CURRENT ISSUES

WORKERS COMPENSATION VIRTUAL SEMINAR

March 19, 2021

Law Offices of Richard L. Montarbo
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SECTION I: CASE LAW UPDATE 2020

CURRENT ISSUES

WORKERS' COMPENSATION SEMINAR

2021

To Be Held Virtually, Friday, March 19, 2021

Vizcaya Sacramento
2019 21st Street, Sacramento, CA
(916) 455-5243

☐	**8:00 a.m. - 9:00 a.m.**	**Registration**
☐	**9:00 a.m. - 11:00 a.m.**	**Introduction & Comments** **Case Law Update** Richard L. Montarbo, Esq *Law Office of Richard L. Montarbo* Dudley Phenix, Esq *Timmons, Owens, Jansen & Tichy*
☐	**11:00 a.m. - 11:15 a.m.**	**Break**
☐	**11:15 a.m. - 1:00 p.m.**	**Case Law Update & Review** Richard L. Montarbo, Esq *Law Office Of Richard L. Montarbo* William Herreras, Esq *Law Offices of William Herreras*

This seminar is webcasted and streamed live from The Vizcaya Hotel in Sacramento, 2019 21st Street, Sacramento, CA (916) 455-5243. For more information, please contact Tori Mays with the Law Offices of Richard L. Montarbo, 146 Main Street, Red Bluff, California 96080, Telephone (530) 529-9860; Fax (530) 529-9865. Materials will include Electronic Course Syllabus and current download of IOS/Droid CompCalcPlus 2021

The registration fee for 2021 is waived. For CEB/MCLE, WORKERS COMPENSATION SPECIALIZATION, QME, AND WCCP CREDITS, all attendees must register with the Law Offices of Richard L. Montarbo. Registration is required for end of conference prize drawing. All registrations much be received by March 5, 2021.

Approved for 5.0 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 5.0 hours, which includes 4.0 hours of class/lecture time plus 1.0 hour of self-study of materials, and 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. 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 accepted.)

Registrant:_____Firm/Office:_____
Address:_____City,State&Zip:_____
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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**.**

- **Dudley Phenix, Esq.** Currently a partner with the firm of Timmons, Owens, Jansen & Tichy**.** Dudley R. 1986. In 1990, Mr. Phenix graduated from U.C. Davis Law School with a J.D. From 1993 to 1998, he worked as an associate attorney and then as a partner for the firm of Jones, Clifford, McDevitt, Naekel and Johnson. Mr. Phenix co-owned the firm of Naekel and Phenix, LLP, where he and his partner managed four associate attorneys, a staff of 15 employees, and several hundred workers' compensation and retirement cases. Between 2006 and 2007, he owned and operated the Law Offices of Dudley R. Phenix. In June of 2006, *Sacramento Magazine* recognized Mr. Phenix as "One of Sacramento's Best Lawyers." Mr. Phenix was recognized by the California State Bar as the Workers' Compensation Judge of the Year.

- **William Herreras, Esq.** William Herreras graduated with Honors from Loyola University of Los Angeles in 1963 as well as graduating from Loyola Law School with Honors in 1966. Admitted to the California State Bar in 1967, Mr. Herreras is a Certified Workers' Compensation Specialist and has been the Co-Chair of the Amicus Committee for the California Applicants Attorneys Association (CAAA) since 1982. A past president of CAAA from 2000 to 2001, Mr. Herreras is an active member and lecturer of the Mexican-American Bar Association and a lecturer before the State Bar, defense and applicant legal associations. Mr. Herreras has appeared on numerous occasions before the California Supreme Court, State Court of Appeal, and en banc decisions before the Workers Compensation Appeals Board. Mr. Herreras is also the editorial consultant for LEXIS NEXIS, California Compensation Cases.

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January 22, 2021

Tori Mays
LAW OFFICE OF RICHARD L. MONTARBO
(office@montarbolaw.com)

Program Title:	2021 Current Issues Workers Compensation
Provider Number:	422
Program Number:	159493
Approved Hours:	5.00
Subfield Area(s)/Hours:	A/1.00; C/3.00; D/1.00
Approval Period:	03/19/2021 - 03/18/2023

Dear Tori Mays:

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

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MCLE PROVIDER CERTIFICATION DEPARTMENT

SINGLE ACTIVITY PROVIDER APPROVAL

January 29, 2021

Tori Mays
LAW OFFICE OF RICHARD L. MONTARBO
146 Main St.
Red Bluff, CA 96080

Re: Provider Number: 422
Educational Activity Approved: 2021 Current Issue Workers Compensation
Approved For the Period: March 19, 2021 to March 18, 2023
Total Credit Hours Approved = 5.00, including the follow subfield credits
.00 = Ethics Hours
.00 = Substance Abuse/Mental Illness Hours
.00 = Bias Hours

Dear Tori Mays:

The above-referenced educational activity has been approved. You do not need to seek approval for repeats of this approved activity during the approval period. The repeated activity must be identical to the approved activity (e.g., same name, same topics, same time for each topic, etc.). Annual events, such as conferences, retreats, and forums are not considered a repeat activity and require a new and separate approval each year.

All Minimum Continuing Legal Education (MCLE) Providers are expected to conform to the State Bar of California's MCLE rules which can be found here.

Please be sure that you are using the State Bar's most current forms including the Record of Attendance, Evaluation Form, and Certificate of Attendance found here.

If, upon review of the above information, you have any questions, please do not hesitate to contact me.

Yours truly,

Jonita Rose
Program Specialist
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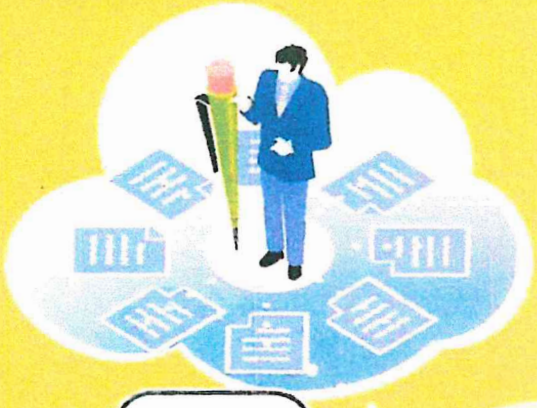

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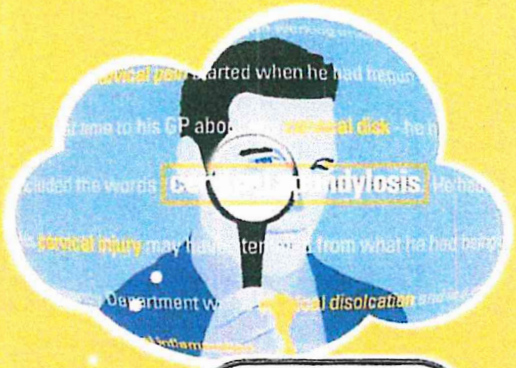

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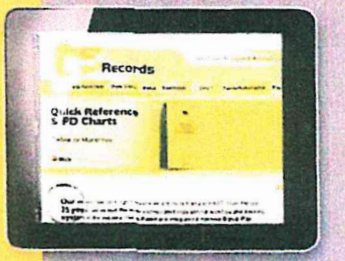

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CASE LAW UPDATE

2021 & 2020

Richard L. Montarbo, Esq

William R. Herreras, Esq

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CASE LAW UPDATE 2021

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. Apportionment

Fraire v. California Dept. of Corrections and Rehabilitation, 48 CWCR 52 (April 2020)

The applicant sustained three separate injuries to various parts of body. The reporting internal medicine AME apportioned 60% of the applicants disability related to ear and eye impairment to non-industrial diabetes and 40% as pre-existing and nonindustrial. Of the industrial causation the internal medicine AME apportioned equally between the 2006 and 2012 industrial injuries. The AME Ophthalmologist deferred to the internist the issue of apportionment the visual impairment noting that he believed that apportionment would be "proportional to the industrial causation of the underlying diabetes and/or hypertension" and also stated that the issue was outside of his expertise. At deposition the AME Ophthalmologists did testify in deposition that the applicant was legally blind which made her permanently totally disabled and that the blindness was a derivative of the diabetes and hypertension.

See also, Hom v. City and County of SF, 2020 Cal. Wrk. Comp. P.D. LEXIS 124, holding apportionment to a prior award pursuant to Labor Code 4664 was upheld despite that an alternate AMA methodology was used on successive dates, provided both methodologies utilized were from the 5th edition of the AMA Guides, and overlap exists between the two methodology; ROM overlaps DRE. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[1]-[3], 8.06[5][d], 8.07[2][a]-[c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.42[1]-[3]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Chs. 6, 8.]

But see also, Smith v. City of Berkeley, 2020 Cal. Wrk. Comp. LEXIS 244, holding defendant failed to meet their burden of proof for apportionment to prior award pursuant to LC 4664(b) on overlap where only evidence was that of qualified medical evaluator, who rated applicant's impairment from subsequent heart injury under different chapter of AMA Guides than used for rating prior heart injury and involving different conditions, (i.e., damage to heart caused by myocardial infraction caused restricted blood flow to coronary arteries, vs. left ventricular hypertrophy involving thickening of left ventricle wall); Citing and discussing Hom v. City & County of San Francisco, 2020 Cal. Wrk. Comp. P.D. LEXIS 124 (Noteworthy Panel Decision). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[1]-[3], 8.06[5][d], 8.07[2][a]–[c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.42[1]–[3]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Chs. 6, 8.]; SOC , Section 10.35, Apportionment – Pre-Existing Disability.

After trial the judge found that the applicant had sustained the three claimed injures. The WCJ held that the applicant was total disability under the conclusive presumption of §4662(a)(1) and that the conclusive presumption precluded apportionment. The WCJ awarded indemnity in the 2012 case at a rate of $442.62 per week, which allowed a $75,403.43 attorney fee.

Defendant sought reconsideration arguing that application of the presumption of total disability under §4662 allows apportionment pursuant to §4663.

By Split Panel decision, the WCAB held that the conclusive presumptions of §4662 does not preclude apportionment to causation of disability. Writing the Board held that LC 4662 states that although the permanent disabilities "shall be conclusively presumed to be total in character", the statute does not mean that it is conclusively presumed to be 100% the result of industrial causes. Looking to the legislative intent, the majority noted also that §4662(a) does not specifically exclude apportionment pursuant to LC 4663 which the legislature could have done if it had intended to do. Citing and discussing Brodie v. WCAB (2007) 40 C4th 1313, 75 CCC 565, the Board explains that the basis for apportionment is expanded rather than narrowed by LC 4663. In Brodie, the approach to apportionment is to parcel out the causative sources of the injury and determine the amount directly caused by the current industrial source. The majority states that the language of Brodie, mandates PD apportionment "shall" be based on causation. They note that it does not exempt PD presumed total under §4662(a). This means, according to the majority that the statutes "mandate that conclusively presumed total disabilities under section 4662(a) shall be subject to apportionment to causation." Further, because §4662(a) appears only once in a very limited way in §4664, the majority concludes that this means that the legislature did not intend to exclude conclusively presumed total disabilities from apportionment to causation.

Dissenting, Board Chair Zalewski held that the conclusive presumptions in §4662(a) cannot be apportioned under §4663 and §4664(a). She explains that the presumptions are not rules of evidence, they are rules of law. They promote social policies. Importantly, she states that because these are conclusive presumptions, evidence cannot be received to contradict the presumption. She cites to a litany of cases where conclusive presumptions were not subject to apportionment.

Thus, Labor codes section 4662(a) presumptions are subject to the section 4663 and 4664 apportionment provisions.

County of Santa Clara v. WCAB, (Justice) (2020, 6th Appellate District) 49 Cal. App. 5th 605, 85 Cal. Comp. Cases 467

The applicant was a claims examiner who worked for defendant from 11/19-12/16. While at work on 11/22/11 the applicant fell which resulted in injury to left knee and later to right knee as a compensable consequence. In June of 2012 applicant underwent a total right knee replacement, followed by the left knee in September of 2013. The AME, after examinations prepared 5 reports and was deposed twice. The AME noted that diagnostic studies including X-rays, and MRIs were positive for findings including "and old tear", preexisting degeneration", "marked loss of articular cartilage in the medial

"FN3: The workers' compensation judge and the Board believed that Hikida dictated a different result. Not so. The injured worker in Hikida suffered from carpal tunnel syndrome and underwent industrial medical treatment as a result. (Hikida, supra, 12 Cal.App.5th at p. 1253.) As a consequence of the medical treatment, the injured worker sustained a ***new*** *"more disabling condition" of CRPS. (Id. at p. 1262.) The Hikida court reasoned that the employer was responsible for this new consequential injury based on longstanding case law requiring employers to pay for all industrial medical treatment without apportionment. (Hikida, at p. 1262; See Boehm & Associates v. Workers' Comp. Appeals Bd. (2003) 108 Cal.App.4th 137, 142 [133 Cal.Rptr.2d 396] ["Once employment and industrial causation are determined, the employer is responsible for all medical expenses incurred."].) The court also determined, again based on longstanding case law, that the consequences of such medical [***18] treatment were also within the ambit of the workers' compensation system. (Hikida, at pp. 1262–1263; see Fitzpatrick v. Fidelity & Casualty Co.(1936) 7 Cal.2d 230, 233 [60 P.2d 276] ["[A]n employee is entitled to compensation for a new or aggravated injury which results from the medical or surgical treatment of an industrial injury."].)*

". . . However, it does not follow that an employer is responsible for the consequences of medical treatment without apportionment, when that consequence is permanent disability. Section 4663 and 4664 make clear that permanent disability "shall" be apportioned and that an employer "shall" be liable only for the percentage of the permanent disability "directly caused" by industrial injury. There is no case or statute that stands for the principle that permanent disability that follows medical treatment is not subject to the requirement of determining causation and thus apportionment, and in fact such a principle is flatly contradicted by sections 4663 and 4664.

Editor's Comments: Since 2017 and the Hikida decision, I have summarized the holding as further articulating the principle of "Direct Causation" in that the employer/defendant is only responsible for that portion of the resulting disability which is "directly", "exclusively" and "causally" related solely to the subject injury. I have also repeatedly asserted that it was an erroneous interpretation of the Hikida holding that surgery/medical treatment might "sanitize" otherwise valid legal non-industrial apportionment. Simply stated, the holding of Hikida is that where industrial medical treatment causes/results in a completely new condition/diagnosis, the resulting disability is not apportionable unless the new condition was in part pre-existing/non-industrially causes. Stated in the alternative, where the new condition was in part caused by the industrial treatment and in part non-industrially caused, apportionment based on substantial medical evidence will exist.

compartment," "moderate loss of articular cartilage in the lateral compartment," and "moderate loss in the patellofemoral joint", and scar tissue on both knees indicating that the applicant had undergone a "significant open procedure" at some point in the past. It was based on these finding that the AME found that the need for surgery and resulting disability was the result of a combination of pre-existing injuries, pathology, and the subject industrial injury. Ultimately the AME apportioned the PD as 50% industrial and 50% non-industrial causation.

See also, Durazo v. Solomon Dental Corp, (2020) 85 Cal. Comp. Cases 976 (BPD), holding that to the extent that a conflict exist between the County of Santa Clara v. WCAB (Justice) and Hikida v. WCAB, 82 Cal. Comp. Cases 679, the WCAB is fee to choose between the conflicting lines of authority until the Cal. Supreme Court or State Legislature resolves the conflict.

The WCJ refused to award apportionment per the AME's opinion, interpreting *Hikida v. WCAB* to preclude apportionment as the disability flowed from the TKR surgeries, writing "*Hikida* holds that where medical treatment (here, the bilateral knee replacement surgery) results in an increase in [permanent disability], should be awarded without apportionment."

Reconsideration was sought by defendant arguing that the opinion of the AME should have been followed regarding apportionment in that the holding in Hikida was limited to new conditions/diagnosis unrelated to the original injury and resulting directly from subsequent treatment. Recon was denied and defendant sought Writ of Review.

The Sixth Appellate District reversed both the WJC and the WCAB holding that LC 4663/4664 mandate that employer "shall" be liable only for the percentage of permanent disability "directly" and exclusively caused by the subject industrial injury, and apportionment is required to non-industrial causation where substantial medical evidence establishes that the applicant's need for TNR surgery was the result in part of 'significant preexisting non-industrial degeneration' and resulting pathology in both knees in combination with the industrial injury. This case is distinguished from Hikida v. WCAB (2017) 82 Cal. Comp. Cases 679, in which as the result of carpal tunnel surgery the applicant developed an entirely new condition, CRPS, which was found not to be subject to apportionment.. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 8.06[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.41[3]; SOC, Section 10.34, Apportionment – Pre-Existing Disease or Condition].

II. Employment AOE/COE

AB 2257 was signed into law modifying AB 2257 with respect to exemptions and stating clearly that for occupations/industries exemption the test for independent contractor is pursuant to S.G. Borello & Sons, Inc. DIR (1989) 54 Cal. Comp. Cases 80, control/right to control, benefit conferred test.

Editor's comments: Last April, prior to creation of the presumption this editor was asked by several client to address the standard of proof and defense strategies for dealing with Covid claims. After the completion of extensive research I concluded that it would be difficult if not impossible to defeat claims where the applicant job involves either (1) dealing with the public generally, or even incidentially, and/or (2) has any exposure to co-employees who have tested positive. Thus, as a practical matter the 3212.88 presumption has little or no effect on the likely outcome of a Covid claim, i.e. a claim for Covid before and after creation of the presumption is likely to be found compensable.

On September 17, 2020 SB 1159 was signed into law modifying LC 3212.88 created a presumption that illness or death resulting from Covid-19 is presumptively compensable where within 14 days of a day of an "employee performed labor or services at the employee's place of employment at the employer's direction".

Leggette v. CPS Security, 2020 Cal. Wrk. Comp. P.D. LEXIS 3 (BPD)

Applicant was a night security guard who made a claim of specific injury occurring on the last day the applicant worked, 9/23/18, in the form of West Nile Virus. At trial, the applicant testified that There was standing water on two sides of the construction site, he saw and heard mosquitos at work, and he was bitten by mosquitos every day that he was on the job. The WCJ stated that applicant's testimony was unrebutted and credible. However, the WCJ found no injury holding that applicant had failed to establish that the applicant had been injured on 9/23/18 as pled. Applicant sought reconsideration.

> *". . .The WCJ erred in finding no industrial injury because there was no evidence that applicant's mosquito bite occurred on September 23, 2018. However, the date of the bite was never at issue in the case. Labor Code section 3208.1 states, "An injury may be either: (a) 'specific,' occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) 'cumulative,' occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment." Here, applicant correctly asserted a specific injury, as his WNV arose out of a single mosquito bite. However, an injury may be both specific and also constitute an occupational disease. An occupational disease is one where the symptoms are latent after exposure. (General Dynamics Corp. v. Workers' Comp. Appeals Bd. (1999) 71 Cal. App. 4th 624, 629 [64 Cal. Comp. Cases 515].). . .*
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> *. . .The WCJ erred in finding that applicant had to specify the exact date that he was bitten by the infected mosquito. As shown above, there is no statutory requirement to show the exact date of exposure. To the contrary, Labor Code section 5412 refers to the confluence of disability and knowledge of industrial causation, and Labor Code section 5500.5 speaks to a period of potential exposure. Requiring an injured worker to know the exact date of exposure in a case like this one would be nearly impossible, and would be counter to the Constitutional mandate that the workers' compensation system "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (California Constitution, Article XIV, § 4.)*
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> *Leggette v. CPS Security, 2020 Cal. Wrk. Comp. P.D. LEXIS pgs 4-6 (BPD).*

The WCAB reversed holding that applicant sustained injury in the form of West Nile Virus when his job as security guard exposed him to repeated mosquito bites, and applicant failure to specifically establish the exact time, date and moment of bite was not required. In explaining their decision the WCAB noted that (1) where Application for Adjudication of Claim form had options to plead either specific injury or cumulative injury, applicant correctly asserted specific injury given that his West Nile Virus arose out of a single mosquito bite rather than longer period of exposure, (2) industrial injury may be specific and at same time constitute occupational disease, which is a separate concept from cumulative injury and may result either from single exposure or exposure over extended period of time, (3) in alleging industrial injury on 9/23/2018, applicant here was alleging last date he was employed in occupation exposing him to hazardous condition, *i.e.*, mosquitos and daily mosquito bites that he was subjected to based on location of his job site, (4) injured employees do not generally need to distinguish between date of potential exposure and LC section 5412 date of injury unless it is relevant to issue in case, nor is there statutory requirement to show exact date of exposure, especially in cases such as this, where pinning down precise date would be nearly impossible, and (5) applicant met burden of proof to establish injury AOE/COE in the form of West Nile Virus. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.05[2], 4.71, 25.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, §§ 10.01[4], 10.06[1][a], [c]; SOC, Section 5.9, Occupational Disease].

> *See also, Dudley v. State of California, Dept. of Corr., 2019 Cal. Wrk. Comp. P.D. LEXIS 520 (BPD), Applicant volunteering to work in state prison kitchen during incarceration was employee within LC 3351(e) holding that "assigned work or employment" includes kitchen duties as part of volunteer work program with structured work hours and supervision, whether for pay or without pay in the prison work program. [See generally, Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d, Section 3.100[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 2, section 2.04[6]; SOC, Section 4.30, State Prison Inmate.].*
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> *Editor's comments: The application of this decision to the current Covid-19 pandemic would make it nearly impossible for an employee to defeat a claim of industrially cause/contracted Covid-19 where the employee either works dealing with the public generally or has a co-employee test positive. The only way to defeat a Covid claim would be to establish that the exposure was exclusively limited to outside the work place, for where multiple sources for contracting the virus exist, and each equally as likely, the claim will be held compensable. See also, See also, accord, City and County of SF v. IAC (Slattery)(1920) 183 Cal. 273, and Engels Cooper Mining Co. v. IAC (Rebstock) (1920) 183 Cal. 714, both involving the Spanish Flu pandemic of 1918;See LC 3202/3202.5, 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.*

Kong v. City of Hope National Medical Center, 2020 Cal. Wrk. Comp. P.D.LEXIS 118

Applicant's injury held compensable as 'special mission' and thus not barred by the 'going and coming' rule when while walking home from work on his day off (Saturday) after preparing data for a presentation scheduled on following day was struck by vehicle while crossing road three to four minutes after calling his supervisor on cell phone. [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].]

Lu v. Oakland Unified School District, 2020 Cal. Wrk. Comp. P.D. LEXIS 117 (BPD)

Assault and robbery occurring when applicant was entering her car parked across street and off employers premises was barred by 'going and coming' rule and the 'special risk exception' did not apply because applicant did not demonstrate that she was placed in 'zone of danger' by employer or that she was at greater risk of being assaulted than the general public. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.156[1], [2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.05[3][d][v]; SOC, Section 5.56, Special Risk – Zone of Danger].

Brawley Union High School District v. WCAB (Sosal), 85 Cal. Comp. Cases 597, 2020 Cal. Wrk. Comp. LEXIS 37 (W/D);

Date of injury for cumulative trauma injury is that date upon which there is the concurrence of (1) injurious industrial events, activities, or exposure, with (2) resulting disability, and (3) knowledge or reason to know there is a cause and effect relationship between the injurious industrial events, activities or exposures and disability. Disability may be temporary disability or permanent disability, and the need for medical treatment alone is not sufficient to establish disability, but is relevant on the issue of the existence of disability. A single date of temporary disability is sufficient to establish disability for the purpose of determining the date of injury pursuant to LC 5412. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.71, 24.03[6], 31.13[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[1], Ch. 14, § 14.13; SOC, Section 5.5, Cumulative Injury].

Gund v. County of Trinity, (2020 Cal. Supreme Court) 10 Cal. 5th 503, [85 Cal. Comp. Cases 735; 2020 Cal. LEXIS 5542];

Private citizens, who were brutally murdered, were engaged in "active law enforcement" and fell within scope of police officer's law enforcement duties, and thus claims for injuries/deaths were limited to the exclusive remedy doctrine of workers' compensation despite deputy's misrepresentation that 911 call was likely due to inclement weather and was "no big deal", and the deputies failure to pass along information suggesting potential of criminal activity. [Discussing Labor Code, Section 3366; See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 3.48; Rassp & Herlick California Workers' Compensation Law, Ch. 2, § 2.04[2].]

Orozco v. City of Redwood City, PSI, 2020 Cal. Wrk. Comp. P.D. LEXIS 205

Police officer off-duty in his personal vehicle who was involved in confrontation initiated by another driver resulting in injuries but involving first a legal verbal altercation and then illegal conduct wherein the other driver attempted to hit the applicant with his vehicle which resulted in a physical altercation when the off-duty police officer attempted to restrain the driver. Injuries sustained during the later event held compensable under LC 3600.2. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.130[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.05[4].]

Knobler v. LA Unified School District, 2020 Cal. Wrk,. Comp. P.D. LEXIS 314 (BPD)

Claim of Injury barred by LC 3600(a), 'initial physical aggressor', where evidence established that student yelling and inadvertently spitting on teacher/applicant prompting the teacher/applicant to slap student and resulting in student punching teacher/applicant despite allegation of serious injury to Teacher/applicant. Spitting was inadvertent and related to verbal altercation and it was teacher/applicant who first started physical altercation by slapping student,

and no evidence that applicant was in reasonable fear of physical attack before he struck student. Citing and discussing Mathews v. WCAB (1972) 6 Cal.3d 719, 37 Cal. Comp. Cases 124.; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.23; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, §§ 10.03[4], 10.04.]

III. Compromise and Release

Moreno v. Hidden Valley Ranch, 2020 Cal. Wrk. Comp. P.D. LEXIS 194 (BPD).

Failure to provide notice to unrepresented applicant of right to PQME constituted 'good cause' to set aside order approving compromise and release WCAB; The minimal record in this case should have triggered inquiry by WCJ into adequacy of settlement supporting 'good cause' to set aside OACR. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 29.05[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 18, § 18.11[1].]

IV. Cases Involving Covid

Salvador Corona v. California Walls, Inc. dba Crown Industrial Operators, Truck Insurance Exchange, 2020 Cal.Wrk. Comp. P.D. LEXIS 256

Applicant sustained injury to bilateral knees and spine. The employer accommodated the applicant providing a medically appropriate modified position which ended actual payment of TD. Through emergency executive order Governor Newsom issued a Covid-19 shelter-in-place order which ended the applicant's modified position. Applicant sought payment of TD during the period where medical evidence established applicant was not MMI and the employer was able to accommodate but for the Covid-19 shelter-in-place order. The WCJ held for the applicant awarding TD. Defendant sought reconsideration.

Editor's Comments: Not raised was whether this was an issue appropriate for unemployment insurance rather than further payments of TD. Perhaps the analysis should have been on the fact it was out of the control and without the fault of both the employer/employee and thus is properly within the realm of unemployment insurance rather than workers' compensation insurance? Instead, the analysis seemed to turn on whether the applicant was medically eligible and that the employer could not accommodate without consideration of the basis or reason that the employer could not provide accommodation.

See also, Ceballos v. TriMark Chefs' Toys (2020) 85 Cal. Comp. Cases 955 (BPD), holding defendant's liability for TD without reduction for income applicant would have received from employment with 'Starbucks had his employment at that job not ended related solely due to applicant's refusal to work and subsequent termination due to 'reasonable' concerns about risk related to COVID-19 presented by high volume of contract with the public; Defendant failed to establish that work was 'reasonable available'. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[4][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.11; SOC, Section 9.26; Temporary Disability].

