins, no reports from the AME who had requested the discogram, nor the discogram report. The UR physician apparently was provided with 18 additional pages of medical records which were not specifically commented upon. The basis for the UR denial was the lack of documented imaging of nerve root compression; no evidence that conservative treatment had failed; and no documented condition/diagnosis for which spinal fusion was indicated. The WCJ found for the defendant holding that despite the procedural defects with defendant's UR described as "critical errors" any alleged procedural defects must be resolved through IMR, as the need for surgery involved an issue of medical necessity.

On reconsideration, the WCAB reversed the WCJ. The WCAB first confirmed that "IMR solely resolves disputes over the medical necessity of treatment requests" where the UR is not invalid. However, issues of timeliness and compliance with statutes and regulations governing UR are legal disputes within the jurisdiction of the WCAB. Second, the WCAB held "a UR decision is invalid if it is untimely or suffers from material procedural defects that undermine the integrity of the UR decision. Minor technical or immaterial defects are insufficient to invalidate a defendant's UR determination, rather a UR decision is invalid only if it suffers from material procedural defects that undermines the integrity of the UR decision. Last, where a defendant's UR is found invalid, the issue of medical necessity is not subject to IMR, but is to be determined by the WCAB based upon substantial medical evidence, with the employee having the burden of providing the treatment is reasonably required.

On further reconsideration the WCAB by En Banc decision reversed holding that medical necessity may only be addressed by the WCJ where the UR is untimely. In circumstances involving medical necessity the procedure is limited to the UR/IMR process and is not subject to expedited hearing

or other proceedings before the WCAB.

Edilberto Cerna Romero v. Stones and Traditions, State Compensation Insurance Fund, 2016 Cal. Wrk. Comp. P.D. LEXIS 142 (Board Panel Decision)

The applicant's PTP submitted an RFA for four different treatment modalities. The UR physician requested additional information pertaining to two of the treatment modalities and issued a decision within 14 days as required by Labor Code § 4610 as to all four of the treatment modalities. The WCJ reasoned that the UR physician should have issued a decision regarding the two treatment modalities for which no additional information was required within 5 days.

On reconsideration the WCAB disagreed holding that Rule 9792.9.1 provides that an RFA triggers the timelines for completing utilization review and does not contemplate different timelines for different treatment requests within a single RFA. Accordingly, the September 14, 2015 UR decision is timely as to all modalities requested as part of the RFA. See also, Favila v. Arcadia Health Care, Cypress Insurance Company, 2016 Cal. Wrk. Comp. P.D. LEXIS 181 (Board Panel Decision) Labor Code § 4610(g)(1), 8 Cal. Code Reg. § 9792.9.1. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02, 22.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.10; Sullivan On Comp, 7.35 Utilization Review – Time Limits.]

See also, accord, infra, Bodam v. San Bernardino County/Department of Social Services (2014) 79 CCC 1519, 2014 Cal.Wrk.Comp.LEXIS 156 (Significant Panel Decision) which held that a defendant is obligated to comply with all time requirements in conducting UR, including the timeframes for communicating the UR decision; (2) A UR decision that is timely made but is not timely communicated is untimely; (3) when a UR decision is untimely and therefore invalid, the necessity of the medical treatment at issue may be determined by the WCAB based upon substantial evidence. LC 4610(g)(1)-(3) requires that the decision be communicated within 24 hours for concurrent review and 2 days for prospective review. (Accord, Vigil v. Milan's Smoke Meats (SCIF) 2014 Cal.Wrk.Comp. LEXIS __)

See also, Stock v. Camarillo State Hospital, SCIF (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 471 (Board Panel Decision) (ADJ2426407/Oxnard) involving the request for a hospital bed for applicant with two level lumbar fusion who could not sleep in flat bed and had been sleeping in recliner for past four years. The WCAB upheld WCJ's determination that RFA from MPN doctor is subject to the UR/IMR process writing "Contrary to the applicant's contentions, by its adoption of the MPN system, the Legislature did not evidence the intent to preclude a defendant from seeking UR review of an MPN physician's request for authorization of medical treatment." Also reaffirming that Rule 9792.10.1(4)(A)-(F) provides that where the MTUS is "silent and there is no peer-review scientific and medical evidence, the reviewer may consider nationally recognized professional standards, expert opinion, generally accepted standards of medical practice and treatment that are likely to provide a benefit to a patient for conditions for which other treatments are not clinically efficacious". See also, accord, opinion granting reconsideration for further consideration Hogenson v. Volkswagen Credit, Inc. AIG Claims San Diego, AJD2145168, (6/18/14 Oxnard District Office);

See also, Glendale Adventist Medical Center v. WCAB (Gibney) 79 CCC 1544, 2014 Cal.Wrk.Comp. LEXIS 158, where medical necessity proper issue at expedited hearing where UR untimely despite treatment for contested part of body where award of medical treatment was reasonable and necessary (LC 4600) to cure or relieve accepted part of body. See also, accord, Sanchez v. Enterprise Rent-A-Car 2014 Cal.Wrk.Comp.P.D. LEXIS 596.

See also, Flores v. Hvolvoll-Johnson Construction 2014 Cal.Wrk.Comp.P.D. LEXIS 561, where defendant only raises jurisdiction/authority of WCAB to determine timeliness and medical necessity on reconsideration, the holding of WCJ on UR timeliness and medical necessity upon a finding of untimely UR will be upheld.

Bissett-Garcia v. Peace and Joy Center, Virginia Surety Company, 2016 Cal. Wrk. Comp. P.D. LEXIS 174 (Board Panel Decision); Bissett-Garcia v. Peace and Joy Center, Virginia Surety Company, 2016 Cal. Wrk. Comp. P.D. LEXIS 282 (Board Panel Decision);

On September 11, 2015, applicant wrote to defense counsel attaching a PR-2 report from primary treating physician. On the bottom of page 2 of the attached report the PTP wrote, "The patient requires home assistance with [activities of daily living]; 8 hours a day, 7 days a week for cooking, cleaning, self-grooming and transportation." On the transmittal letter, applicant's counsel wrote, "Please see the attached PR-2, treating doctor's report from Dr. Vincent J. Valdez 9/08/15. Requesting authorization from home assistance 8 hours a day, 7 days a week. We are asking that this be authorized upon receipt of this

letter."

Despite the fact that this "request for authorization" did not comply with Administrative Rule 9792.9.1(a) or Administrative Rule 9792.9.1(c)(2)(B) (Cal. Code Regs., tit. 8, § 9792.9.1, subds. (a) & (c)(2)(B)), defense counsel forwarded the request for treatment to the utilization review process established by defendant pursuant to Labor Code section 4610. On September 17, 2015, defendant's utilization review provider denied the requested treatment. The WCJ held the UR decision untimely and therefore that the WCAB had jurisdiction under Dubon to determine the issue of medical necessity.

On reconsideration, the WCAB reversed writing that "according to the utilization review determination, Dr. Valdez's request for treatment was received by the utilization review provider on September 14, 2015. Pursuant to Labor Code section 4610(g)(1) and Administrative Director Rule 9792.9.1(c)(3) (Cal. Code Regs., tit. 8, § 9792.9.1, subd. (c)(3)), defendant had five business days to issue a decision to approve, modify, delay or deny the request. The time runs from the date that a request for authorization "was received by the claims administrator or the claims administrator's utilization review organization." (Administrative Director Rule 9792.9.1(a)(1); Cal. Code Regs., tit. 8, § 9792.9.1, subd. (a)(1).) Thus, defendant's utilization review determination was due September 21, 2015. The September 17, 2015 utilization review denial was well within the time limits. Thus, time limit for UR runs from the date the request for authorization "was received by the claims administrator or the claims administrator's utilization review organization" not from date defense attorney receives request. 8 Cal. Code Reg. § 9792.9.1(a)(1). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02, 22.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.10; Sullivan On Comp, 7.36, Independent Medical Review – Procedure; Sullivan On Comp, Section 7.34 Utilization Review – Request for Authorization.] But see conta, Czech v. Bank of America, 2016 Cal.Wrk.Comp.P.D. LEXIS 257 UR found untimely where defense attorney did nothing with request.

Favila v. Arcadia Health Care, Cypress Insurance Company, 2016 Cal. Wrk. Comp. P.D. LEXIS 181 (Board Panel Decision)

Applicant appealed the UR non-certification of the PTP's RFA for artificial disk replacement surgery to IMR. The IMR upheld the UR determination. Applicant then sought review by the Appeals Board arguing that the Board should order a second IMR review because the IMR determination was based upon a plainly erroneous expressed or implied finding of fact. Applicant asserted that there is a dispute over the appropriate applicable medical guideline for determining whether the proposed surgery is reasonable, asserting that the UR and IMR physicians relied upon outdated medical information as to the efficacy of the artificial disk replacement surgery.

> *". . . Applicant's contention that the UR and IMR reviewers relied upon outdated medical treatment guidelines and not the most recent studies that applicant claims validate the requested surgery, ignores the mandate that a mistake of fact be of a "matter of ordinary knowledge . . . and not a matter that is subject to expert opinion." The question of whether the proper medical treatment guidelines were used to determine the appropriateness of the disputed surgical treatment is clearly a matter subject to expert opinion and is not a matter of ordinary knowledge. Furthermore, Labor Code section 4610.6(i) expressly precludes the WCJ, the Appeals Board or any higher court from making "a determination of medical necessity contrary to the determination" of the IMR organization. . ."*
>
> *Favila v. Arcadia Health Care, Cypress Insurance Company, 2016 Cal. Wrk. Comp. P.D. LEXIS at pg. 183 (Board Panel Decision)*
>
> *But see, contra, McAtee v. Briggs & Pearson Construction, 2016 Cal.Wrk.Comp. P.D. LEXIS 375(BPD), ordering that new IMR determination pursuant to Labor Code § 4610.6(i) was appropriate where WCAB found that UR determination was result of plainly erroneous express or implied finding of fact as matter of ordinary knowledge based on information submitted for review where IMR reviewer erroneously applied Medical Treatment Utilization Schedule (MTUS) guideline.*
>
> *See also, Gonzalez-Ornelas, v. County of Riverside, 2016 Cal. Wrk. Comp. P.D. LEXIS 151(BPD) where Applicant's IMR appeal pursuant to Labor Code § 4610.6(h)(1) and (5) granted, as IMR determination denying authorization based lack of documentation of diagnosis and failure of conservative treatment, where documentation on both existed and were provided to reviewer -- IMR determination was "plainly and directly contradicted" without need for "expert opinion" within "realm of ordinary knowledge". [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02, 22.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.11; Sullivan On Comp, 7.41, Independent Medical Review – Appeal and Implementation of Determinations]*

Labor Code section 4610.6(h) limits the grounds for an appeal from an IMR determination, which determination is "presumed to be correct and shall be set aside only upon proof by clear and convincing

evidence of one or more of the following grounds for appeal: "The ground for appeal cited by applicant is set forth in section 4610.6(h)(5): The determination was the result of a plainly erroneous express or implied finding of fact, provided that the mistake of fact is a matter of ordinary knowledge based on the information submitted for review pursuant to Section 4610.5 and *not a matter that is subject to expert opinion*.

The WCAB held that a UR denial based on outdated medical treatment guidelines, is not a proper basis for IMR appeal as "plainly erroneous express or implied finding of fact" as described in Labor Code § 4610.6(h)(5) which requires that mistake of fact be matter of ordinary knowledge, not matter subject to expert opinion, and that whether proper medical treatment guidelines were used to determine appropriateness of disputed surgical treatment is clearly matter of expert opinion and not grounds for IMR appeal. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02, 22.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.11; Sullivan On Comp, 7.41, Independent Medical Review – Appeal and Implementation of Determinations]

II. The Obligation to Return to the Prior/Original QME/AME.

Generally, the parties are required to return to the original report medical-legal evaluator. The medical-legal evaluator is to address all issues including injury(ies) and entitlement to benefits as of the date of the examination. However, an alternative medical-legal evaluator may be obtained as to subsequent injuries by any party. But be reminded that the parties may always agree to return to a prior QME/AME.

LC 4060(c) provides "If a medical evaluation is required to determine compensability at any time after the filing of the claim form, and the employee is represented by an attorney, a medical evaluation to determine compensability shall be obtained only by the procedure provided in section 4062.2…"

LC 4060(d) provides "…If a medical evaluation is required to determine compensability at any time after the claim form is filed. . .Either party may request a comprehensive medical evaluation to determine compensability. The evaluation shall be obtained only by the procedure provided in Section 4062.1."

LC 4062.2(a) provides "Whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney the evaluation shall be obtained only as provided in this section.

Editor's comments: Noteworthy is that 4060(a),(c) (d) and 4062.2(a) all refer to a single claim form, injury or claimed injury. Thus, where multiple injuries are pled at the same time, a party would only be entitled to a single PQME. Note also that this holding might be of use to the defense bar as well. Although this case involved the applicant wanting another bite at the PQME apple, the holding would also apply where it is the defendant seeking a new PQME on additional and subsequent claims filed by the applicant, and the original reporting PQME was pro-applicant rather than pro-defendant.

See also, Torres v. Auto Zone, 2013 Cal.Wrk. Comp. PD LEXIS 230 held electronic signature by PQME did not invalidate admissibility of med-legal report. The WCJ noted that "this (electronic signature) procedure is used by the undersigned and is not deemed contrary to workers' compensation law." See also, accord, United States Fire Insurance v. WCAB, (Love), (2007) 72 Cal Comp Cases 865.

See also, Robertson v. Bonnano 2014 Cal.Wrk.Comp. P.D. LEXIS 443 holding that failure to timely object to a treatment request on contested part of body on accepted claim pursuant to LC 4062(a) creates liability on the part of the defendant for treatment and implicitly the determination of industrial causation thereafter.

Navarro v. City of Montebello (2014) 79 Cal. Comp. Cases 418; 2014 Cal. Wrk. Comp. LEXIS 41 (En Banc Decision)

The Applicant while employed as a police officer filed a CT claim of injury for the period ending 2/9/09. While represented by an attorney applicant was examined on 9/14/09 by a PQME. Subsequently the applicant on 10/4/10 filed additional claims alleging injuries to back occurring on 6/1/10 and 8/31/10. Defendant sought to have the applicant re-examined by the original PQME with respect to the newly filed claims of injury. Applicant objected and the parties proceeded to trial. At trial the WCJ held that the applicant was entitled to a new PQME with respect to the newly filed claims of injury, and that Rule 35.5(e) which required an employee to return to the same evaluator when a new injury or illness is claimed involving the same body parts is inconsistent with the provision of the Labor Code.

On reconsideration, the WCAB upheld the WCJ. The WCAB wrote that "the language of the statutes is mandatory, and thereby controls" and that Rule 35(e) imposes unwarranted limitations in direct conflict with Labor Code sections 4060(a), (c), and (d), 4062.1, 4062.2(a), 4062.3(j), 4062(k), 4064(a) and 4067. The WCAB further noted that where, as here, the "applicant's two claims of specific injury were reported after the original evaluation", the applicant would be entitled to a new PQME citing LC 4062.3(j) and 4064(a).