By Panel decision, the decision of the WCJ was upheld. Citing and discussing *McFarland Unified School Dist. v. WCAB (McCurtis) (2015) 80 Cal. Comp. Cases 199 (Writ Denied); Manpower Temporary Services v. WCAB (Rodriguez) (2006) 71 Cal. Comp. Cases 1614 (Writ Denied); Dennis v. State of California (2020) 85 Cal. Comp. Cases 389 (En Banc Opinion)*, the Board determined applicant entitled to TD where it is determined that although employer accommodated worker through modified position until emergency statewide COVID-19 shelter-in-place orders placed all employees, including applicant, out of work and left applicant with no employment. The rationale was that because this was outside the control, nor the fault of the applicant, the employer remained liable. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[4][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.11.]

Gao v. Chevron Corp, 86 Cal. Comp. Cases 44, (Significant Panel Decision).

Applicant filed an Application for Adjudication, alleging a psyche injury sustained while employed by Chevron from May 2, 2014 to July 2, 2015. The matter proceeded to trial on March 10, 2020, at which time the applicant flew in from Ontario, Canada to testify in-person. Because the trial could not be completed in one session, the trial was continued to June 9, 2020, with in-person testimony contemplated from several defense witnesses.

Due to the Covid-19 pandemic, on May 7, 2020, Governor Newsom issued Execute Order N-63-20 which suspended the requirement for in-person testimony and allowed remote testimony provided all parties are able to hear the witness and see the documents. Effective Aug. 17, 2020, the WCAB district offices provided a video option for trial.

". . . All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (Rucker v. Workers' Comp. Appeals Bd. (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is ". . . one of 'the rudiments of fair play' assured to every litigant . . ." (Id. at 158.) A fair hearing includes but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See Gangwish v. Workers' Comp. Appeals Bd. (2001) 89 Cal.App.4th 1284, 1295 [66 Cal. Comp. Cases 584]; Rucker, supra, 82 Cal.App.4th, at 157-158 citing Kaiser Co. v. Industrial Acci. Com. (Baskin) (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; Katzin v. Workers' Comp. Appeals Bd. (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) .

The "essence of due process is simply notice and the opportunity to be heard." (San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd. (1999) 74 Cal.App.4th 928, 936 [88 Cal.Rptr.2d 516].) Determining an issue without giving the parties notice and an opportunity to be heard violates the parties' rights to due process. (Gangwish, supra, 89 Cal.App.4th 1284, 1295, citing Rucker, supra, 82 Cal.App.4th 151, 157-158.)
Due process requires "a 'hearing appropriate to the nature of the case.'" (In re James Q. (2000) 81 Cal.App.4th 255, 265, quoting Mullane v. Cent. Hanover Bank & Trust Co. (1950) 339 U.S. 306, 313.) Although due process is "a flexible concept which depends upon the circumstances and a balancing of various factors," it generally requires the right to present relevant evidence. (In re Jeanette V. (1998) 68 Cal.App.4th 811, 817.)

The object of the workers' compensation system is to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., art. XIV, § 4.) To that end, under Labor Code Section 5709, "[n]o informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule[.]" (Cal. Lab. Code, § 5709.). . ."

Gai v. Chevron Corp, 86 Cal. Comp. Cases __, at pg. __

Editor's Comments: Presumable 'good cause' for continuance of trial to allow in-person testimony might be established where genuiene issues involving crediability of testimony, concerns over influence from outside persons during testimony, or perhaps due to the complexities related to the evidence being presented. However, the rule under Gai is clear that generally trials will proceed remotely absent "good cause" with the burden of proof placed on the moving party.

See also, Truhitte v. Santa Maria Bonita School District, 2020 Cal. Wrk. Comp. P.D. LEXIS 276 (BPD), holding that on petition for removal the WCJ decision to continue trial on issue of injury AOE/COE proper where WCJ found it impossible to make credibility determinations absent in-person testimony which was suspended due to Covid-19 emergency order of Governor Newsom and WCAB not persuaded that continuation of trial in this case would result in substantial prejudice or irreparable harm so as to justify removal.; See also, Ceballos v. TriMark Chefs' Toys (2020) 85 Cal. Comp. Cases 955 (BPD), and Wall v. State of Cal., HIS, 2020 Cal. Wrk. Comp. P.D. LEXIS 327 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 25.09, 26.02[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, §§ 16.04[3], 16.11.]

As the June 9, 2020, trial date approached, the parties made clear they had very different ideas about how the case should proceed. Applicant favored proceeding via remote testimony, while defendant objected, requesting a continuance until in-person testimony could be elicited from its three rebuttal witnesses. On June 9, 2020, applicant filed a petition to allow remote testimony, arguing the case was ripe for such testimony given the pandemic, that applicant's demeanor had already been observed in-person, that she resided in Canada, and that the WCAB had indicated the capability to conduct remote trials in a May 28, 2020 press release. Extended remote back-and-forth between the parties and the judge largely related to the logistical ability to conduct such a trial ultimately resulted in the WCJ issuing a letter to the parties, dated August 20, 2020, stating that it was possible to conduct a video trial, and asking whether either party objected to completing the trial via that format. Defendant filed an objection on August 24, 2020, stating it was opposed to a trial via any method except in-person testimony, and seeking a continuance until in-person testimony could safely be provided.

On August 25, 2020, apparently without waiting for a response from applicant, the WCJ issued the Order Continuing September 1, 2020 Trial, stating that due process required continuing the trial to allow for in-person testimony from defendant's witnesses, because applicant had previously given in-person testimony. The matter was continued to "such time as in-person testimony can again be taken." Applicant sought removal.

In reversing the WCJ, the WCAB wrote, "Due process is the process that is due under the circumstances as we find them, not as we might wish them to be. Executive Order N-63-20 represents the Governor's best judgment as to how to strike a fair balance between the due process rights of participants in hearings, the necessity of protecting the public from real and significant harm, and the state's responsibilities under the California Constitution to provide efficient, timely resolution of disputes in order to secure benefits for eligible injured workers.

To be sure, each case must be resolved according to its own particular circumstances, and it would therefore be inappropriate to institute a blanket rule that it is per se unreasonable to continue a case to allow for in-person testimony. However, in consideration of Executive Order N-63-20, the purpose of the workers' compensation system, and current conditions, the default position should be that trials proceed remotely, in the absence of some clear reason why the facts of a specific case require a continuance. Moreover, as the party seeking the continuance, the burden should be on defendant in this case to demonstrate why a continuance is required." The matter was reversed and remanded to the trial level for further proceedings.

Brooks v. Corecivic of Tennessee LLC (2020) 2020 U.S. Dist. LEXIS 162428, 85 Cal. Comp. Cases 843.

Plaintiff was a detention officer for a privately operated correctional facilities with contracts for services with United States Immigration and Customs Enforcement and the United States Marshals Service. Plaintiff noted her employer had failed to take action to ensure a safe work place with respect to the Covid pandemic in that at the facility where she worked a number of persons had tested positive for Covid-19, including 234 detainees and 30 staff members. Plaintiff noted that she was at risk of developing severe complications from COVID-19 due to her race (African American) and obesity, and that her husband is also at high risk. Plaintiff claimed that defendant had "intentionally created or knowingly permitted working conditions that were so intolerable or aggravated … that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." Plaintiff made claims for wrongful constructive termination in violation of public policy, as well as claims for negligent supervision and intentional infliction of emotional distress arising out of her employment due to her employer's response to the Covid-19 pandemic. Defendant sought dismissal arguing that the claims were barred by the exclusive remedy rule and that no issue of material fact was presented, and thus as a matter of law the claim should be dismissed.

The Court first addressed the claim for wrongful constructive termination. In denying defendant's motion, the Court found ample evidence to "leave to the trier of fact the determination of whether the workplace conditions alleged by Plaintiff at the time of her resignation were so intolerable that a reasonable person in Plaintiff's position would have had no reasonable alternative except to resign, [which] is inherently fact-bound, particularly considering the circumstances of the case."

Addressing the claim for negligent supervision/intentional infliction of emotional distress, the Court held that Plaintiff's claims for negligent supervision and intentional infliction of emotional distress were barred by the exclusive remedy rule citing a number of decision that those claims fall squarely within the employment bargain. The Court wrote that here, although "pandemics are generally uncommon events, that does not mean Defendant's response to the pandemic falls outside the risk inherent in the employment relationship. On the contrary, one would expect employers to have some type of protocol in place to deal with this kind of catastrophic event." Therefore, these claim fall within the risk inherent in this employment relationship, and within compensation bargain and are barred by the exclusive remedy rule. Remanded with direction.

V. Discovery

Lin v. Automobile Club of Southern California, 2020 Cal. Wrk. Comp. P.D. LEXIS 169 (BPD)

Applicant sustained injury to various parts of body and asserted he could not attend hearing to testify due to industrial restrictions. When counsel for applicant and applicant failed to facilitate the deposition of Applicant's wife and then when set for hearing on that issue, applicant failed to attend. The WCJ issued an award of sanctions. Applicant sought reconsideration.

The Board held that the order compelling deposition of applicant's wife was a proper basis for sanctions where Applicant and Applicant's Attorney failed to facilitate deposition of applicant's wife where purpose of deposition of wife was on alleged medical restrictions and ability of applicant to appear and testify at trial, and Applicant thereafter failed to attend hearing on that issue. Discussing LC 5813 & 8 Cal. Code Reg. 10561; [See generally Hanna, Cal. Law of Emp.

Inj. and Workers' Comp. 2d § 23.15; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.35; SOC, Section 14.15, Legal Privilege].

VI. Disqualification for Cause

Infinity Staffing v. WCAB (Guillen) (2020) 85 Cal. Comp. Cases 867 (Writ Denied).

Applicant filed a workers' compensation claim alleging that he suffered industrial injury to his right shoulder on 9/4/2012 and during the period 7/23/2012 to 7/23/2013. At hearing on 5/22/14 the applicant denied that he had worked since July of 2013. On 4/14/2015, Applicant was charged with workers' compensation insurance fraud under Insurance Code 1871.4(a) for falsely testifying on the issue of work. On 10/12/2016, Defendant filed a petition to dismiss Applicant's workers' compensation case pursuant to Insurannce Code 1871.5, based on the fraud conviction. The WCJ was however called and testified at the Applicant's criminal trial.

See also, Alvarado v. Sky Ready Mix Inc., 2020 Cal. Wrk. Comp. P.D, LEXIS 268 (BPD), holding that Petition to Disqualify WCJ for bias or the appearance of bias pursuant to LC 5311 and Code of Civil Procedure was proper where WCJ called lien claimant "bottom of the barrel", and lien claimant's counsel spoke privately with WCJ in chambers to request WCJ to recuse himself due to prior statements about lien claimant. The appearance of bias may "not necessarily exist indefinitely. . . [and] the appearance of bias might pass after a time . . .," disqualified was only as to the subject case. [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].]

Defendant requested that WCJ Padilla be disqualified from hearing Applicant's workers' compensation case based on bias.

In split panel opinion, the majority denied defendant's petition to disqualify WCJ from applicant's workers' compensation case based on her testimony in criminal case against applicant for workers' compensation insurance fraud under Insurance Code § 1871.4. The panel majority held that testimony provided by WCJ regarding matters in applicant's workers' compensation case did not, as claimed by defendant, amount to unqualified opinions or beliefs as to merits of applicant's claim pursuant to Code of Civil Procedure § 641(f) as the opinion was merely an expression of the legal consequences of a fraud conviction on a workers' compensation claim. The majority also found no bais as the WCJ was under subpoena and testified only as the legal consequence of fraud and not otherwise on substantive issues. Disenting, Commissioner Lowe, would have granted defendant's petition to disqualify WCJ pursuant to Code of Civil Procedure § 641(f), given WCJ's testimony that applicant's conviction would not require dismissal of his claim, nor affect his permanent disability, which Commissioner Lowe found constituted expressions of "unqualified" beliefs and opinions as to the merits of defendant's petition to dismiss applicant's case, and created appearance of bias justifying disqualification.

VII. Jurisdiction

Wilson v. Florida Marlins, et al., 2020 Cal. Wrk. Comp. P.D. LEXIS 30 (BPD).

Applicant was a professional baseball player for over 16 years and claimed CT injury to various parts of body over his professional career. During his baseball career the applicant was a lifelong resident of California prior to 2000, and had signed multiple contracts within California with the Diamondbacks, the Tampa Bay Rays, the Yankees, the Athletics, and the Dodgers within California. The Athletics, the Dodgers, and the Padres are California-based teams, applicant was regularly employed in California for these teams, and was employed by the Dodgers as recently as 2004, less than two years before his retirement. Defendant, asserted that LC 3600.5(c) and (d) overrode the general jurisdiction provisions of LC 3600.5(a) and 5305. The WCJ found for the applicant finding sufficient 'minimum contacts' with California to establish jurisdiction and that where there is a 'contract for hire' entered into during the period in injurious exposure/period of CT injury, the prohibition of LC 3600.5(c) and (d) does not apply.

On reconsideration the WCAB upheld the WCJ finding that it was the legislative intent of LC 3600.5(c) and (d) to exclude only those claims where 'no contract for hire' entered into in California existed. Stated alternatively, LC 3600.5(c) and (d) applies to claims where the contract for hire of a professional athlete was entered into outside California but with games played within California. In this case the applicant entered into a number of contracts for hire within California during the applicant's career/CT period. The WCAB also briefly discussed the distinction between the

period of CT, which in this case was over a 16 year career, and liability for CT injury pursuant to LC 5500.5, limited to last year of injurious exposure.

Farley v. San Francisco Giants, 2020 Cal. Wrk. Comp. P.D. LEXIS 173 (BPD)

The applicant was a professional minor league baseball player within the San Francisco Giants organization. Successive employment contracts were signed by applicant outside California.

The contracts were on the form of an offer by the Giants and accepted by applicant when signed. Although the applicant performed no services within the State of California, the Giants exercised supervision over the applicant throughout his employment from their principal place of business in California.

Applicant brought a claim of cumulative injury to various parts of body. Defendant denied based on a lack of jurisdiction. The WCJ found for the applicant holding that because (1) applicant was employed by the San Francisco Giants ("the Giants"), a California employer, and (2) after applicant signed his contract with the Giants outside California, the Giants signed the contract in California, that California contract of hire was created.

> *". . .In general, the WCAB can assert subject matter jurisdiction in a presented workers' compensation injury claim when the evidence establishes that an employment related injury, which is the subject matter, has a sufficient connection or nexus to the state of California. (See §§ 5300, 5301; King, supra, 270 F.2d at 360; Federal Insurance Co. v. Workers' Comp. Appeals Bd. (Johnson) (2013) 221 Cal.App.4th 1116, 1128 [165 Cal.Rptr.3d 288]).) Where an applicant sustains injurious exposure in California, jurisdiction is generally established under section 5300.*
>
> *In addition to injuries occurring in California, the WCAB can also assert subject matter jurisdiction over injuries occurring outside this state in certain circumstances. Section 3600.5, subdivision (a) states: "If an employee who has been hired or is regularly working in the state receives personal injury by accident arising out of and in the course of employment outside of this state, he or she, or his or her dependents, in the case of his or her death, shall be entitled to compensation according to the law of this state." (§ 3600.5(a).) Similarly, section 5305 states: "The Division of Workers' Compensation, including the administrative director, and the appeals board have jurisdiction over all controversies arising out of injuries suffered outside the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state." (§ 5305.). . ."*
>
> *See Farley v. San Francisco Giants, 2020 Cal. Wrk. Comp. P.D. LEXIS at pg. 176. Decision Affirmed, 2020 Cal. Wrk. Comp. P.D. LEXIS 292.*

By Panel Decision, the WCAB reversed holding that (1) the contract for hire was not made in California as the offer was made through the employer sending the contract to the applicant, and a contract created upon the applicant signing the contract outside the state of California. Thus no California contract for hire had been created. Further, the WCAB held that jurisdiction over Workers' Compensation claim is not established merely by the fact that the employer's principal place of business and supervision of employee were both within the State of California, rather there must be work performed within the State of California. Interpreting and applying, LC Section 3600.5(a), 5305; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d, Sections 3.22[2], [3], 21.02, 21.06, 21.07[5]; Rassp & Herlick, California Workers' Compensation Law, Ch. 13, Section 13.01[2].]

VIII. Presumptions

Aguirre v. State of California, 2019 Cal. Wrk. Comp. P.D. LEXIS 544 (BPD)

Labor Code 3213.2 duty belt presumption, does not apply to correction officer with Department of Corrections and Rehabilitation, as it did not fall within listed agencies and applicant's status as peace officer, in itself, did not automatically entitle applicant to application of duty belt presumption. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.138[4][l]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.07[5][j]; SOC, Section 5.18, Presumption of Injury – Public Employees Covered Condition].

Blais v. State of California, 2020 Cal. Wrk. Comp. P.D. LEXIS 119 (BPD)

Presumption pursuant to LC 3212.1 rebutted where QME determined that it was reasonably medically probable that applicant's current cancer was recurrence of applicant's prior breast cancer, and that there was no reasonable link between applicant's cancer and his exposure to carcinogens during his employment with defendant based upon (1) latency period; (2) the fact that lymph nodes previously removed were positive for breast cancer, making it probable that

applicant's current cancer was recurrence of prior cancer that had metastasized rather than new cancer, and (3) applicant's presentation was consistent with usual clinical presentation of recurrent metastatic breast cancer. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.138[4][b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.07[5][c]; SOC, Section 5.18, Presumption of Injury].

IX. Medical Treatment

Romo v. Pacific Bell Telephone Co.. 2019 Cal. Wrk. Comp. P.D. LEXIS 525 (BPD)

Applicant sustained multiple injuries to various parts of body. On 10/4/18 defendant entered into a stipulation which provided that "Defendant stipulates to authorize home health care recommended by [PTP] in his 8/7/18 RFA." Pursuant to this stipulation, Defendant provided home health care services until May 29, 2019, at which time defendant terminated the home health care and housekeeping services. Several months later the PTP issued a new RFA requesting further home health care. A timely UR denial issued which was upheld by IMR. This issue proceeded to expedited hearing with the WCJ holding that the WCAB has jurisdiction to adjudicate the home health care issue, and that applicant is entitled to home health care according to the opinion of the primary treating physician and the Amended Stipulation and Order. In his Report, the WCJ explained that, pursuant to Patterson v. the Oaks Farm (2014) 79 Cal.Comp.Cases 910, defendant was not entitled to unilaterally cease home health care services absent a showing that applicant's circumstances had changed. Here, the WCJ determined, because defendant terminated home health care without meeting its burden to show changed circumstances, the WCAB has jurisdiction to determine applicant's need for reasonable and necessary home health care services.

See also, Smith v. Marin General Hospital, 2020 Cal. Wrk. Comp. P.D. LEXIS 20 (BPD) holding that WJC may determine the issue of need for surgery/medical necessity, and then properly award back surgery where prior surgery RFA non-certified, but subsequent surgery RFA sent within one year of original RFA based on change of circumstance not submitted for UR determination. Discussing, interpreting and applying LC 4610(k).; [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; SOC, Section 7.36; Utilization Review -- Procedure].

See also, Miller v. Apple One Employment Services, 2020 Cal. Wrk. Comp. P.D. LEXIS 9, holding UR denial of requested treatment held untimely despite a faulty fax transmission missing page one of report and one of two RFA from PTP. Defendant has a regulatory duty to conduct reasonable and good faith investigation to determine whether benefits are due. (LC §4600). [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].]

On reconsideration, the WCAB held that where defendant has authorized indeterminate home health care services as reasonable medical treatment, it must, pursuant to Patterson v. The Oaks Farm (2014) 79 Cal. Comp. Cases 910 (Appeals Board significant panel decision), continue to provide those services until they are no longer reasonably required under Labor Code § 4600 to cure or relieve effects of industrial injury. However, where RFA is for limited duration of care or specified end date then *Patterson* would not apply and termination is appropriate without defendant establishing changed circumstances. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02, 5.04[6], 22.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, §§ 4.05[3], 4.10; SOC, Section 7.2, Scope of Care – Cure or Relieve].

Williams v. Mar Pizza,Inc., 2020 Cal. Wrk. Comp. P.D. LEXIS 211 (Split Panel Decision).

Applicant sustained an admitted physical injury to various parts of body. Applicant's attorney wrote defendant "Would you please schedule an appointment with a treating (not just evaluating) mental health specialist as soon as possible. . . if such appointment is not scheduled within 10 business days, the employee should be permitted to obtain necessary treatment with an appropriate specialist outside the MPN according to Reg. 9767(g)." Defendant responded that although the treatment was authorized any treatment outside the MPN was objected to. The matter proceeded to hearing on the issue of applicant right to treat outside MPN. No evidence was presented that applicant attempted to obtain treatment within the MPN. The WCJ also ordered that applicant may obtain reasonable and necessary medical treatment within defendant's MPN subject to UR. Applicant sought Reconsideration.

By split panel decision, the Board held that there was no deny of care when (1) applicant, sought treatment from non-MPN physician, (2) defendant, *approved* requested treatment through utilization review less than two weeks later but objected to said treatment being provided by physician outside of MPN, and (3) no evidence that applicant ever attempted to obtain treatment within MPN nor that defendant refused or denied such treatment within MPN; Commissioner Sweeney, dissenting, noted that defendant's failure to timely investigate applicant's need for psychiatric treatment could establish a denied care supporting treatment outside of the MPN. [See generally Hanna, Cal. Law of

Emp. Inj. and Workers' Comp. 2d § 5.03; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.12; SOC, Section 7.41, Independent Medical Review].

X. Medical-Legal

Ortiz v. Pederson Fence & Patio Co., Inc. 2019 Cal. Wrk. Comp. P.D. LEXIS 513 (BPD)

Although no specific remedy exists for violation of Labor Code § 4062.3(b) due to ex parte communication by a party, the WCJ has wide discretion to determine appropriate remedy, and in the absence of bad faith, or intentional misconduct, good cause does not exist for imposition of attorney's fees, costs or sanctions; Citing and discussing Maxham v. California Department of Corrections and Rehab (2017) 82 Cal. Comp. Cases 136 (En Banc Decision), and Suon v. California Dairies (2018) 83 Cal. Comp. Cases 1803 (En Banc Decision); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.06[1][d], [3], 22.11[18], 23.15; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[4][d], [e], Ch. 16, § 16.35.]

Jimenez v. Rodriquez Farm Labor Contractor, Inc., 2019 Cal Work. Comp. P.D. LEXIS 539 (BPD)

Petition for removal granted rescinding WCJ's order setting case for trial where no evidentiary record regarding alleged ex parte communication in violation of LC 4062.3 prior to setting over defendant's objection; The WCAB held that parties would be significantly prejudiced by trial on all disputed issues without first addressing whether defendant is entitled to new qualified medical evaluator panel, and that, despite applicant's contrary suggestion, it was not necessary for defendant to show prejudice to invoke remedy for prohibited *ex parte* communication. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 22.06[1][d], [3], 22.11[18], 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[4][d], [e], Ch. 19, § 19.37; SOC, Section 14.41, Communications with AME/QME].

Porcello v. State of California Department of Corrections & Rehabilitation, 2020 Cal. Wrk. Comp. P.D. LEXIS 9 (BPD).

Nothing in Labor Code precludes party from submitting panel specialty dispute to WCJ prior to or instead of submitting dispute to Medical Director. Contra to Portner v. Costco, 2016 Cal. Wrk. Comp. P.D. LEXIS 499 (Appeals Board noteworthy panel decision).; CCR 31.5(a), 31.1(b); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[6], [7]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[6], [7].].

See also, Contreras v. Randstad North America, 2020 Cal. Wrk. Comp. P.D. LEXIS 12, holding that Medical Director's issuance of replacement panel in specialty of orthopedic surgery is not dispositive and may be disregarded if it is not supported by substantial evidence, and pursuant to 8 Cal. Code Reg. § 31.5(a)(10), a replacement panel may only issue when the specialty is "medically or otherwise inappropriate," and the WCJ is not obligated to follow Medical Director's determination. ; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[6], [7]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[6], [7]].

Camara v. Tesla, Inc. /American Zurich Insurance Co., (March 2020) 48 CWCR 35.

Holding that a primary treating doctor (PTP) may solicit and adopt a secondary physician's report upon which a PD award may be based. See also, Harden v. County of Sacramento (February 2020), 48 CWCR 9 (BPD), allowing Medical-legal evaluators, AMEs and QMEs, to review the medical reports and records prepared for a disability retirement claim.

XI. Penalties

Angulo v. Pacific Coast Tree Experts, 2020 Cal. Wrk. Comp. P.D. LEXIS 217 (BPD)

Applicant sustained injury which was resolved via C&R approved on 4/25/19. The Compromise and Release (C&R) provided that "penalties/interest waived if payment issues within 30 days of Order Approving Compromise and

Release." Counsel for applicant called defense counsel on or about 5/28/19 to notify them that the applicant had not received payment. Defendant's witness testified that the replacement check was issued on June 19, 2019, 22 days later, and applicant testified that he received it on or about June 26, 2019, 29 days later. The payment did not include self-imposed penalty or interest pursuant to section 4650(d). The WCJ found applicant's testimony credible regarding the date he received the reissued check. The only explanation given by defendant for the delay after notice that the check had not been received was "there is some investigation to do: Whether or not the check was returned, verify the address, and this can take several days. Then they issue a stop payment on the check, and when it's verified that the first check was not paid by the bank, a second check is reissued." The WCJ found for the applicant and awarded 10% 5814 penalty, along with attorney fees pursuant to LC 5814.5. Defendant sought reconsideration.

> *". . .The amount of a section 5814 penalty is discretionary, "up to 25%" of the delayed benefit, or "up to ten thousand dollars ($10,000), whichever is less." The Appeals Board's en banc decision in Ramirez v. Drive Financial Services(2008) 73 Cal. Comp. Cases 1324 (En Banc Decision) sets forth factors that should be considered in the exercise of that discretion, considering both the remedial and penal purposes served by section 5814. An essential aspect of the exercise of this discretion is how the amount of the penalty accomplishes a fair balance and substantial justice between the parties. The specific factors to be considered in determining the amount of a penalty, including, but not limited to:*
>
> *1. Evidence of the amount of the payment delayed.*
> *2. Evidence of the length of the delay.*
> *3. Evidence of whether the delay was inadvertent and promptly corrected.*
> *4. Evidence of whether there was a history of delayed payments or, instead, whether the delay was a solitary instance of human error.*
> *5. Evidence of whether there was any statutory, regulatory, or other requirement (e.g., an order or a stipulation of the parties) providing that payment was to be made within a specified number of days.*
> *6. Evidence of whether the delay was due to the realities of the business of processing claims for benefits or the legitimate needs of administering workers' compensation insurance.*
> *7. Evidence of whether there was institutional neglect by the defendant, such as whether the defendant provided a sufficient number of adjusters to handle the workload, provided sufficient training to its staff, or otherwise configured its office or business practices in a way that made errors unlikely or improbable.*
> *8. Evidence of whether the employee contributed to the delay by failing to promptly notify the defendant of it.*
> *9. Evidence of the effect of the delay on the injured employee."*
>
> *Angulo v. Pacific Coast Tree Experts, 2020 Cal. Wrk, Cimp. P.D. LEXIS at pg. 219 (BPD).*

By panel decision, the WCAB held that failure to diligently conduct investigation regarding applicant's non-receipt of initial check issued by defendant, and failed to include self-imposed penalty for delay in payment, with failure to provide insufficient explanation as to cause of delay to investigate provided sufficient basis to support WCJ imposition of LC 5814 penalties plus LC 5814.5 attorney's fees. Citing and discussing Ramirez v. Drive Financial Services (2008) 73 Cal. Comp. Cases 1324 (En Banc Decision), the Board held that the WCJ must accomplish fair balance and substantial justice between parties, giving consideration to various factors when imposing 5814 penalties. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 10.40[1], [3], 10.42, 29.04[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.11[1]-[3]; SOC, Section 13.13, LC 5814 – Principle of Reasonable Delay].