See, Portner v. Costco, Liberty Mutual Insurance Company, 2016 Cal. Wrk. Comp. P.D. LEXIS 499 (BPD) holding dispute over appropriate qualified medical evaluator specialty must first be submitted to Medical Director as required by 8 Cal. Code Reg. § 31.5(a)(10), and 31.1(b) applicable rules do not permit parties to bypass requirement that qualified medical evaluator specialty disputes "shall be resolved" by Medical Director, and that it was improper for WCJ to issue determination without first directing parties to submit dispute to Medical Director [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 22.06[1][a], 22.11[2], [4], 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[2], [4], Ch. 19, § 19.37. Sullivan on Comp, Section 14.29, Medical-Legal Process]

See, Ventura v. The Cheesecake Factory, Zurich American Insurance Company, 2014 Cal. Wrk. Comp. P.D. LEXIS 417 (BPD) where Matter dropped from calendar despite no objection by Defendant to applicant's DOR as Labor Code § 4061(i), as amended by SB 863, expressly requires evaluation by agreed or qualified medical evaluator before parties can file declaration of readiness to proceed on issue of permanent disability, and no waiver by Defendant because Labor Code § 4061contains no specific time limits for objection to treating physician's permanent disability findings, and defendant acted reasonably and timely in medical legal process.); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 22.06[1][a], [2], 22.11[7], 26.03[4], 32.06[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[2], Ch. 16, § 16.54[7]. Sullivan on Comp, Section 15.17, Declaration of Readiness to Proceed]

Hernandez v. Ramco Enterprises, PSI, 2016 Cal. Wrk. Comp. P.D. LEXIS 486 (BPD)

Applicant was a farm laborer who suffered multiple industrial injuries to various body parts. Applicant had previously filed four claims on or before 2/9/2015 and was evaluated for those claims by panel qualified medical evaluator Ernest Miller, M.D., on 12/2/2015. Applicant filed on 2/12/16 a new claim alleging injury occurring on 9/25/2015 with his employer. Applicant sought a new QME panel for the new date of injury. The WCJ found for the applicant and allowed the new Panel. Noteworthy was that the original panel was with an orthopedist and that applicant was seeking the new panel in pain specialty.

In upholding the WCJ, the WCAB held that the applicant was allowed a new QME as the date of injury under LC 4062.3(j) and LC 4064(a) was the date the claim form was filed with the employer pursuant to LC 5401 interpreting Navarro v. City of Montebello (2014) 79 Cal. Comp. Cases 418 (Appeals Board en banc opinion), despite the fact that the new claim form alleged a DOI prior to date of QME examination set on previously filed injuries, where filed subsequent to date of QME examination. The WCAB rejected defendant's suggestion that applicant had intentionally delayed filing claim for 9/25/2015 injury until after initial evaluation in order to obtain another panel qualified medical evaluator as there was no evidence to support defendant's assertion. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[11]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[11]. Sullivan on Comp, Section 14.52, Subsequent Evaluations and Additional QME Panels in Different Specialties.]

See also, Garza v. O'Reilly Auto Parts, Corvel, 2017 Cal. Wrk. Comp. P.D. LEXIS 3, 82 Cal. Comp. Cases 424 (BPD), holding that orthopedic panel specialty was correct panel notwithstanding applicant's request for chiropractic panel; Parties' Labor Code § 4062.2, right to designate specialty is not absolute, and Medical Director has authority under 8 Cal. Code Reg. §§ 31and 31.1(b) to issue panel in different specialty if that specialty is more appropriate than specialty designated by requesting party.; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 22.06[1][a], 22.11[2], [4], 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[2], [4], Ch. 19, § 19.37. Sullivan on Comp, Section 14.29, Medical-Legal Process]

See also, Feige v. State of California Department of Corrections, 2017 Cal. Wrk. Comp. P.D. LEXIS 10 (BPD, holding applicant was entitled to second QME where claimed back injury involved two cases with separate and distinct injuries with different causes, citing Navarro v. City of Montebello (2014) 79 Cal. Comp. Cases 418 (Appeals Board en banc opinion).); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 22.11[11], 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[11], Ch. 19, § 19.37. Sullivabn on Comp, Section 14.52, Subsequent Evaluations and Additional QME]

United States Fire Insurance v. WCAB (Jose Montejo) 80 CCC 55, 2014 Cal.Wrk.Comp. LEXIS 179.

Defendant sought to provide to the PTP, the QME, and the AME the report of internist Roth M.D. obtained by defendant pursuant to LC 4064(d). LC 4064(d) allows an employer to obtain a medical evaluation or consultation at their own expense. Although Dr. Ross did not conduct a direct examination of the applicant, he did review applicant's medical records, applicant's deposition testimony, and surveillance videotape. The report of Dr. Roth found that although treatment appropriate, the applicant was malingering and had masochistic tendencies, and may have a genetic predisposition to poor healing. Applicant objected to defendant's providing the report of Dr. Ross to the PTP, QME, or AME.

> *". . .Dr. Roth's opinions about the injured worker's compliance with post-operative treatment plans, his motivation to heal, his physical activities following the various surgical procedures, his work history before and after the work injury, and whether he is malingering, rendered without any contact with the injured worker, and with inadequate reference to the specific facts relied upon, have no probative value. . .For that reason, Dr. Roth's report should not come into evidence, either standing alone or as part of the medical record created by the panel QME or AME in this case. . ."*
>
> *United States Fire Insurance v. WCAB (Jose Montejo) 80 CCC at pg. 57*

The issue was submitted after MSC to the WJC. The WCJ sustained counsel for applicant's objection discussing at length the inadequacy of the report and finding that the report did not constitute substantial evidence. The focus was on the fact that Dr. Ross did not conduct an evaluation of the applicant but rather was limited to a forensic evaluation without reference to specific facts. Therefore was without probative value. Writ Denied.

Fernando Martinez, Applicant v. Santa Clarita Community College District, Defendant, 2015 Cal. Wrk. Comp. P.D. LEXIS 2 (BPD).

Applicant concurrently requested QME panels in the specialties of orthopedics, internal medicine, and psychiatry. At the time of the request applicant was receiving treatment for an orthopedic condition. Defendant objected arguing that applicant's request for panels in internal medicine and psychiatry was premature as applicant had failed to comply with LC 4062 and Rule 31.7. The parties proceeded trial on the issue with the WCJ finding for defendant.

Recon denied.

> *§ 31.7. Obtaining Additional QME Panel in a Different Specialty*
>
> *(a) Once an Agreed Medical Evaluator, an Agreed Panel QME, or a panel Qualified Medical Evaluator has issued a comprehensive medical-legal report in a case and a new medical dispute arises, the parties, to the extent possible, shall obtain a follow-up evaluation or a supplemental evaluation from the same evaluator.*
>
> *(b) Upon a showing of good cause that a panel of QME physicians in a different specialty is needed to assist the parties reach an expeditious and just resolution of disputed medical issues in the case, the Medical Director shall issue an additional panel of QME physicians selected at random in the specialty requested. For the purpose of this section, good cause means:*
>
> *(1) A written agreement by the parties in a represented case that there is a need for an additional comprehensive medical-legal report by an evaluator in a different specialty and the specialty that the parties have agreed upon for the additional evaluation; or*
> *(2) Where an acupuncturist has referred the parties to the Medical Unit to receive an additional panel because disability is in dispute in the matter; or*
> *(3) An order by a Workers' Compensation Administrative Law Judge for a panel of QME physicians that also either designates a party to select the specialty or states the specialty to be selected and the residential or employment-based zip code from which to randomly select evaluators; or*
> *(4) In an unrepresented case, that the parties have conferred with an Information and Assistance Officer, have explained the need for an additional QME evaluator in another specialty to address disputed issues and, as noted by the Information and Assistance Officer on the panel request form, the parties have reached agreement in the presence of and with the assistance of the Officer on the specialty requested for the additional QME panel. The parties may confer with the Information and Assistance Officer in person or by conference call.*
>
> *(c) Form 31.7 shall be used to request an additional QME panel in a different specialty.*

Is Applicant Unrepresented or Represented?

The use of an **AME** is limited to those matters where the applicant IS **REPRESENTED**, regardless of the issue. (See LC 4060(c)&(d), 4061(c)&(d), 4062(a), 4062.1(a). See also 4062.2)

Where the applicant is UNREPRESENTED, a LC 139.2 request is made for a PANEL QME.

Editor's Comments: As a practical matter, the defendant in Martinez did nothing but delay the inevitable and bill his client not only for his time but additionally incur cost for multiple QME's within the same specialty. Applicant need only to have secured the ortho PQME and properly object to obtain an alternate specialty, or upon agreement between the parties.

See also, Chanchavac v. LB Industries, Sentry (2015) 2015 Cal.Wrk.Comp. P.D. LEXIS 516.WCAB(BPD), denying removal as no irreparable harm thereby upholding defendant's right to obtain its own panel qualified medical report even though co-defendant on CT claim had already obtained panel qualified evaluator report, when applicant declined to elect carrier.

See also, Ruiz v. Schwan's Home Services (2015) 2015 Cal.Wrk.Comp. P.D. LEXIS 571 (BPD) denying removal where Psych PQME requested additional time to receive results of psychological testing, sent more detailed report dated 1/2/2015 with proof of service having same date held substantially complied with her obligations regarding reporting rejecting defendant's assertion that "bright-line" rule must be applied to reporting timeframes based on statutory language requiring qualified medical evaluator to serve initial evaluation within 30 days of examination.

See also, Salazar v. Motel 6 (2015) 2015 Cal.Wrk.Comp. P.D. LEXIS 642 (BPD) were removal denied pursuant to Matute v. Los Angeles Unified School Dist. (2015) 80 Cal. Comp. Cases 1036 (Appeals Board en banc opinion), and Razo v. Las Posas Country Club, 2014 Cal. Wrk. Comp. P.D. LEXIS 12 (Appeals Board Noteworthy Panel Decision), reasoning that Code of Civil Procedure § 1013(a) extends time period for striking name by five calendar days so that party has total of 15 days after assignment to strike name from panel qualified medical evaluator list. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 22.06[1][a], 22.11[1], [6], 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[1], Ch. 19, § 19.37.] See also, Adams v. Merced City School District (2015) 2015 Cal.Wrk.Comp. P.D. LEXIS 649 (BPD), 15 Days period to strike is extended where last day falls on Sunday.

A. In Pro Per Applicant – The Panel QME Process (LC 4062.1)

Where the **APPLICANT IS UNREPRESENTED**, a PQME must be utilized. (LC 4062.1(a)) The employee shall NOT be entitled to an additional evaluation should the applicant later become represented. (LC 4062.1(e)) A three member panel shall be provided by the medical director within 5 working days after receiving the request. If not provided within 15 working days, the employee shall have the right to obtain a medical evaluation from any QME of his or her choice. The unrepresented applicant shall select the specialty. (LC 139.2 (h)(1)) The PQME is required to prepare and submit the report within 30 days of the evaluation. (LC 139.2(j)(1)(A))

Errors by Employee: LC 4062.1 (b) & (c)

(1) Failure to submit PQME request within 10 days of employer providing form and request that employee submit – Employer may then submit and DESIGNATE SPECIALTY.

(2) Within 10 days of issuance of the PQME, the employee shall select, schedule the appointment, and inform the employer of the selection and appointment. Failure to do so will allow employer to select the physician from the panel. The employer is responsible for scheduling the appointment where either the employee has (1) informed the employer of the selection but failed to schedule the appointment within 10 days of issuance of the PQME or (2) fails to make selection.

B. Represented Applicant (LC 4062.2)

Where the applicant is REPRESENTED, the procedures pursuant to LC 4062.2 are to be utilized. They require that where any issue arises under Labor Codes 4060 (AOE/COE), 4061 (PD) or 4062 (Catch All Provision) the parties may agree to an AME at any time. Thereafter either party may request PQME.

(1) The party "submitting the request shall designate the specialty of the medical evaluator". (4062.2(b)) But shall also disclose the specialty of the treater, and opposition's specialty preference if know. The party submitting the request shall also serve a copy of the PQME request on the other party.

(2) Within 10 days of "assignment of the panel", the parties shall confer and attempt to agree upon an Agreed PQME. Where the parties fail to agree by the 10th day, each party shall have 3 days within which to strike one doctor from the panel. The remaining physician shall serve as the PQME. WHERE ONE PARTY FAILS TO EXERCISE THE RIGHT TO STRIKE, THE OTHER PARTY MAY SELECT THE PHYSICIAN. (4062.2(c))

(3) The represented employee shall have 10 days to arrange the PQME examination, and upon failure to do so the employer shall make the appointment.

(4) The employee who later ceases to be represented is not entitled further PQME (4062.2(e)).

Messele v. Pitco Foods, California Insurance Company (2011) 76 CCC 1187 (En Banc Decision)

Applicant sustained a specific injury occurring on 1/29/10 to hands and other body parts. On 4/20/10 defendant sent written objection to the PTP opinion, and proposing an AME pursuant to LC 4062. This objection was sent by mail. Six days later Counsel for Applicant offered by fax several different physicians to serve as AME. On 5/1/10, eleven days after Defendant's objection, Counsel for Applicant submitted to the DWC Medical Unit a request for a pain medicine panel. The Applicant's request noted that the PTP was a hand specialist and that the defendant's preference was therefore a hand specialist. On 5/4/10, fourteen days after Defendant's original objection, Defendant sent a request seeking an orthopedic hand specialist. On 5/5/10, fifteen days after Defendant's objection letter the DWC Medical Unity received Applicant's request, and issued a pain medicine panel. On 5/10/10 the Medical Unit received the Defendant's request and issued a second panel of three hand specialists. On 10/6/10 the applicant was evaluated by pain management physician from the first panel. Trial was held on12/29/10 on the sole issue of which panel was proper.

4062(a) provides ". . .if an injured employee is represented by an attorney the parties have 20 days to object to a medical determination by the treating physician. . ."

4062(b) provides ". . .if either party requests a medical evaluation pursuant to Section 4060, 4061, or 4062, either party may commence the selection process for an agreed medical evaluator by making a written request naming at least one proposed physician to be the evaluator. The parties shall seek agreement with the other party on the physician. . .If no agreement is reached within 10 days of the first written proposal that names a proposed agreed medical evaluator. . .either party may request the assignment of a three-member panel of qualified medical evaluators to conduct a comprehensive medical evaluation. The party submitting the request shall designate the specialty of the medical evaluator, the specialty of the medical evaluator request by the other party if it has been made known to the party submitting the request, and the specialty of the treating physician. . ."

LC. 4062.2 requires the requesting party to designate the specialty, the specialty of the PTP and if known the preference of the other party.