XII. Petition to Reopen

Lewis v. County of Riverside, 2020 Cal. Wrk. Comp. P.D. LEXIS178 (BPD)

Good Cause to reopen prior Stipulation established where petition to reopen filed within one year of first evidence provided by PTP report opining arthritic hip caused by industrial exposure although beyond five years of injurious industrial exposure but where causation of injury not previously addressed by AME; "New evidence established true nature of injury". Citing and discussing LC 5803, "Good Cause" and LC 5412, DOI; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 31.04; Rassp & Herlick, California Workers' Compensation Law, Ch. 14, § 14.08[1], [4]; SOC, Section 6.27; Five-Year Statute – Reopen for Good Cause].

XIII. Permanent Disability

Sedlack v. University of California, Berkeley, 2019 Cal. Wrk. Comp. P.D. LEXIS 545 (BPD)

Defendant is generally entitled to take credit by subtracting actual payments of PD made under the original award, not weeks of payment, as against a further award PD on petition to reopen. However, where LC 4658(d) is applicable, the defendant shall take credit at the applicable rate without consideration of actual payment/bump-up/down under the original award as against the award of new and further PD, and thereafter the new and further PD awarded shall be paid at the rate reflecting a bump-up/down of 15% pursuant to LC 4658.(d) as applicable. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 31.04[2][b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 14, § 14.05; SOC, Section 11.6, Adjustment of PD Payments for Offer of Work].

Nahmani v. Kabbalah Center LA, 2019 Cal. Wrk. Comp. P.D. LEXIS 563 (BPD)

Applicant sustained injury to upper extremities and was determined by medical evidence to have rating disability of 30%. Applicant sought to rebut the PD schedule through VR evidence. The VR expert opined that the applicant had an increase in disability due to a 69.89% loss of earning capacity, based upon work restrictions limiting her to the use of one hand. The VR expert however also opined that the applicant had transferable skills and could benefit from job assistance/direct placement services. The WCJ held for the defendant and awarded 30% PD.

See also, Corona v. Kern High School District, 2020 Cal. Wrk. Comp. P.D. LEXIS 186 (BPD) holding that despite that job was limited to 250-hours, and history of seasonal and irregular earning, AWW properly calculation based on earning capacity pursuant to LC 4453 (c)(4). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 6.02[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 5, §§ 5.01, 5.04.]

See also, Collins v. Macro Crane Rigging, 2020 Cal. Wrk. Comp. P.D. LEXIS 192 (BPD), holding that in the absence of a genuine dispute over whether the applicant is owed PD, indemnity rate, or whether PD is total, defendant must initiate PD payment within 14 days of the ending of TD with payment retroactive back to last day of TD. Where there was no dispute regarding injury, disability or indemnity rate, liability exists for 10 percent increase on all accrued permanent disability indemnity pursuant to LC 4650(d) for failure to timely pay; Citing and discussing Rivera v. WCAB (2003) 112 Cal. App. 4th 1124, 68 Cal. Comp. Cases 1460; Leinon v. Fishermen's Grotto (2004) 69 Cal. Comp. Cases 995 (En Banc Decision); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 10.40[1], 32.04[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.06[2], Ch. 7, § 7.50[1], Ch. 11, § 11.11[1].]

On reconsideration by panel decision the WCAB held that PD schedule was not rebutted by vocational evidence where vocational expert found that applicant was amenable/could benefit from vocational rehabilitation in the form of job placement services as applicant had necessary transferable skills to obtain employment within her physical limitations. Citing and discussing Ogilvie v. WCAB 76 Cal. Comp. Cases 625; Contra Costa County v. WCAB (Dahl) 80 Cal. Comp. Cases 587, and Lebeouf v. WCAB 48 Cal. Comp. Cases 587. Nahmani v. Kabbalah Center LA, 2019 Cal. Wrk. Comp. P.D. LEXIS 563 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§8.02[3], [4], 32.01[3][a][ii], 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.05[3][d], 7.12[2][a], [d][iii], 7.42[2]; The Lawyer's Guide to the AMA *Guides* and California Workers' Compensation, Ch. 7; SOC, Section 10.19, Rebutting Schedule Under Ogilvie.]

Martinez v. State of California, Dept. of Corrections, 2020 Cal. Wrk. Comp. PD LEXIS --, 48 CWCR 56 (April 2020), Decision after Reconsideration.

A QME must give substantive reasoning explaining why 'addition' is the most accurate way of combining disabilities in order to rebut the use of the combined values chart.

Arias v. County of LA, 2020 Cal. Wrk. Comp. P.D. LEXIS 210 (BPD).

Holding not all manifestations of hepatitis C constitute progressive diseases as matter of law, and that under circumstances in this case, where applicant's hepatitis C had resolved/cured, there was no progressive insidious disease for purposes of reserving jurisdiction over permanent disability. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.03, 8.04, 32.02[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.30, Ch. 14, §§ 14.04, 14.06[3]; SOC, Section 6.26; Disability Awarded After Five Years].

XIV. Presumptions

Aguirre v. State of California, 2019 Cal. Wrk. Comp. P.D. LEXIS 544 (BPD)

Labor Code 3213.2 duty belt presumption, does not apply to correction officer with Department of Corrections and Rehabilitation, as it did not fall within listed agencies and applicant's status as peace officer, in itself, did not automatically entitle applicant to application of duty belt presumption. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.138[4][l]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.07[5][j]; SOC, Section 5.18, Presumption of Injury – Public Employees Covered Condition].

Blais v. State of California, 2020 Cal. Wrk. Comp. P.D. LEXIS 119 (BPD)

Presumption pursuant to LC 3212.1 rebutted where QME determined that it was reasonably medically probable that applicant's current cancer was recurrence of applicant's prior breast cancer, and that there was no reasonable link between applicant's cancer and his exposure to carcinogens during his employment with defendant based upon (1) latency period; (2) the fact that lymph nodes previously removed were positive for breast cancer, making it probable that applicant's current cancer was recurrence of prior cancer that had metastasized, rather than new cancer, and (3) applicant's presentation was consistent with usual clinical presentation of recurrent metastatic breast cancer. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.138[4][b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.07[5][c]; SOC, Section 5.18, Presumption of Injury].

Baker v. County of Riverside, 2020 Cal. Wrk. Comp. P.D. LEXIS 179 (BPD)

QME opinion that cancer was "rare" was not sufficient to rebut LC 3212.1 presumption where evidence established applicant's exposure to known carcinogens, including diesel exhaust, outdoor air pollution, second-hand smoke, cadmium, and benzene, thereby shifting burden to defendant to affirmatively establish that applicant's exposure to these agents was "not reasonably linked" to his synovial sarcoma. See also, Arias v. County of LA, 2020 Cal. Wrk. Comp. P.D. LEXIS 210 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.138[2], [4][b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.07[5][c], [7]; SOC, Section 5.18, Presumption of Injury].

XV. Psychiatric Injury

Leonard v. Santa Monica-Malibu Unified School District, 2019 Cal. Wrk. Comp. P.D. LEXIS 530 (BPD).

Applicant sustained an industrial CT injury for period ending 10/24/16 which included endocrine system (thyroid cancer), gastroesophageal reflux disease, hypertension and

"In the case at bar, it is admitted that applicant's thyroid cancer arose out of and occurred in the scope of her employment with defendant. As a result, applicant has suffered a "multitude of health issues", including hypertension, severe allergies, thyroid cancer, radioactive iodine therapy, depression, anxiety, stress, occipital neuralgia, hypothyroidism, GERD, thyroidectomy due to papillary carcinoma, follicular neoplasms, and Hurtle cell cancers (ibid, page 4). Although causation was not found by a preponderance of the evidence, applicant also suffers from a sleep disorder and infertility. While the ultimate outcome of these conditions are specifically unpredictable, the prognosis has been stated to be extremely guarded. The effect on her activities of daily living, social functioning and concentration was described by Dr. French to be moderate (ibid, page 60). Cancer itself, although treatments have advanced, still carries the risk of death and may become a progressive disease. . .

. . .Simply because an applicant in any given case may or may not manifest severe indicators in any one of the factors delineated in Wilson, it is the totality of the "nature of the injury" which must be taken into account when determining whether an injury is "catastrophic" for the purposes of LC 4660.1. Also to be considered is whether this case presents the type of questionable claim of disability that the Legislature sought to preclude, which this case clearly does not. Applicant's thyroid cancer, with resulting impairments to multiple parts of body, is also clearly the type of serious and life-threatening condition to which the exception of LC 4660.1(c)(2)(B) should be applied."

Leonard v. Santa Monica-Malibu Unified School District, 2019 Cal. Wrk. Comp. P.D. LEXIS at pg. 532.

Editor's Comments: The Leonard decision is most important for the proposition that no single factor is reqired for a finding of "catastrophic" physical injury. Rather, it is the totality of the circumstance: Mechanism of injury, past, present and future medical treatment, and resulting PD, including, as in Leonard, the risk of possible death. These factors when consider support the legislative intent and policy of providing compensation for legitimate compensable consequence psychiatric injury but disallowing compensation for psychiatric injuries of questionable legitimacy. This was the exact analysis which this editor provided in the presentation at the 2014 at the Current Issues Conference, and in 2018 at the CAAA Conference held in San Francisco.

psyche. The primary issue at trial was whether applicant's impairment could or could not be increased due to whether the physical injury was 'catastrophic pursuant to LC 4660.1(c)(2)(B). The WCJ found for the applicant and awarded increased disability resulting from the psychiatric injury pled as a compensable consequence holding the physical injury was "catastrophic' pursuant to LC 4660.1(c)(2)(B), and awarded applicant 74% PD. Defendant sought reconsideration.

The WCAB on reconsideration provided a thorough review of Wilson v. State of Ca Cal. Fire (2019) 84 Cal. Comp. Cases 393 (En Banc Decision), in upholding the WCJ's decision. The WCAB noted that the physical industrial injury involved significant medical treatment, a requirement for lifelong medical attention, and the risk of death from her injury. These facts, held the WCAB, supported the finding that injury was "catastrophic" and that it was not type of claim the Legislature intended to preclude from receiving separate psychiatric disability rating. [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].]

Gomez v. State of California, 2020 Cal. Wrk. Comp. P.D. LEXIS 135 (BPD)

Claim of psychiatric injury as compensable consequence held not predominant where evidence established applicant's symptoms of anxiety and depression were caused by behavior of applicant's husband after he learned of diagnosis, including descent into alcoholism and domestic violence, determined to be predominant cause of applicant's psychiatric injury. Husband's behavior held not actual events of employment. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3][a], [b], 4.69[3][a], [b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[3][b].]

XVI. Statute of Limitations

Batista v. Lee's Paving, Inc. 2020 Cal. Wrk. Comp. P.D. LEXIS 8 (BPD).

Claim of industrial injury due to MVA occurring prior to start of work day, held barred by one-year statute of limitations (LC 5405) when claim filed two years later, although employer knew of MVA, no evidence showing defendant knew applicant was claiming that accident was AOE/COE, and no basis found for tolling as no trigger to provide DWC1 Claim Form pursuant LC 5401/Reynolds v. WCAB (1974) 12 Cal. 3d 726, 39 Cal. Comp. Cases 768. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 24.04[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 14, § 14.01[2], [4]; SOC, Section 6.17, Estoppel Based on Failure to Provide Notice].

Ca. Department of Social Services v. WCAB (Magoulas) 2020 Cal. Wrk. Comp. LEXIS 13 (W/D).

Death claim not barred by statute of limitation where filed as amendment to inter vivos claim of descendent by surviving spouse, and where filed within 1 year of death and 240 weeks of date of original injury pursuant to LC 5406. Amendment to reflect distinct adjudication number was proper and that amendment will relate back to timely filing of original application/claim. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 9.01[4], 24.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 9, § 9.05, Ch. 14, § 14.11; SOC, Section 6.48, Statute of Limitation for Death Benefits].

XVII. Supplemental Job Displacement Benefits

Finch v. Chicos, 2020 Cal. Wrk. Comp. P.D. LEXIS 233 (BPD)

Applicant sustained injury to left thumb which was resolved via C&R approved 3/28/17, which contained the following language:

> "Pursuant to *Beltran* a serious dispute exists as to whether applicant is eligible for a voucher. To resolve the dispute defendant will issue a voucher within 30 days from date of OACR, however, parties stipulate applicant will only utilize the voucher to secure supplemental funding from the state."

Defendant issued the supplemental job displacement voucher on June 14, 2017. Applicant filed a completed Application for Return to Work Supplemental Program Benefits on June 21, 2017, and timely filed appeal of the denial of the AD. The parties stipulated that the appeal of the decision of the Administrative Director was timely. Return to Work Supplemental Program was contained in Senate Bill 863 in Section 6.5 which added LD 139.48 states that:

> *"There shall be in the department a return-to-work program administered by the director, funded by one hundred twenty million dollars ($ 120,000,000) annually derived from non-General Funds of the Workers' Compensation Administration Revolving Fund, for the purpose of making supplemental payments to workers whose permanent disability benefits are disproportionately low in comparison to their earnings loss. Eligibility for payments and the amount of payments shall be determined by regulations adopted by the director, based on findings from studies conducted by the director in consultation with the Commission on Health and Safety and Workers' Compensation. Determinations of the director shall be subject to review at the trial level of the appeals board upon the same grounds as prescribed for petitions for reconsideration."*

By panel decision the WCAB held that the "agreement between the parties resulted in the issuance of a voucher that did not provide the applicant with the benefits delineated in 8 CCR 10133.31. Therefore, the document that issued titled Supplemental Job Placement Nontransferable Voucher For Injuries Occurring on or after 1/1/13 was in fact not a voucher providing the applicant with the benefits provided for by regulation." The Board wrote, that the issuance of a voucher "in name only" is not sufficient to trigger the applicant's eligibility for the Return to Work Supplemental Program Benefit or to create an obligation on the Administrative Director to provide said benefits. Citing and discussing Beltran v. Structural Steel Fabricators, 2016 Cal. Wrk. Comp. P.D. LEXIS 366 and Thomas v. Sports Chalet (1977) 42 Cal. Comp. Cases 625 (En Banc Decision), the Board held applicant was not entitled to Return to Work Supplemental Program (RTWSP) when serious disputes existed regarding applicant's entitlement to SJDB voucher at time parties settled applicant's case by way of Compromise and Release as evidenced by the stipulated terms of the agreed and approved settlement terms within the Compromise and Release. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 35.01, 35.03; Rassp & Herlick, California Workers' Compensation Law, Ch. 21, §§ 21.01, 21.03; SOC, Section 10.71, Return-To-Work Program]

See also, Dennis vs. State Department of Corrections and Rehabilitation Inmate Claims (February 2020) __ Cal. Comp. Cases __, 48 CWCR 1 (En Banc Decision), holding that Article XIV, §4 of the California Constitution and Labor Code §5300 that provides for the exclusive jurisdiction of the Board to adjudicate claims involving compensation, including SJDB which is in conflict therefore AD Rule §10133.54 which permits the Administrative Director to adjudicate the issue of entitlement/eligibility.

See also, Corona v. Kern High School District, 2020 Cal. Wrk. Comp. P.D. LEXIS 186 (BPD), holding that termination of job on date certain does not relieve employer of liability for SJDB as the impossibility of returning to work is not basis for releasing defendant from its obligation to provide SJDB voucher under Labor Code § 4658.7(b); Released from obligation to provide voucher requires that employer offer regular, modified or alternative work within 60 days of employee's permanent and stationary date setting forth job description within applicant's physical restrictions. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 35.01; Rassp & Herlick, California Workers' Compensation Law, Ch. 21, § 21.01; SOC, Section 11.4; Supplemental Job Displacement Benefit].

See also, Prod v. San Pasqual Valley Unified School District, 2020 Cal. Wrk. Comp. P.D. LEXIS 218 (BPD Applicant entitled to SJDB despite no loss time from work before her employment contract was terminated as applicant could have lost time from work given her work restrictions, but instead chose to self-accommodate in order to stay employed; Citing and discussing Dennis v. State of California (2020) 85 Cal.Comp. Cases 389 (En Banc Decision).). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 35.01; Rassp & Herlick, California Workers' Compensation Law, Ch. 21, § 21.01; SOC, Section 11.4, Supplemental Job Displacement Benefit].

See also, Morgan v, Living Spaces Furiture, 2020 Cal. Wrk. Comp. P.D. LEXIS 250 (BPD), holding Applicant's resignation from her employment no bar to SJDB voucher where applicant suffered permanent partial disability as result of injury and defendant did not make bona fide offer of regular, modified, or alternative work. Citing and discussing Dennis v. State of Cal., (2020) 85 Cal. Comp. Cases 389 (En Banc Decision); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 35.01; Rassp & Herlick, California Workers' Compensation Law, Ch. 21, § 21.01; SOC, Section 11.4, Supplemental Job Displacement Benefits – Injury on or After 1/1/13].

XVIII. Temporary Disability

Nelson v. SP Plus, 2020 Cal. Wrk. Comp. P.D. LEXIS 166 (BPD)

Employer made initially by text and then followed up by phone call, and offer to applicant to return to work. The evidence established that the offer did not include either a job description or whether the offer was within the applicant work restriction. The WCJ found for the applicant awarding TD.

On reconsideration the Board upheld the WCJ. The Board held that Defendant has burden of proof to establish a valid offer of modified work and for an offer to be valid even where made by text that offer must include (1) job description and (2) whether job offered was within applicant's work restriction thus Applicant held entitled to temporary disability benefits. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[4][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.11; SOC, Section 9.24, Termination of Liability for Payment].

See also, Corona v. Cal. Walls, Inc. dba Crown Industrial Operators, 2020 Cal. Wrk. Comp. P.D. LEXIS 256 (BPD) holding worker entitled to temporary disability indemnity during time defendant was required to shut down due to state and local emergency orders as result of COVID-19 pandemic preventing defendant from providing a medically appropriate modified or alternate position. Citing and discussing Mcfarland Unified School Dist. v. WCAB (McCurtis) (2015) 80 Cal. Comp. Cases 199 (W/D), Manpower Temporary Services v. WCAB (Rodriguez) (2006) 71 Cal. Comp. cases 1614 (W/D), and Dennis v. State of Ca. (2020) 85 Cal. Comp. Cases 389 (En Banc Decision).); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[4][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.11; SOC, Section 9.26, Temporary Disability for Terminated Employee].

See also, Salazar v. Kodiak Roofing, 2020 Cal. Wrk. Comp. P.D. LEXIS 277 (BPD) holding applicant not entitled to temporary disability indemnity following shoulder surgery, when employer had modified work to offer applicant, but applicant was unable to work in United States due to his undocumented status. Citing and discussing Del Taco v. WCAB (Gutierrez) (2000) 79 Cal. App. 4th 1437, 94 Cal. Rptr. 2d 825, 65 Cal. Comp. Cases 343, Romero v. Plantel Nurseries, Inc., 2016 Cal. Wrk. Comp. P.D. LEXIS 672 (Noteworthy Panel Decision); [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; SOC, Section 9.26, Temporary Disability for Terminated Employee].

CASE LAW UPDATE 2020

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. Apportionment

Hom v. City and County of SF, 2018 Cal.Wrk. Comp. P.D. LEXIS 431 (BPD)

> *"... before apportionment under section 4664(b) will apply, the defendant must prove both the existence of a prior award and overlap of the permanent disability caused by the two injuries. (Kopping v. WCAB (2006) 71 Cal Comp Cases 1229 (3rd DCA); Minvielle v. County of Contra Costa (2010) 76 Cal Comp Cases 896 (writ denied). Overlap is not proven merely by showing that the second injury was to the same body part, because the issue of overlap requires a consideration of the factors of disability or work limitations resulting from the two injuries, not merely the body part injured. (... Sanchez v. County of Los Angeles (2005) 70 Cal Comp Cases 1440 (WCAB en banc) This requirement was not changed by the legislature's adoption of section 4664. (Kopping, supra.)" (Emphasis added.)*
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> *Therefore, it is defendant's burden to prove, not only that there was a prior award to the same body part, but ALSO that there is "overlap" between the prior industrial injury and the current industrial injury. . . in order to sustain the burden of proof on the issue of "overlap" between an initial and subsequent injury, for purposes of implementing LC § 4664(b), defendant must provide PD ratings for both injuries using the same **metric** or standard. ."*
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> *Hom v. City and County of SF, 2018 Cal.Wrk. Comp. P.D. LEXIS at pg. 434*

Applicant suffered an initial admitted industrial injury to his lumbar spine on 7/29/2012 settled with Stipulations and Request for a permanent disability (PD) Award in the amountof 20% permanent disability (PD) on 7/2/2013. The PD award was based on a DRE III. Applicant sustained a second injury on 11/16/2013 to his lumbar spine with the QME finding a WPI of 14% using the ROM. The WCJ held for applicant holding defendant had not met their burden of proof in establishing overlap as difference method, metric or standard was used.

On reconsideration the WCAB upheld the WCJ holding apportionment to a prior award pursuant to LC 4664 requires that defendant prove overlap between current and prior award of PD, and where different AMA methods are used (DRE vs. ROM) defendant failed to meet that burden of proof. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 8.07[2][a]-[c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.42[3]; The Lawyer's Guide to the AMA *Guides* and California Workers' Compensation, Ch. 9.]

Estrada v. Edge Sales and Marketing, 2018 Cal. Wrk. Comp. P.D. LEXIS 451 (BPD)

> *Editor's Analysis: Although just another Board Panel Decision, two critical facts are present in both Hikida and Estrada: (1) The use of an AME, and (2) a condition/diagnosis which was not preexisting and solely/exclusively the result/complication of industrial medical treatment. Simply stated the holding in Hikida required (1) substantial medical evidence establishing (2) that the condition/diagnosis is new/not preexisting and (3) the sole/exclusive result of industrial medical treatment. In the limited facts/situation of Estrada the resulting PD would not be apportionable as the deep-vein thrombosis was a new condition solely cause by the results of the industrial surgery.*
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> *See also, Rojas v. Gay and Lesbian Community Center, 2018 Cal.Wrk,Comp. P.D. LEXIS 494 (BPD), holding that disability relating to ACF was apportionable despite the fact that the rating was based on an industrially required surgery where the need for surgery was in part caused by both industrial and non-industrial causation. Rojas also affirmed Department Of Corrections and Rehab. v. WCAB (Fitzpatrick) (2018) 83 CCC 1680, that LC 4662(b) does not provide a separate and independent path or method of establishing an award of total disability, but rather 4662(b) is merely the authorizing statute to allow an award of total disability in accordance with the facts pursuant to LC 4660 which provides the method/theory: (1) Standard method under the Standard Method/Chapter/Table of AMA Guides; (2) Guzman/Almarez; (3) Ogilvie/Lebeof.*

Applicant sustained injury to back which ultimately resulted in low back surgery. Following surgery the applicant developed pain and swelling in her left leg which was diagnosed as severe deep-vein thrombosis requiring several surgical procedures including implantation of a stent and a vena cava filter. AME Dr. Newton determined the applicant to be P&S with WPI of 28% impairment, plus 3% for pain, but with one-third apportionment to preexisting pathology. The internal medicine QME ultimately found the applicant to be totally disabled due to the effects of her surgery, and 20% of the impairment given for atrial fibrillation is due to that, with 80% stemming from nonindustrial causes. The internal medicine QME at deposition testified:

> Question: "If we looked at just her back and the leg issues alone, and we took out everything else, we took out the atrial fibrillation, the gallbladder, everything else, just diagnosis one and diagnosis two and put those in a box, would that alone make her totally disabled?" Answer: "I think so." After a discussion about the different effect of impairment on different activities (flute versus clarinet playing) and an admission that he was confusing two patients, there is this: Question: "Would you agree that solely due to her industrial injury and the back surgery and the vein thrombosis and the edema that resulted, just solely that alone, probably made her—gave her, her inability to work?" Answer: "Yes" And: "…I didn't separate them out as carefully as I might into what was industrial and what -" Question: "But none of those pre-existing conditions cost ['caused' is probably intended] her inability to work; it's solely the industrial injury?" Answer: "Yes. That's true." And, finally: Question: "You still believe, after everything you've just heard that just diagnosis one and two alone, her back injury, her back surgery, and the venous insufficiency alone, just those three alone is enough to say she's pretty much not employable?" Answer: "Well, that's what I said, and that's what I told her."

Applicant was also evaluated by a psychological QME recommended by AME Dr. Newton, and although not submitted in evidence, was summarized by AME Dr. Newton who found no industrial causation of either depression or anxiety.

Finally, applicant was vocationally evaluated, by Frank Diaz, whose report of September 20, 2016, is in evidence. Mr. Diaz's conclusion is that applicant has been rendered totally disabled by her work injury, or "Ms. Estrada has incurred a total loss of labor market access."

Last, Dr. Newton in a very thoughtful response noted that the surgery (1) the need for surgery can be considered to flow exclusively from the subject work injury. The internal medicine QME also stated that "I do feel that her disability is 100% related to her industrial back injury and back surgery."

The WCJ found for applicant and awarded total disability. WCAB denied reconsideration holding the deep vein thrombosis as complication of back surgery necessitated by industrial injury held not apportionable despite AME opinion that one third of applicant's back impairment was nonindustrial, citing and discussing Hikida v. WCAB (2017) 12 Cal. App. 5th 1249, 82 Cal. Comp. Cases 679. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[1]-[3], 8.06[5]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.40, 7.41; The Lawyer's Guide to the AMA *Guides* and California Workers' Compensation, Ch. 9; SOC, Section 10.34, Apportionment.]

Chadburn v. Applied Materials Inc, 2019 Cal. Wrk. Comp. P.D. LEXIS 235 (BPD)

Applicant sustained a specific injury on 11/27/01, on 5/05 and CT through 1/15/08 to neck, bilateral upper extremities and psyche. The applicant received medical treatment on an industrial basis provided by Dr. Massey. During this treatment treating physician, Dr. Massey, engaged in a sexual relationship with the applicant. Applicant contented that this relationship was not consensual and gave rise to a psychiatric injury as a compensable consequence. The WCJ found the applicant to be permanently totally disabled without apportionment. Defendant sought reconsideration. By Board Panel decision, the decision of the WCJ was upheld citing Hikida v. WCAB (2017) 12 Cal. App. 5th 1249 , 82 Cal. Comp. Cases 679. The Board held that the Applicant was entitled to an unapportioned award of 100 percent permanent disability when permanently totally disabled was directly and exclusively/entirely resulting from post—traumatic stress disorder caused by sexual misconduct of applicant's treating physician, and arising out of industrial medical treatment.

See also, citing Hikida v. WCAB (2017) 12 Cal. App. 5th 1249, 82 Cal. Comp. Cases 679 applicant's permanent total disability arose directly from applicant's failed back surgery, holding that permanent disability arising from medical treatment necessary to cure effects of industrial injury cannot be apportioned to any other cause. McFarland v. Charles Abbott, 2019 Cal. Wrk. Comp. P.D. LEXIS 209; Editor's analysis: The decision in McFarland might be explain by the doctrine of substantial evidence and direct causation rather than an expansion of the Hikida doctrine; See, Steinkamp v. City of Concord 2006 Cal.Wrk.Comp. P.D. LEXIS 24(BPD), But also, County of Sac. v. WCAB (Chimeri) 75 Cal. Comp. Cases 159 (W/D); Nilsen v. Vista Ford, 2012 Cal.Wrk.Comp.P.D. LEXIS 528 (BPD); Moran v. Dept. of youth Authority 2011 Cal.Wrk.Cop. P.D. Lexis 43; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[1]-[4], 8.06[5]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.40-7.42; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Chs. 4, 8.]