Editor's Comments: First, note that CCP 1013 (c) governs express mail, (e) governs facsimile transmission, and (g) electronic service, all of which provide an extension of two court days. Second, this Editor would analyze this case slightly different noting that CCP 1013(a) is generally applicable whenever service by mail with two exceptions: when service of a document is NOT the operative trigger for the time period, and when a jurisdictional deadline is involved. (See Camper v. WCAB 1992, 57 CCC 644 where writ of review period was filing of the WCAB decision not service of a document and LC 5950 was held to be a jurisdictional deadline.) (Recall also that 1013(a) 5 day extension was held not to apply to the time period for striking a doctor from a QME panel as the operative trigger was the striking of the name from the list not service of a document. See Alvarado v. WCAB (2007) 72 CCC 1142).

By separate decision on 11/22/11, the WCAB held that Messele applied prospectively to requests made on or after 9/26/11.

The WCJ held that CCP 1013(a) applied to extend by five calendar days the 10 days within which to agree on an AME, and that the first day on which either party could request a panel was therefore on the 5/6/10, which was 16 days after defendant's objection letter. The WCJ initially held that the defendant's panel was the proper panel, but in his Report and Recommendation, the WCJ reversed himself recommending that reconsideration be granted, and that both panel be found to have been prematurely requested.

By En Banc decision the WCAB held that CCP 1013(a) applied to LC 4062(b) to extend by five days the right to request a panel. The WCAB noted that written objection to a medical determination of the

PTP is the triggering event. Thereafter the parties have 10 days to discuss the use of an AME. Further, that where the written request is sent by mail this period is extended by 5 days by CCP 1013(a). The Court's analysis relied on the critical fact that service of the objection was requested to be in writing and where sent by mail this results in the first date upon which the panel can be requested is the 16th day after the objection to the PTP medical treatment determination.

III. What Is the Issue?

A. AOE/COE -- LC 4060

LC 4060 shall ONLY apply where **ALL PARTS OF BODY** with regard to any injuries are **DISPUTED/CONTESTED.** Where applicant is **REPRESENTED THEN LC 4062.2** procedures. If **UNREPRESENTED**, then LC 4062.1

Editor's Comments: Please note the Rule 30(d) prohibiting the employer from requesting and securing a 4060 AOE/COE report after denial of claim was struck down by the decision of Mendoza v. WCAB (2010) 75 CCC 1204 (En Banc Decision); Amelia Mendoza v. Huntington Hospital, PSI, Sedgwick Claim Management Services, (2010) 75 CCC 634. (En Banc.)

B. Permanent Disability – LC 4061

Together with the last payment of TD, employer shall provide notice of NO PD, PD or too early to determine as employee is not yet P&S. This notice must **INCLUDE THE PROCEDURES SHOULD THE EMPLOYEE DISAGREE** with the employer's decision. Where the employer determines that PD is owed, the notice must state the basis, percentage and amount, and the employer shall commence payments or promptly commence proceeding before the appeals board to resolve the issue.

4061 notices require the following language: "should you decide to be represented by an attorney, you may or may not receive a larger award, but, unless you are determined to be ineligible for an award, the attorney's fee will be deducted from any award you might receive for disability benefits. The decision to be represented by an attorney is yours to make, but it is voluntary and may not be necessary for you to receive your benefits." (LC 4061(b))

". . .With the exception of an evaluation . . .prepared by a treating physician, no evaluation of permanent impairment shall be obtained, except in accordance with Section 4062.1 and 4062.2. Evaluation obtained in violation of this prohibition shall not be admissible in any proceeding before the appeal board." (LC 4061(i))

Where the parties fail to agree on PD, either party may request PQME. Where applicant is represented LC 4062.2 procedures apply, if unrepresented LC 4062.2 procedures apply.

C. Issues NOT Including AOE/COE, PD or Medical Treatment/4610 – LC 4062

LC 4062 is the "CATCH ALL" PROVISION, generally applying to TD/P&S determinations.

Anytime either party objects to a medical determination made by the treating physician not involving AOE/COE (4060), PD (4061) OR MEDICAL TEATMENT/UR(4610), the objecting party has 20 days if employee is represented, 30 days if employee is unrepresented from date of receipt of report to notify the other party of the objection in writing. (LC 4062(a))

Labor Code 4062(a) provides ". . .Employer objections to the treating physician's recommendations for spinal surgery shall be subject to [4062(b)], and after denial of the physician's recommendations, in accordance with Section 4610. If the employee objects to a decision made pursuant to Section 4610 to modify, delay, or deny a treatment recommendation, the employee shall notify the employer of the objection in writing within 20 days of receipt of the decision. These time limits may be extended for good cause or by mutual agreement."

If the employee objects to a decision made pursuant to Section 4610 to modify, delay, or deny a request for authorization of a medical treatment recommendation made by a treating physician, the objection shall be resolved only in accordance with the independent medical review process established in Section 4610.5.

If the employee objects to the diagnosis or recommendation for medical treatment by a physician

within the employer's medical provider network established pursuant to Section 4616, the objection shall be resolved only in accordance with the independent medical review process established in Sections 4616.3 and 4616.4.

J.C. Penny v. WCAB (Edwards) (2009, 3rd District Court of Appeal)175 Cal.App. 4th 818, 37 CWCR 141, 74 CCC 826.

Applicant sustained injury to back and knee which resulted in knee surgery in February 2005 and later a referral to a spinal surgeon who recommended surgery in October 2006. Defendant through the UR process denied the surgery. The UR denial was supported by Dr. Anderson who provided a second surgical opinion and report dated 2/14/06. The applicant's PTP however continued to report the applicant as TD through 2006 and in need of surgery. The parties selected Dr. Peter Mandell to act as the AME. Dr. Mandell in his report of 2/5/07 declared the applicant P&S as of 6 months post knee surgery or 8/05. Defendant however, had provided TD until 3/14/07, a date shortly after receipt of the report. The matter proceeded to trial with defendant asserting a credit for TD overpayment during the period from 8/05 through 3/14/07.

> *"The requirement for an objection under section 4062 is stated in mandatory language: 'the objecting party shall notify the other party in writing.' The ordinary meaning of a mandatory time limit is that once the prescribed time has passed the action subject to the time limit may no longer be taken. When JC Penny failed to object to a medical determination of TTD by Edwards's treating physician within the time limit provided in section 4062, it lost the right to object to that determination in the future.*
>
> *The evident purpose of the time limits in section 4062 is to induce both employer and employee to declare promptly medical determination disputes and expeditiously resolve them through the prescribed mechanisms. This purpose cannot be attained if a party. . .can fail to object in a timely manner and nonetheless thereafter tender a claim that contradicts a medical determination subject to the object requirement of the statute. If either employer or employee fails to raise a dispute about a medical determination within the ambit of section 4062 within the prescribed time, they may not attack that determination thereafter.. ."*
>
> *J.C. Penny v. WCAB (Edwards) 74 CCC at pgs. 831-832.*

The WCJ denied defendant's credit before the date of the AME exam finding the applicant to have become P&S as of the date of the AME examination (2/5/07). The WCJ held that the reports of the PTP supported a finding of continuing TD and that defendant's failure to timely object resulted in a waiver of any right to assert applicant was P&S prior to the report of the AME. The WCJ wrote that it would "violate the spirit of LC 4062" for defendant to have not objected and yet be allowed to assert a retroactive P&S date for the purpose of claiming a credit. Reconsideration was denied.

On Writ of Review the 3rd District Court granted defendant's request and requested that the parties address the issue raised by the WCJ as to the "spirit of LC 4062". Defendant argued that the reports of the PTP relied upon did not constitute substantial evidence in that it was predicated upon the need for surgery which was not indicated. The Court spent little time addressing the substantial evidence argument of defendant deciding the issue based upon an analysis of LC 4062. The Court noted that the language of LC 4062 acted as a bar to recovery of overpayment, not that there was no TD overpayment. The Court held that objection under 4062 was mandatory, and failure of defendant to object timely results in the loss of the right to object and attack that determination in the future. Thus, the Court held that failure by the defendant to timely object to the physician's report will bar defendant's right to later contest the issue and claim credit for any TD overpayment determined to have occurred. Therefore, the analysis is not whether substantial evidence existed to refute the claim of TD, but rather simply whether defendant timely objected to the PTP opinion. In this case defendant failed to do so.

Christensen v. Zurich Amer. Ins. Co. (November 2014) 42 CWCR 249 (orders dismissing petition for reconsideration and granting removal; decision after removal).

Applicant sustained injury on 1/29/09 to right knee, back and left knee as a compensable consequence. The intial course of treatment focused on the right knee, although the medical reports continued to document pain in the left knee. At deposition the PTP testified that he did not have a diagnosis for the left knee and that an MRI "might be necessary". Ultimately an MRI was performed which lead to a

RFA to surgery. When defendant refused to take action the applicant filed for expedited hearing. At hearing the WCJ vacated the submission and ordered further development of the record.

Applicant sought removal on the grounds that (1) the defendant had not timely objected to the PTP reports; (2) the proper result of such a failure to object should be to authorize the surgery; (3) it was inconsistent for the defendant to both deny liability on the left knee and submit the request for surgery to UR.

The WCAB first determined that removal was appropriate as "irreparable harm" would result from further delay. Next the majority noted that although the UR physician report is relevant to the IMR process it is not admissible on the issue of injury including part of body. On the issue of part of body the WCAB noted

that the early reports of the PTP both explicitly and impliedly found the left knee condition to be related to the industrial injury. Further it was listed as a part of body on the Application for Adjudication of Claim. Here the defendant had a duty under § 4062 to object to the report of the PTP within 20 days if they were contesting liability for treatment on the left knee. Here however, since the defendant failed to object to various treating physician report, or even the RFA, but merely submitted the RFA to UR which approved the surgery request, surgery must be authorized.

Labor Code § 4062. Objection to medical determination by treating physician; Notice; Medical evaluation

(a) If either the employee or employer objects to a medical determination made by the treating physician concerning any medical issues not covered by Section 4060 or 4061 and not subject to Section 4610, the objecting party shall notify the other party in writing of the objection within 20 days of receipt of the report if the employee is represented by an attorney or within 30 days of receipt of the report if the employee is not represented by an attorney. These time limits may be extended for good cause or by mutual agreement. If the employee is represented by an attorney, a medical evaluation to determine the disputed medical issue shall be obtained as provided in Section 4062.2, and no other medical evaluation shall be obtained. If the employee is not represented by an attorney, the employer shall immediately provide the employee with a form prescribed by the medical director with which to request assignment of a panel of three qualified medical evaluators, the evaluation shall be obtained as provided in Section 4062.1, and no other medical evaluation shall be obtained.

Editor's Comments: See also, accord, Simmons v. Department of Mental Health (2005) 35 CWCR 162, 70 CCC 866 holding the defendant must timely object to the compensability of a body part if it disputes industrial causation and institute proceedings under LC 4062, the AME/QME process. The issue of causation is not an appropriate issue for a UR physician to determine. Also recall the past decision of J.C. Penny v. WCAB (Edwards) (2009, 3rd Appellate District) 175 Cal.App.4th 818, 37 CWCR 141, 74 CCC 826 which held that although the defendant was entitled to a credit for TD overpayment when AME retro-actively determined applicant to be P&S, defendant was precluded from asserting that credit against PD due to defendant's failure to specifically object to treaters opinion on whether applicant continued to be TD, as required by LC 4062. (Accord, Jones v. Tulare District Hospital 2014 Cal.Wrk.Comp.P.D. LEXIS 593)

D. Utilization Review/Independent Medical Review – LC 4610, et seq.

See UR/IMR Procedures Outline.

V. AD RULES 30 – 38

Rule 30

(1) Rule 30(a) & (b)

The PQME request in the unrepresented cases made pursuant to LC 4062.1 shall be made pursuant to Form 105 with the claim examiner/employer providing the form along with Attachment "How to Request a PQME if you do Not have an Attorney" to the unrepresented applicant.

The PQME request in the represented cases made pursuant to LC 4062.2 shall be made pursuant to Form 106 with the requesting party (1) Identifying the dispute, (2) Attaching a copy the proposed AME attempt between the parties, (3) Designate the specialty, (4) and state the specialty of the PTP.

Editor's Comments: Please note the Rule 30(d)(1)&(2) prohibiting the employer from requesting and securing a PQME 4060 AOE/COE panel and therefore report after denial of claim was struck down by the recent decision of Mendoza v. WCAB (2010) 75 CCC 1204 (Panel Decision)

But note that the Court in Mendoza did not address whether Rule 30(d)(3) which prohibits a PQME 4060 AOE/COE panel requested after the 90 days without an order of the WCJ is proper.

Rule 31(c)

Any physician who has provided treatment for the disputed injury pursuant to 9785 is

PROHIBITED from acting as the PQME.

Rule 31.1 – Represented Cases

Where multiple requests for PQME's pursuant to LC 4062.2 (Represented Applicant) are received by the Medical Director ON THE SAME DAY and the requests DESIGNATE DIFFERENT SPECIALTIES, the Medical Director shall:

(1) Where requested, select the specialty consistent with that of the treater, UNLESS the Medical Director is PERSUADED by supporting documentation provided by the requestor.

(2) Where no party selects the specialty of the treater, then the Medical Director shall select the a specialty APPROPRIATE for the disputed medical issue.

(3) Further, upon request by the Medical Director, the party requesting the panel shall provide medical records to assist the Medical Director in determining the appropriate specialty.

(4) Supporting documentation appears to be required where the requesting party seeks a specialty different than that of the treater. *(31.1(3))*

Rule 31.3 - Scheduling Appointment

The UNREPRESENTED APPLICANT shall have **10 DAYS** of receipt of the PQME to SELECT AND SCHEDULE the PQME examination. The employer representative is PROHIBITED from DISCUSSING THE SELECTION of the PQME with the unrepresented applicant. Where the REPRESENTED or UNREPRESENTED APPLICANT fails to schedule the medical examination within 10 days of the receipt of the PQME, the employer/defendant shall schedule the examination. Recall also that where the unrepresented applicant fails to select the PQME within 10 days of receipt of the PQME, then the employer shall make the selection. *(See LC 4062.1(c))*

Rule 31.5 – QME Replacement Requests

Replacement Doctor to the PQME or a entirely NEW Panel shall be randomly selected by the Medical Director where (1) specialty of the panel or an individual doctor on the panel does not practice in the requested specialty; (2) the selected PQME cannot set the appointment within 60 days of the initial request by the scheduling party; (3) applicant has changed residence prior to the initial evaluation; (4) PQME is unavailable pursuant to Rule 33; (4) QME on the panel is or has been a treater; (5) for the convenience of the applicant only, and upon written agreement with the employer/defendant; or (6) for "good cause" limited to documented medical or psychological impairment; (7) The specialty selected is medically or otherwise INAPPROPRIATE for the disputed medical issue; (8) Violation of Rule 34, Appointment Notification and Cancellation; (9) Violation of timelines pursuant to LC 4062.5 and Rule 38 (completion of timely evaluation – 30 days of evaluation, supplemental report 60 days of request)

Rule 31.7 – Additional QME Panel in Different Specialty

"Upon a showing of good cause that a different specialty" PQME is appropriate, the Medical Director shall issue additional panel. *"Good Cause"* exists (1) by order of the WCJ *(see also AD Rule 32.6)*; (2) QME notifies the parties and the Medical Director that they cannot comply with the time lines; (3) in a REPRESENTED CASE written agreement between the parties that additional specialty is appropriate and the parties are unable to agree to an AME; (4) In an UNREPRESENTED CASE, with the assistance of the Information and Assistance Officer have reached agreement in the presence of the I&O Officer.