Editor's Comments: The Courts continue to apply Hikida to those situations where the PD is directly and exclusively caused by a new medical condition/diagnosis that is resulting/arises out of the industrial medical treatment. The closer question is where medical care is necessary due to a combination of pre-existing non-industrial pathology and an industrial injury. Here defendant might argue that the WPI and resulting disability is due to the non-industrial pre-existing pathology and industrial injury/industrial medical treatment. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[1]—[4], 8.06[5]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.40—7.42; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Chs. 4, 8.]

II. CIGA

CIGA v. Azar (2019) 940 F.3d 1061, 2019 U.S. App. LEXIS 30339, 84 Cal. Comp. Cases 894.

U.S. Court of Appeals held that Medicare, as secondary payer, was not entitled to reimbursement from CIGA, pursuant to 42 U.S.C.S. § 1395y(b)(2)(A)(ii), as (1) insurance regulation is a field traditionally occupied by states, and that Cal. Ins. Code Section 1063.1(c)(4) prohibited CIGA from reimbursing federal government agencies, including Medicare, and that (2) Medicare secondary payer provisions are presumed not to preempt state insurance laws unless Congress clearly manifested its intent to do so, and that nothing in Medicare statute or implementing regulations suggested that Congress meant to interfere with state schemes to protect against insurer insolvencies. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 2.84[2], 29.09[2][a]-[c], [e]; Rassp & Herlick, California Workers' Compensation Law, Ch. 3, § 3.33[3].]

CIGA v. San Diego County Schools Risk Management, (2019, 4th Appellate District) 41 Cal.App.5th 640 [84 Cal.Comp. Cases 957, 2019 Cal.App. LEXIS 1070];

Superior Court has jurisdiction over dispute between the employer and CIGA to determine applicant's date of injury even if its decision is contrary to that of WCAB where parties had stipulated to DOI contrary to that determined by Superior Court (Superior Court found CT while WCAB had approved Stips for Specific Injury). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 2.83, 2.84[3][a], 21.03[5]; Rassp & Herlick, California Workers' Compensation Law, Ch. 3, § 3.18, Ch. 13, § 13.08[1]; SOC, Section 3.47 CIGA – Coverage Limitations].

III. Contribution

Lasko v. Entertainment Partners, 2019 Cal. Wrk. Comp. P.D. LEXIS 383 (Split BPD);

Applicant filed a CT injury to left shoulder, GERD, constipation and high blood pressure. Although the shoulder was accepted, the claim of internal injury was denied. Applicant elected against a single defendant. Before fully completing discovery the elected defendant resolved the case via C&R with open medical. In the settlement agreement defendant accepted injury to left shoulder, and internal injury involving GERD, constipation and high blood pressure. At arbitration on petition for contribution as between co-defendants, the unelected co-defendants contested internal injury. The arbitrator found no internal injury, awarding contribution limited to benefits related to the accepted left shoulder. The arbitrator found a lack of substantial medical evidence establishing internal injury. The elected co-defendant sought reconsideration.

Editor's Comments: Although it has been held that a good faith stipulation and settlement is binding on co-defendant on petition for contribution, the Lasko suggests otherwise. Here, the elected defendant settled without completion of discovery and relied merely on the settlement and stipulation to injury approved by the WCJ in the case in chief. Citing Greenwald v. Carey Dist. Co. (Greenwald) (1981) 46 Cal. Comp. Cases 703 (En Banc), the WCAB held that "a decision or settlement in the case in chief between the applicant and the elected against insurer is not res judicata, and issues of liability among the defendants are decided de novo." In this decision the elected defendant assumed the burden of proof on injury and the risk that internal injury could be established at arbitration on petition for contribution. In Lasko, the mistake of the elected defendant was that discovery was not completed at the time of settlement of the case in chief, and thus the elected defendant had not obtained the necessary substantial medical evidence to establish injury to contested parts of body at arbitration on petition for contribution.

In a split panel decision, the WCAB Panel upheld the arbitrator's award finding that the stipulation and order of injury was not binding on co-defendants' petition for contribution at arbitration, and therefore injury to contested parts of body are subject to review. Substantial medical evidence is required to establish injury to contested parts of body on petition for contribution. Here, the elected co-defendant failed to introduce substantial medical evidence on the issue of internal injury. Despite the appearance of good faith in resolving the case with applicant, the elected defendant is not relieved of the obligation of establishing injury at arbitration on petition for contribution. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.05[1], [2][a], [3][a], 27.01[1][c], 34.16[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.01[4]; SOC, Section 5.8, Contribution Among Defendants].

IV. Discrimination – LC 132(a)

Franco v. MV Transportation, ACE America Insurance Company, 2019 Cal.Wrk. Comp. P.D. LEXIS 120, 84 Cal.Comp.Cases 666 (BPD).

Applicant claimed a specific injury occurring on 4/5/11 and a CT ending 8/23/12 to various parts of body including his arm, hand, shoulder, back, neck, and trunk while employed by defendant as a bus driver. Defendant accepted injury to bilateral hands, with defendant initially denying the other parts of body.

See also, accord, Alnimri vs. Southwest Airlines/Ace Ins.Co. (September 2019) 47 CWCR 189, citing Dept. of Rehab. v. WCAB (Lauher) (2003) 30 Cal.4th 1281, 135 Cal. Rptr. 2d 665, 70 P.3d 1076, 68 Cal. Comp. Cases 831, holding Labor Code §132a penalties may be awarded where an employer fails to follow its own procedures when faced with conflicting work restrictions from the PTP and the QME. Where the injured worker is subject to disadvantages not visited upon by other employees there is a violation of 132a when an employer unilaterally decided to disregard medical reports releasing the applicant to return to work without restrictions and violates its own internal policies after dismissing the applicant.

Addressing the issue of causation of injury the AME ultimately found the back and neck compensable along with the bilateral hands. Initially the AME deferred the issue of disability, but on July 29, 2013, applicant was examined by his PTP, who released the applicant back to full duty without restrictions as of 8/14/13. In response to the July PTP's report, the employer's human resource manager, defendant's recommended that the employer contact the applicant to let him know to report to work on 8/14 to begin the physicals, drug tests and retraining. The applicant's supervisor instead decided to await the report of the AME. The AME issued a further report dated 10/28/13 in which he found the neck, back, shoulders and carpal tunnel all industrial and therefore, that the applicant was "not able to return to his usual and customary job because of the vibration associated with driving a bus, even in the absence of job-related responsibilities that exceed his residual capacity. Prolonged sitting and exposure to vibration while driving his bus have contributed to

his low back injury. I am not aware of how either could be ameliorated and allow him to return to his usual and customary job without the likely risk of further injury to his low back." Receiving the AME's report the Human Resource Manager sent an email to the applicant supervisor and others stating "Please advise if you have any open positions within these restrictions that he is qualified for. If not, I suggest you submit an [employee separation agreement]. Since he's been working full duty since Aug/Sept, he might not agree with the AME. [To Applicant's Supervisor] -- if you believe an interactive meeting is needed, please advise."

On 12/3/13 at MSC, the WCJ approved Stips of 3% for bilateral upper extremities, and 1% for back. During the next several months, emails between employer personnel suggested that the employer desired to terminate the applicant and in fact had made that decision. The 132(a) Petition went to trial with the evidence establishing that the Applicant had worked full duty from August to December 2013 and that the employer had no process in place to address how to handle returning the applicant to work where there exist a conflict in the medical record regarding work restrictions and ability to return to work.

The WCJ denied the applicant's Petition for Increased Benefits pursuant to LC 132(a) holding that the applicant had not shown that he was treated differently than non-industrially injured employees.

On Reconsideration, the WCAB reversed and remanded with direction holding that the injured worker is not required, in every case, to prove that he or she was "singled out for disadvantageous treatment" to establish prima facie case for discrimination, rather the employee claiming a violation of LC 132(a) must demonstrate through specific factual scenario that he or she was subject to "disadvantages not visited on other employees" because of an industrial injury. A critical fact seemed to be the absence of an employee policy addressing how employees should be treated where a conflict between physicians on the issue of return to work. This decision was written by Commissioner Sweeny and provides an excellent discussion of the California Supreme Court decision of Dept. of Rehab. v. WCAB (Lauher) (2003) 30 Cal.4th 1281, 135 Cal. Rptr. 2d 665, 70 P.3d 1076, 68 Cal. Comp. Cases 831; See also, accord, Alnimri vs. Southwest Airlines/Ace Ins.Co. (September 2019) 47 CWCR 189; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.11[1]-[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.27[1], [6][a].].

V. Discovery

Robles v. TE Connectivity Corporation, 2019 Cal. Wrk. Comp. P.D. LEXIS 259 (BPD)

See also, Oranje v. Crestwood Behavior Health, 2019 Cal. Wrk. Comp. P.D. LEXIS 251 (BPD), holding that the defendant's due process right to cross-examine applicant outweighed possible harm to applicant by having to undergo cross-examination; Remanded with instructions to WCJ to determine a plan to accommodate applicant and minimize possible harm. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 26.01[3][a], 26.03[4], 26.05[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.48[2], Ch. 19, § 19.37; SOC, Section 16.3, Trial – Proceedings and Submission].

Defendant sought to compel applicant to respond to questions regarding applicant's source and amount of earnings. Applicant had refused to answer asserting his right against self-incrimination. Ultimately the WCJ issued an order compelling applicant's response. Applicant sought petition for removal.

By Panel decision, the WCAB held that the Applicant may be compelled to answer relevant questions or risk dismissal of claim despite assertion of Fifth Amendment right against self-incrimination. See also, accord, Vargas v Select Staffing 2010 Cal Wrk Camp PD LEXIS 548 (BPD) relying on Britt v. Superior Court of San Diego County (Cal. Supreme Court, 1978) 20 Cal.3d 844; [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; SOC Section 14.15, Legal Privileges].

VI. Disqualification and Reassignment of Judges

Simonian v. County of Los Angeles, 2019 Cal.Wrk.Comp. P.D. LEXIS 301 (BPD)

The WCJ had been reported for ethical violations by the lien claimant to the Ethics Advisory Committee of the Department of Workers' Compensation in a prior matter. The complaint by the lien claimant was determined to be valid. In this subsequent matter the lien claimant filed a petition to disqualify the WCJ for bias. The WCJ in her report and recommendation opposed the petition.

> *"Pursuant to section 5311, "Any party to the proceeding may object to the reference of the proceeding to a particular workers' compensation judge upon any one or more of the grounds specified in Section 641 of the Code of Civil Procedure and the objection shall be heard and disposed of by the appeals board." (Lab. Code, § 5311.) A petition to disqualify must be verified upon oath in the manner required for verified pleadings in courts of record. (Cal. Code Regs., tit. 8, § 10844.) Any attempt to disqualify a WCJ pursuant to section 5311,*
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> > *...shall be initiated by the filing of a petition for disqualification supported by an affidavit or declaration under the 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..." (Cal. Code Regs., tit. 8, § 10452, emphasis added.)*
>
> *Code of Civil Procedure section 641states, in pertinent part, that "[a] party may object to the appointment of any person as referee, on one or more of the following grounds...(g) The existence of a state of mind in the potential referee evincing enmity against or bias toward either party." (Code Civ. Proc., § 641(g).) "Due process is violated where there is even an appearance of bias or unfairness in administrative hearings. (citations)" (Robbins v. Sharp Healthcare, et al. (2006) 71 Cal. Comp. Cases 1291, 1302 [2006 Cal. Wrk. Comp. LEXIS 314] (Robbins).) The test "is an objective one, i.e., would a reasonable person with knowledge of the facts entertain doubts concerning the WCJ's impartiality." (Id., at p. 1303, emphasis added.) Bias against a party's attorney may be a ground for disqualification. (Id., at p. 1306.)"*
>
> *Simonian v. County of Los Angeles, 2019 Cal.Wrk.Comp. P.D. LEXIS at pg. 302.*

By panel decision, the WCAB held that the petition should be granted. The WCAB held the Petition for Disqualification pursuant to Labor Code § 5311 and 8 Cal. Code Reg. § 10452 was properly granted where based on a claim of biased due to that party having filed a complaint against the WCJ with Department of Workers' Compensation Ethics Advisory Committee, which was sustained. Under these circumstances it was either (1) reasonable to entertain doubts as to whether *any* judge could remain impartial, and/or (2) that there clearly existed the *potential* for the appearance of bias. [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].]

VII. Injury AOE/COE

Shin v. Forever 21, Incorporated, New Hampshire Insurance, 2018 Cal. Wrk. Comp. P.D. LEXIS 192.

The applicant filed a CT for the period ending 2015 after he was laid off. The applicant testified to treatment prior to the layoff but no evidence of disability by way of TD (time off work) nor PD was presented at trial prior to layoff. Defendant asserted that the claim was barred as post-termination pursuant of LC 3600(a)(10). The WCJ found for the defendant noting evidence established treatment, and supported that the applicant knew or should have known a cause and effect relationship

> *LC Section 3600 provides in part as follows:*
>
> ***(a)(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, is subsequent to the date of the notice of termination or layoff.*

between the need for treatment/condition and injurious industrial activity. Applicant sought reconsideration arguing that the date of injury was after the date of layoff due to the lack of disability.

The WCAB reversed the WCJ holding that applicant's claim for cumulative trauma was not barred by Labor Code § 3600(a)(10) post-termination defense even though applicant did not report injury to defendant until after he was laid off. The WCAB noted that the date of injury for CT is the date where there is the concurrence of (1) injuries industrial event, activity, or exposure; (2) knowledge or reason to know that there is a cause and effect relationship between the injurious industrial event, and (3) disability (TD or PD). WCAB found that because applicant did not suffer disability (either TD or PD) until after his layoff, the date of injury under Labor Code § 5412 was subsequent to notice of layoff, and therefore not barred as a post-termination claim under the exception as provided in Labor Code § 3600(a)(10)(d). [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].];

Gonzales v. Athwal Farms, 2019 Cal. Wrk. Comp. P.D. LEXIS 16 (BPD)

MVA causing injury not barred by intoxication where defendant failed to establish intoxication was the "substantial cause" of the accident and resulting injury noting no blood test and evidence that the accident occurred when applicant swerved to avoid hitting a dog. Injury AOE/COE through application of Bunkhouse Rule. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.05[2][a], [3], 4.20; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, §§ 10.01[4][a], [c], 10.03[1].]

Zeigler-Bainbridge v. Maxim Healthcare Services, 2019 Cal. Wrk. Comp. P.D. LEXIS 232 (BPD)

Claim of injury by home-health care nurse barred by "going and coming" rule because although she was en route to her place of employment at time of injury, applicant failed to establish that defendant made any "substantial payment" to induce her to accept long-distance work assignment/evidence of offer to pay insufficient. ; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.154[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.05[3][d][i].; SOC, Section 5.44, Wages or Travel Expenses Paid During Travel Time.]

Scott v. County of LA Probation Department, 2019 Cal.Wrk. Comp. P.D. LEXIS 242 (BPD)

MVA barred by "going and coming" rule where job duties did not require use of vehicle and evidence established applicant was only out of office between two to five times during her six months of employment, defendant had no expectation that applicant would use her personal vehicle, did not cover applicant's commute expenses, and applicant did not utilize defendant's mileage reimbursement program or county cars available for use by employees, and was not required to travel long distances. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.155; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.05[3][d][ii]. SOC, Section 5.45, Transportation Controlled by Employer.]

Ledesma v. Martinez, Estrada, 2019 Cal. Wrk. Comp. P.D. LEXIS 364 (BPD)

Defendant failed to meet their burden of proof barring the calm due to intoxication pursuant to LC 3600(a)(4) despite urine sample confirming cocaine, opiate and alcohol usage at time of injury where (1) evidence indicated that fall was due to improper construction of scaffolding, and (2) evidence did not establish applicant's intoxication contributed to the fall as and when it occurred. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.20, 4.24; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.03[1], [5].]

VIII. Injury -- Presumption of Compensability

Carrasco v. California Department of Correction and Rehabilitation, 2018 Cal.Wrk.Comp.P.D. LEXIS 398, 83 Cal.Comp.Cases 1931 (BPD).

WCJ held that applicant's claim of CT injury through 7/8/08 to her back, shoulders, headaches, chest pain, psyche, stress, internal system and sleep disorder, was not timely denied and is presumed compensable. The WCJ also found that defendant "raised as a collateral issue" whether evidence of good faith personnel actions may be raised to rebut the presumption, that "the exclusion of evidence in LC 5402 does not provide any exception for evidence offered as an affirmative defense," that "since any evidence of a good faith personnel defense would come from other employees of the Department of Corrections, it appears that any such evidence could have been discovered in the 90 day period," and that defendant "should also be precluded from offering evidence regarding good faith personnel actions.

"In reference to section 5402, we note that the presumption of compensability does not give rise to a blanket exclusion of evidence not discovered within the initial 90-day period. In State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Welcher) (1995) 37 Cal. App. 4th 675 [60 Cal. Comp. Cases 717], for instance, the Court of Appeal implicitly rejected an interpretation of section 5402 that would bar all further discovery once the presumption applies. Rather, defendant may seek evidence on corollary and related issues.

In Napier v. Royal Insurance Co. (1992) SAC 174290, 20 Cal. Workers' Comp. Rptr. 124 (writ den.), a Board panel rejected an extremely broad interpretation of Labor Code section 5402 which would have barred all further discovery once the presumption applied, but said: "While the presumption of compensability will preclude the defendant from disputing its liability for injury with evidence which could have been obtained with the exercise of reasonable diligence within the initial 90 day period, defendant is not thereafter permanently prevented from seeking evidence on corollary and related issues."

Carrasco v. California Department of Correction and Rehabilitation, 2018 Cal.Wrk.Comp.P.D. LEXIS 398, 83 Cal.Comp.Cases 1931 (BPD).

Editor's Comments: Simply stated, when psychiatric injury is alleged, evidence which was later discovered supporting the affirmative defenses of 'lawful, good faith personnel action' and ' less than an aggregate six months employment and the injury was not caused by a sudden and extraordinary employment incident,' is not excluded by the presumption of compensability under LC 5402. Both Carrasco and James both turn of the stated legislative intent to "to establish a new and higher threshold of compensability for psychiatric injury under this division."

See also, Quintero v, Chamberlains Farms, 2018 Cal. Wrk. Comp.P.D. LEXIS 468 (BPD), holding that LC 5402 presumption applied where defendant failed to establish medical-legal evidence it proffered to rebut presumption could not have been obtained with exercise of reasonable diligence within 90-day period after its receipt of applicant's DWC-1 Claim Form. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 24.01[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.02; SOC, Section 5.16, Presumption of Injury].

Quintero v. Chamberlains Farms, 2018 Cal. Wrk. Comp.P.D. LEXIS 468, also held that QME report did not constitute substantial evidence where the QME lacked understanding of relevant facts including *of length of time/arduous nature of job duties, and an accurate understanding of medical-legal concept of cumulative trauma. Quintero v. Chamberlains Farms, 2018 Cal. Wrk. Comp.P.D. LEXIS 468.*

Defendant sought reconsideration contending that the presentation of evidence including employer witnesses and psychiatric PQME was admissible to support the defense of good faith personnel under LC 3208.3(h).

In reversing the WCJ, the WCAB citing and discussing *James v. WCAB (1997) 55 Cal.App. 4th 1053, 62 CCC 757*, held that the similarity between the opening phrase of section 3208.3(d) and subdivision (h)'s opening phrase that "[n]o compensation under this division shall be paid … if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action[,]" support the conclusion that when a psychiatric injury is presumed compensable under section 5402, defendant is not precluded from asserting and presenting evidence on the good faith personnel action defense under section 3208.3(h). This conclusion is consistent with the legislative intent of section 3208.3 as described in subdivision (c), which is "to establish a new and higher threshold of compensability for psychiatric injury under this division.

Perez v. Deardorff Jackson Company, 2018 Cal.Wrk.Comp.P.D. LEXIS 413 (BPD)

Decedent had chest pains on 3/8/16 while working in a field, lapsed into unconsciousness and died 3/23/16. Paramedics found Decedent to be markedly hypertensive. Decedent's family advised that he had a history of untreated hypertension, but without known drug history. A report from Dr. Babu on 3/10/16 reflects that Decedent was being seen in relation to a hypertension emergency which was suspected of being secondary to amphetamines (Defense exhibit C). While in the hospital, approximately two weeks after being admitted, a drug screen turned up positive for methamphetamine. The cause of death stated by the coroner on the death certificate was sequelae of hypertensive stroke.

See also, Barbani v. City of Beverly Hills, 2018 Cal. Wrk. Comp. P.D. LEXIS 448, holding that claim of injury to right knee incurred while participating in dodgeball event at World Police and Fire Games (the ultimate underdog story) was not barred by LC 3600(a)(9) citing and discussing Ezzy v. WCAB (1983) 48 Cal. Comp. Cases 611. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.25; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.03[6].]

Petitioner's claim was denied by Respondent on 2/22/17 due to lack of medical evidence in support of industrial causation as well as the affirmative defense of intoxication (Defense exhibit A).
After trial the WCJ held that Respondent did not prove their intoxication defense, but that Petitioner did not meet its burden to prove industrial injury. Applicant sought reconsideration arguing that pursuant to *Clemmens v. WCAB 33 CCC 186*, the claim should be presumed industrial.

In upholding the WCJ, the WCAB held that although a death taking place within the time and space limits of employment may enjoy a presumption or inference that the death arose out of employment, where a non-industrial disease appears to be the cause, the burden is placed on the Applicant to prove industrial causation; Where employment appears to be the cause, the burden is placed on the employer to prove otherwise. In this case, the death did not appear to be industrially caused, but rather the use of methamphetamines. Further, applicant failed to provide medical evidence establishing industrial causation. See also Clemmens v. WCAB (1968) 261 Cal.App.2nd 1, 68 Cal.Rptr 804, 33 Cal.Comp.Cases 186; Labor Code 3202.5, 5705; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.04, 27.01[1][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.01[4]. SOC, Section 5.58, Mysterious Death]

IX. Jurisdiction

Allen v. Minesota Vikings, 2019 Cal. Wrk. Comp. P.D. LEXIS 331 (BPD)

The applicant signed three successive contracts to play professional football. The first two were executed within the state of California, the last outside the state. Applicant only played one game for defendant within the state of California. The New Orleans Saints were the terminal (final) employer of the applicant and although originally a named defendant, the Saints were dismissed without prejudice. Joinder was sought by the Minesota Vikings, a named defendant and prior employer. The WCJ did not grant joinder focusing on the very limited contacts which the applicant had with the forum state, California. Co-Defendant, Minesota Vikings, sought reconsideration.

Editor's comments: Simply stated, for the WCAB to have "personal jurisdiction" (In Personam) there must be sufficient minimum contacts on the part of the defendant within the forum state, California. In establishing in personam jurisdiction, the Courts have traditionally considered factors to include where the contract for hire was negotiated, and executed, where services were to be performed, defendant's business dealing within the forum state, and where the parties were domiciled/reside focusing on whether requiring an out-of-state defendant to defend in California would be so unfair as to cause a denial of due process. Often confused is the distinction between In Personam Jurisdiction, Subject Matter Jurisdiction, and the issue of Conflicts of Law. Simply stated, In Personam Jurisdiction focuses on whether the defendant has sufficient minimum contacts within the forum state to ensure due process.. Subject Matter Jurisdiction is merely whether the particular court is proper given the issue at controversy and focusing on the doctrine of forum non-convenience, while Conflict Of Law/Choice of Laws is generally always the law of the forum state unless modified by contract between the parties.

Citing and discussing a number of authorities, the WCAB held that the issue of joinder of an out-of-state defendant requires a review of the defendant/employers contacts with the forum state, and not the employees' contacts. This analysis turns essentially on whether joinder of an out-of-state defendant would result in a denial of that defendant's right to due process. Here, although the applicant had very minimal contract with California limited to signing two prior contracts and playing a single game in California, the Saints had a number of contacts beyond those relating to the applicant. Given these

contacts it would not be a denial of the due process rights of the Saints to join and require them to defend the applicant's claim within the state of California.

Simply stated, the issue of in personam jurisdiction over a particular employer is resolved by focusing not upon relationship of *entire claim* to the State of California, but instead on relationship of particular defendant, to the state of California. Further, the issue of in personam jurisdiction is one of due process and not of subject matter jurisdiction per se; See also, Federal Insurance Co. v. WCAB (Johnson) (2013) 221 Cal. App. 4th 1116 [78 Cal. Comp. Cases 1257]; New York Knickerbockers v. WCAB (Macklin) 240 Cal.App.4th 1229 (2015); Sutton v. WCAB (2018) 83 Cal. Comp. Cases 1613 (BPD); Bowen v. WCAB (1999) 73 Cal.App.4th 15, [64 Cal.Comp.Cases 745]; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d Section 3.22[2] [3], 21.02, 21.06, 21.07[5], 29.02[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 13, § 13.01[2], Ch. 18, § 18.01; SOC, Section 2.9, Jurisdiction Over Out-of-State Injuries].

See also, Carreon vs. Cleveland Indians (National Union Fire Insurance (San Francisco Giants) (CIGA) 47 CWCR 241(November 2019), in which the defendant confused and erroneously argued lack of "personal jurisdiction", rather than "subject matter," jurisdiction.

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.]

Hollingsworth v. Superior Court (2019, 2nd Appellate District) 37 Cal.App. 5th 927 [84 Cal.Comp.Cases 718, 2019 Cal.App. LEXIS 671.

As between superior court and the Appeals Board, where civil action and workers' compensation proceeding are concurrently pending, the tribunal first assuming jurisdiction should determine the issue of exclusive jurisdiction citing Scott v Industrial Acc. Commission (1956) 46 Cal.2d 76, 21 Cal. Comp. Cases 55. Hollingsworth v. Superior Court (2019, 2nd Appellate District) 37 Cal.App. 5th 927 [84 Cal.Comp.Cases 718, 2019 Cal.App. LEXIS 671]; Contra, see In Bobbitt v. WCAB (1983) 143 Cal. App. 3d 845, 48 CCC 427, in which the court allowed proceedings before both the WCAB and the Outer Continent Shelf (Longshore Harbor Worker Act), But that the worker recovery is subject to offset and credit for any amounts awarded in either jurisdiction citing Sea-Land Serv, Inc. v. WCAB (Lopez) (1996) 14 Cal. 4th 76, 61 CCC 1360. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 11.01[5], 21.08[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 13, §§ 13.09[1], 13.10[1]. SOC, Section 2.2, Exclusive Jurisdiction]

X. Liens

Castro v. Palominos General Construction, SCIF, 2019 Cal. Wrk. Comp. P.D. LEXIS 320 (BPD)

Lien was stayed pursuant to Labor Code § 4615 based on felony conviction of provider who willfully made false, fictitious, or fraudulent statements to federal agents, and holding that conviction fell within scope of Labor Code § 139.21(a)(1)(A), as felony conviction related to qualifications, functions, or duties as provider of medical services. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 30.04[4][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 17, § 17.70[1]; SOC, Section 7.77, Medical Expense – Illegal Conduct].

Colamonico v. Secure Transportation, 2019 Cal. Wrk. Comp. LEXIS 111 (En Banc)

Medical-legal provider/lien claimant have initial burden of proof that: (1) contested claim existed at time expenses were incurred, and expenses were incurred for purpose of proving or disproving contested claim; and (2) its medical-legal services were reasonably, actually, and necessarily incurred pursuant to LC 4621(a). Copy service fees are considered medical-legal expenses (See Cornejo v. Younique Café (2015) 81 Cal. Comp. Cases 48, 55, interpreting LC 4620(a).) ; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.08[2][a]-[c], 22.09[1], [2], 27.01[8][b][i]-[iv], 30.05[1], [2][a], [b][i], [ii]; Rassp & Herlick, California Workers' Compensation Law, Ch. 17, §§ 17.70[1][c], 17.72[1][a], [b].]

XI. Legislation and Statutes

Labor Code 138.8 (SB-537) was enacted which provided that the AD publish information involving UR decisions and IMR determinations that resulted in modification or denial of an RFA.