Rule 33 – Unavailability of QME

QME appointment must be scheduled within 60 days of the request by the party with the legal right to schedule the appointment, or 90 days if the requesting party agrees to waive the right to a replacement panel. *(Rule 33(e))*.

Editor's Comments: Please note the Rule 31.3 & 4062.1(c) create a situation where if (1) the unrepresented worker fails to select or (2) select but fails to schedule the PQME within 10 days of receipt of the panel, then it is the employer who shall schedule the PQME exam and who may request an alternate PQME panel where the selected PQME cannot conduct the exam within 60 days of the employer's request for examination.

THE
UTILIZATION REVIEW
AND
INDEPENDENT MEDICAL REVIEW (IMR)
Process

The following represents a summary and analysis of some of the most recent case decisions issued by the California Supreme Court, California Court of Appeal, and the Workers' Compensation Appeals Board, and Statutes which the Editor believes is significant to the UR/IMR process, as well as the practice of Workers' Compensation law generally. The summaries are only the Editor's interpretation, analysis, and legal opinion, and the reader is encouraged to review the original case decision in its entirety.

Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236]. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]. Panel Decisions which are designated as "Significant" by the WCAB, while not binding in workers compensation proceedings, are intended to augment the body of binding appellate court and en banc decision and is limited to panel decisions involving (1) issue(s) of general interest to the workers' compensation community, especially a new or recurring issue about which there is little or no published case law; and (2) upon agreement en banc of all commissioners on the significance and importance of the issues presented and resulting decisions. (See Elliot v. WCAB (2010) 182 Cal.App. 4th 355, 361, fn. 3, 75 CCC 81; Larch v. WCAB (1999) 64 CCC 1098, 1099-1100 (writ denied).

Due to the complexities, this author has decided to address IMR by an organized summary of relevant sections of the Labor Code, and Title 8 Regulations under Three headings: (1) Time Periods and Procedures for UR-IMR; (2) Time Periods and Procedures for MPN-IMR; and (3) Appeal of IMR Determination;

I. Overview of UR-IMR and MPN-IMR Process

A. Effective Date:

Effective for all DOI occurring after 1/1/13 and all DOI after 7/1/13 the legislature, as part of SB 863, has directed that all medical treatment issues are to first be submitted to Utilization Review, or follow Medical Provided Network treatment procedures, with all medical treatment issues involving denial/disputes over care/treatment to be appealed by the applicant through the Independent Medical Review process and procedures. *Lab. Code §§4610.5(a)(1) & (2)*; See generally *Lab. Code §§4610, 4610.1, 4610.5, 4610.6, 4616.3, 4616.4; UR/IMR Emergency Regulations, Cal. Code Regs., tit. 8, §§ 9792.9, 9792.9.1, 9792.10.3, 9792.10.4, 9792.10.5, 9792.10.6, 9792.10.7*

One distinction between UR-IMR procedures and MPN-IMR procedures should be highlighted. Under UR-IMR, it is the employee seeking authorization of the treater's recommended course of treatment after the employer has denied the care following a UR

denial/non-certification. However, under MPN-IMR, it will be the applicant who is disputing the recommendations of the treater and, after securing a 2nd and 3rd opinion, goes forward to request IMR. *(Lab. Code 4616.3(c); Lab. Code 4616.4(b).*

II. The UR Process

A. Time Periods and Procedures for UR

Basic Timeline for UR: Prospective/Concurrent Decisions on requests for authorization of treatment made within **5 days from receipt of information "reasonably necessary"** to make the determination, **but in no event more than 14 days from treatment recommendations.** *Lab. Code §4610(g)(1); Cal. Code Regs., tit. 8, §9792.9.1.* Decision to approve, modify, delay or deny must generally be **communicated within 24 hours** to the requesting physician. *Lab. Code §4610(g)(3)(a).*

a. Check List for Defects In UR Denial

1. Was UR Denial Valid?: Timely (5-14 days) *Lab. Code 4610(g);*
2. UR physician must be competent to evaluate medical necessity? *Lab. Code 4610(e); Cal. Code Regs., tit. 8, §9792.9(g)*;
3. UR denial must be communicated to proper parties? *Lab. Code 4610(g)(2) & (g)(3)(A);*
4. Did the UR denial include DWC Form IMR with instruction to applicant? *Cal. Code Regs., tit. 8, §9792.9.1(e)(5)*

b. Remedies For Defective UR Denial

Editor's Comments: Please note that two cases working their way up to the Supreme Court filed by the applicants' bar attacking the IMR process primarily on due process/constitutional grounds. These cases are Zuniga v. WCAB (Interactive Truck, SCIF) ADJ2563341(1st Appellate District) filed by Lisa Ivancich; and Stevens v. Outspoken Enterprise and SCIF (September 2014) 42 CWCR 194 (Order Denying Reconsideration (ADJ1526353) filed by Joseph Waxman. Among the arguments asserted were that the restricted grounds of review ran afoul of the constitutional mandate that all determinations within the workers' compensation system be subject to judicial review, that the nature of the review process is so restrictive as to deny injured workers basic due process rights, and that the scheme is contrary to the separation of powers clause of Article III.

Both were denied holding the UR/IMR procedure constitutional. See infra., Stevens v. WCAB (Otuspoken Enterprises et al.,) (2015 1st Appellate District) 241 Cal.App. 4th 1074, 80 CCC 1262.

Dubon v. World Restoration Inc., SCIF (2014) 79 CCC 1298, 79 CCC 566, 79 CCC 313, 42 CWCR 219 (En Banc Decision)

The applicant sustained successive injuries in 2003 and 2004 to various parts of body. The applicant underwent a course of treatment which included various diagnostic studies including EMG/NCV (positive for L4-5 radiculopathy), Lumbar MRI (positive for L4-5 disc protrusion) and a discogram (positive for L4-5 and L5-S1 discogenic pain). The PTP referred the applicant to Dr. Simpkins for evaluation regarding further treatment including the need for surgery. On July 1, 2013 Dr. Simpkins requested authorization for surgery. Defendant submitted the request for UR and thereafter the defendant's UR agent sent a denial letter to Dr. Simpkins. The evidence relied upon by the UR physician did not contain any report from the applicant PTP, only one report from the treating/evaluation surgeon Dr. Simpkins, no reports from the AME who had requested the discogram, nor the discogram report. The UR physician apparently was provided with 18 additional pages of medical records which were not specifically commented upon. The basis for the UR denial was the lack of documented imaging of nerve root compression; no evidence that conservative treatment had failed; and no documented condition/diagnosis for which spinal fusion was indicated. The WCJ found for the defendant holding that despite the procedural defects with defendant's UR described as "critical errors" any alleged procedural defects must be resolved through IMR, as the need for surgery involved an issue of medical necessity.

On reconsideration, the WCAB reversed the WCJ. The WCAB first confirmed that "IMR solely resolves disputes over the medical necessity of treatment requests" where the UR is not invalid. However, issues of timeliness and compliance with statutes and regulations governing UR are legal disputes within the jurisdiction of the WCAB. Second, the WCAB held "a UR decision is invalid if it is untimely or suffers from material procedural defects that undermine the integrity of the UR decision. Minor technical or immaterial defects are insufficient to invalidate a defendant's UR determination, rather a UR decision is invalid only if it suffers from material procedural defects that undermines the integrity of the UR

Editor's Comments: While Dubon I placed the burden on the defendant/claims adjuster to submit to the UR physician all relevant information necessary for UR physician to address the issue of medical necessity, Dubon II clearly places the burden on the applicant/applicant attorney to ensure timely submission by defendant, as well as that the defendant has submitted all relevant documentation/information to the UR physician and limits to review through the IMR process on the issue of medical necessity, absent an untimely UR submission by defendant.

But see, the dissenting opinion by Commissioner Sweeney who relying on the California Supreme Court decision of Sandhagen wrote "A treatment determination that does not comply with section 4610 is not a 'decision pursuant to section 4610,' and thus by definition is not a 'utilization review decision.' A utilization review decision is a necessary prerequisite for independent medical review, and by the terms of sections 4610 and 4610.5, only a dispute after a utilization review decision, i.e., a treatment determination that complies with section 4610, is resolved through independent medical review. Therefore, a dispute over a treatment determination without compliance with section 4610 is not a dispute over a utilization review decision pursuant to section 4610.5(a), and such is dispute is not subject to section 4610.5 independent medical review." Further, judicial review and decision based on substantial medical opinions is not contrary to the legislative intent behind the IMR process that medical necessity be determine by medical professionals rather than the judiciary. Succinctly, Commissioner Sweeney concluded her opinion writing "Section 4610 established a utilization review process with mandatory requirements. Section 4610.5 established a process of independent medical review of a utilization review decisions. Treatment determinations that do not comply with section 4610 are not utilization review decisions and are not subject to independent medical review, controversies as to those determinations must be resolved by the WCAB pursuant to section 4604."

This editor is unaware of any Reg or Labor Code section which limits evidence/information which is provided to the IMR physician to that available at the time the UR process was begun. The applicant therefore might to able to obtain/generate evidence after review of the UR determination to be used as rebuttal on IMR.

See also, accord, infra, Bodam v. San Bernardino County/Department of Social Services (2014) 79 CCC 1519, 2014 Cal.Wrk.Comp.LEXIS 156 (Significant Panel Decision) which held that a defendant is obligated to comply with all time requirements in conducting UR, including the timeframes for communicating the UR decision; (2) A UR decision that is timely made but is not timely communicated is untimely; (3) when a UR decision is untimely and therefore invalid, the necessity of the medical treatment at issue may be determined by the WCAB based upon substantial evidence. LC 4610(g)(1)-(3) requires that the decision be communicated within 24 hours for concurrent review and 2 days for prospective review. (Accord, Vigil v. Milan's Smoke Meats (SCIF) 2014 Cal.Wrk.Comp. LEXIS __)

See also, Stock v. Camarillo State Hospital, SCIF (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 471 (Board Panel Decision) (ADJ2426407/Oxnard) involving the request for a hospital bed for applicant with two level lumbar fusion who could not sleep in flat bed and had been sleeping in recliner for past four years. The WCAB upheld WCJ's determination that RFA from MPN doctor is subject to the UR/IMR process writing "Contrary to the applicant's contentions, by its adoption of the MPN system, the Legislature did not evidence the intent to preclude a defendant from seeking UR review of an MPN physician's request for authorization of medical treatment." Also reaffirming that Rule 9792.10.1(4)(A)-(F) provides that where the MTUS is "silent and there is no peer-review scientific and medical evidence, the reviewer may consider nationally recognized professional standards, expert opinion, generally accepted standards of medical practice and treatment that are likely to provide a benefit to a patient for conditions for which other treatments are not clinically efficacious". See also, accord, opinion granting reconsideration for further consideration Hogenson v. Volkswagen Credit, Inc. AIG Claims San Diego, AJD2145168, (6/18/14 Oxnard District Office);

decision. Last, where a defendant's UR is found invalid, the issue of medical necessity is not subject to IMR, but is to be determined by the WCAB based upon substantial medical evidence,
with the employee having the burden of providing the treatment is reasonably required.

On further reconsideration the WCAB by En Banc decision reversed holding that medical necessity may only be addressed by the WCJ where the UR is untimely. In circumstances involving medical necessity the procedure is limited to the UR/IMR process and is not subject to expedited hearing or other proceedings before the WCAB.

See also, Glendale Adventist Medical Center v. WCAB (Gibney) 79 CCC 1544, 2014 Cal.Wrk.Comp. LEXIS 158, where medical necessity proper issue at expedited hearing where UR untimely despite treatment for contested part of body where award of medical treatment was reasonable and necessary (LC 4600) to cure or relieve accepted part of body. See also, accord, Sanchez v. Enterpriase Rent-A-Car 2014 Cal.Wrk.Comp.P.D. LEXIS 596.

See also, Flores v. Hvolvoll-Johnson Construction 2014 Cal.Wrk.Comp.P.D. LEXIS 471, where defendant only raises jurisdiction/authority of WCAB to determine timeliness and medical necessity on reconsideration, the holding of WCJ on UR timeliness and medical necessity upon a finding of untimely UR will be upheld.

Torres vs. Contra Costa Schools Insurance Group, SCIF (2014) 79 CCC 1181, 2014 Cal.Wrk. Comp. LEXIS 111 (Significant Panel Decision)

Applicant sustained injury to left knee, neck and spine which caused a need for medical treatment. The PTP requested further authorization for Duragesic patches and Norco. Defendant's UR physician certified the Norco but conditionally denied the Duragesic patches pending submission of additional information to include whether other medications had been tried, whether applicant has a history of opioids use, and most recent lab tests. The UR physician went on to specially write that "the conditional non-certification represents an administrative action taken to comply with regulatory time frames constraints, and does not represent a denial based on medical necessity," and that the request for authorization for Duragesic patches will be reconsidered upon receipt of the information requested." Defendant did not send further information to the UR physician and denied the request for Duragesic patches. Applicant timely submitted an application for IMR on 8/1/13 and a further report by the PTP addressing opioid history and prior use of Duragesic patches. The IMR determination dated 11/12/13 provided without explanation that the Duragesic patches were "not medically necessary and appropriate". Applicant's Counsel sought appeal to the Administrative director writing that the "[IMR] reviewer failed to review documents submitted by applicant and applicant's representative before making the determination "contrary to applicant's right to due process", applicant's attorney also filed a DOR for expedited hearing. Although the appeal was signed by applicant's representative it was not verified. At expedited hearing the WCJ dismissed applicant's appeal for lack of verification.

Labor Code section 4610(h) requires that a determination of the administrative director "may be reviewed only by a verified appeal from the medical review determination of the administrative director". The verification requirement found in LC 4610(h) is consistent with the WCAB Rules of Practice and Procedure, Rule 10450(a) which requires that all petitions and answers be verified and failure to verify is a valid ground for summary dismissal. The Board, went on however, to note that it has "long been recognized that lack of verification does not necessitate automatic dismissal of nonconforming pleadings". *(See United Farm Workers v. Agricultural Labor Relations (1985) 37 Cal.3rd 912, 915).* Even so noted the court, "failure to correct a lack of verification within a reasonable time after receiving notice of the defect allows dismissal of the nonconforming petition." Noting that the verification requirement is relatively new, and that there is a strong public policy favoring the disposition of cases on the merits, the finding of dismissal of appeal by the WCJ at expedited hearing is reversed.

Bodam v. San Bernardino County/Department of Social Services (2014) 79 CCC 1519, 2014 Cal.Wrk.Comp LEXIS 156 (Significant Panel Decision)

Applicant, who was represented, sustained injury to his low back on 3/24/11. Dr. Cheng, after conducting an examination for the purpose of evaluating the applicant's need for surgery, faxed a RFA to defendant's adjuster (SCIF) on 10/28/13 requesting authorization for a three level fusion. SCIF sent the RFA to its UR agent the

AD Rule 9792.9.1(e)(3) provides, "For prospective, concurrent, or expedited review, a decision to modify, delay, or deny shall be communicated to the requesting physician within 24 hours of the decision, and shall be communicated to the requesting physician initially by telephone, facsimile, or electronic mail. The communication by telephone shall be followed by written notice to the requesting physician, the injured worker, and if the injured worker is represented by counsel, the injured worker's attorney within 24 hours of the decision for concurrent review and within two (2) business days for prospective review and for expedited review within 72 hours of receipt of the request."

Editor's comments: Note that LC 4610(g)(5)(A) only requires that the UR decision be communicated either within 24 hours by fax or electronically or in writing within 2 business days but not both. AD Rule 9792.9.1(e) seems to require both?? Also for the first time the WCAB has upheld the parties' right to agree to utilize an AME on medical treatment issue rather than utilizing the UR/IMR process. (See, Bertrand v. County of Orange 42 CWCR 20 (ADJ3135829)(BPD)

same day. On 10/31 the UR agent made its determination to deny the request. On 11/5/13 defendant mailed written denial letters to applicant, applicant's counsel and to Dr. Cheng. At expedited hearing no evidence was presented that the UR decision was communicated to Dr. Cheng by fax, phone or email within 24 hours of the decision, nor any evidence that written notice was provided within two business days of the decision to applicant, applicant's physician or attorney. Applying *Dubon II* the WCJ found the UR decision, although timely decided, was not timely communicated and therefore the issue of medical necessity was properly before the WCJ. The WCJ then order the parties to develop the medical record on the issue of medical necessity for surgery. Defendant sought removal.

Labor Code 4610(g)(1) provides that the UR decision must be made within "five working days from receipt of the information reasonably necessary to make the determination, but in no event more than 14 days from the date of the medical treatment recommendation by the physician". Further, under LC 4610(g)(3)(A), the decision must be communicated to "the requesting physician within 24 hours of the decision" by fax, phone or email and in writing within two business days to physician, employee, and if represented counsel.

In upholding the WCJ, the WCAB wrote that (1) a defendant is obligated to comply with all time requirements in conducting UR, including timeframes for communicating the UR decision; (2) a UR decision that is timely made but not timely communicated is untimely; (3) When a UR decision is untimely for any reason, it is invalid and the issue of medical necessity may properly be decided by the WCAB based upon substantial evidence, citing *Dubon II.* Removal denied.

McFarland v. The Permanente Medical Group, Inc., adjusted by Athens Administrators, Inc., 2015 Cal. Wrk. Comp. P.D. LEXIS 23(BPD).

> ". . .Labor Code section 4604.5 states that the MTUS "shall be presumptively correct on the issue of extent and scope of medical treatment. The presumption is rebuttable and may be controverted by a preponderance of the scientific medical evidence establishing that a variance from the guidelines reasonably is required to cure or relieve the injured worker from the effects of his or her injury. The presumption created is one affecting the burden of proof."
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> Whether a party has rebutted a presumption affecting the burden of proof is a legal question and the determination of a legal question must be made by a court. "A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence." (Evid. Code § 600(a).) '"Preponderance of the evidence' means that evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth." (Lab. Code § 3202.5.)
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> Pursuant to a constitutional grant of authority (Cal. Const., art. XIV, §§ 1, 4), the Legislature created the WCAB and vested it with judicial powers. (Lab. Code, § 111.) The Legislature further gave the WCAB the "full power, authority, and jurisdiction to try and determine" all workers' compensation claims and any right or liability arising out of or incidental thereto. (Lab. Code, § 5301, see also Lab. Code, § 5300.) The WCAB is the court with jurisdiction to determine whether a party to a workers' compensation case has met its burden of proof and rebutted a presumption found in division four of the Labor Code. (*Honeywell v. Workers' Comp. Appeals Bd.* (2005) 35 Cal. 4th 24 [70 Cal.Comp.Cases 97]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418 [67 Cal.Comp.Cases 236].)
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> The Legislature specifically vested the WCAB with jurisdiction over any controversy relating to or arising out of Labor Code sections 4600 to 4605 inclusive. (Lab. Code § 5304.) Labor Code section 4604 states that "['controversies between employer and employee arising under this chapter shall be determined by the appeals board. . .except as otherwise provided by Section 4610.5." Thus, a challenge to the presumptively correct MTUS as set forth in Section 4604.5 is within the jurisdiction of the WCAB. In contrast, Section 4610.5 applies to independent medical review of disputes over UR decisions and is outside the purview of Section 4604 and, accordingly, 5304. Interpreting these statutes together, an applicant may attempt to rebut the MTUS and must be provided with an opportunity to adjudicate whether he or she has rebutted the MTUS under Labor Code section 4604.5 separate from the UR/IMR process discussed in Dubon II.

Applicant, while employed as a registered nurse sustained injury to her thoracic spine, cervical spine, chest, abdominal wall, left shoulder, respiratory system, and in the form of hypertension and damage to the aorta ultimately resolved via Compromise and Release with "open" medical care for $300,000 based on the opinion of QME Steven Isono that the applicant was totally permanently disabled. Later the parties proceeded to trial on the issue of applicant's need for a epidural steroid injection. Defendant had denied this treatment based upon a timely and proper UR. It was Applicant's position that the UR physician had been furnished an insufficient medical record from which to determine the reasonableness of the treatment and that the UR therefore suffered from a "material procedural defect" within the meaning of Dubon v. Workers' Compensation Appeals Board (2014) 79 Cal.Comp.Cases 313 [hereafter, Dubon I]. Subsequently in *Dubon II*, the Appeals Board held that a timely UR decision must be reviewed through the independent medical review (IMR) process rather than by the WCAB. With respect to applicant's contention that the denial of applicant's ability to appeal a noncompliant UR decision is unconstitutional, the WCAB has no authority to determine the constitutionality of the IMR statutes as sought by applicant. (*Greener v. Workers' Comp. Appeals Bd* (1993) 6 Cal.4th 1028 [58 Cal.Comp.Cases 793]; *Niedle v. Workers' Comp. Appeals Bd.* (2001) 87 Cal.App.4th 283 [66 Cal.Comp.Cases 223].) Based on *Dubon II* the WCAB upheld the WCJ finding that the WCAB had no jurisdiction to award the disputed medical treatment.

However, in a succinctly written dissent, Commissioner Margaret Sweeney proposed that applicant should be

allowed to rebut MTUS guidelines before WCAB, because although Labor Code § 4604.5 provides that MTUS guidelines are presumptively correct, it does not provide procedure for determining whether scientific medical evidence establishes that variance from guidelines is reasonably required to cure or relieve injured worker from effects of industrial injury. Commissioner Sweeney maintained that whether party has rebutted presumption affecting burden of proof is a legal question that must be determined by court of law, as such determination requires weighing of facts and evidence, that Labor Code §§ 4604 and 5304, together, give WCAB jurisdiction to determine medical treatment guideline controversies arising under Labor Code § 4604.5, independent from procedures in Labor Code § 4610.5 and *Dubon v. World Restoration, Inc.* (2014) 79 Cal. Comp. Cases 1298 (Appeals Board en banc opinion) (*Dubon II*), which apply to UR/IMR process for resolving "medical necessity" issues based on established guidelines, that UR decision here denied applicant's medical treatment based upon MTUS, and that, therefore, applicant should be entitled to present evidence that she rebutted MTUS before the WCAB.

> *". Contrary to Labor Code sections 5304 and 4604.5, applicant has not been provided a forum to rebut the Administrative Director's medical treatment utilization schedule (MTUS). In contrast to 4604.5 and the legal concept of rebuttal, Labor Code Section 4610.5 establishes a methodology which the independent medical reviewer must follow to determine the "medically necessity" of a treatment request that was not approved by a UR decision. It requires the application of tiered standards applied in ranked order, "allowing reliance on a lower ranked standard only if every higher ranked standard is inapplicable to the employee's medical condition" and the highest ranked standard is "guidelines adopted by the administrative director pursuant to Section 5307.27. [1](Lab. Code § 4610.5(c)(2) and (c)(2)(A).) Thus, the IMR process itself is not and cannot be a forum where, a statutory legal presumption may be challenged or rebutted, according to the plain language of 4610.5(c).*
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> *Rebuttal is not a medical issue but a legal issue that must be determined by a court. The right of rebuttal is guaranteed by Labor Code Section 4604.5. Labor Code sections 5304 and 4604 give the WCAB jurisdiction to determine controversies relating to or arising out of Labor Code section 4604.5 which states that the MTUS is rebuttable. Here, the utilization review decision denied applicant's medical treatment based upon the MTUS (specifically, subdivisions (b) and (c) of section 9792.25 which is part of the MTUS). (Cal. Code Regs., tit. 8, § 9792.21.) Accordingly, applicant is entitled to present evidence that she has rebutted the MTUS. . . "*
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> *See also, Arredondo v. Tri-Modal Distribution Services, Inc., State Compensation Insurance Fund, Defendants, 2015 Cal. Wrk. Comp. P.D. LEXIS 209, 2015 Cal. Wrk. Comp. P.D. LEXIS 209, which held by split panel decision that untimely completion of IMR by Adminstrative Director does not remove medical necessity to WCAB. Reasons given were that (1) Legislature requires medical treatment disputes to be evaluated through IMR in order to assure that medical necessity is objectively and uniformly determined based on Medical Treatment Utilization Schedule (MTUS) and other recognized standards of care, (2) IMR determination is governmental action performed under auspices and control of Administrative Director, distinctly different from UR where defendant is obligated to perform within statutory and regulatory framework, (3) Legislature provided guidelines in Labor Code § 4610.6(d), administrative in nature, addressing when IMR determination should issue, but it enacted no provisions that invalidate IMR determination if determination is not made within Labor Code § 4610.6(d) timeframes, (4) given statutory design of IMR, Labor Code § 4610.6(d) timeframes are directory and not mandatory, and, therefore, IMR determination is valid even if it does not issue within specified timeframes, (5) untimeliness is not listed as ground for IMR appeal in Labor Code § 4610.6(h), and (6) because no grounds for appeal of IMR determination under Labor Code § 4610.6(h) were established at trial, IMR determination in this case was final and binding on applicant. But see contra, Saunders v. Loma Linda University Medical Group, PSI, Defendant, 2015 Cal. Wrk. Comp. P.D. LEXIS 311, 2015 Cal. Wrk. Comp. P.D. LEXIS 311.*

Garraway-Jimenez, v. Santa Barbara Medical Foundation Clinic, Zurich American Insurance, Defendants, 2015 Cal. Wrk. Comp. P.D. LEXIS 130.

Applicant sustained CT injury to cervical spine and elbows for the period ending 10/10/05. Defendant denied a request for left ulnar nerve decompression based upon timely Utilization Review (UR) denial. Although both the treater and the AME supported the surgery, defendant failed to provide the report from either to the UR or IMR physicians, or electrodiagnostic studies performed on June 4, 2014, and existing records as well as a supplemental report by the recommending surgeon, Dr. Ruth. An expedited hearing was held on January 27, 2015. The WCJ concluded that it was applicant's failure to timely forward the medical records that prevented the IMR reviewer from considering the AME reports, such that any error on the part of IMR was self-inflicted by applicant; and that since the error was caused by applicant's oversight and inadvertence, it would be unreasonable to force defendant to provide another IMR Determination.

> *Editors' Comments: Although the Garraway-Jimenez case was a win for the applicant, it demonstrates the real problem with the IMR process – the potential for delay without any real consequence to the defendant.*

On reconsideration/removal the WCAB reversed citing LC 4610.5(i) and Rule 9792.10.5, both of which require the defendant/representative to provide "all relevant medical records". The WCAB held that defendant's "failure to provide the IMR reviewer with all material and relevant medical records, the determination of the IMR organization, and thus the Administrative Director, was an act without or in excess of its powers. The IMR process can only work if the parties meet their obligation to provide the necessary medical records. The WCJ's determination that it would be unfair to defendant to require it to pay for another IMR appeal fails to recognize that it is defendant, not applicant, who is

mandated to provide the medical records for the IMR Determination. Under these circumstances, unfairness to defendant is not a valid basis upon which to make a determination, where defendant has not met its statutory obligation to serve medical records." Reversed and remanded.

Stevens v. WCAB (Otuspoken Enterprises et al.,) (2015 1st Appellate District) 241 Cal.App. 4th 1074, 80 CCC 1262.

Applicant sustained injury to right foot in October 1997 and subsequently underwent three surgeries. Ultimately the applicant was diagnosed with complex-regional-pain syndrome to bilateral feet. The bilateral foot pain ultimately forced the applicant from continuing to work and into a wheelchair. The applicant also sustained as a compensable consequence injury to low back, bilateral shoulders and ultimately depressions which all combined to result into a total award of disability. The applicant's PTP requested authorization for pain medications and in-home health aide 8 hours a day five days a week. The home health aide was to help the applicant with bathing, dressing, ambulation, meals and picking up prescription medications. The request was timely submitted by the defendant to UR which was not certified, with a proper notice provided by defendant to applicant. Applicant requested an internal review submitting additional records and information, but the internal review also denied authorization. Applicant next requested an IMR which upheld the original UR determination. Next, the applicant appealed the IMR determination to the Board pursuant to LC 4610.6(h) raising constitutional issues including violation of Section 4 of the State Constitution and the applicant's right to due process. The WCJ held that none of the grounds for appeal applied and that the Board had no jurisdiction to consider the constitutionality of LC 4610.6. Then the applicant sought reconsideration by the WCAB who adopted the decision of the WCJ. The applicant then petitioned for a writ of review raising constitutional challenges.

In addressing and denying the applicant's petition, the Court on eight separate occasions noted that the "state Constitution gives the Legislature 'plenary power. . .to create and enforce a complete system of workers' compensation. . ." noting that "the underlying premise behind this statutorily created system. . .is the 'compensation bargain' under which the 'employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. Next, the Court noted that the legislature intent behind SB 228 and 899 was to "steamline the process and control costs", with the system to resolve disputes over medical treatment existing prior 1/1/13 being "costly, time consuming, and did not [produce] uniform results." The Court discussed at length the procedures available to the applicant under the UR/IMR procedures noting (1) only the applicant may request review of an adverse UR determination by IMR; (2) the IMR reviewer reviews pertinent medical records, provider reports and other information submitted by the parties; (3) the standard for review includes MTUS, peer-reviewed scientific and medial evidence regarding the effectiveness of the disputed treatment, nationally recognized professional standards etc. (4) although the IMR reviewer's name is kept confidential, the decision must include the reviewer's professional qualification; (5) A worker may dispute through appeal to the Board under specified grounds, and (6) where the applicant is successful the remedy is a new IMR; and further (7) the Boards decision can always be challenged by writ of review to the Court of Appeal.