CCP Section 1002.5. Agreement Settling Employment Disputes; Prohibition of Preventing a Person From Obtaining Future Employment

(a) An agreement to settle an employment dispute shall not contain a provision prohibiting, preventing, or otherwise restricting a settling party that is an aggrieved person from obtaining future employment with the employer against which the aggrieved person has filed a claim, or any parent company, subsidiary, division, affiliate, or contractor of the employer. A provision in an agreement entered into on or after January 1, 2020, that violates this section is void as a matter of law and against public policy.

(b) Nothing in subdivision (a) does any of the following:

(1) Preclude the employer and aggrieved person from making an agreement to do either of the following:
(A) End a current employment relationship.
(B) Prohibit or otherwise restrict the settling aggrieved person from obtaining future employment with the settling employer, if the employer has made a good faith determination that the person engaged in sexual harassment or sexual assault.

(2) Require an employer to continue to employ or rehire a person if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing to rehire the person.

(c) For purposes of this section:

(A) "Aggrieved person" means a person who has filed a claim against the person's employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process.

Labor Code 2750.3 (SB-5) codified the holding of Dynamex Operation West v. Superior Court of LA County (Lee) (2018) 83 CCC 817 and the ABC test for determining whether a person is an employee or an independent contractor. LC 2750.3 exempts specified occupations which are governed by S.G. Borello & Son v. DIR (1989) 54 CCC 80.

Labor Code 3212.15 created yet another rebuttable presumption of compensability for PTSD for safety officer (firefighters/peace officers).

SB-537 amended LC 4600.4(b) to clarify "normal business day" to not include Saturday, Sunday, or any day that is declared by the governor to be an official state holiday or holiday listed on the Department of Human Resources website.

SB-537 amended LC 4616(a)(4) to require commencing 7/1/21 that the MPN post on the MPN'S website quarterly updates of the roster of all participating providers to include all physicians and ancillary services within the MPN.

AB-749 created CCP 1002.5 effective 1/1/20 prohibited employment dispute settlements from including a provision barring the rehiring of an employee.

Top Rule Changes:

10972 -- Rejection of skeletal Pleadings but does not disallow amendments;
10305 -- Party redefined to include lien claimants.
10403/10404 – Permits Discipline non-attorney hearing reps.
10629/10382 - Amends procedures for service of self-destruct orders.

10620 – All documents which a party seeks to offer at trial must be filed with WCAB 20 days prior to trial unless otherwise ordered.
10752/10755 – Applicant need not appear but can appear via applicant attorney provided attorney has settlement authority.
10555 – When a dispute arises over overpayment of TD, petition must be filed.
10450 – Codified Yee-Sanchez v. Permanente Medical, 2003 68 CCC 637 holding WCAB has no jurisdiction to conduct hearing, or issue orders until Application for adjudication is filed.
10888 – Repealed which had required that parties make a good-faith attempt to contact lien Claimants' and resolved liens prior to approval of settlement.
10305 – Defines party to include lien claimant but does not change the practice of deferring lien claims until conclusion of case-in-chief.
10761 – Repealed 10353 and now allows WCJ to take evidence including testimony at conference upon agreement of the parties.
10832 – Notice of intentions and self-destructive orders upon objection must be served by WCAB rather than a party.
10789 – Sets forth walk-through procedures state wide.
10752 – Applicant and defendants' must appear at all hearings or be represented by attorney or non-attorney representative, but lien claimant need only be immediately available by telephone with full settlement authority.
10960 – Allows disqualification of WCJ even after swearing in of first witness where basis for disqualification becomes know after swearing in of first witness.
10547 – 5710 fee procedure for petition may only be filed 30 days after demand.

10900 – New rules for LC 5270 arbitration; 10900, 10905, 10910, 10914.
10964 – Requires supplemental petitions on reconsideration requires first that the parties filed a petition establishing good cause first be filed.

XII. Medical Treatment, UR/IMR, MPN

Puni Pa'u v. Department of Forestry, legally uninsured adjusted by SCIF, 84 Cal. Comp. Cases 815, 2019 Cal. Wrk. Comp. LEXIS 86 (Significant Panel Decision)

> *"Additionally, the denials in this case would have been timely even if Saturday were a working day for purposes of Labor Code section 4610. Code of Civil Procedure section 12a provides: "If the last day for the performance of any act provided or required by law to be performed within a specified period of time is a holiday, then that period is hereby extended to and including the next day that is not a holiday. For purposes of this section, 'holiday' means all day on Saturday, all holidays specified in Section 135 and, to the extent provided in Section 12b, all days that by terms of Section 12b are required to be considered as holidays." (Code Civ. Proc., § 12a(a).) UR is an act "provided or required by law to be performed within a specified period of time." Here, because each request for authorization was issued on a Monday, even if the deadline for response was the following Saturday, Code of Civil Procedure section 12a would therefore have extended the deadline for timely denial to the following Monday, making the denials timely.*
>
> *Therefore, as stated above, we conclude that although Saturday is a business day under Civil Code section 9, it is not a working day under Labor Code section 4610, because Labor Code section 4610 does not incorporate the definition of business day found in Civil Code section 9. The phrase "working day" as it appears in Labor Code section 4610 does not include Saturdays based upon standard modern usage, as reflected in dictionary definitions, statutory and regulatory enactments, and judicial decisions. Moreover, even if Saturday were a working day, the UR decisions in this case would still be timely based upon Code of Civil Procedure section 12a."*
>
> *Puni Pa'u v. Department of Forestry, legally uninsured adjusted by SCIF, 84 Cal. Comp. Cases at pgs 821*
>
> *Editor's Comments: SB-537 amended LC 4600.4(b) to clarify "normal business day" to not include Saturday, Sunday, or any day that is declared by the governor to be an official state holiday or holiday listed on the Department of Human Resources website.*

Defendant denied successive RFA's received by defendant both times on a Monday and denied the on following Monday. The issue before the WCAB was whether the denial was timely pursuant to Labor Code 4610(i)(1) "five working days" includes Saturday thus requiring that the denial be made on the preceding Friday, or Saturday, a day not within the traditional work week, or on Monday, as the defendant had. The WCJ held that the UR denials were timely because Saturdays and Sundays are not working

days under the meaning of the Labor Code 4610. Specifically, the WCJ concluded that Saturday is not a working day for purposes of UR because Saturday is listed as an optional bank holiday in Civil Code 7.1 and not within the definition of business day provided in Civil Code 9. Defendant sought reconsideration.

The WCAB, by Significant Panel Decision, held that the phrase "working days" in Labor Code 4610(i)(1), which requires that decisions on requests for authorization for medical treatment "be made in a timely fashion that is appropriate to the nature of the employee's condition, not to exceed five working days from the receipt of a request for authorization," does not include Saturdays. Further, the phrase "working days" in Labor Code 4610(i)(1) is not defined the same as "business day" in Civil Code 9. However, Code of Civil Procedure 12a is applicable and provides that, if last day for performing an act required by law, e.g., utilization review denial of request for authorization, falls on Saturday, period for performing act is extended to following Monday. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 5.02[2][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.10[4], [6]. SOC, Section 7.35 Utilization Review – Time Limit].

See also, Olson v. Banks Pest Control, 2019 Cal.Wrk.Comp. P.D. LEXIS 252 (BPD), holding that enforceable contract to authorize and provide consultation and cervical surgery was found where counsel for defendant sent qn email to counsel for applicant stating defendant would "approve any RFAs for consultation and surgery within the MPN" despite subsequent utilization review decision denying cervical spine 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; SOC, Section 7.36, Utilization Review].

See also, Gorbanwand v. Pacific GIS, 2019 Cal.Wrk. Comp. P.D. LEXIS 385 (BPD), holding that applicant may not treat outside the MPN at defendant's expense where applicant selects specialist physician as PTP, where Defendant-MPN meets access standard for specialists (at least three available physicians within 30-mile/60-minute radius) but not the access standard for primary treating physicians (at least three available physicians within 15-mile/30-minute radius) in 8 Cal. Reg. 9767(a). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 5.03; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.12; SOC, Section 7.53, Medical Provider Network – Establishment and Maintenance].

See also, Pike v. City of Long Beach, 2019 Cal. Wrk. Comp. P.D. LEXIS 455 (BPD), holding that although WCJ had jurisdiction to determine medical treatment dispute due to defendant's untimely utilization review, applicant did not rebut the presumption of correctness of MTUS pursuant to Labor Code §§ 4604.5 and 5307.27, where report of PTP failed to cite any peer-reviewed scientific, medical evidence, nationally recognized professional standards, treatment guidelines, diagnosis studies, or used systematic methodology required by Labor Code § 4610.5(c)(2) and 8 Cal. Code Reg. §§ 9792.21 and 9792.21.1, in support of the RFA. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02[1], 5.04[1], 22.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.01[3]; SOC, Chapter 7.36, Utilization Review.]

Recano v. J. Brand, Inc., Travelers Insurance Company, 2018 Cal.Wrk.Comp.P.D. LEXIS 443 (BPD).

Applicant sustained injury on 7/30/12 to lumbar spine which led to a low back fusion. The PTP surgeon requested home healthcare following surgery. At the time of injury and throughout post-surgical recovery, the applicant lived alone. Defendant initially authorized home healthcare for a period of two months following the surgery. The applicant self-procured home health care services by hiring her housekeeper to assist her.

The applicant's PTP noted that the applicant during the period he had requested home healthcare that the applicant moved around the exam room with difficulty and used the assistance of a walker, complaints of pain in the low back and right leg, worsened with activities and weather changes, that she was ambulating with a walker, that she has persistent lower back pain which worsened with activities. With respect to applicant's activities of daily living, the PTP wrote: "Today, I would like to request authorization again for home health care 5 hours a day for 5 days a week as she lives alone. She is unable to drive or go shopping for any food or do any basic activities of daily living by herself." On June 2, 2017, Dr. Pelton submitted a prescription for an additional three-week period of home health care services, five hours per day, five days per week.

Defendant timely submitted the RFA to UR which denied the requested treatment. The UR physician based his denial on a definition of homebound, "Homebound is defined as 'confined to the home.' To be homebound means: The individual has trouble leaving the home without help (e.g., using a cane, wheelchair, walker, or crutches; . . . because of the occupational illness or injury."

Applicant appealed the UR denial to IMR. In upholding the UR determination, the IMR based the decision on the MTUS Chronic Pain Medical Treatment 2016 Guidelines for home health services, which provided that, 'For home health care extending beyond a period of 60 days, the physician's treatment plan should include referral for an in-home evaluation by a Home Health Care Agency Registered Nurse, Physical Therapist, Occupational Therapist, or other qualified professional certified by the Centers for Medicare of Medicaid in the assessment of activities of daily living to assess the appropriate scope, extent, and level of care for home health care services. . .Per the submitted documentation, the patient was noted to have undergone lumbar fusion. The treatment plan included a request for home care to assist

with home activities and chores. However, there is a lack of significant objective evidence on examination indicative of functional deficits indicating the patient is on homebound status to support the requested treatment. As such, the request for Home [*sic*] care, five hours per day for four weeks is not medically necessary.'

Applicant sought review by filing a DOR for hearing on applicant's appeal. The WCJ held that applicant's petition failed to establish that IMR determination exceeded the powers of the AD resulting in a plainly erroneous finding of fact. Applicant sought reconsideration.

In reversing the WCJ, the WCAB first held that the WCAB's 'authority to review an IMR determination includes the authority to determine whether it was adopted without authority or based on a plainly erroneous fact that is not a matter of expert opinion. *These grounds are considerable and include reviews of both factual and legal questions*.' Next the WCAB reviews the definition of 'homebound' requiring in home healthcare. Turning to the MTUS, the WCAB wrote that the 'Applicant's use of a walker is, by definition, objective evidence sufficient to establish her homebound status. (Cal. Code Regs., tit. 8, § 9792.24.2.) In this case, it is apparent that the IMR reviewer failed to consider the RFA *and* the physicians' reports in light of the 2016 MTUS for home health care.'

'In Stevens v. Workers' Comp. Appeals Bd. (2015) 241 Cal.App.4th 1074 [80 Cal.Comp.Cases 1262], the Court of Appeal held that the Workers' Compensation Appeals Board (WCAB) has jurisdiction to review an IMR determination to consider whether denial of the requested medical treatment was without authority. The decision states that the WCAB's "...authority to review an IMR determination includes the authority to determine whether it was adopted without authority or based on a plainly erroneous fact that is not a matter of expert opinion. ***These grounds are considerable and include reviews of both factual and legal questions****. ..." (Stevens, supra, 241 Cal.App.4th at p. 1100.) (Emphasis added.) Stevens leaves no doubt that the WCAB and its WCJs have jurisdiction to review an IMR determination for that stated purpose.'*

* * *

IMR applied the 2016 Guideline to affirm UR de-certification. However, before affirming the UR denial of the RFA, IMR should have analyzed the validity of the UR denial pursuant to the applicable authority and the facts of this case. Applicant's use of a walker is, by definition, objective evidence sufficient to establish her homebound status. (Cal. Code Regs., tit. 8, § 9792.24.2.) In this case, it is apparent that the IMR reviewer failed to consider the RFA and the physicians' reports in light of the 2016 MTUS for home health care. Because the medical record substantiating the need for treatment is a requirement, the DWC form RFA and the attached documents must be read together as a whole. The purpose of the required documentation, such as a narrative report, is to expand upon and flesh out the RFA. A report may contain the injured worker's treatment history, the justification for the requested treatment, or a description of the requested treatment.

The IMR determination states that all medical records were reviewed, including the records of Dr. Pelton and Dr. Falkinstein. In Dr. Pelton's May 23, 2017 report, he described applicant as "living alone, unable to drive or go shopping for any food or do any activities of daily living by herself" and that she was "ambulating with a walker." (Applicant's Ex. 7.) In his May 22, 2017 report, after applicant's fusion surgery, Dr. Falkinstein noted that applicant "moves around the exam room with difficulty and uses the assistance of a walker" and that her pain in the low back and right leg was worsened with activities. (Applicant's Ex. 4.) These factual observations by both of applicant's physicians of her functional deficits contradict the finding by IMR that there is "a lack of significant objective evidence on examination indicative of functional deficits indicating the patient is on homebound status."

The reports of Dr. Falkenstein and Dr. Pelton and all the medical evidence marked as "received" by IMR establish that applicant was "homebound." Their reports document that she was unable to leave home or to perform activities of daily living without help, i.e., the use of a walker or a cane. Here, after observing applicant's mobility impairment, Dr. Pelton opined that there was a medical necessity for her to be provided with three more weeks of home health care.

The IMR reviewer applied an incorrect standard in evaluating applicant's "homebound status." The reviewer stated, "it appears the patient is attending physical therapy and no longer confined to the home (homebound) to warrant home health care." The 2016 MTUS Guideline defines "homebound" as having trouble leaving the home without help (e.g., using a cane or walker). The record reflects that applicant had trouble leaving the home without help, and used a cane, a quad cane, and a walker to ambulate because of her occupational injury. (Cal. Code Regs., tit. 8, § 9792.24.2.)

We find by clear and convincing evidence that the IMR determination was adopted without authority and based on plainly erroneous facts that are not a matter of expert opinion. Critical deficiencies in the IMR determination include the application of an incorrect legal standard and failure to consider the factual observations set forth in the treating physician's reports. As such, the IMR determination was adopted without and in excess of the AD's authority and is subject to re-review by IMR. (Lab. Code, § 4610.6(i).)'

Recano v. J. Brand, Inc., Travelers Insurance Company, 2018 Cal.Wrk.Comp.P.D. LEXIS at pg. 446 (BPD)

Ramirez v. Jaguar Farm Labor Contracting, 2018 Cal.Wrk. Comp. P.D. LEXIS 442 (BPD)

Applicant claimed injury to various parts of the left upper extremity occurring on July 5, 2016. Defendant accepted left wrist only. Applicant's PTP raised the potential need for surgery and diagnosed the applicant with tendinitis of the left wrist and left wrist joint pain. Subsequently the PTP found the applicant P&S with 7% WPI. Applicant objected and submitted an online request for a QME panel in the specialty of chiropractic. Defendant timely objected to the Medical Unit regarding the panel specialty of chiropractic as "inappropriate for the disputed medical

issues" and requested an orthopedic panel in lieu of chiropractic on the basis that "[i]t is in the applicant's medical interest to have a QME in orthopedic surgery to establish a credible, objective medical cause for her symptoms".

On March 16, 2018, the Medical Unit issued a response letter to defendant's request, which states in its entirety: "This is in response to your 10/13/17 request to have the Medical Director determine appropriateness of medical specialty for Panel # 7141808 under Title 8.C.C.R. § 31.5(a)(10). The contested claim involves surgery and the use of prescription medication that is outside the scope of practice of a Chiropractor. A medical specialty change to Orthopedic has been approved. Enclosed is the replacement panel #2232550."

The matter proceeded to an expedited hearing on June 21, 2018 on the issue of whether the chiropractic panel is inappropriate as determined by the Medical Unit. The WCJ found that the applicant's request for a QME panel was valid, but that a chiropractic panel is inappropriate for this claim as determined by the Medical Unit. The WCJ consequently ordered the parties to utilize the orthopedic QME panel number 2232550. The WCJ explained that because the Applicant's left wrist injury involves surgery and prescriptions, and a licensed chiropractor may not practice surgery or use any drug or medicine, it is reasonable to conclude that a chiropractor is inappropriate to assess such a condition. Applicant sought reconsideration.

The WCAB reversed holding that a Chiropractic PQME was an appropriate specialty to evaluate applicant's left wrist injury despite need for surgery and use of prescription medication which is outside scope of chiropractic medicine, reasoning that although a chiropractor may not perform surgery or prescribe medications, nothing prevents chiropractic QME from opining that evaluations or referrals for surgery or medications may be necessary, and deferring determination of medical necessity of those modalities to appropriate physicians. (Title Section 31.5(a)(10); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[1], [2], [4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[1], [2], [4].])

The party first requesting a QME panel has the legal right to designate the panel specialty pursuant to section 4062.2(b). (See also Cal. Code Regs., tit. 8, § 30.5 ["Medical Director shall utilize in the QME panel selection process the type of specialist(s) indicated by the requestor"].) However, as stated by the WCJ, that right is not absolute. The opposing party may submit a written request for a replacement QME panel in another specialty to the Medical Director on the basis that the chosen specialty "is medically or otherwise inappropriate for the disputed medical issue(s)" pursuant to AD Rule 31.5(a)(10). Either party may appeal the Medical Director's decision regarding the appropriateness of the panel specialty to a WCJ as provided in AD Rule 31.1 (b).

In the instant matter, applicant objected to Dr. Wagner's opinions regarding diagnosis, prognosis, and work status. The Medical Director provided the following rationale for a replacement QME panel in orthopedic: "[t]he contested claim involves surgery and the use of prescription medication that is outside the scope of practice of a Chiropractor." There is no other discussion in the Medical Director's letter regarding what would render chiropractic QME medically or otherwise inappropriate for the disputed medical issues in this case.

It is acknowledged that a chiropractor may not perform surgery or prescribe medications. However, this does not preclude a chiropractor from acting as a QME. QMEs are expressly required to "[r]efrain from treating or soliciting to provide medical treatment, medical supplies or medical devices to the injured worker." (Cal. Code Regs., tit. 8, § 41(a)(4).) Chiropractic QME may not provide treatment to an injured worker while also acting as the QME and thus, applicant's specific treatment needs are not relevant to whether chiropractic is a medically appropriate specialty in this matter.

The AD Rules also restrict QMEs from commenting on current medical treatment disputes. Although a QME must discuss whether the injured worker will need future medical care, the QME "shall not provide an opinion on any disputed medical treatment issue." (Cal. Code Regs., tit. 8, § 35.5(g)(2).) The Labor Code permits a request for a medical-legal evaluation for disputes over the compensability of an injury (Lab. Code, § 4060), objections to the extent of permanent impairment and limitations or "the need for future medical care" (Lab. Code, § 4061), or objections "concerning any medical issues ... not subject to Section 4610 [utilization review]" (Lab. Code, § 4062(a)). Disputes regarding current medical treatment are generally governed by other procedures independent of the QME process. (See Lab. Code, §§ 4062(b)-(c), 4610.5.)

Applicant's objection letter to Dr. Wagner's opinions identified the disputed issues as "diagnosis, prognosis, and work status." Treatment, including potential surgery and the use of prescription medication, was not specified as one of the disputed issues. If disputes arise as to applicant's current medical treatment, those disputes must be resolved through the applicable process as discussed above. Nothing prevents a chiropractic QME from opining that evaluations or referrals for surgery or medications may be necessary as part of applicant's future medical care, but deferring determination of the medical necessity of those modalities to the appropriate physicians.

Additionally, all QMEs must complete a course of instruction in disability evaluation report writing. (Cal. Code Regs., tit. 8, § 11.5.) Chiropractic QMEs are also required to be certified. (See Lab. Code, § 139.2(b); Cal. Code Regs., tit. 8, §§ 11(a)(4), 14.) This includes certification in workers' compensation evaluation through a mandatory course that addresses, among other topics, the proper use of the AMA Guides and medical treatment utilization schedule (MTUS). (Cal. Code Regs., tit. 8, § 14.) Chiropractors are consequently held o the same standard as other physicians that act as QMEs.

Ramirez v. Jaguar Farm Labor Contracting, 2018 Cal.Wrk. Comp. P.D. LEXIS at pg. 446.

Garcia v. Barrett Business Services, 2018 Cal.Wrk. Comp. P.D. LEXIS 529, 84 Cal.Comp.Cases 350 (BPD).

While employed as a truck driver, the applicant suffered traumatic brain injury on 3/6/2013, and was ultimately transferred into Center for Neuro Skills (CNS) in July 2017. On March 15, 2018, applicant's PTP submitted an RFA for applicant's continued stay at CNS. Defendant responded to the RFA on March 22, 2018 by requesting additional information. On March 26, 2018, a UR determination issued.

In his Report, the WCJ explains that he found that defendant's UR determination was untimely and therefore invalid. The WCAB found that the WCJ is correct that an untimely UR is invalid. However, in making that determination, the WCJ had failed to address the specific statutory provisions of Labor Code section 4610(i) that apply when an RFA involves "concurrent" medical treatment in the form of an inpatient stay, like applicant's inpatient stay at CNS. The WCAB held that LC 4610(i)(3) requires that when the employee's condition is one in which the employee faces an imminent and serious threat to his or her health, a "concurrent" UR decision, "shall be made in a timely fashion that is appropriate for the nature of the employee's condition, *but not to exceed 72 hours* after the receipt of the information reasonably necessary to make the determination. Further, LC 4610(i)(4)(A) requires that when a utilization reviewer decides to deny the recommendation of a treating physician in the midst of treatment, that determination must be communicated to the requesting physician within 24 hours of the decision, which did not occur in this case. An untimely UR determination or untimely communicated UR determination allows the WCJ to address medical necessity.

". . .Under Labor Code section 4610(i)(3), when the employee's condition is one in which the employee faces an imminent and serious threat to his or her health, a "concurrent" UR decision, "shall be made in a timely fashion that is appropriate for the nature of the employee's condition, but not to exceed 72 hours after the receipt of the information reasonably necessary to make the determination." (Italics added; see also Cal. Code Regs., tit. 8, § 9792.9.1(e)(3).) In this case, the record reflects that defendant did not make a UR decision within 72 hours of receiving the RFA.

Moreover, Labor Code section 4601(i)(4)(A) provides that when a utilization reviewer decides to deny the recommendation of a treating physician in the midst of treatment, that determination must be communicated to the requesting physician within 24 hours of the decision. That did not occur in this case. A UR decision that is not timely communicated is untimely, and a WCJ may determine the medical treatment request. (Bodam v. San Bernardino County/Department of Soc. Servs. (2014) 79 Cal. Comp. Cases 1519, 1521 [2014 Cal. Wrk. Comp. LEXIS 156] (significant panel decision) ["A defendant is obligated to comply with all time requirements in conducting UR, including the timeframes for communicating the UR decision"].)"

Editors' Comments: Although the Garia decision was poorly written in terms of organization and presentation of relevant facts, the issue address by the WCAB is of critical importance for both sides to understand. Specifically, anytime the treatment involves a 'condition which is one in which the employee faces an imminent and serious threat to his or her health, a "concurrent" UR decision, "shall be made in a timely fashion that is appropriate for the nature of the employee's condition, but not to exceed 72 hours after the receipt of the information reasonably necessary to make the determination. Further, LC 4610(i)(4)(A) requires that when a utilization reviewer decides to deny the recommendation of a treating physician in the midst of treatment, that determination must be communicated to the requesting physician within 24 hours of the decision, which did not occur in this case.' What was not address was the definition of 'imminent and serious threat to his or her health', which the Court left for another day.

See also, Franklin v. Solano County Probation Department, 2019 Cal. Wrk. Comp. P.D. LEXIS 248 (BPD), holding the predesignating of orthopedic surgeon as PTP was not valid because predesignating of PTP must be either an "internist, pediatrician, obstetrician-gynecologist, or family practitioner" pursuant to DWC Form 9783 and 8 Cal. Code Reg. § 9780. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 5.03; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.12.; SOC, Section 7.49, Predesignating of PTP]

Ussery v. City of Modesto Police Department, 2019 Cal. Wrk. Comp. P.D. LEXIS 307 (BPD)

Applicant, a police officer sustained a specific and CT injury to cervical spine, lumbar spine, left knee, hypertensive cardiovascular disease, sleep/consciousness, upper digestive tract, and coronary heart disease as a result of an automobile accident while on duty.

Applicant sought independent medical review of a utilization review determination denying medications Gabapentin and Amitriptyline prescribed the PTP.Although the IMR determination upheld the UR denial, the decision stated: "A complete record of what treatments had transpired to date was not furnished. The additional rationale provided for the determination that the prescriptions for Gabapentin and Amitriptyline was not medically necessary included an absence of a showing in the medical records of applicant's "meaningful, material, and/or substantive improvements in function (if any) achieved through ongoing ... use." The WCJ denied applicant's appeal of the IMR decision affirming the UR denial of medications as it involves medical questions, and was therefore not a proper subject matter for an IMR appeal under LC 4610(h). Applicant sought appeal to the WCAB.

The WCAB by Panel decision held that applicant may appeal an IMR determination to the Appeals Board, limited to the following grounds: (1) the administrative director acted without or in excess of his or her powers, (2) the Administrative Director's determination was procured by fraud, (3) the independent medical reviewer had a material conflict of interest, (4) the determination was the result of bias based on race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, or (5) the determination was the result of an erroneous finding of fact not subject to expert opinion. (LC 4610.6(h))

Here applicant argues that insufficient medical records were provided to independent medical review, pursuant to LC 4610.5(l)(1), which requires the employer to provide "under rules adopted by the Administrative Director," all records relevant to applicant's current medical condition and the medical treatment being provided by the employer. The rules adopted by the Administrative Director require the employer to provide "all reports of the physician relevant to the employee's current condition produced within six months prior to the date of the request for authorization ... ." (Cal. Code Regs., § 9792.10.5, subd. (a)(1)(A).) The IMR determination was expressly based upon a failure to provide an adequate medical record.

A failure to provide a complete medical record is not a medical question that excludes judicial review. There is clear and convincing evidence that the IMR determination was the result of plainly erroneous findings of fact as a matter of ordinary knowledge and not a matter that is subject to expert opinion as described in 4610.6(h)(5), and for that reason the determination was without or in excess of the powers of the Administrative Director.

XIII. Medical-Legal Procedures

Rizzo v. PropPark Inc. 2018 Cal. Wrk. Comp. P.D. LEXIS 492 (BPD)

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

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.

(i) Subdivisions (e) and (g) shall not apply to oral or written communications by the employee or, if the employee is deceased, the employee's dependent, in the course of the examination or at the request of the evaluator in connection with the examination.