The Court also noted that the UR/IMR procedure now "guarantees that the UR decision rendered in [applicant's] favor could not be challenged by employers on medical-necessity grounds" . . . "ensuring faster final resolution of these decisions" . . . "and constituted a meaningful curtailment of the employers' rights" in exchange of the promised reduction in insurance costs "by creating uniform medical standards". In the end the Court of Appeal held that the Legislature had "Plenary Powers" over the Workers' Compensation System are (1) not limited by the State Constitution's separation of powers or due process clauses; (2) Nor does the IMR process violate Section 4's requirement that tribunal decisions be subject to review by appellate courts; (3) Nor does the IMR process violate Federal Due Process requirements. During this past February the California Supreme Court denied review.

McBurney, Applicant v. All That Glitters, Employers Compensation Insurance Company, 2015 Cal. Wrk. Comp. P.D. LEXIS 637 (Panel Decision)

Applicant sustained injury on 12/8/04 to left knee when he fell from a ladder. Primary treating physician Michael Laird, M.D., signed an RFA dated March 24, 2014, requesting authorization for left total knee arthroplasty. The subject treatment was supported by the opinion of the AME. The RFA contains a date stamp of March 24, 2014, along with a hand-written note that says: "This was faxed to WC on 3/24/14 [with] Dr. notes"; "KR/Dr. Laird." Defendant issued a UR decision on April 16, 2014, which denied the request for left total knee arthroplasty. The UR decision states that the RFA was received on April 7, 2014. Defendant also produced an email from its UR agency dated April 10, 2014. The email indicates that the RFA was first received by the adjuster on April 7, 2014, and that April 7 was the date of first knowledge of the RFA. Defendant did not produce a copy of the RFA it received with an electronic date stamped receipt. The April 16, 2014 UR decision was served at an old address on Boeker Street in Pismo Beach, CA. According to EAMS, the application for adjudication, and as set forth in applicant's petition, applicant has lived in Nipomo, CA for approximately eight years.

> *". Applicant claims that the RFA for left knee arthroplasty was transmitted on March 24, 2014. Defendant claims to have received it on April 7, 2014. To determine whether UR was timely conducted, we must determine when the RFA was received by the adjuster and/or transmitted to the adjuster. We must also determine who has the burden of proving when the RFA was received and/or transmitted and delineate exactly how that burden is proven. The controlling regulation in making this determination is WCAB Rule 9792.9.1(a)(1), which states:*
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> > *(1) For purposes of this section, the DWC Form RFA shall be deemed to have been received by the claims administrator or its utilization review organization by facsimile or by electronic mail on the date the form was received if the receiving facsimile or electronic mail address electronically date stamps the transmission when received. If there is no electronically stamped date recorded, then the date the form was transmitted shall be deemed to be the date the form was received by the claims administrator or the claims administrator's utilization review organization. A DWC Form RFA transmitted by facsimile after 5:30 PM Pacific Time shall be deemed to have been received by the claims administrator on the following business day, except in the case of an expedited or concurrent review. The copy of the DWC Form RFA or the cover sheet accompanying the form transmitted by a facsimile transmission or by electronic mail shall bear a notation of the date, time and place of transmission and the facsimile telephone number or the electronic mail address to which the form was transmitted or the form shall be accompanied by an unsigned copy of the affidavit or certificate of transmission, or by a fax or electronic mail transmission report, which shall display the facsimile telephone number to which the form was transmitted. The requesting physician must indicate if there is the need for an expedited review on the DWC Form RFA. (Cal. Code Regs., tit. 8, § 9792.9.1(a)(1).)*
>
> *The preferred method for proving when an RFA is received is to produce a copy of the RFA with an electronic date stamp showing precisely when the RFA was received by defendant. If defendant produces a copy of the RFA with an electronic date stamped receipt, the dated receipt will be prima facie evidence of the date received. No such evidence was offered in this case.*
>
> *If a fax or email receipt does not exist, then we must determine if and when the RFA was transmitted. The evidence of transmission must consist of one of the following documents: (1) a copy of the RFA, or (2) the fax cover sheet accompanying the RFA, or (3) the email that transmitted the RFA. Whichever document is used, the document must contain either: (A) the date, time, and place of transmission and the fax number or email address to which the RFA is sent, (B) an unsigned copy of the affidavit or certificate of transmission, or (C) a fax or electronic mail transmission report confirming that the RFA was sent.*
>
> *Applicant did not meet his burden of proving that the RFA was transmitted to defendant on March 24, 2014. Applicant produced a copy of the March 24, 2014 RFA. (Exhibit 5). However, the only indication that the RFA was faxed is a hand-written note, which is missing the time of transmission. Applicant did not produce sufficient evidence that proves the RFA was transmitted on March 24, 2014.*
>
> *Defendant also failed its burden of proving receipt of the RFA on April 7, 2014. There was a two-week gap in time from the claimed transmission of the RFA to the claimed receipt of the RFA. Given the clear discrepancy in evidence in this case, we ordered the production of additional evidence and specifically requested that defendant produce an electronically date stamped copy of the RFA as it was received by defendant. Defendant did not produce any such evidence.*
>
> *We clearly requested in our August 11, 2015 Order that the parties provide copies of the March 24, 2014 RFA with electronic date stamps. However, after providing both parties a second chance to meet their respective burdens of proof, neither applicant nor defendant provided substantial evidence documenting transmission or receipt of the March 24, 2014 RFA. Absent such evidence we cannot determine whether defendant timely completed UR based on the transmission or receipt date of the RFA. [2] However, as explained below, the parties' failure to prove transmission / receipt of the RFA is not dispositive of the timeliness issue in this case.*

WCAB, held that although the applicant had failed to establish defendant's utilization review was untimely since applicant failed to (1) produce copy of RFA with electronic date stamp showing precisely when RFA was received by defendant and that dated receipt is prima facie evidence of date received, (2) or where a fax or email receipt does not exist, evidence of RFA transmission which may include document showing date, time and place of submission and fax number or email address to which RFA is sent, or unsigned copy of affidavit or certificate of transmission, or fax or electronic mail transmission report confirming RFA was sent; And a handwritten note indicating that RFA was faxed, without time of transmission, is insufficient evidence to prove date and time that RFA was transmitted. However, a parties' failure to produce substantial evidence documenting transmission or receipt of RFA was not dispositive of timeliness issue in this case because UR decision was untimely under 8 Cal. Code Reg. §

9792.9.1(e)(3) and Bodam v. San Bernardino County/Department of Soc. Servs. (2014) 79 Cal. Comp. Cases 1519 (Appeals Board significant panel decision), based on defendant's failure to timely serve decision because defendant did not serve applicant at his official address of record and did not serve decision on Dr. Laird, and reasonableness of treatment was supported by agreed medical examiner's opinion and Medical Treatment Utilization Schedule.

"...Regardless of when the RFA was received by defendant, we still find that the UR decision is untimely because defendant failed to timely serve the decision. Rule 9792.9.1(e)(3) states:

> *For prospective, concurrent, or expedited review, a decision to modify, delay, or deny shall be communicated to the requesting physician within 24 hours of the decision, and shall be communicated to the requesting physician initially by telephone, facsimile, or electronic mail. The communication by telephone shall be followed by written notice to the requesting physician, the injured worker, and if the injured worker is represented by, the injured worker's attorney within 24 hours of the decision for concurrent review and within two (2) business days for prospective review and for expedited review within 72 hours of receipt of the request. (Cal. Code Regs., tit. 8, § 9792.9.1(e)(3).)*

In this case UR was completed on April 14, 2014. Defendant has the burden of proving that it served the UR decision appropriately. Defendant failed to serve the UR decision on applicant as it did not serve applicant at his official address of record, but sent the decision to an old address that applicant had not occupied for approximately eight years. Next, the UR decision in evidence contains no proof of service on Dr, Laird. (Exhibit C.) The first page of the document states that it was faxed to Dr. Laird; however the electronic date stamp on the document is April 23, 2014. (Id.) Defendant has failed to prove the UR decision was timely served on applicant and Dr. Laird. Defendant's UR decision was untimely served and thus it is invalid."

Editor's Comments: Regardless of how the WCAB reached their decision in McBurney, or the holding on the burden of proof, a defendant should be reminded that it is the defendant who this editor believes has the burden of proof on establishing that the UR determination is timely and notice of UR determination was timely and properly served, for it is the defendant who benefits from the affirmative on both issues. Also noteworthy is that the Court in Footnote 2 provided that, "On a case by case basis, the court may wish to analyze whether a UR's timeliness can be determined by Rule 9792.9.1(a)(2)(C), which states: "In the absence of documentation of receipt, evidence of mailing, or a dated return receipt, the DWC Form RFA shall be deemed to have been received by the claims administrator five days after the latest date the sender wrote on the document." (Cal. Code Regs., tit. 8, § 9792.9.1(a)(2XC).) However, we need not apply that rule in this matter as the UR decision was not timely served."

See also, Hacker v. County of San Bernardino (2015) 2015 Cal.Wrk.Comp.P.D. LEXIS 415 holding that IMR determination need not list specific date of each report reviewed, listing documents reviewed by name of provider and range of provider's date of service is sufficient.

See also, Herring v. Paradise Valley Hospital (2015) 2015 Cal.Wrk.Comp.P.D. LEXIS 526 where WCJ was directed to address medical necessity where UR determined to be untimely even where drug prescription was stale by the time the issue came before the WCJ due to delays resulting from the UR process and litigation.

B. Miscellaneous UR Provisions

Effective Period of UR Denial: Absent a documented change in the facts material to the basis of the UR decision, the UR decision shall remain effective for 12 months from the date of the decision. Lab. Code §4610(g)(6)

Expedited Review -- Imminent and serious threat to health: expedited review decision to authorize must be made within 72 hours of receipt of information reasonable necessary to make the determination. Lab. Code §4610(g)(2). Rule 9792.9.1(c)(4).

Jesus Rodriguez v. Air Eagle, Inc., California Insurance Guarantee Association, Sedgwick CMS for Legion Insurance In Liquidation, Defendants, 2015 Cal. Wrk. Comp. P.D. LEXIS 3 (BPD).

Applicant sustained industrial injury to his right elbow, right shoulder, psyche, right hand grip loss, and neck on December 29, 2000. An issue arose whether the applicant was in need of 24/7 home health care due to severe depression and three psychiatric hospitalizations for suicide attempts in 2004 and 2005, although he had not made any subsequent suicide attempts and was not actively suicidal at time of his DQME evaluation in April 2008. During March 7 to March 21, 2013 applicant was again hospitalized "after disclosing his plans of jumping out of a moving vehicle to end his life." (*Ibid.*) Upon discharge the PTP recommended that applicant have 24 hours per day, 7 days per week of home health care services "preferably by a psyche technician or LVN level. On October 28, 2013, the PTP submitted a Request for Authorization for Medical Treatment (RFA) to defendant. The form is electronically date-stamped "10/28/2013 2:53:13 PM." The box which states: "Check box if the patient faces an imminent and serious threat to his or her health" was checked. The requested procedure is "24/7 home health care by psyche tech or LVN." The RFA was signed by the PTP. On November 6, 2013, a UR decision issued denying the requested home health care services. On November 7, 2013, defendant's adjuster wrote to PTP and advised of four UR decisions, including the request for home health care services. The WCJ found for the defendant that the UR was timely as made 9 days from the request.

Applicant sought reconsideration asserting that the UR was untimely as expedited review was requested and pursuant to Rule 9792.9.1(c)(3)(A) *(currently Rule 9792.9.1.(c)(4)*, the decisions to approve, modify, delay, or deny a request for authorization related to an expedited review shall be made in a timely fashion appropriate to the injured worker's condition, not to exceed 72 hours after the receipt of the written information reasonably necessary to make the determination. Recon granted.

". We first address whether the UR decision of November 6, 2013 was invalid. In Dubon II, we held that a UR decision is invalid only if it is untimely. (Id. at p. 1299.) Accordingly, we consider former Rule 9792.9.1 which set forth the timeframes for UR decisions at the time that the subject RFA was submitted and one UR decision issued. (See Cal. Code Regs., tit. 8, § 9792.9.1, operative October 1, 2013.) [1] According to then Rule 9792.9.1(a)(1), the RFA is deemed to have been received "on the date the form was received if the receiving facsimile or electronic mail address electronically date stamps the transmission when received. If there is no electronically stamped date recorded, then the date the form was transmitted shall be deemed to be the date the form was received by the claims administrator or the claims administrator's utilization review organization." (Cal. Code Regs., tit. 8, § 9792.9.1(a)(1).) Here, the October 28, 2013 RFA was electronically date-stamped "10/28/2013 2:53:13 PM" (Exhibit E), and defendant's adjuster testified that she received the RFA on October 28, 2013. Thus, the operative date is October 28, 2013 at 2:53 p.m. The UR decision issued nine days later on November 6, 2013, and the WCJ concluded that defendant's UR decision was timely because it issued within the time requirements for a regular UR decision.

However, Dr. Hekmat checked the box for imminent and serious threat on the RFA, thereby raising the issue of whether the October 28, 2013 RFA was subject to the timelines for expedited review. According to then Rule 9792.9.1(c)(3)(A), "Prospective or concurrent decisions to approve, modify, delay, or deny a request for authorization related to an expedited review shall be made in a timely fashion appropriate to the injured worker's condition, not to exceed 72 hours after the receipt of the written information reasonably necessary to make the determination. The requesting physician must certify the need for an expedited review upon submission of the request." (Cal. Code Regs., tit. 8, § 9792.9.1(c)(3)(A).) Here, both defendant's adjuster Ms. Valencia-Friend and defendant's UR reviewer Ms. Laubach testified that the RFA of October 23, 2013 was correctly filled out and that the RFA was complete when it was received on October 28, 2013. As part of the RFA, Dr. Hekmat attached his September 26, 2013 report which was signed under penalty of perjury. The purpose of the box check is to alert the reviewer that a separate timeframe for the decision applies, and there is nothing in Rule 9792.9.1 as it existed in 2013 which allows a defendant to override a requesting physician's designation of a request as imminent and serious. Thus, the October 28, 2013 RFA should have been treated as an expedited request.