Administrative Director (AD) Rule 35(k) states in pertinent part that:
The Appeals Board shall retain jurisdiction in all cases to determine disputes arising from objections and whether ex parte contact in violation of Labor Code section 4062.3 or this section of Title 8 of the California Code of Regulations has occurred. If any party communicates with an evaluator in violation of Labor Code section 4062.3, the Medical Director shall provide the aggrieved party with a new panel in which to select a new QME or the aggrieved party may elect to proceed with the original evaluator . . . .
(Cal. Code Regs., tit. 8, § 35(k).)

Applicant claims injury to his neck, back, hand, fingers and hernia on February 5, 2016. The selected QME issued a report and thereafter supplemental reports requested by the defendant. In one of the supplemental reports the QME in discussing the issue of TD period noted "The patient has sent me a letter confirming this fact but pairs with it the qualifying statement that his intention was to look for some sort of sedentary work (in other words, work within his restrictions). It appears to me very reasonable that if he has restrictions that aren't being accommodated, he might seek other work that he is capable of. . ." Defendant sought to strike the QME based upon inproper ex parte communications sent by the applicant and not served on defendant citing LC 4062.3(i). The WCJ held for the applicant and denied defendant's request for an alternate QME.

The Board reversed holding that "after completion of examination and without the request of QME LC 4062.3(g) prohited ex parte communication between the applicant and the QME. This violation of LC 4062.3(g) entitled the defendant to a new QME. The Board noted that LC 4062.3(i) allowing ex parte communications is limited to communications *actually made during* evaluation or communications made at request of doctor in connection with evaluation. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.06[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[4][e].]; SOC, Section 14.41, Communications with AME/QME].

Herrera v. Koreana Plaza Markert, 2019 Cal. Wrk. Comp. P.D. Lexis 238 (BPD)

Applicant sustained a crush/laceration injury to hand, and claimed injury to neck, back, and upper extremities. No medical evidence existed regarding treatment or injury to neck, back and upper extremities. Counsel for applicant requested PQME in the specialty of Chiropractic medicine. Defendant objected pursuant to 31.5(a)(10), and sought an orthopedic hand surgery panel. The Medical Unit found defendant's objection valid and issued an alternate panel in orthopedic hand surgery. The WCJ followed the determination of the Medical Unit. Applicant sought removal.

On removal the WCAB held that "the general legal standard for purposes of determining the appropriate medical specialty for replacement QME's by the Medical Unit, and by implication WCJs, is laid out in Rule 31.5(a)(10), which states that after review of "all appropriate records" it is determined that "the specialty chosen by the party holding the right to designate a specialty is medically or otherwise *inappropriate* for the disputed medical issue(s)." In other words, the standard to be applied is not whether a given specialty is *more appropriate*, but rather, whether the selection of specialty by the party holding the right to designate such specialty is medically *inappropriate*."

Here the WCAB in denying removal found that due to the absence of evidence relating to the back, neck and upper extremities, this case was limited to a crushed/lacerated hand injury, and thus the specialty of chiropractic medicine was inappropriate. The WCAB wrote that "[we] do not believe it is proper to bootstrap a medical specialty specifically sought by an Applicant solely for tactical reasons". See also, Tallent v. Infinite Resource, 2014 Cal. Wrk. Comp. P.D. LEXIS 141, Ramirez v. Jaguar Farm Labor Contracting, 2018 Cal. Wrk. Comp. P.D. LEXIS 442; 8 Cal. Code Reg. 30.5, 31.1(b), 31.5(a)(10) [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §

Editor's Comments: Although the defendant prevailed in Herrera v. Koreana Plaza Market, the holding is really harmful to defendant's who wish to avoid the use of pain management and chiropractic doctors as QME. Under Herrera the standard is not whether an alternate specialty is "more appropriate", but rather, whether the selected specialty is "completely inappropriate". This standard makes the use of Pain Management and Chiropractic QME's even more difficult for defendants to avoid.

But, see also, Conejo v. Sierra West Drywall Inc., 2018 Cal. Wrk. Comp. P.D. LEXIS 553 (BPD) holding that a telephone call made to applicant by panel qualified medical evaluator seeking clarification regarding review and comment of videotapes did not constitute impermissible ex parte communication, nor provide a basis for removal of QME, but fell with the exception pursuant to LC 4062.3(i) ; [[See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 22.06[3], 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[4][e], Ch. 19, § 19.37.]

See also, Rivera v. Western Consolidated Equities, 2019 Cal. Wrk. Comp. P.D. LEXIS 88 (BPD), holding that the DEU rating was not ex parte communication where sent concurrently to opposition, but constitutes "information" which requires service 20 days prior to opposition pursuant to LC 4062.3(e). However, under Suon v California Dairies (2018) 83 Cal. Comp. Cases 1803, replacement panel is not automatic. Rivera v. Western Consolidated Equities, 2019 Cal. Wrk. Comp. P.D. LEXIS 88 (BPD); Citing and discussing Maxham v. Cal. Dept. of Corrections (2017) 82 Cal. Comp. Cases 136; Suon v California Dairies (2018) 83 Cal. Comp. Cases 1803; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 22.06[1][d], [3], 22.11[18], 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[4][d], [e], Ch. 19, § 19.37.]

See also, Osorio v. Agilent Technologies, 2019 Cal. Wrk. Comp. P.D. LEXIS 250 (BPD), holding technical violation involving service of report by QME does not automatically result in new panel.

See also, Lee v. Xchanging, 2019 Cal. Wrk. Comp. P.D. LEXIS 268 (BPD) holding that the mere dismissal of attorney by applicant did not justify new QME panel citing and discussing Romero v. Costco Wholesale (2007) 72 Cal.Comp.Cases 824 (Significant Panel Decision); However, where panel qualified medical evaluator was permanently unavailable, new panel was necessary to ensure due process and fair trial; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 22.11[6], 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[6], Ch. 19, § 19.37; SOC, Section 14.29, Medical-Legal Process – Represented Employee]

See also, Sanchez v. Employ Bridge aka Select Staffing, 2019 Cal. Wrk. Comp. P.D. LEXIS 254 (BPD), holding that WCJ exceeded his authority by ordering replacement QME panel due to PQME unavailability for deposition reasoning that although 8 Cal.Code Reg. 35.5(f) requires qualified medical evaluator to be available for deposition within 120 days of notice of deposition, unavailability for deposition per 35.5(f) is not one of enumerated circumstances for obtaining replacement panel pursuant to 8 Cal. Code Reg. 31.5(a). ; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 22.11[6], 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[6], Ch. 19, § 19.37; SOC, Section 14.42, Timeliness Requirements.]

See also, Garcia v. Kim-Dun, 2019 Cal. Wrk. Comp. P.D. LEXIS 280 (BPD) holding that an additional PQME in second specialty is only proper by either agreement between the parties or upon petition and order of the WCAB compelling issuance of additional panel; Defendant not liable for additional QME panel improperly obtained. ; 8 Cal. Code Reg. 31.7(b); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[7], [9]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[7], [9]; SOC, Section 14.52, Subsequent Evaluations and Additional QME]

See also, Ponce De Leon v. Southern Calif. Edison, (September 2019) 47 CWCR 194, (BPD), holding that Labor Code section 4060 et seq. which governs disputes over compensability, does not limit the admissibility of a medical reports/consultative reports obtained at the party's own expense is admissible.

22.11[1], [2], [4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[1], [2], [4]. SOC, Section 14.29, Medical-Legal Process.]

XIV. Trial and MSC Procedure

Hovanesian v. Arcadia Transit Inc., 2019 Cal. Wrk. Comp. P.D. LEXIS 418.

Witnesses not undisclosed at MSC excluded despite defendant's claim that they were necessary for impeachment and rebuttal purposes, as issue was raised at MSC and defendant failed to show good cause for failure to list them on pre-trial conference statement. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 26.04[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.45[1]; SOC, Section 15.41, MSC – Close of Discovery].

XV. Permanent Disability

Marquez v. LA Unified School District, 2018 Cal. Wrk. Comp. P.D. LEXIS 488 (BPD)

Defendant failed to meet burden of proof in establishing apportionment by substantial medical evidence and opinion of PQME who merely stated that industrial chemical exposure aggravated and accelerated thyroid carcinoma is insufficient. Editor's Comments: This opinion is another example of the lack of substantial evidence and not the rule that apportionment can never exist where the injury is due to aggravation resulting in the acceleration of an otherwise non-industrial condition/diagnosis. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 8.05[1]-[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.40; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Ch. 9.] See also Accord, Qualcomm, Inc v WCAB (Brown), (2019) 84 CCC 531 (W/D); Hennessey v. Compass Group, (2019) 2019 Cal.Wrk. Comp. P.D. LEXIS 121, 84 CCC 756 (BPD).

Garietz v. Vertis Communication, 2018 Cal. Wrk. Comp. P.D. LEXIS 552 (BPD)

Where employee files petition to reopen after receiving award of permanent partial disability and permanent disability is found to be total, award of permanent total disability is retroactive to applicant's original permanent and stationary date, and that employee's transition from temporary disability to permanent disability sets date for beginning COLAs; COLA/permanent total disability indemnity applies upon applicant being declared permanently partially disabled, not date that permanent disability is determined to be total citing and applying Brower v. David Jones Construction (2014) 79 Cal. Comp. Cases 550 (En Banc Decision). ; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 8.08[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.50[1], [2].]

Hennessey v. Compass Group, (2019) 2019 Cal.Wrk. Comp. P.D. LEXIS 121, 84 CCC 756 (BPD).

PQME found medical apportionment on post 1/1/13 DOI. Counsel for applicant secured a VR report to rebut the 1.4 modifier. The VR report failed to address whether or not the medical apportionment had been consider. The WCJ followed the opinion of the AME rejecting the report of the applicant's VR expert. Applicant sought reconsideration.

Two issues were presented on reconsideration. The WCAB was asked to address whether the 1.4 modifier was subject to rebuttal using VR evidence on a on or after a 1/1/13 DOI. May a VR report which fails to address medical apportionment constitute substantial evidence which may be relied upon.

The WCAB affirmed WCJ's following the opinion of the AME. Further, that although the reports of the vocational expert were admissible to rebut the 1.4 modified, the VR report and opinion did not constitute substantial evidence to rebut scheduled permanent disability rating. WCAB reasoned that to rebut permanent disability rating, vocational expert must explain whether or not the medical apportionment, as identified in medical evidence, was considered and how it affected his or her conclusions. The VR report failed to explain why he failed explain whether he had considered nor the basis for not applying the apportionment found by the orthopedic AME. In determining the VR report admissible, WCAB found that applicant was entitled to use vocational evidence to attempt to rebut permanent disability rating under permanent disability rating schedule for post-1/1/2013 industrial injury pursuant to Labor Code §

4660.1. In doing so the WCAB rejected defendant's assertion that changes in Labor Code § 4660.1, removing language regarding consideration of future diminished earning capacity, made vocational expert evidence irrelevant and inadmissible for post-1/1/2013 dates of injury. The WCAB stated that the 2012 amendment of Labor Code § 4660.1 did not eliminate adjustment factor but rather standardized factor to multiple of 1.4, and provisions in Labor Code and regulations enacted contemporaneously with Labor Code § 4660.1 support position that vocational expert reports are still admissible and not limited to dates of injury prior to 2013. See also, accord, Sandoval v. The Conco 2019 Cal. Wrk. Comp. P.D. LEXIS 299 (BPD); [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;]

XVI. Psychiatric Injury

Wilson v. State of Ca/Cal Fire (2019) 84 Cal.Comp. Cases 393, 2019 Cal. Wrk. Comp. LEXIS 29 (En Banc)

Editor's comments: Two comments. First, in part this maybe a win for the defendant as factor/evidence involving the mechanism of injury do not appear to be proper for consideration on the issue of 'catastrophic'. Second, recall the 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, which held that a new condition created by/or resulting from medical treatment is not apportionable. Under the Wilson decision, 'catastrophic injury' resulting in psychiatric injury due to treatment, the awarded psychiatric PD might not be subject to apportionment.

Applicant claims injury occurring on 5/13/14 to his lungs, psyche, left eye, head, brain, heart and circulatory system, while employed as a firefighter. Defendant accepted injury but disputed heart, circulatory system, and liability for PD for applicant's psychiatric injury. The injury arose out of exposure to fumes and smoke which resulted in blisters, rashes, shortness of breath, nausea, vomiting, low back pain, neck pain, headache and dizziness (when standing), crusty bilateral eye discharge, difficulty speaking, and sore threat with swelling to the left side of his neck, ulcers in his throat and mouth and resulted in the applicant be hospitalized and put on oxygen. Ultimately the Applicant was admitted to ICU and stayed in the hospital for approximately 2 weeks, during which time he was intubated and put on a mechanical respirator.

"Our review of extrinsic sources did not provide us with a clear, useable definition of "catastrophic injury" for purposes of interpreting section 4660.1(c)(2)(B). However, based on our analysis, we conclude that the statutory language of section 4660.1(c)(2)(B) focuses on the nature of the injury, as reflected in the statutory examples included in the section by the Legislature. The nature of the injury will vary with the individual circumstances of each case. Thus, determination of whether an injury is catastrophic under section 4660.1(c)(2)(B) will be a fact-driven inquiry. Section 4660.1(c)(2) permits an increased impairment rating "if the compensable psychiatric injury resulted from" a catastrophic injury. If the psychiatric injury is a compensable consequence of the physical injury, the statute's language reflects that the psychiatric injury must result from a catastrophic injury in order for the employee to receive an increased rating for the psychiatric injury. This indicates that the inquiry into whether an injury is catastrophic is limited to looking solely at the physical injury, without consideration for the psychiatric injury in evaluating the nature of the injury. The injury must therefore be deemed catastrophic independent of the psychiatric injury.

Although the focus in determining whether an injury is catastrophic is on the physical injury, the employee must prove the psychiatric injury was predominantly caused by actual events of employment in order to receive an increased impairment rating under section 4660.1(c)(2)(B). Determination of causation of a psychiatric injury requires competent medical evidence. (Rolda v. Pitney Bowes, Inc. (2001) 66 Cal.Comp. Cases 241, 245) The causation threshold for a psychiatric injury is predominant as to all causes combined. The evaluating physicians must render an opinion as to whether the psychiatric injury was predominantly caused by actual events of employment. The physicians must further specify if the psychiatric injury is directly caused by events of employment or if the psychiatric injury is a compensable consequence of the physical injury.

The nature of the injury sustained is a question of fact for the WCJ. Whether an injury is "catastrophic" under section 4660.1(c)(2)(B) is therefore a factual/legal issue for the WCJ to determine. The WCJ, after considering all the medical evidence, and other documentary and testimonial evidence of record, must determine whether the injury is "catastrophic" under section 4660.1(c)(2)(B).

The applicant underwent separate QME's in the fields of neurology, internal medicine, cardiopulmonary, ophthalmology and psychology. Symptoms and diagnosis by the QME Neurologist and internist included constant fatigue, persistent chest pain impairing the ability to walk long distances or runs, and lifting. The applicant "also complained of impaired memory, cognition, difficulty with sleep 'episode of loss of consciousness'. On one occasion the applicant was watching a graphic television show where they were cutting open a man. After viewing this graphic scene, Mr. Wilson blacked out. He noted prior to blacking out, he felt bilateral tingling in his arms." Applicant's wife "noted that his whole body was shaking for perhaps 10 seconds" when he blacked out.

The QME Internist diagnosed the applicant with ARDS, possible asthma and chronic insomnia on an industrial basis. The QME Internist (1) described the ARDS as 'a life-threatening condition involving the lungs that impairs gas exchange'; (2) that 'survivors [of ARDS] commonly have chronic decrement of lung function and persistent symptoms even five years after the original insult, showing the severe nature of the condition'; and (3) that the applicant 'can no longer fight fires, given his sensitivity to smoke.'

The cardiopulmonary QME noted that the "records [he] reviewed reflect that indeed [applicant] had significant issues requiring even intubation due to respiratory failure' and diagnosed the applicant with "hypersensitivity pneumonitis with respiratory failure generalized paular eruption resolved/pulmonary hypertension;" allergic diathesis, severe; toxic metabolic encephalopathy with cognitive impairment.

The ophthalmological QME diagnosed applicant with industrially caused a cataract in his left eye, refractive error and vitreous liquefaction in both eyes. The applicant reported that he cannot read anymore and complained of blurred vision and glares in both eyes, as well as reduced depth perception.

Each of the QME's in the fields of neurology, internal medicine, cardiopulmonary, ophthalmology, determined substantial WPI. The Psychiatric QME diagnosed applicant with post-traumatic stress disorder (PTSD) and a severe major depressive disorder predominantly caused by actual events of employment. In a subsequent re-evaluation report, the Psychiatric QME opined that 100% of applicant's PTSD was "due to the direct effects of an actual event of employment." The depression was "deemed to be 75% related to his untreated PTSD and 25% related to not being able to continue to work as a firefighter/EMT." Applicant was deemed "temporarily totally disabled from May 13, 2014 until the present on a psychiatric/psychological basis." The Psych QME also wrote, '… while the primary injury, a Post-traumatic Stress Disorder, arose out of the effects of and treatment for a compensable physical injury, it is my opinion that it is not precluded from compensability for disability by Labor Code Section 4660.1 pursuant to SB863 for dates of injury effective January 1, 2013; because in my opinion, the industrial psychological injury represents a **catastrophic injury**.' The Psych QME assigned a GAF score of 47 with a 36% WPI rating with apportionment of 90% of his permanent impairment to actual events of employment and 10% to his reaction to not being able to continue to work as a firefighter/EMT. The Psych QME deferred to the trier of fact if this reaction would also represent an actual event of employment, "in which case there would be 100% apportionment of the cause of the permanent impairment/disability to actual events of his employment."

The matter proceeded to trial on the various issues including applicant's entitlement to a disability award for psychiatric injury. After submission the WCJ submitted rating instructions which did not include WPI for psychiatric injury. The WCJ awarded 66% permanent without PD for

"A fact-driven analysis of whether an injury is catastrophic may encounter a range of circumstances beyond the statutorily specified injuries covered by section 4660.1(c)(2)(B). There are factors the trier of fact may consider in determining whether an injury may be deemed catastrophic. These factors include, but are not limited to, the following, as relevant:

1. *The intensity and seriousness of treatment received by the employee that was reasonably required to cure or relieve from the effects of the injury.*
2. *The ultimate outcome when the employee's physical injury is permanent and stationary.*
3. *The severity of the physical injury and its impact on the employee's ability to perform activities of daily living (ADLs).*
4. *Whether the physical injury is closely analogous to one of the injuries specified in the statute: loss of a limb, paralysis, severe burn, or severe head injury.*
5. *If the physical injury is an incurable and progressive disease.*

Not all of these factors may be relevant in every case and the employee need not prove all of these factors apply in order to prove a "catastrophic injury." This list is also not exhaustive and the trier of fact may consider other relevant factors regarding the physical injury. In determining whether an injury is catastrophic, the trier of fact should be mindful of the legislative intent behind section 4660.1(c)."

See also, Deverse v. City of Porterville, 2019 Cal.Wrk.Comp. P.D. LEXIS 340 (BPD) holding that injury suffered by after school assistant struck in head with thrown football was not "sudden and extraordinary" per LC 3208.3(d) so as to create exception to six-month employment rule applicable to psychiatric injuries, as applicant was aware that children were throwing and kicking balls in her vicinity, and that because applicant knew of potential hazard.); [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]. SOC, Section 5.31; Psychiatric Injury – Six Month Rule].

See also, Paquini v. Spring Hill Jersey Cheese, Inc., 2019 Cal. Wrk. Comp. P.D. LEXIS 38 (BPD), holding psychiatric injury arising out of MVA barred by six-month employment requirement was not "sudden and extraordinary" employment event, where applicant failed to establish, that steering wheel on truck he was driving locked up causing him to lose control of truck; and there was no testimony offered to establish that locking of wheel was "uncommon, unusual and unexpected" occurrence in type of truck applicant was driving. [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].]

See also, Chou v. County of Riverside, 2019 Cal. Wrk. Comp. P.D. LEXIS 28 (BPD), holding that lawful, nondiscriminatory personnel actions, under Labor Code 3208.3(h) addresses causation of injury and sets forth rule that psychiatric injury will be deemed non-compensable if at least 35 percent of injury is caused by lawful, nondiscriminatory personnel actions, and is not a proper basis for apportionment of PD under Labor Code § 4663.; [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].]
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].]

psych. The WCJ explained that the basis for not including impairment for the psychiatric injury in the permanent disability rating was that pursuant to " LC 4660.1(c)(2)(b) a 'catastrophic' [injury] is required for an award of compensation in terms of permanent disability for a psychiatric injury. The Legislature includes certain examples which are loss of limb, paralysis, severe burn, or severe head injury. The examples in the statute are obviously something that have exceptionally grave consequences that massively affect an individual's ability to live an ordinary life. However, one can say that about many injuries. One can look at the dictionary definitions of catastrophic but obviously a great many injuries have a huge effect on an individual. Ultimately, the undersigned sometimes must look at the words of Justice Stewart and reach the conclusion that Justice Stewart did, certainly on an altogether different subject, "I know it when I see it". It is not the consequences of an injury that are catastrophic but the injury itself."

Applicant sought reconsideration on the issue of preclusion for psychiatric disability.

On reconsideration by En Banc decision the Board first addressed whether the psychiatric injury was direct or a compensable consequence holding it arose out of medical treatment and therefore was a compensable consequence. Next, the Board discussed whether it arose out of a 'violent act'. Again the Board held the psychiatric injury was not the result of a 'violent act'.

The Board then turned to the exception of to the prohibition of an award of PD for compensable consequence psychiatric injury pursuant to LC 4660.1 of 'catastrophic injury'. In defining 'catastrophic injury', the Board wrote, " A fact-driven analysis of whether an injury is catastrophic may encounter a range of circumstances beyond the statutorily specified injuries covered by section 4660.1(c)(2)(B). There are factors the trier of fact may consider in determining whether an injury may be deemed catastrophic. These factors include, but are not limited to, the following . . .(1) The intensity and seriousness of treatment received by the employee that was reasonably required to cure or relieve from the effects of the injury; (2) The ultimate outcome when the employee's physical injury is permanent and stationary; (3) The severity of the physical injury and its impact on the employee's ability to perform activities of daily living (ADLs); (4) Whether the physical injury is closely analogous to one of the injuries specified in the statute: loss of a limb, paralysis, severe burn, or severe head injury; (5) If the physical injury is an incurable and progressive disease.

See also, Duran v. California Dept. of Correction, 2019 Cal. Wrk. Comp. P.D. LEXIS 186 (BPD), holding that applicant was not the "victim of violent act" (LC 3208.3/4660.1(c)(2)) where circumstances of motor vehicle accident did not rise to level of "violent act"; Vehicles remained under control, applicant did not strike her body, or lose consciousness, without airbag deployment, and applicant able to exited vehicle without assistance. [See generally Hanna, Cal. Law of Emp. Inj and Workers' Comp. 2d 402[3][a], [b],[ff], 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, Arevalo v. Ca. Department of Corrections, 2019 Cal. Wrk. Comp. P.D. 166 (BPD), holding no psychiatric injury resulting from being victim of violent act without direct exposure to violent act. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3][a], [b], 4.05[2][d], 4.69[3][a]-[c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[3][a], [b].]

See also, Flintroy v. Pacific Bell Telephone, 2019 Cal. Wrk. Comp. P.D. LEXIS 148 (BPD), six month aggregate employment shall include all periods of employment, both before and after injury. [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].]

See also, Valdes v. City of Torrance, 2019 Cal.Wrk.Comp. P.D. LEXIS 456, holding that psychiatric injury not barred by LC 4660.1(c)(1) where substantial medical evidence established that psychiatric injury resulted directly from incident that caused applicant's industrial injury, i.e., actual events of applicant's employment, and was not compensable consequence of his orthopedic injury. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3][a], [b], [ff], 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].]

XV. Subsequent Injury Benefit Trust Fund

Kwasigroch v. City of LA, 2017 Cal. Wrk. Comp. P.D. LEXIS 344 (BPD).

The applicant sustained successive injuries to different difference parts of body which resulted in successive settlements via Stipulation with Request for Award for 63% and 74 respectively. Applicant sought additional benefits against the Subsequent Injuries Benefits Trust Fund arguing that through addition of the two awards the applicant was 100% disabled and therefore was entitled in terms of dollars to the difference between the two Stipulated Awards and essentially TD for life. Defendant argued that the applicant was not totally disabled as the successive awards should be combined. The WCJ found for defendant noting the complete absence of clear and substantial medical, factual, or vocational evidence to support addition of disabilities or finding of permanent total disability under Labor Code § 4662(a) or (b). The WCJ held that LC 4751 requires use the CVE absence factual, medical, and/or vocational evidence substantial evidence supporting aggregation rather than application of the CVE. Applicant sought reconsideration.

The WCAB upheld the WCJ. In doing so, the WCAB interpreted Labor Code § 4751 to require combining impairments using CVC unless there is clear and substantial medical, factual, or vocational evidence to support addition of disabilities or finding of permanent total disability under Labor Code § 4662(a) or (b). The WCAB found no such no such evidence in this case. In interpreting Labor Code § 475,1, the WCAB that a holding which required in all cases the addition of prior and subsequent impairments/disabilities as asserted by applicant would lead to absurd results by creating significantly disparate awards for workers with same injuries based on whether those injuries were subject of one claim or multiple claims. Further, this interpretation of statute satisfies purpose of Labor Code § 4751 is consistence with the policy of encouraging employers to hire workers with preexisting disability and to provide previously injured workers with additional benefits if they sustain substantial subsequent injury which would allow addition where supported by factual, medical, and/or vocational evidence. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d, section 8.09, 31.20[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 8, §§ 8.01, 8.02.]

XVI. Supplemental Job Displacement Benefits

Supplemental Job Displacement Benefits-Physician's Return-to-Work Forms-Failure of Physician's to send Return-to-Work form does not preclude applicant's entitlement to SJDB and it is the defendant who has burden to obtain Physician's RTW form. Fndkyan v. Opus One Lab, 2019 Cal. Wrk. Comp. P.D. LEXIS 51 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 35.01, 35.02; Rassp & Herlick, California Workers' Compensation Law, Ch. 21, §§ 21.01, 21.02.]

XVII. Temporary Disability

Bedoya v. Ashley Furniture Industries, 2018 Cal.Wrk. Comp. P.D. LEXIS 396 (BPD)

Applicant sustained injury for the period August 25, 2016. On August 26, 2016, defendant gave applicant notice that the plant where he worked was being closed, that he would no longer be actively working, and that he would be laid off as of October 25, 2016. Applicant claimed injury to his shoulders, hands, fingers, back (lumbar), cervical spine, heels, waist, left knee, ankles, and feet for the period ending August 25, 2016. On August 1, 2017, the Application was amended to include applicant's cervical spine and heels and on January 1, 2018, it was amended to include his pulmonary system.

The QME after examination found the application to be TD with restriction of a limitation "to light work with no lifting greater than 30 pounds and no repetitive bending or stooping, no repetitive work with the bilateral hands at or above shoulder level, and no heavy gripping or grasping with the bilateral hands." The PTP also found the application to be TD with a need for surgery with restrictions of limitation to "light work no lifting over 30 pounds. No repeated bending, stooping, twisting; no repetitive work with the bilateral hands at or above shoulder level and no heavy gripping and grasping with the bilateral hands." The parties proceeded to trial on May 23, 2018, on the issue of TD.