For . . . expedited review, a decision to modify, delay, or deny shall be communicated to the requesting physician within 24 hours of the decision, and shall be communicated to the requesting physician initially by telephone, facsimile, or electronic mail. The communication by telephone shall be followed by written notice to the requesting physician . . . within 72 hours of receipt of the request [for expedited review]. (Cal. Code Regs., tit. 8, § 9792.9.1(e)(3).) "The first day in counting any timeframe requirement is the day after receipt . . . except when the timeline is measured in hours . . . [then] the time for compliance is counted in hours from the time of receipt of the DWC Form RFA." (Cal. Code Regs., tit. 8, § 9792.9.1(c)(1).) Here, 72 hours after October 28, 2013 at 2:53:13 p.m. is October 31, 2013 at 2:53:13 p.m. The request for further information was sent on November 1, 2013, and both Ms. Valencia-Friend and Ms. Laubach admitted that defendant did not meet the 72 hour timeframe. Accordingly, the UR decision of November 6, 2013 was untimely. "

Editor's comments: In an effort to avoid the UR/IMR process we can now expect that applicant attorneys might now seek to have the requesting physician seek an expedited review which simply requires the request be reasonably supported by evidence establishing that the injured worker faces "an imminent and serious threat to his or her health", or that the "timeframe for utilization review under subdivision (c)(3) & (f)(3) (5 days) would be "detrimental to the injured worker's condition" which shorten the period of review from 5/14 day period to within 72 hours of receipt of information reasonable necessary to make the determination. (Lab. Code §4610(g)(2); Rule 9792.9.1(c)(4))

Penalties: 5814 penalties inapplicable during the UR process absent an unreasonable delay in completion of the UR process. Lab. Code §4610.1.

Rescission of Authorization: Rescission after treatment provided prohibited. Lab. Code §4610.3

III. The UR-IMR Process

A. Basic Timeline for UR-IMR

Request for IMR must be submitted to the AD **within 30 days after service of the UR decision**. *Lab. Code §4610.5(h)(1)*. IMR final determination must be made within thirty (30) days of the receipt of the Application for Independent Medical Review, DWC Form IMR, and the supporting documentation and information. *Cal. Code Regs., tit. 8, §9792.10.6(g)(1).*

Exception to 30 day request requirement: where dispute over issues other than medical necessity, ie. liability dispute, than IMR request must be submitted by the applicant within 30 days of notice to the employee showing that the other dispute is resolved. *Lab. Code §4610.5(h)(2).*

AD makes determination of eligibility/appropriateness for IMR request involving issues of timeliness, completeness of application for IMR, previous requests, assertion by claim's administrator contesting liability for injury or part of body, etc. *Lab. Code 4610.5(k); Cal. Code Regs., tit. 8, §9792.10.3.* AD may request additional information/documentation from the parties which is required to make eligibility determination, parties to reply/provide within 5 days of request. *Cal. Code Regs., tit. 8, §9792.10.3(c).* Appeal of eligibility determination of the AD may be made by either party upon petition to the WCAB Commissioners. *Cal. Code Regs., tit. 8, §9792.10.3(e).*

Treatment Authorization: If IMR approves treatment request, it must be authorized within 5 working days or sooner. *Cal. Code Regs., tit. 8, §9792.10.7(a)(2).*

a. Documents To Be Provided By Employer Upon Request by Employee for IMR

Essentially all relevant documents must be provided by employer within 15 days of notification of assignment to IMR organization (15 days if notice by mail, 12 if electronically, 24 hours if expedited review). *Lab. Code §4610.5(l) and (n).* The claims professional shall provide to the IMR organization and copied to employee the UR denial, previous six months reports from treater, correspondence with employee involving the treatment at issue, and all documents relevant to the treatment issue. *Cal. Code Regs., tit. 8, §9792.10.5.* (But note conflict in 10 day requirement under *Lab. Code 4610.5(l) and Reg. 9792.10.5* requiring 12-15 days?) By Employee: *Lab. Code 4610.5(f)(3); Cal. Code Regs., tit. 8, §9792.10.5(b)(1)*

IMR organization may request **additional information** from the parties, parties' response due within 5 business days of request, with responding party required to serve response on other party. *Cal. Code Regs., tit. 8, §9792.10.5(c). Lab. Code 4610.5(m).*

Expedited Review: Where there exists an "imminent and serious threat to health of the employee" all necessary information and documentation shall be delivered to IMR organization within 24 hours of approval of request for review. *Lab. Code 4610.5(n); Cal. Code Regs., tit. 8, §9792.10.5(a)(1).* IMR organization shall make decision within 3 days of receipt of IMR Application and documentation. *Cal. Code Regs., tit. 8, §9792.10.6(g)(2)*

b. Penalties For Employer's Delay of IMR Process

An employer who engages in conduct that has the effect of delaying the IMR process shall be subject to an administrative penalty of $5,000 for each day proper notice to employee was delayed. Lab. Code §4610.5(i).

IV. The MPN-IMR Process

MPN Diagnosis or Treatment Dispute: Where employee disputes diagnosis or treatment recommendations, the employee shall send written demand/request for 2nd Opinion from second physician within the MPN. Where the dispute exists after 2nd opinion employee may request 3rd opinion from MPN physician. *Lab. Code 4616.3(c)* and where the dispute persists after the 3rd opinion the applicant may proceed to the IMR process by employee submitting AD Form "Independent Medical Review Application". *Lab. Code 4616.4(b)&(c); Cal. Code Regs., tit. 8, §9792.10.7*

a. Procedures: MPN-IMR Procedures after submittal by Employee of AD Form "Independent Medical Review Application".

Following receipt of that application, the employer or insurer shall provide the IMRer with required info. LC 4616.4(d).

Following receipt of documentation, IMRer shall conduct **physical examination** of the EE at EE's discretion. LC 4616.4(e). (Under UR-IMR, IMR an examination is not performed.)

IMR shall issue report to AD within 30 days or less. LC 4616.4(f).

The AD shall immediately adopt the decision of the IMR and promptly issue a written decision. (LC 4616.4(h).)

If IMRer finds disputed treatment or diagnosis consistent with Section 5307.27 or ACOEM, EE can seek disputed treatment from a physician of their choice from **within or outside the MPN.** LC 4616.4(i). See 8 CCR 9767.1, 9768.1-9768.17)

b. Appeal of the IMR Determination:

The IMR determination may be appealed only by verified appeal filed with the appeals board, served on all interested parties within 30 days of mailing of the determination. Lab. Code 4610.6(h) **Grounds for Appeal** of the IMR determination must be established upon proof of clear and convincing evidence of: (1) AD acted **without or in excess** of AD's power; (2) Determination was procured by **fraud**; (3) Material **conflict of interest** in violation of LC 139.5; (4) the existence of race, national origin, ethnicity, religion, age, sex, sexual orientation, color or disability **BIAS;** (5) The determination was the result of **plainly erroneous** express or implied finding of fact based on ordinary knowledge. Lab. Code 4610.6(h). Any appeal is made even more difficult by the fact that the **IMR reviewer's name confidential**. Lab. Code 4610.6(f).

VI. Miscellaneous Case Law

King v. CompPartners, (2018, Cal. Supreme Court)) 4 Cal.5th 1039, 83 Cal.Comp.Cases 1523, 2018 Cal. LEXIS 6268.

Editor's comments: Although a win for UR and the defendant, UR physicians must be careful to not "stepped outside of the utilization review role contemplated by statute" as the King decision suggest that any gratuitous comments or treatment recommendation may create a "duty" which might create liability on the part of the UR physician?

Plaintiffs filed a complaint after a utilization reviewer denied a treating physician's request to continue prescribing the drug Klonopin for the injured employee. The trial court sustained defendants' demurrer without leave to amend. The Court of Appeal on Writ of Review affirmed the order sustaining the demurrer but reversed the denial of leave to amend. The Court of Appeal agreed with defendants that plaintiffs' challenge to the decision to decertify the prescription was subject to the exclusive remedies of the workers' compensation system. The Court of Appeal held that because the plaintiffs were challenging the reviewer's failure to warn plaintiffs of the risks of Klonopin withdrawal, the Court of Appeal concluded the claim was not preempted because it did not directly challenge the medical necessity determination.

The Supreme Court reversed the lower Court insofar as it permitted plaintiffs to amend their complaint to bolster their claim that defendants were liable in tort for failure to warn. The Supreme Court of California by unanimous decision held that the workers' compensation law provided the exclusive remedy for the employee's injuries and thus preempted plaintiffs' tort claims. The harm plaintiffs alleged was collateral to and derivative of that industrial injury and arose within the scope of employment for purposes of the workers' compensation exclusive remedy. Because the acts alleged did not suggest that defendants stepped outside of the utilization review role contemplated by statute, plaintiffs' claims were preempted. Further, the plaintiffs did not show that they could amend their complaint in a manner that would alter this conclusion.

Simply stated, the Supreme Court, held that the UR physician was not liable in tort for failure to warn finding that workers' compensation law provides exclusive remedy for employee's injuries and thus preempts employee's tort claims, where after two years of authorization and use of Klonopin, the UR physician decertified use without weaning regimen nor warning applicant/plaintiff of risks of abruptly ceasing Klonopin.

Lambert v. State of California Department of Forestry, SCIF, 2016 Cal. Wrk. Comp. P.D. LEXIS 492 (BPD)

> *"Labor Code section 4604.5(c)(1) sets a 24 visit cap on physical therapy visits "notwithstanding the medical treatment utilization schedule." However, this cap is not applicable to physical therapy visits for "postsurgical physical medicine and postsurgical rehabilitation services provided in compliance with a postsurgical treatment utilization schedule established by the administrative director pursuant to Section 5307.27." (Labor Code section 4604.5(c)(3).)*
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> *Applicant was correct in asserting that since this was a postsurgical treatment request, SCIF's claims adjuster erroneously relied on the 24 visit cap in Labor Code section 4604.5(c)(1) when he denied Dr. McLennan's request.*
>
> *When considering requests for medical treatment for post-surgical knee complaints, the MTUS provides:*
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> *(d) If surgery is performed in the course of treatment for knee complaints, the postsurgical treatment guidelines in section 9792.24.3 for postsurgical physical medicine shall apply together with any other applicable treatment guidelines found in the MTUS. In the absence of any cure for the patient who continues to have pain that persists beyond the anticipated time of healing, the chronic pain medical treatment guidelines in section 9792.24.2 shall apply. (Cal. Cod Regs., tit. 8, section 9792.23.6 Emphasis added.)*
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> *When a treating physician submits a Request for Authorization for medical treatment to a claims adjuster, Labor Code section 4610(e) provides that only a licensed physician "may modify, delay, or deny requests for authorization of medical treatment for reasons of medical necessity to cure and relieve." Thus a reviewing physician, and not a claims adjuster, is required to apply the MTUS when determining the medical necessity of a proposed medical treatment. (Labor Code section 4610(f).)"*
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> *Lambert v. State of California Department of Forestry, 2016 Cal. Wrk. Comp. P.D. LEXIS at pg. 494*

Applicant sustained an admitted injury to his left knee on February 7, 2015, while employed as a firefighter by California Department of Forestry and Fire Protection. Applicant's PTP performed a surgical repair of the medial meniscus on October 24, 2015. Applicant was provided physical therapy prior and subsequent to his surgery. The parties stipulated that applicant had at least 28 post-operative physical therapy visits. Applicant's PTP submitted an RFA for an additional eight physical therapy visits. Defendant's claims adjuster issued a denial of the request on May 26, 2016, citing the 24 physical therapy visit cap in Labor Code section 4604.5(c)(1). The additional RFA of 8 PT visits was not submitted to UR, rather the adjuster relied on a pre-surgical denial based upon pre-surgical PT totaling 24 visit. Applicant's attorney responded on May 31, 2016, noting that the 24 visit cap on physical therapy cited by defendant's claims adjuster was not applicable to post-surgical physical therapy, and he demanded that defendant immediately authorize the requested treatment. The matter was submitted on this record at an expedited hearing.

> *See, Garcia, v. American Tire Distributors, Broadspire, 2016 Cal. Wrk. Comp. P.D. LEXIS 527 (BPD), where the Board held that an agreement between the parties to resolve a single medical issue through the use of an AME pursuant to LC 4062(b) cannot be used to avoid application of the UR/IMR process pursuant Labor Code §§ 4610 and 4610.5. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02, 22.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, §§ 4.10, 4.11. Sullivan on Comp. Section 7.36, Utilization Review -- Procedure]*
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> *See also, Hogenson v. Volkswagen of America, Insurance Company of the State of Pennsylvania, 2016 Cal. Wrk. Comp. P.D. LEXIS 488 (BPD, holding that RFA from MPN treating physician is subject to UR/IMR process, which is consistent with the legislative goal of assuring that medical treatment is provided by all defendants consistent with uniform evidence-based, peer-reviewed, nationally recognized standards of care; Commissioner Sweeney concurring separately noted two separate statutory tracks to dispute recommendation of MPN treating physician, consisting of UR IMR (employer objects) and second opinion MPN IMR process (applicable when employee objects); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§5.02[2], 5.03[4], [5], 22.05[6][b][iv]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, §§ 4.10, 4.11, 4.12[8], [9]. Sullivan on Comp, Section 7.55, Medical Provider Network – Dispute Resolution]*
>
> *See also, Rivas v. North American Trailer, 2016 Cal. Wrk. Comp. P.D. LEXIS 572 (BPD) holding that Applicant may properly select individual physician not individually listed on employer's MPN where physician's medical group is listed, and MPN medical groups employs services of physicians who do not register individually with MPN; WCAB interpreting Labor Code § 4616(a)(3) and 8 Cal. Code Reg. § 9767.5.1. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 5.03[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.12[2]. Sullivan on Comp, Section 7.53, Medical Provider Network.]*

The WCJ held that when treating physician submits RFA for medical treatment, the UR Physician, not claims adjuster, is required to apply MTUS to determine medical necessity of proposed treatment, and that since application of MTUS post-surgical guidelines was required to determine whether additional physical therapy visits were medically necessary to treat applicant's injury, it was beyond claims adjuster's authority to apply MTUS to deny treating physician's RFA, and RFA should have been submitted to UR for review by licensed physician. However, Labor Code section 4604.5(c)(1) sets a 24 visit cap on physical therapy visits "notwithstanding the medical treatment utilization schedule." However, this cap is not applicable to physical therapy visits for "postsurgical physical medicine

and postsurgical rehabilitation services provided in compliance with a postsurgical treatment utilization schedule established by the administrative director pursuant to Section 5307.27." (Labor Code section 4604.5(c)(3).); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§5.02[2][a], [b], 22.05[6][b][i], [ii]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.10[6].]

Federal Express Corporation v. WCAB (Paynes) 82 Cal. Comp. Cases 1014, 2017 Cal.Wrk.Comp. LEXIS 243

Applicant sustained a specific injury on 2/25/97 to various parts of body to include bilateral knees. The claim was settled via C&R with open medical treatment with AME Peter Mandel to decide issues regarding reasonableness and necessity for future medical care. In 2015 the PTP reported that Applicant was a candidate for left knee total arthroplasty after she lost weight. Defendant's UR denied the weight loss requested extension, and the UR denial was upheld by IMR. Thereafter Dr. Mandel issued a report indicating that Applicant needed an additional six months of the weight loss program to enable a left knee replacement.