> *"An injured employee who is terminated from his or her employment for good cause is not entitled to temporary disability; however, the defendant has the burden of proving that the applicant was terminated for cause. (Butterball Turkey Co. v. Workers' Comp. Appeals Bd. (Esquivel) (1999) 65 Cal.Comp.Cases 61 (writ den.); Peralta v. Party Concepts (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 100 (Appeals Board panel decision).) "Good cause" in this context relates to the employee's misconduct, (e.g., Romero v. Sunbelt USA, Inc. (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 728 (Appeals Board panel decision) [applicant not entitled to temporary disability where she was terminated for good cause due to excessive absenteeism and where, but for applicant's termination, employer would have offered modified work and accommodated applicant's work restrictions]; Flores v. Wal-Mart Associates, Inc. (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 24(Appeals Board panel decision) [applicant not entitled to temporary disability benefits based on stipulation that applicant was "terminated for failure to comply with company policy"]; Toloza v. Dolan Foster Enterprises (2011) 2011 Cal. Wrk. Comp. P.D. LEXIS 51 (Appeals Board panel decision) [applicant not entitled to temporary disability for period following her termination due to theft from employer].)*
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> *An employer remains liable for temporary disability after terminating an employee if it fails to establish good cause by showing employee misconduct. (Manpower Temporary Services v. Workers' Comp. Appeals Bd. (Rodriguez) (2006) 71 Cal.Comp.Cases 1614 (writ den.) [applicant entitled to temporary disability where, although there was evidence he had ongoing attendance and performance problems, these problems were not the basis for his discharge]; cf. Reynoso v. Lusamerica Foods (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 134 [employer's at-will termination of probationary employee is not equivalent to termination for cause and did not bar the employee's entitlement to temporary disability].) Moreover, this is not a situation where the injured employee is not entitled to temporary disability because he or she voluntarily left work and/or choose to retire. (Gonzales v. Workers' Comp. Appeals Bd. (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477]; King v. Anaheim Police Dept. (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 153 (Appeals Board panel decision).)*
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> *This is more akin to a situation where an injured employee's inability to work for full wages is a function of his or her industrial injury, which results in the employee being entitled to temporary disability benefits. (Pham v. Workers' Comp. Appeals Bd. (2000) 78 Cal.App.4th 626, 634 [65 Cal.Comp.Cases 139]; Gonzales, supra; see also, e.g., Davies v. Los Angeles Unified Sch. Dist. (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 89 (Appeals Board panel decision); Univ. of Southern Cal. v. Workers' Comp. Appeals Bd. (Miller) 48 Cal.Comp.Cases 477 (writ den.).) We conclude that this same principle applies if the employee's inability to work for full wages is a function of the employer's decision to close a plant or otherwise layoff the employee.*
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> *Also, we note that, "Under the 'odd lot' doctrine, a worker who is only partially disabled may receive temporary total disability payments if his partial disability results in a total loss of wages." (Pacific Employers Ins. Co. v. Industrial Acc. Com. (Stroer) (1959) 52 Cal.2d 417, 421 [24 Cal.Comp.Cases 144].) This doctrine places the burden on the employer to show that work within the capabilities of the partially disabled employee is available. If the employer does not make this showing, the employee is entitled to temporary total disability benefits. (Id., at 422); (General Foundry Service v. Workers' Comp. Appeals Board (Jackson) (1986) 42 Cal.3d 331, 339, fn. 5 [51 Cal.Comp.Cases 375]; Hardware Mutual Casualty Co. v. Workers' Comp. Appeals Bd. (1967) 253 Cal.App.2d 62 [32 Cal.Comp.Cases 291].)"*
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> *Bedoya v. Ashley Furniture Industries, 2018 Cal.Wrk. Comp. P.D. LEXIS at pg. 399 (BPD)*

The WCAB upheld the award of TD by the WCJ noting that the applicant was laid off due to plant closure and not termination for cause/misconduct, and no evidence was presented that defendant offered applicant modified work within restrictions imposed by applicant's doctors. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[4][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.11.]

See also, Camberos v. Lyon, dba Taco Bell, 2019 Cal. Wrk. Comp. P.D. LEXIS 75 (BPD), holding that AWE based on anticipated increase in state minimum wage rate is proper pursuant to LC 4453(c)(4) and the earning capacity doctrine. Camberos v. Lyon, dba Taco Bell, 2019 Cal. Wrk. Comp. P.D. LEXIS 75 (BPD); But see also, contra?, Gutierrez v. NB&T Industries, 2019 Cal. Wrk. Cop. P.D. LEXIS 76 [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 6.02[1], [2], [5]; Rassp & Herlick, California Workers' Compensation Law, Ch. 5, §§ 5.01, 5.04.]

See also, Rodriguez v. Rubio's Restaurants, 2019 Cal.Wrk.Comp. P.D. LEXIS 231 (BPD), holding that applicant was not entitled to temporary disability indemnity where injured worker is released to modified duty and employer offers applicant job within his or her work restrictions, and applicant never responded to offer; Defendant was not required to repeatedly offer applicant modified work based on further medical reporting releasing applicant to modified work where applicant had resigned from her employment; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[4][b], [c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, §§ 6.10, 6.11; SOC, Section 9.26, Temporary Disability for Terminated Employees.]

Editor's Comments: In analyzing Temporary Disability two issues are always presented: (1) Eligibility and (2) Calculation. An applicant is 'Eligibility' from the date of a compensable industrial injury until the applicant is determined to be MMI/P&S. 'Calculation' is limited generally to 104 weeks payable at two-thirds of the applicants AWW. Issues raised in 'Calculation' include 'Wage Loss Calculation', AWW based upon 'Earning Capacity', offers of medically appropriate modified/alternate work, and applicant's termination for cause as basis for terminate defendant's liability of TDI.

"In general, temporary disability indemnity is payable during the injured worker's healing period from the injury until the worker has recovered sufficiently to return to work, or until his/her condition reaches a permanent and stationary status. [Citation.]" (Huston, supra, 95 Cal.App.3d at p. 868.) "The purpose of temporary disability indemnity is to provide interim wage replacement assistance to an injured worker during the period of time he or she is healing and incapable of working. [Citations.]" (Meeks Building Center v. Workers' Comp. Appeals Bd. (2012) 207 Cal.App.4th 219, 224 [142 Cal.Rptr.3d 920], italics added (Meeks); see Department of Rehabilitation, supra, 30 Cal.4th at p. 1291.) "The employer's obligation to pay temporary disability benefits is tied to the employee's 'actual incapacity to perform the tasks usually encountered in one's employment and the wage loss resulting therefrom.' [Citation.]" (Meeks, supra, at p. 224, italics added, fn. omitted; accord, Livitsanos v. Superior Court (1992) 2 Cal.4th 744, 753 [7 Cal.Rptr.2d 808, 828 P.2d 1195](Livitsanos) [temporary disability benefits "are a substitute for lost wages during a period of temporary incapacity from working"]; Signature Fruit, supra, 142 Cal.App.4th at p. 795 ["temporary disability is intended as a substitute for lost wages during a period of transitory incapacity to work"].) The duty to pay TDI "continues during the period in which an injured worker, while unable to work, is undergoing medical diagnostic procedure and treatment for an industrial injury. [Citation.]" (J.C. Penney Co. v. Workers' Comp. Appeals Bd. (2009) 175 Cal.App.4th 818, 824 [96 Cal.Rptr.3d 469], italics added (J.C. Penney); accord, Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd. (1983) 34 Cal.3d 159, 168 [193 Cal.Rptr. 157, 666 P.2d 14] (Braewood).)

"That TDI is intended as wage replacement is inferable from section 4653, which requires temporary total disability be calculated as 'two-thirds of the average weekly earnings during the period of such disability, consideration being given to the ability of the injured employee to compete in an open labor market.' Because '[t]emporary disability indemnity is intended primarily to substitute for the worker's lost wages, in order to maintain a steady stream of income' [citations], an employer's obligation to pay TDI to an injured worker ceases when such replacement income is no longer needed. Thus, the obligation to pay TDI ends when the injured employee either returns to work [citations] or is deemed able to return to work [citation], or when the employee's medical condition achieves permanent and stationary status [citations]." (Department of Rehabilitation, supra, 30 Cal.4th at pp. 1291–1292.)

Regarding the amount of the disability payment, "[i]f the injury causes temporary total disability, the disability payment is two-thirds of the average weekly earnings during the period of such disability, consideration being given to the ability of the injured employee to compete in an open labor market." (§ 4653, italics added.) "If the injury causes temporary partial disability, the disability payment is two-thirds of the weekly loss in wages during the period of such disability." (§ 4654, italics added; see also § 4657 [defining "weekly loss in wages"].)

Significantly, "our system of workers' compensation does not provide a make-whole remedy. 'The Workers' Compensation Law is intended to award compensation for disability incurred in employment. "The purpose of the award is not to make the employee whole for the loss which he [or she] has suffered but to prevent [the employee]

Skelton v. WCAB (2019, 6th Appellate District) 39 Cal. App. 5th 1098, 84 Cal. Comp. Cases 795, 2019 Cal. App. LEXIS 874

> *and his [or her] dependents from becoming public charges during the period of [the employee's] disability."' [Citation.] 'The purpose of [workers'] compensation is to rehabilitate, not to indemnify, and its intent is limited to assuring the injured [worker] subsistence while he [or she] is unable to work and to effectuate his [or her] speedy rehabilitation and reentry into the labor market.' [Citation.] Consistent with this view, for example, section 4653 provides that payment for temporary total disability is only 'two-thirds of the average weekly earnings during the period of such disability.'" (Department of Rehabilitation, supra, 30 Cal.4th at p. 1300.)"*
>
> *Skelton v. WCAB (2019, 6th Appellate District) 39 Cal. App. 5th at pg. 1105*
>
> *See also, Spiva v. The Baby Connection, 2019 Cal.Wrk. Comp. P.D. LEXIS 381 (BPD), holding that termination for cause as basis for termination or denial of TD requires a determination of misconduct as alleged, and the employer's having conducted reasonable investigation of alleged misconduct by applicant and having good faith belief that applicant engaged in misconduct is insufficient. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[4][b], [c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, §§ 6.10, 6.11; SOC, Section 9.26; Temporary Disability for Terminated Employees].*

The applicant sustained injury to ankle in July 2012, and to shoulder in July 2014, while working for respondent Department of Motor Vehicles (DMV). The parties disputed whether the applicant was entitled to TDI for wage loss for time missed at work to attend medical appointments and for medical evaluation. Applicant continued working after each injury and, based on her work restrictions, was placed on modified work in approximately May 2017. She missed work to attend appointments with her treating physicians and to attend two visits with the panel qualified medical evaluator (QME). Applicant's work hours were not flexible, and she could not visit her doctors on weekends. She initially used her sick and vacation leave, but eventually her paycheck was reduced for missed time at work. She was then "forced to miss doctors' appointments because she could not afford to attend." Skelton's shoulder injury was found permanent and stationary on November 30, 2017. Applicant contended that pursuant to the holding of Department of Rehab v. WCAB (Lauher) 30 Cal.4th 1281, an employee is entitled to TDI unless the employee has returned to work *and* the employee's injury is permanent and stationary. Because her injury was not permanent and stationary, applicant argued that she was entitled to compensation, including "full reimbursement of sick and vacation time used," for time spent attending medical treatment with her treating physicians and medical evaluations with the QME. The WCJ found for defendant on applicant's entitlement to TD for loss wages due to attending medical treatment, but for applicant on applicant's entitlement to reimbursement for loss wages due to attending med-legal examinations.

On reconsideration, the WCAB held that the Applicant was not entitled to TD indemnity for time lost from work due to attend medical treatment appointments following her return to work, but was entitled to compensation for wage loss for attending medical-legal evaluations, when continued working following injury citing Department of Rehabilitation v. WCAB (Lauher) (2003) 30 Cal.4th 1281, 135 Cal.Rptr. 2d 665, 68 Cal. Comp. Cases 831 and interpreting/applying LC 4600(e)(1). Skelton v. WCAB (2019, 6th Appellate District) 39 Cal. App. 5th 1098, 84 Cal. Comp. Cases 795, 2019 Cal. App. LEXIS 874; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[1], [4][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.01[1].]

WORK COMP INDEX

UPDATED ENTRIES FOR 2022

Work Comp Index – Update 2022

The following represents the draft materials which are anticipated to be included in the 2022 Work Comp Index. These summaries of some of the most recent case decisions which 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 will be . 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.

Summary/Entries for 2022 Worker Comp Index

WCAB Jurisdiction—Professional Athletes—Contracts of Hire—Where the contract for hire was not made in California, no work was performed within the State of California, jurisdiction over Workers' Compensation claim is not established merely by the fact that the employer's principal place of business and supervision of employee were both within the State of California. Farley v. San Francisco Giants, 2020 Cal. Wrk. Comp. P.D. LEXIS 292; Interpreting and applying, LC Section 3600.5(a), 5305; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d, Sections 3.22[2], [3], 21.02, 21.06, 21.07[5]; Rassp & Herlick, California Workers' Compensation Law, Ch. 13, Section 13.01[2].]

Exclusive Remedy Rule--Employment Status--Persons Assisting Police Officers in Active Law Enforcement> Private citizens were engaged in "active law enforcement" and fell within scope of police officer's law enforcement duties, and thus injuries limited to the exclusive remedy doctrine of workers' compensation despite deputy's misrepresentation that 911 call was likely due to inclement weather and was "no big deal", and failure to pass along information suggesting potential criminal activity. Gund v. County of Trinity, (2020 Cal. Supreme Court) 10 Cal. 5th 503, [85 Cal. Comp. Cases 735; 2020 Cal. LEXIS 5542]; Discussing Labor Code, Section 3366; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 3.48; Rassp & Herlick California Workers' Compensation Law, Ch. 2, § 2.04[2].]

Injury AOE/COE—Injury Outside Normal Work Hours—Off-Duty Police Officers—Off-Duty Police officer in his personal vehicle who was involved in confrontation initiated by another driver resulting in injuries but involving first a legal verbal altercation and then illegal conduct wherein the other driver attempted to hit the applicant with his vehicle which then resulted in a physical altercation when the off-duty police officer attempted to restrain the driver. Injuries sustained during the later event held compensable under LC 3600.2. Orozco v. City of Redwood City, PSI, 2020 Cal. Wrk. Comp. P.D. LEXIS 205; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.130[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.05[4].]

Presumption of Compensability—Cancer—Peace Officers—Rebuttal—QME opinion that cancer was "rare" was not sufficient to rebut LC 3212.1 presumption where evidence established applicant's exposure to known carcinogens, including diesel exhaust, outdoor air pollution, second-hand smoke, cadmium, and benzene, thereby shifting burden to defendant to affirmatively establish that applicant's exposure to these agents was "not reasonably linked" to his synovial sarcoma. Baker v. County of Riverside, 2020 Cal. Wrk. Comp. P.D. LEXIS 179 (BPD); See also, Arias v. County of LA, 2020 Cal. Wrk. Comp. P.D. LEXIS 210 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.138[2], [4][b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.07[5][c], [7]; SOC, Section 5.18, Presumption of Injury].

Permanent Disability—WCAB's Reservation of Jurisdiction—Progressive Insidious Diseases—Not all manifestations of Hepatitis C constitute progressive diseases as matter of law, and that under circumstances in this case, where applicant's Hepatitis C had resolved/cured, there was no progressive insidious disease for purposes of reserving jurisdiction over permanent disability. Arias v. County of LA, 2020 Cal. Wrk. Comp. P.D. LEXIS 210 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.03, 8.04, 32.02[1]; Rassp &

Herlick, California Workers' Compensation Law, Ch. 7, § 7.30, Ch. 14, §§ 14.04, 14.06[3]; SOC, Section 6.26; Disability Awarded After Five Years].

Petitions to Reopen—Good Cause—Newly Discovered Evidence—Good Cause to reopen prior Stip established where petition to reopen filed within one year of first evidence provided by PTP report opining arthritic hip caused by industrial exposure although beyond five years of injurious industrial exposure but where causation of injury not previously addressed by AME; "New evidence established true nature of injury". Lewis v. County of Riverside, 2020 Cal. Wrk. Comp. P.D. LEXIS178 (BPD); Citing and discussing LC 5803, "Good Cause" and LC 5412, CT DOI for Statute of Limitation; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 31.04; Rassp & Herlick, California Workers' Compensation Law, Ch. 14, § 14.08[1], [4]; SOC, Section 6.27; Five-Year Statute – Reopen for Good Cause].

Settlements—Compromise and Release Agreements—Setting Aside—Failure to provide notice to unrepresented applicant of right to PQME constituted 'good cause' to set aside order approving compromise and release WCAB; The minimal record in this case should have triggered inquiry by WCJ into adequacy of settlement supporting 'good cause' to set aside OACR. Moreno v. Hidden Valley Ranch, 2020 Cal. Wrk. Comp. P.D. LEXIS 194 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 29.05[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 18, § 18.11[1]; SOC, Section 6.28, Reopening Compromise and Release].

Medical Treatment—Reasonableness and Necessity—Testing Donors for Kidney Transplantation—Testing of donors for potential kidney donation was medical treatment necessary to cure or relieve admitted industrial kidney/renal injury. Putnam v. City of Salinas, 2020 Cal. Wrk. Comp. P.D. LEXIS 172 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 5.01[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.01[1]; SOC, Section 7.3, Scope of Care – Applied Cases].

Temporary Disability—Offers of Regular, Modified or Alternative Work—COVID-19 Shutdown—Applicant determined to be entitled to TD where not MMI and where although employer accommodated worker through modified position until emergency statewide COVID-19 shelter-in-place orders placed all employees, including applicant, out of work and left applicant with no employment for approximately two months. Salvador Corona v. California Walls, Inc. dba Crown Industrial Operators, Truck Insurance Exchange, 2020 Cal.Wrk. Comp. P.D. LEXIS 256; Citing and discussing McFarland Unified School Dist. v. WCAB (McCurtis) (2015) 80 Cal. Comp. Cases 199 (Writ Denied); Manpower Temporary Services v. WCAB (Rodriguez) (2006) 71 Cal. Comp. Cases 1614 (Writ Denied); Dennis v. State of California (2020) 85 Cal. Comp. Cases 389 (En Banc Opinion). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[4][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.11.]

Medical Treatment—Independent Medical Review—Appeals— IMR determination was a plainly erroneous finding of fact in violation of LC 4610(h)(1) & (5) where IMR failed to review all documents submitted by Defendant as the IMR physician is obligated to consider the entire record. Sanchez v. Central Contra Costa Transit, 2020 Cal. Wrk. Comp. P.D. LEXIS 189 (Board Panel Decision); [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; SOC, Section 741, Independent Medical Review].

Medical Provider Network—Employer's Liability for Outside Treatment—No denial of care when (1) applicant, sought treatment from non-MPN physician, (2) defendant, *approved* requested treatment through utilization review less than two weeks later but objected to said treatment being provided by physician outside of MPN, and (3) no evidence that applicant ever attempted to obtain treatment within MPN nor that defendant refused or denied such treatment within MPN; Commissioner Sweeney, dissenting, noted that defendant's failure to timely investigate applicant's need for psychiatric treatment could establish a denied care supporting treatment outside of the MPN. Williams v. Mar Pizza, Inc., 2020 Cal. Wrk. Comp. P.D. LEXIS 211 (Split Panel Decision); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 5.03; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.12; SOC, Section 7.41, Independent Medical Review].

Temporary Disability—Offers of Suitable Modified Work—Inadequate Offer—Defendant has burden of proof to establish a valid offer of modified work and for an offer to be valid, even where made by text, that offer must include (1) job description and (2) whether job offered was within applicant's work restriction and thus Applicant held entitled to temporary disability benefits. Nelson v. SP Plus, 2020 Cal. Wrk. Comp. P.D. LEXIS 166 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[4][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.11; SOC, Section 9.24, Termination of Liability for Payment].

Supplemental Job Displacement Benefits—Termination of job on date certain does not relieve employer of liability for SJDB as the impossibility of returning to work is not basis for releasing defendant from its obligation to provide SJDB voucher under Labor Code § 4658.7(b); Released from obligation to provide voucher requires that employer offer regular, modified or alternative work within 60 days of employee's permanent and stationary date setting forth job description within applicant's physical restrictions. Corona v. Kern High School District, 2020 Cal. Wrk. Comp. P.D. LEXIS 186 (BPD); See also, Peery v. Cal. Dept. of Water Resouces, 2020 Cal. Wrk. Comp. P.D. LEXIS 318 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 35.01; Rassp & Herlick, California Workers' Compensation Law, Ch. 21, § 21.01; SOC, Section 11.4; Supplemental Job Displacement Benefit].

Supplemental Job Displacement Benefits—Penalties and Sanctions— Defendant's failure to provide SJDB voucher did not amount to unreasonable refusal of payment to warrant Labor Code § 5814 penalties, nor was defendant's conduct sanctionable under Labor Code § 5813 where job was to end on date certain and employer/defendant therefore contested applicant eligibility for SJDB. Corona v. Kern High School District, 2020 Cal. Wrk. Comp. P.D. LEXIS 186 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 35.01; Rassp & Herlick, California Workers' Compensation Law, Ch. 21, § 21.01.]

Average Weekly Wages—Part-Time Employment and Earning Capacity—Despite job limited to 250-hours, and history of seasonal and irregular earning, AWW properly calculation based on earning capacity pursuant to LC 4453 (c)(4). Corona v. Kern High School District, 2020 Cal. Wrk. Comp. P.D. LEXIS 186 (BPD); See also, Meadowbrook Insurance Co. V. WCAB (Gamez) 2020 Cal. Wrk. Comp. LEXIS 79; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 6.02[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 5, §§ 5.01, 5.04.]

Permanent Disability—Time to Commence Payment of Indemnity—Self-Imposed Penalty—In the absence of a genuine dispute over whether the applicant is owed PD, indemnity rate, or whether PD is total, defendant must initiate PD payment within 14 days of the ending of TD with payment retroactive back to last day of TD. Where there was no dispute regarding injury, disability or indemnity rate, liability exists for 10 percent increase on all accrued permanent disability indemnity pursuant to LC 4650(d). Collins v. Macro Crane Rigging, 2020 Cal. Wrk. Comp. P.D. LEXIS 192 (BPD); Citing and discussing Rivera v. WCAB (2003) 112 Cal. App. 4th 1124, 68 Cal. Comp. Cases 1460; Leinon v. Fishermen's Grotto (2004) 69 Cal. Comp. Cases 995 (En Banc Decision); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 10.40[1], 32.04[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.06[2], Ch. 7, § 7.50[1], Ch. 11, § 11.11[1]; SOC, Section 13.2, Penalty Under LC 4650].

Discovery—Deposition—Order Compelling—Order compelling deposition of applicant's wife held proper as basis for sanctions where Applicant and Applicant's Attorney failed to facilitate deposition where purpose of deposition of wife was on alleged medical restrictions and ability of applicant to appear and testify at trial, and Applicant failed to attend hearing. Lin v. Automobile Club of Southern California, 2020 Cal. Wrk. Comp. P.D. LEXIS 169 (BPD); Discussing LC 5813 & 8 Cal. Code Reg. 10561; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 23.15; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.35; SOC, Section 14.15, Legal Privilege].

Sanctions—Award of sanctions, jointly and severally against applicant, his attorney, and attorney's law firm for violation of order instructing applicant to appear as adverse witness at trial upheld. Lin v. Automobile Club of Southern California, 2020 Cal. Wrk. Comp. P.D. LEXIS 169 (BPD); Discussing LC 5813 & 8 Cal. Code Reg. 10561; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 23.15; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.35.]

Medical-Legal Procedure—Qualified Medical Evaluator Panel Requests—QME panel request on admitted injury with contested part of body is pursuant to LC 4062 rather than LC 4060 which is only applicable to denied claims; LC 4062 requires notice to opposing party and a waiting period of 10 days thereafter (LC 4062.2(b)) which is different than that not required by LC 4060. The 4062/4062.2 procedure prevent a party from "jumping the line" and failure to comply with the notice and waiting period will deprive the other party the opportunity to 'start the race'. Campos v. Mt. Diablo Country Club, 2020 Cal. Wrk. Comp. P.D. LEXIS 161, 85 Cal. Comp. Cases 914 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[1]; SOC, Section 14.27, Medical Legal Process on or after 1/1/05].

Settlements—Compromise and Release Agreements—Structured Settlements—Medicare Set-Asides—Although LC 4900 prohibits workers/applicant from assigning their workers' compensation claims or awards, LC 4900 does not preclude structured settlement in which liable employer or insurer arranges, with consent of injured worker, for third-party financial institution, such as life insurance company, to satisfy obligation to pay workers' compensation benefits. Willoughby v. Hoge, Fenton Jones & Appel, 2020 Cal. Wrk. Comp. P.D. LEXIS 162, 85 Cal. Comp. Cases 712 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 29.02[4], 29.09[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 18, § 18.07; SOC, Section 14.82, Compromise and Release – Structured Settlement].

Psychiatric Injury—Compensable Consequence—Subsequent Nonindustrial Event—Psychiatric injury due to death of applicant's child held compensable consequence of physical injury where death of child caused by accidental exposure by infant to industrially prescribed topical medication including Tramadol, Dextromethorphan and Amitriptyline finding it was the orthopedic injury and possible psychiatric injury from alleged wrongful termination which caused applicant to develop symptoms of depression, including poor concentration, which made her less attentive in applying medication and washing her hands, and applicant's failure to wash hands, in turn, led to her son's fatal ingestion of medication thereby causing psychiatric injury. Lujan v. Goodwill Serving the People of LA, 2020 Cal. Wrk. Comp. P.D. LEXIS 224; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3][a]-[c], 4.69[3][a], 4.41, 4.94; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, §§ 10.04[4][a], 10.06[3][a], [b].].

Discrimination—Statute of Limitations—Tolling—LC 132(a) claim barred by statute of limitations holding no equitable tolling of statute by the filing of union grievances, OSHA complaint and civil complaint where no evidence (1) establishing applicant's pursuit of these remedies provided timely notice to defendant and (2) the absence of prejudice to defendant for delayed filing of petition. Dean v. Southern California Edison, 2020 Cal. Wrk. Comp.P.D. LEXIS 238(BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 10.11[4], 24.03[9]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.27[5], Ch. 14, § 14.19; SOC, Section 6.46 Statute of Limitation].

Temporary Disability—Post-Retirement Period of Disability—Applicant held entitled to retroactive temporary disability indemnity following his retirement, when evidence established that applicant retired solely due to effects of his industrial knee injury which rendered him unable to drive bus; Pension fund payment and State Disability Payments do not constitute "wages" or "salary" for purposes of limiting defendant's liability for temporary disability payments. Bedi v. San Mateo County Transit District, 2020 Cal. Wrk. Comp. P.D. LEXIS 228 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.01[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.01[1].]

Expedited Hearings—Telephonic Trial—COVID-19 Restrictions—Due Process—No denial of due process where trial held telephonically necessitated by COVID-19 shelter-in-place restrictions. Bedi v. San Mateo County Transit District, 2020 Cal. Wrk. Comp. P.D. LEXIS 228 (BPD); See also, Ceballos v. TriMark Chefs' Toys (2020) 85 Cal. Comp. Cases 955 (BPD), and Gai v. Chevron Corp, 86 Cal. Comp. Cases __, (Significant Panel Decision). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 26.02[1], 25.09; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, §§ 16.04[3], 16.11.]

Permanent Disability—Apportionment—Prior Awards—Defendant failed to meet their burden of proof for apportionment to prior award pursuant to LC 4664(b) on overlap where only evidence was that of qualified medical evaluator, who rated applicant's impairment from subsequent heart injury under different chapter of AMA *Guides* than used for rating prior heart injury and involving different conditions, (*i.e.*, damage to heart caused by myocardial infarction caused restricted blood flow to coronary arteries, vs. left ventricular hypertrophy involving thickening of left ventricle wall); Citing and discussing Hom v. City & County of San Francisco, 2020 Cal. Wrk. Comp. P.D. LEXIS 124 (Noteworthy Panel Decision). Smith v. City of Berkeley, 2020 Cal. Wrk. Comp. LEXIS 244; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[1]-[3], 8.06[5][d], 8.07[2][a]–[c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.42[1]–[3]; The Lawyer's Guide to the AMA *Guides* and California Workers' Compensation, Chs. 6, 8.]; SOC , Section 10.35, Apportionment – Pre-Existing Disability.