Applicant filed a DOR requesting an expedited hearing on the issue of her entitlement to an extension of the recommended weight loss program, seeking to enforce the C&R stipulation that the parties would utilize AME Dr. Mandel on future issues of treatment. Defendant objected to the DOR, asserting that the requested treatment was denied by UR/IMR, and that the WCAB had no jurisdiction over the medical treatment dispute.

The matter proceeded to a trial, with the WCJ agreeing with Defendant and concluded that he had no jurisdiction to decide the necessity of the weight loss program since Applicant triggered the IMR process by appealing the UR denial. The WCJ stated, however, that, had the IMR appeal not been filed, he may have allowed the weight loss program, based on Dr. Mandel's opinion and the WCAB's holding in *Bertrand v. County of Orange*, 2014 Cal. Wrk. Comp. P.D. LEXIS 342(Appeals Board noteworthy panel decision).

On reconsideration the WCAB reversed holding that the 2003 agreement within C&R to utilize AME on issues of future medical treatment was enforceable despite statutory changes implementing utilization review/independent

See, Gonzalez v. Imperial County Office of Education, 2016 Cal. Wrk. Comp. P.D. LEXIS 528 (BPD), holding that dismissal without prejudice be rescinded where when medical reports established diagnosis of agoraphobia and panic disorder and applicant was medically unable to appear in court; Due process required accommodations such as being permitted to appear telephonically or via Skype [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 26.01[3][b], 26.04[1][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.07[2][b]. Sullivan on Comp, Section 15.37, Requirement to Appear at Hearing.]

See, Williams v. Department of Corrections & Rehabilitation, 2016 Cal. Wrk. Comp. P.D. LEXIS 511(BPD) holding that it was error for WCJ to order former counsel to attend hearing as witness rather than by subpoena pursuant to Cal. Code Civ. Proc. § 1985, and the subpoena must be personally served as required by Cal. Code Civ. Proc. § 1987. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 25.10[2][a], 26.03[4], 26.05[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.45[1], Ch. 16, § 16.48[1], Ch. 19, § 19.37. Sullivan on Comp, Section 15.47, Trial – Proceedings and Submission]

See, Bonilla v. San Diego Personnel and Employment dba Good People Employment Services, 2017 Cal. Wrk. Comp. P.D. LEXIS 56 (BPD), holding that treatment requests from all physicians, even those treating within MPN, must go through UR/independent medical review (IMR) process mandated by Labor Code § 4610 et seq., and that existing law requires RFAs for medical treatment be utilized by MPN physicians and are subject to all UR requirements.; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02[2], 5.03[4], [5], 22.05[6][b][iv]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, §§ 4.10, 4.11, 4.12[8], [9]; Sullivan on Comp, Section 7.34, Utilization Review – Requests for Authorization.] See also, Parrent v. Workers' Compensation Appeals Board, Pacific Bell Telephone Co. SBC, 82 Cal. Comp. Cases 155; 2017 Cal. Wrk. Comp. LEXIS 3 (Writ Denied), holding that treatment recommendations of medical provider network treating physician, may only be disputed through utilization review/independent medical review process; Commissioner Sweeney, concurring, wrote separately to emphasize that, even if employer raises dispute with medical provider network treating physician's recommendation and submits issue to utilization review, injured worker may, at same time, exercise his or her right to initiate second opinion process provided in Labor Code § 4616.3 or change treating physicians within medical provider network.; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02[2], 5.03[4], [5], 22.05[6][b][iv]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, §§ 4.10, 4.11, 4.12[8], [9]. Sullivan on Comp, Section 7.55, MPN -- Dispute Resolution]

See also, Ramirez v. Workers' Comp. Appeals Bd., 10 Cal. App. 5th 205, 215 Cal.Rptr.3d 723, 82 Cal.Comp.Cases 327, 2017 Cal.App. LEXIS 282, holding that the WCAB has no jurisdiction over whether utilization review and independent medical review had used correct standard, where IMR reviewer arguable corrected but upheld UR basis for denial of further RFA for additional acupuncture treatments holding that whether utilization reviewer correctly followed medical treatment utilization schedule is question directly related to medical necessity and, therefore, is reviewable only by independent medical review; Court of Appeal also held that independent medical review does not violate state separation of powers or due process and does not violate federal procedural due process citing and following Stevens v. WCAB (2015) 241 Cal.App.4th 1074 [194 Cal.Rptr. 3d 469; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 5.02[1], [2][a]-[d]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, §§ 4.10, 4.11.]

See also, Mata v. Supermercado Mi Tierra, 2017 Cal. Wrk. Comp. P.D. LEXIS 166 (BPD), holding that Applicant was entitled to UR approved treatment where defendant failed to act timely within five-day timeframe in 8 Cal. Code Reg. 9792.9.1(b)(1) to defer liability for recommended treatment, and where defendant decided to proceed with UR rather than defer, it cannot later decide to delay medical treatment approved by UR on basis that it is disputing industrial injury; Since defendant ultimately in this case accepted liability for applicant's neck injury and recommended surgery was certified by UR there was no basis for defendant's failure to authorize surgery.; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02, 22.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, §§ 4.10, 4.11.]

medical review citing *Bertrand v. County of Orange*, 2014 Cal. Wrk. Comp. P.D. LEXIS 342 (Appeals Board noteworthy panel decision). The WCAB also seemed to allow in this limited situation the applicant to proceed both as the to UR/IMR procedures and pursuant to the Stipulation within the C&R. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02, 22.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, §§ 4.10, 4.11.]

Edilberto Cerna Romero v. Stones and Traditions, State Compensation Insurance Fund, 2016 Cal. Wrk. Comp. P.D. LEXIS 142 (Board Panel Decision)

The applicant's PTP submitted an RFA for four different treatment modalities. The UR physician requested additional information pertaining to two of the treatment modalities and issued a decision within 14 days as required by Labor Code § 4610 as to all four of the treatment modalities. The WCJ reasoned that the UR physician should have issued a decision regarding the two treatment modalities for which no additional information was required within 5 days.

On reconsideration the WCAB disagreed holding that Rule 9792.9.1 provides that an RFA triggers the timelines for completing utilization review and does not contemplate different timelines for different treatment requests within a single RFA. Accordingly, the September 14, 2015 UR decision is timely as to all modalities requested as part of the RFA. See also, Favila v. Arcadia Health Care, Cypress Insurance Company, 2016 Cal. Wrk. Comp. P.D. LEXIS 181 (Board Panel Decision) Labor Code § 4610(g)(1), 8 Cal. Code Reg. § 9792.9.1. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02, 22.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.10; Sullivan On Comp, 7.35 Utilization Review – Time Limits.]

Bissett-Garcia v. Peace and Joy Center, Virginia Surety Company, 2016 Cal. Wrk. Comp. P.D. LEXIS 174 (Board Panel Decision); Bissett-Garcia v. Peace and Joy Center, Virginia Surety Company, 2016 Cal. Wrk. Comp. P.D. LEXIS 282 (Board Panel Decision);

On September 11, 2015, applicant wrote to defense counsel attaching a PR-2 report from primary treating physician. On the bottom of page 2 of the attached report the PTP wrote, "The patient requires home assistance with [activities of daily living]; 8 hours a day, 7 days a week for cooking, cleaning, self grooming and transportation." On the transmittal letter, applicant's counsel wrote, "Please see the attached PR-2, treating doctor's report from Dr. Vincent J. Valdez 9/08/15. Requesting authorization from home assistance 8 hours a day, 7 days a week. We are asking that this be authorized upon receipt of this letter."

Despite the fact that this "request for authorization" did not comply with Administrative Rule 9792.9.1(a) or Administrative Rule 9792.9.1(c)(2)(B) (Cal. Code Regs., tit. 8, § 9792.9.1, subds. (a) & (c)(2)(B)), defense counsel forwarded the request for treatment to the utilization review process established by defendant pursuant to Labor Code section 4610. On September 17, 2015, defendant's utilization review provider denied the requested treatment. The WCJ held the UR decision untimely and therefore that the WCAB had jurisdiction under Dubon to determine the issue of medical necessity.

On reconsideration the WCAB reversed writing that "according to the utilization review determination, Dr. Valdez's request for treatment was received by the utilization review provider on September 14, 2015. Pursuant to Labor Code section 4610(g)(1) and Administrative Director Rule 9792.9.1(c)(3) (Cal. Code Regs., tit. 8, § 9792.9.1, subd. (c)(3)), defendant had five business days to issue a decision to approve, modify, delay or deny the request. The time runs from the date that a request for authorization "was received by the claims administrator or the claims administrator's utilization review organization." (Administrative Director Rule 9792.9.1(a)(1); Cal. Code Regs., tit. 8, § 9792.9.1, subd. (a)(1).) Thus, defendant's utilization review determination was due September 21, 2015. The September 17, 2015 utilization review denial was well within the time limits. Thus Time limit for UR runs from the date the request for authorization "was received by the claims administrator or the claims administrator's utilization review organization" not from date defense attorney receives request. 8 Cal. Code Reg. § 9792.9.1(a)(1). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02, 22.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.10; Sullivan On Comp, 7.36, Independent Medical Review – Procedure; Sullivan On Comp, Section 7.34 Utilization Review – Request for Authorization.] But see conta, Czech v. Bank of America, 2016 Cal.Wrk.Comp.P.D. LEXIS 257 UR found untimely where defense attorney did nothing with request.

Favila v. Arcadia Health Care, Cypress Insurance Company, 2016 Cal. Wrk. Comp. P.D. LEXIS 181 (Board Panel Decision)

> *". . . Applicant's contention that the UR and IMR reviewers relied upon outdated medical treatment guidelines and not the most recent studies that applicant claims validate the requested surgery, ignores the mandate that a mistake of fact be of a "matter of ordinary knowledge . . . and not a matter that is subject to expert opinion." The question of whether the proper medical treatment guidelines were used to determine the appropriateness of the disputed surgical treatment is clearly a matter subject to expert opinion and is not a matter of ordinary knowledge. Furthermore, Labor Code section 4610.6(i) expressly precludes the WCJ, the Appeals Board or any higher court from making "a determination of medical necessity contrary to the determination" of the IMR organization. . ."*
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> *Favila v. Arcadia Health Care, Cypress Insurance Company, 2016 Cal. Wrk. Comp. P.D. LEXIS at pg. 183 (Board Panel Decision)*
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> *But see, contra, McAtee v. Briggs & Pearson Construction, 2016 Cal.Wrk.Comp. P.D. LEXIS 375(BPD), ordering that new IMR determination pursuant to Labor Code § 4610.6(i) was appropriate where WCAB found that UR determination was result of plainly erroneous express or implied finding of fact as matter of ordinary knowledge based on information submitted for review where IMR reviewer erroneously applied Medical Treatment Utilization Schedule (MTUS) guideline.*
>
> *See also, Gonzalez-Ornelas, v. County of Riverside, 2016 Cal. Wrk. Comp. P.D. LEXIS 151(BPD) where Applicant's IMR appeal pursuant to Labor Code § 4610.6(h)(1) and (5) granted, as IMR determination denying authorization based lack of documentation of diagnosis and failure of conservative treatment, where documentation on both existed and were provided to reviewer -- IMR determination was "plainly and directly contradicted" without need for "expert opinion" within "realm of ordinary knowledge". [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02, 22.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.11; Sullivan On Comp, 7.41, Independent Medical Review – Appeal and Implementation of Determinations]*

Applicant appealed the UR non-certification of the PTP's RFA for artificial disk replacement surgery to IMR. The IMR upheld the UR determination. Applicant than sought review by the Appeals Board arguing should order a second IMR review because the IMR determination was based upon a plainly erroneous expressed or implied finding of fact. Applicant asserted that there is a dispute over the appropriate applicable medical guideline for determining whether the proposed surgery is reasonable, asserting that the UR and IMR physicians relied upon outdated medical information as to the efficacy of the artificial disk replacement surgery.

Labor Code section 4610.6(h) limits the grounds for an appeal from an IMR determination, which determination is "presumed to be correct and shall be set aside only upon proof by clear and convincing evidence of one or more of the following grounds for appeal:" The ground for appeal cited by applicant is set forth in section 4610.6(h)(5): The determination was the result of a plainly erroneous express or implied finding of fact, provided that the mistake of fact is a matter of ordinary knowledge based on the information submitted for review pursuant to Section 4610.5 and *not a matter that is subject to expert opinion*.

The WCAB held that a UR denial based on outdated medical treatment guidelines, is not a proper basis for IMR appeal as "plainly erroneous express or implied finding of fact" as described in Labor Code § 4610.6(h)(5) which requires that mistake of fact be matter of ordinary knowledge, not matter subject to expert opinion, and that whether proper medical treatment guidelines were used to determine appropriateness of disputed surgical treatment is clearly matter of expert opinion and not grounds for IMR appeal. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02, 22.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.11; Sullivan On Comp, 7.41, Independent Medical Review – Appeal and Implementation of Determinations]

King v. Comppartners, Inc., (2016 4th Appellate District) 243 Cal. App. 4th 685; 196 Cal. Rptr. 3d 696; 81 Cal. Comp. Cases 10; 2016 Cal. App. Lexis 2.

Applicant sustained injury to back on 2/15/08 and suffered anxiety and depression due to chronic back pain resulting in the psychotropic medication Klonopin being prescribed. In July 2013, a workers' compensation utilization review was conducted to determine if the Klonopin was medically necessary. (Lab. Code, § 4610, subd. (a).) The UR physician determined the drug was unnecessary and decertified it, with applicant required to immediately cease taking the Klonopin. Typically, a person withdraws from Klonopin gradually by slowly reducing the dosage. Due to the sudden cessation of Klonopin, King suffered four seizures, resulting in additional physical injuries. In September 2013 as second authorization request for Klonopin which was submitted to UR and by a second UR physician determined Klonopin was medically unnecessary. Neither UR physician examined applicant in person, nor warned applicant of the dangers of an abrupt withdrawal from Klonopin. Applicant filed a civil complaint seeking damages for negligence arguing that the UR physician owed the applicant a duty of care, which was breached by failure to warn and/or failure to recommend weaning. Defendants demurred to the complaint contending the Labor Code set forth a procedure for objecting to a utilization review decision, and that procedure preempted the Kings' complaint. Alternatively, defendants asserted that the UR physicians did not owe applicant a duty of care. Defendants argued there was no doctor-patient

relationship because they never personally examined Kirk and did not treat him. Defendants reasoned that because there was no relationship, there was no duty of care. The trial judge granted defendant's demur without leave to amend.

The Court of Appeal reversed holding that the UR physician has physician-patient relationship with person whose medical records are being reviewed and, thus, owed applicant a duty of care, that determination of scope of duty owed depends on facts of case, and that, to the extent plaintiffs are faulting utilization review physician for not communicating warning to applicant, their claims are not preempted by exclusivity rule of workers' compensation. Demur sustained with leave to amend. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02[2][c], [d], 22.05[6][b][iii], [iv]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.10[6][b], [7][b].]