Subsequent Injuries Benefits Trust Fund—Combining Disabilities to Determine Eligibility—Credit Against Payments—SIBTF credit includes addition of seven prior and subsequent permanent disabilities awards and CalPERS industrial disability retirement payments pursuant to LC 4753; Allowing credit for CalPERS industrial disability retirement payments is consistent with purpose of LC 4753 to avoid depletion of SIBTF funds and to avoid double recovery for same injuries. Baono v. State of California, Dept. of Fire and Forestry Protection, 2020 Cal. Wrk. Comp. P.D. LEXIS 219 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.09[2], [4], 31.20[4][a], [c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 8, §§ 8.02[5], 8.04[3], Ch. 16, § 16.19; SOC, Section 10.70, Subsequent Injury Benefits Trust Fund].

Supplemental Job Displacement Benefits—Eligibility For Return to Work Supplemental Program—Applicant held not entitled to Return to Work Supplemental Program (RTWSP) when serious dispute existed regarding applicant's entitlement to SJDB voucher at time parties settled applicant's case by way of Compromise and Release. Finch v. Chicos, 2020 Cal. Wrk. Comp. P.D. LEXIS 233 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 35.01, 35.03; Rassp & Herlick, California Workers' Compensation Law, Ch. 21, §§ 21.01, 21.03; SOC, Section 10.71, Return-To-Work Program]

Supplemental Job Displacement Benefits—Employer's Duty to Offer Regular, Modified, or Alternative Employment—Entitlement to Benefits When Employee Loses No Time From Work—Applicant entitled to SJDB despite no loss time from work before her employment contract was terminated as applicant *could have* lost time from work given her work restrictions, but instead chose to self-accommodate in order to stay employed; Citing and discussing Dennis v. State of California (2020) 85 Cal.Comp. Cases 389 (En Banc Decision). Prod v. San Pasqual Valley Unified School District, 2020 Cal. Wrk. Comp. P.D. LEXIS 218 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 35.01; Rassp & Herlick, California Workers' Compensation Law, Ch. 21, § 21.01; SOC, Section 11.4, Supplemental Job Displacement Benefit].

Supplemental Job Displacement Benefits—Employer's Duty to Offer Regular, Modified, or Alternative Employment—Injured worker with permanent partial disability held entitled to SJDB voucher *unless* employer makes offer of regular, modified, or alternative work, and termination from employment, irrespective of reason for termination, did not release defendant from statutory obligation to provide SJDB voucher; Citing and discussing Dennis v. State of California (2020) 85 Cal. Comp. Cases 389 (En Banc Dicision). London v. University of Redlands, 2020 Cal. Wrk. Comp. P.D. LEXIS 223; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 35.01; Rassp & Herlick, California Workers' Compensation Law, Ch. 21, § 21.01; SOC, Section 11.4 Supplemental Job Displacement Benefits].

Trials—Telephonic Trial—COVID-19 Restrictions—Due Process—Remote video trials do not per se violate a parties right to due process. In consideration of Executive Order N-63-20, the purposes of the workers' compensation system, and the covid pandemic, the default position should be that trials proceed remotely, in the absence of some clear reason why the facts of a specific case require a continuance. The party seeking the continuance has the burden of demonstrating why the continuance is required. Gao v. Chevron Corp, 86 Cal. Comp. Cases 44, (Significant Panel Decision). See also, Bedi v. San Mateo County Transit District, 2020 Cal. Wrk. Comp.

P.D. LEXIS 228 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 26.02[1], 25.09; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, §§ 16.04[3], 16.11.]

Penalties—Delay in Payment of Settlement Funds—Failure to diligently conduct investigation regarding applicant's non-receipt of initial check issued by defendant, and failed to include self-imposed penalty for delay in payment, and failure to provide insufficient explanation as to cause of delay to investigate provided sufficient basis to support WCJ imposition of LC 5814 penalties plus LC 5814.5 attorney's fees; The WCJ must accomplish fair balance and substantial justice between parties, giving consideration to factors set forth in Ramirez v. Drive Financial Services (2008) 73 Cal. Comp. Cases 1324 (En Banc Decision) when imposing 5814 penalty. Angulo v. Pacific Coast Tree Experts, 2020 Cal. Wrk. Comp. P.D. LEXIS 217 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 10.40[1], [3], 10.42, 29.04[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.11[1]-[3]; SOC, Section 13.13, LC 5814 – Principle of Reasonable Delay].

Serious and Willful Misconduct of Employer—Injury held the result of serious and willful misconduct of employer where prison warden and captain of the prison yard failed to act on a memo warning of attack by inmates where evidence established that the memo should have triggered an investigation and possible lockdown of prison for cell search. State of California, Dept. of Corrections and Rehab. v. WCAB (Ayala), 2020 Cal. Wrk. Comp. LEXIS 272 (Writ Denied). [Note: Defendant's petition for writ of review was subsequently denied on August 11, 2020, *sub nom.* State of California, Department of Corrections and Rehabilitation v. Workers' Comp. Appeals Bd. (Ayala, *et al.*), 2020 Cal. Wrk. Comp. LEXIS 72]. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.01; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.14; SOC, Section 13.40, Penalty for Serious and Willful Misconduct -- Employer].

Medical-Legal Procedure—Qualified Medical Evaluator Panel Requests—Party Seeking Reimbursement Not Entitled to Participate in Qualified Medical Evaluator Process—Co-defendant in specific injury seeking reimbursement through establishing CT but without liability for coverage during CT held not entitled to separate QME panel pursuant to LC 4062.2 as the medical-legal statutory scheme contemplates only two parties, "employer" and "employee," having the right to engage in qualified medical evaluator process. Hobbs v. North Valley Electronics Distributing, 2020 Cal. Wrk. Comp. P.D. LEXIS 239; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.06[1], [7], 22.11[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[2], Ch. 16, § 16.54[1]; SOC, Section 14.29, Medical-Legal Process – Represented Employee].

Liens—Medical-Legal—Burden of Proof—Copy Services—Copy service lien claim met its burden of proof where services provided were reasonably and necessarily incurred and actually incurred based on subpoenas and declarations from the custodian of records pursuant to 4620/4621. Failure to object and provide explanation of review (EOR) within 60 days of receipt of invoice for services results in a waiver of all objections with defendant liable for the reasonable value of services provided, plus 10 percent penalty and interest. LC 4620, 4621, 4622(a). Colamonico v. Secure Transportation, 2020 Cal. Wrk. Comp. P.D. LEXIS 226 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.08[2], 22.09[1], 27.01[8][b], 30.05[1], [2][a], [b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 17, §§ 17.70[1][c], 17.72; SOC, Section 14.65, Payment of or Objection to Medical-Legal Expense].

Costs—Interpreting Services—Defendant's Liability When No Employment Found—Defendant held liable for interpreters fees per LC 5811 despite finding of no employment and thus no injury AOE/COE. Reynoso v. Catchball Products Corp, RDG, LLC, 2020 Cal. Wrk. Comp. P.D. LEXIS 246 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 23.13[3], 27.01[8][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, §§ 16.35[1], 16.49; SOC, Section 15.111, Interpreter].

Wrongful Constructive Discharge -- Failure to Maintain Safe Work Environment -- Employer's COVID-19 Response --Claim arising out of the Covid pandemic for wrongful constructive termination raises triable issues of fact on whether the workplace conditions alleged by Plaintiff at the time of her resignation were so intolerable that a reasonable person in Plaintiff's position would have had no reasonable alternative except to resign, [which] is inherently fact-bound, particularly considering the circumstances of the case." Brooks v. Corecivic of Tennessee LLC (2020) 2020 U.S. Dist. LEXIS 162429, 85 Cal. Comp. Cases 843; [See generally Hanna, Cal. Law of Emp. Inj.

and Workers' Comp. 2d § 11.05[5]; Rassp & Herlick California Workers' Compensation Law, Ch. 12, § 12.09[4][c].]

Exclusive Remedy Rule-- Intentional Infliction of Emotional Distress and Negligent Supervision -- Employer's COVID-19 Response--Claim of negligent supervision/intentional infliction of emotional distress, held barred by the exclusive remedy rule as falling squarely within the employment/compensation bargain. The Court wrote that, although "pandemics are generally uncommon events, that does not mean Defendant's response to the pandemic falls outside the risk inherent in the employment relationship. On the contrary, one would expect employers to have some type of protocol in place to deal with this kind of catastrophic event. Brooks v. Corecivic of Tennessee LLC (2020) 2020 U.S. Dist. LEXIS 162429, 85 Cal. Comp. Cases 843; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 11.01[1], [2], 11.05[1], [5]; Rassp & Herlick California Workers' Compensation Law, Ch. 12, § 12.09[1], [4][c], [d], [e]; SOC, Section 2.19, Exception to Exclusive Remedy Rule for Conduct Outside the Compensation Bargain].

Medical Treatment—Utilization Review—Concurrent and Expedited Utilization Review Determinations— LC 4610(i) and 8 Cal. Code Reg. 9792.1(e)(6), provides that 'concurrent' UR for applicant receiving in facility care for severe neuro-rehabilitation therapy, is subject to 72-hour expedited review given serious risk of bodily injury if care were discontinued, with notification to treating physician of decision and agreement for safe discharge plan that is appropriate for applicant's medical needs. Greenhall v. CalTech, 2020 Cal. Wrk. Comp. P.D. LEXIS 269 (BPD); [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 -- Procedure].

Medical Provider Networks—Transfer of Care—Defendant upon acceptance of claim may transfer applicant's treatment into MPN regardless of date of injury without showing that there was change of condition or defective or incomplete treatment. Citing and approving Babbitt v. Ow Jing (2007) 72 Cal. Comp. Cases 70 (En Banc Decision); Vasquez v. Accurate Concrete Sawing, Inc., 2020 Cal. Wrk. Comp. P.D. LEXIS 258; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 5.03[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.12[4].]

Temporary Disability—Offers of Regular, Modified or Alternative Work—COVID-19 Shutdown—Warehouse worker entitled to temporary disability indemnity during time defendant was required to shut down due to state and local emergency orders as result of COVID-19 pandemic preventing defendant from providing a medically appropriate modified or alternate position. Citing and discussing McFarland Unified School Dist. v. WCAB (McCurtis) (2015) 80 Cal. Comp. Cases 199 (W/D), Manpower Temporary Services v. WCAB (Rodriguez) (2006) 71 Cal. Comp. cases 1614 (W/D), and Dennis v. State of Ca. (2020) 85 Cal. Comp. Cases 389 (En Banc Decision). Corona v. Cal. Walls, Inc. dba Crown Industrial Operators, 2020 Cal. Wrk. Comp. P.D. LEXIS 256 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[4][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.11; SOC, Section 9.26, Temporary Disability for Terminated Employee].

Disability—Undocumented Workers—Applicant held not entitled to temporary disability indemnity following shoulder surgery, when employer had modified work to offer applicant, but applicant was unable to work in United States due to his undocumented status. Citing and discussing Del Taco v. WCAB (Gutierrez) (2000) 79 Cal. App. 4th 1437, 94 Cal. Rptr. 2d 825, 65 Cal. Comp. Cases 343, Romero v. Plantel Nurseries, Inc., 2016 Cal. Wrk. Comp. P.D. LEXIS 672 (Noteworthy Panel Decision). Salazar v. Kodiak Roofing, 2020 Cal. Wrk. Comp. P.D. LEXIS 277 (BPD); [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; SOC, Section 9.26, Temporary Disability for Terminated Employee].

Supplemental Job Displacement Benefits—Employer's Duty to Offer Regular, Modified, or Alternative Employment— Applicant's resignation from her employment held no bar to SJDB voucher where applicant suffered permanent partial disability as result of injury and defendant did not make bona fide offer of regular, modified, or alternative work. LC 4658.7(b). Citing and discussing Dennis v. State of Cal., (2020) 85 Cal. Comp. Cases 389 (En Banc Decision). Morgan v, Living Spaces Furniture, 2020 Cal. Wrk. Comp. P.D. LEXIS 250 (BPD); [See

generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 35.01; Rassp & Herlick, California Workers' Compensation Law, Ch. 21, § 21.01; SOC, Section 11.4, Supplemental Job Displacement Benefits – Injury on or After 1/1/13].

Medical-Legal Procedure—Psychiatric Evaluations—Attorney's Attendance Not Permitted—While the Code of Civil Procedure § 2023.510 specifically permits applicant's attorneys to attend *physical* medical examinations, this does not apply to psychiatric evaluations. Citing and discussing Golfland Entertainment Centers, Inc. v. Superior Court (2003) 108 Cal. App. 4th 739, 133 Cal. Rptr. 2d 828. Roan v. Department of Social Services, 2020 Cal. Wrk. Comp. P.D. LEXIS 266 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 25.40[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.45[1]; SOC, Section 14.44, Evaluation Requirements and Rights].

Workers' Compensation Judges—Disqualification—Appearance of Bias—*Ex Parte* Communications—Petition to Disqualify WCJ for bias or the appearance of bias pursuant to LC 5311 and Code of Civil Procedure was proper where WCJ called lien claimant "bottom of the barrel", and lien claimant's counsel spoke privately with WCJ in chambers to request WCJ recuse himself due to prior statements about lien claimant. The appearance of bias may "not necessarily exist indefinitely. . . [and] the appearance of bias might pass after a time . . .," disqualified was only as to the subject case. Alvarado v. Sky Ready Mix Inc., 2020 Cal. Wrk. Comp. P.D, LEXIS 268 (BPD); [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].]

Hearings—Telephonic Trial—COVID-19 Restrictions—Due Process—On petition for removal the WCJ decision to continue trial on issue of injury AOE/COE proper where WCJ found it impossible to make credibility determinations absent in-person testimony which was suspended due to Covid-19 emergency order of Governor Newsom and WCAB not persuaded that continuation of trial in this case would result in substantial prejudice or irreparable harm so as to justify removal. Truhitte v. Santa Maria Bonita School District, 2020 Cal. Wrk. Comp. P.D. LEXIS 276 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 25.09, 26.02[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, §§ 16.04[3], 16.11.]

Injury AOE/COE—Initial Physical Aggressor Defense—Injury barred by LC 3600(a), 'initial physical aggressor', where evidence established that student yelling and inadvertently spitting on teacher/applicant prompted teacher/applicant to slap student resulting in student punching teacher/applicant; spitting was related to verbal altercation and it was teacher/applicant who first started physical altercation by slapping student, and that there was no evidence applicant was in reasonable fear of physical attack before he struck student. Citing and discussing Mathews v. WCAB (1972) 6 Cal.3d 719, 37 Cal. Comp. Cases 124. Knobler v. LA Unified School District, 2020 Cal. Wrk,. Comp. P.D. LEXIS 314 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.23; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, §§ 10.03[4], 10.04.]

Petition for Contribution—Statute of Limitations—Claim for contribution against co-defendant held not barred by one year statute of limitation pursuant to LC 5500.5(e) by the filing of DOR within one year of Order Approving C&R where DOR identified issue as "joinder" where party defendant previously joined and contribution was only remaining issue. The filing of DOR sufficient as timely 'institute proceedings' before the WCAB and comply with LC 5500.5(e) Statute of Limitations. Brotherhood Mutual Insurance Co. v. WCAB (Lewis) (2020) 85 Cal. Comp. Cases 931 (W/D); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 24.03[7], 31.13[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.15; SOC, Section 6.52, Statute of Limitations for Contribution from Co-Defendant].

Medical-Legal Procedure—Unrepresented Employees—Objections to Determinations of Treating Physician—Utilization Review Certification of Treatment—Failure to object and dispute the PTP recommended treatment as not industrial treatment pursuant to LC 4062 'concerning any medical issue not covered by LC 4060/4061 and not subject to LC 4610, and initiate PQME process until after UR certification, that treatment must be provided as there is no procedure for employer to dispute UR decision after certification. Williams v. Chino Valley Independent Fire District, 2020 Cal. Wrk. Comp. P.D. LEXIS 301 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers'

Comp. 2d § 22.06[1][b], [2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[1]; SOC, Section 7.36, Utilization Review -- Procedure].

Medical Treatment—Employer's Obligation to Provide Reasonable and Necessary Treatment—Travel Expenses—Defendant held liable to provide treatment in Sweden where applicant resides, and if treatment determined unavailable to provide funds for or make travel arrangements to secure treatment. Fuller (McCully v. Leslie's Pool Mart, Inc.., 2020 Cal. Wrk. Comp. P.D. LEXIS 303 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.01[1], 5.07[5], 5.08[1], 22.01[1][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, §§ 4.01[1], 4.04[1]; SOC, Section 7.50, Medical Control If There Is No Established Network].

Temporary Disability—Offers of Suitable Modified Work—COVID-19—Defendant held liability for TD without reduction for income applicant would have received from employment with Starbucks had his employment at that job not ended related solely due to applicant's refusal to work and subsequent termination due to 'reasonable' concerns about risk related to COVID-19 presented by high volume of contract with the public; Defendant failed to establish that work was 'reasonable available'. Ceballos v. TriMark Chefs' Toys (2020) 85 Cal. Comp. Cases 955 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[4][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.11; SOC, Section 9.26; Temporary Disability].

Public Employees—Leave of Absence Benefits—Applicant entitled to full LC 4850 pay/full salary statutory benefit even during partial leave of absence from work due to injury. LC 4850 does not distinguish between temporary partial disability and temporary total disability. Hoffman v. County of Butte Probation Department, 2020 Cal. Wrk. Comp. P.D. LEXIS 333 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 3.113[1], [2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.21[1], [7]; SOC, Section 9.43, One Year's Salary – Public Safety Employee].

Permanent Disability—Rating—Occupational Group Numbers—Permanent disability caused by single injury is rated applying same occupational group number to each of injured body parts, and where employee performs duties of multiple occupations, rating should be for occupation carrying highest percentage. Skains v. G6 Hospitality LLC dba Motel 6, 2020 Cal. Wrk. Comp. P.D. LEXIS 320 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 32.03[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.21[3]; SOC, Section 10.35, Permanent Disability Schedule].

Medical-Legal Procedure—Exchange of Information—*Ex Parte* Communications—Defendant violated LC 4062.3(b) where surveillance video sent concurrently to PQME and Counsel for applicant without providing to Counsel for Applicant 20 days prior. Although the WCJ has broad discretion, the remedy for violation of LC 4062.3(b) requires the consideration of various factors to include (1) Are the interest and rights of the objecting party in fact prejudices, (2) The length of time the PQME has been on the case; (3) After due consideration of the conduct and facts involved in the case, can the Constitutional Mandate to accomplish justice only be accomplished with a new Panel QME or AME. Citing and Discussing, Suon v. Cal. Dairies (2018) 83 Cal. Comp. Cases 1803. Martinez v. Allied Barton Security, 2020 Cal. Wrk. Comp. P.D. LEXIS 289 (BPD); [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]; SOC, Section 14.41, Communication with AME/QME].

Liens—Lien Claimant's Procedural Rights and Duties—Dismissal for Lack of Prosecution—Lien of lien claimant not subject to dismissal for lack of prosecution per 8 Cal. Code Reg. 10888(b) where lien claimant was not a party at time of settlement of case in chief by C&R. Villegas v. Ametek, Inc., 2020 Cal. Wrk. Comp. P.D. LEXIS 332 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 30.22[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 18, § 18.09; SOC, Section 15.95, Lien --]

Uninsured Employers—Employer's Appeal— A necessary element for finding that defendant was prima facie illegally uninsured is employment, and defendant claiming that applicant was *not* his employee but rather independent contractor, and thus the lack of employment, rebutted implicit prima facie determination that defendant was illegally uninsured. Ramos v. Hakim 2019 Cal. Wrk. Comp. P.D. LEXIS 560 (BPD); Labor Code 3715(d)

[See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.24[2], [3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 3, § 3.19[3]; SOC, Section 3.35, Penalties Against Uninsured Employer – Compensation Proceedings].

Employment Relationships—State Prisoners—Volunteer Work—Applicant volunteering to work in state prison kitchen during incarceration was employee within LC 3351(e) holding that "assigned work or employment" includes kitchen duties as part of volunteer work program with structured work hours and supervision, whether for pay or without pay in the prison work program. Dudley v. State of California, Dept. of Corr., 2019 Cal. Wrk. Comp. P.D. LEXIS 520 (BPD); [See generally, Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d, Section 3.100[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 2, section 2.04[6]; SOC, Section 4.30, State Prison Inmate.].

Presumption of Industrial Causation—Duty Belts and Lower Back Injury—Peace Officers—Labor Code § 3213.2 duty belt presumption, does not apply to correction officer with Department of Corrections and Rehabilitation, as it did not fall within listed agencies and applicant's status as peace officer, in itself, did not automatically entitle applicant to application of duty belt presumption. Aguirre v. State of California, 2019 Cal. Wrk. Comp. P.D. LEXIS 544 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.138[4][l]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.07[5][j]; SOC, Section 5.18, Presumption of Injury – Public Employees Covered Condition].

Medical Treatment—Home Health Care—Termination of Services—Where defendant has authorized indeterminate home health care services as reasonable medical treatment, it must, pursuant to Patterson v. The Oaks Farm (2014) 79 Cal. Comp. Cases 910 (Appeals Board significant panel decision), continue to provide those services until they are no longer reasonably required under Labor Code § 4600 to cure or relieve effects of industrial injury, but where RFA for limited duration of care or specified end date then *Patterson* would not apply. Romo v. Pacific Bell Telephone Co.. 2019 Cal. Wrk. Comp. P.D. LEXIS 525 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02, 5.04[6], 22.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, §§ 4.05[3], 4.10; SOC, Section 7.2, Scope of Care – Cure or Relieve].

Psychiatric Injury—Increased Permanent Disability—"Catastrophic" injury pursuant to LC 4660.1(c)(2)(B) for purpose of awarding PD for psychiatric injury as compensable consequence of industrial thyroid cancer given significant medical treatment, requirement for lifelong medical attention, the risk of death from her injury, supported finding that injury was catastrophic and that it was not the type of claim Legislature intended to preclude from receiving separate psychiatric disability rating; citing and discussing, Wilson v. State of Ca Cal. Fire (2019) 84 Cal. Comp. Cases 393 (En Banc Decision). Leonard v. Santa Monica-Malibu Unified School District, 2019 Cal. Wrk. Comp. P.D. LEXIS 530 (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].]

Petitions to Reopen—New and Further Disability—Credit for Permanent Disability Payments—Defendant is generally entitled to take credit by subtracting actual payments of PD made under the original award, not weeks of payment, as against a further award of PD on petition to reopen. However, where LC 4658(d) is applicable, the defendant shall take credit at the applicable rate without consideration of actual payment/bump-up/down under the original award as against the award of new and further PD, and thereafter the new and further PD awarded shall be paid at the rate reflecting a bump-up/down of 15% pursuant to LC 4658.(d) as applicable. Sedlack v. University of California, Berkeley, 2019 Cal. Wrk. Comp. P.D. LEXIS 545 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 31.04[2][b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 14, § 14.05; SOC, Section 11.6, Adjustment of PD Payments for Offer of Work].

Medical-Legal Procedure—Replacement Qualified Medical Evaluator Panels—Unrepresented applicant entitled to replacement qualified medical evaluator panel pursuant to 8 Cal. Code Reg. § 31.5(a), when applicant timely requested QME Panel but was unable to schedule appointment with any physician within 60 days. Loomis-Lyons v. County of Mendocino, 2019 Cal. Wrk. Comp. P.D. LEXIS 556; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[5], [6], [7], [10]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[5], [6], [7], [10]; SOC, Section 14.28, Medical-Legal Process].

Medical-Legal Procedure—Exchange of Information—*Ex Parte* Communications—Although no specific remedy exists for violation of Labor Code § 4062.3(b) due to ex parte communication by a party, the WCJ has wide discretion to determine appropriate remedy, and in the absence of bad faith, or intentional misconduct, good cause does not exist for imposition of attorney's fees, costs or sanctions; Citing and discussing, Maxham v. California Department of Corrections and Rehab (2017) 82 Cal. Comp. Cases 136 (En Banc Decision), and Suon v. California Dairies (2018) 83 Cal. Comp. Cases 1803 (En Banc Decision); Ortiz v. Pederson Fence & Patio Co., Inc. 2019 Cal. Wrk. Comp. P.D. LEXIS 513; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.06[1][d], [3], 22.11[18], 23.15; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[4][d], [e], Ch. 16, § 16.35.]

Medical-Legal Procedure—*Ex Parte* Communications—Petition for removal granted rescinding WCJ's order setting case for trial where no evidentiary record regarding alleged ex parte communication in violation of LC 4062.3 prior to setting over defendant's objection; The WCAB held that parties would be significantly prejudiced by trial on all disputed issues without first addressing whether defendant is entitled to new qualified medical evaluator panel, and that, despite applicant's contrary suggestion, it was not necessary for defendant to show prejudice to invoke remedy for prohibited *ex parte* communication. Jimenez v. Rodriquez Farm Labor Contractor, Inc., 2019 Cal Work. Comp. P.D. LEXIS 539 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 22.06[1][d], [3], 22.11[18], 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[4][d], [e], Ch. 19, § 19.37; SOC, Section 14.41, Communications with AME/QME].

Injury AOE/COE—Pleading Injury as Specific Injury or Occupational Illness—West Nile Virus—Applicant sustained injury in the form of West Nile Virus when his job as security guard exposed him to repeated mosquito bites, and applicant failure to specify/establish exact time, date and moment of bite was not required. Leggette v. CPS Security, 2020 Cal. Wrk. Comp. P.D. LEXIS 3 (BPD); See also, City and County of SF v. IAC (Slattery)(1920) 183 Cal. 273, and Engels Cooper Mining Co. v. IAC (Rebstock) (1920) 183 Cal. 714, both involving the Spanish Flu pandemic of 1918; Also note that on May 6, 2020, California Governor Gavin Newsom issued Executive Order N-62-20, which created a rebuttable presumption that any COVID-19 related illness is presumed to be work-related if certain conditions are met. The Executive Order (EO) is available here: https://www.gov.ca.gov/wpcontent/uploads/2020/05/5.6.20-EO-N-62-20-text.pdf; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.05[2], 4.71, 25.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, §§ 10.01[4], 10.06[1][a], [c]; SOC, Section 5.9, Occupational Disease].

Presumption of Industrial Causation—Correctional Officers—Exposure to Biochemical Substances—LC 3212.85 presumption applied to establish injury resulting in prostate cancer, where applicant established exposure to teargas and mace, as both are listed on hazardous chemical Material Safety Data Sheets. California Department of Corrections and Rehabilitation v. WCAB (Boyajian), 2020 Cal. Wrk. Comp. LEXIS 12 (WD); [See generally Hanna, Cal. Law of Emp. Inj. andWorkers' Comp. 2d Section 4.138[4][p]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.07[5][g].]

Statute of Limitations—Tolling—Claim of industrial injury due to MVA occurring prior to start of work day, held barred by one-year statute of limitations (LC 5405) when claim filed two years later, although employer knew of MVA, no evidence showing defendant knew applicant was claiming that accident was AOE/COE, and no basis found for tolling as no trigger to provide DWC1 Claim Form pursuant LC 5401/Reynolds v. WCAB (1974) 12 Cal. 3d 726, 39 Cal. Comp. Cases 768. Batista v. Lee's Paving, Inc. 2020 Cal. Wrk. Comp. P.D. LEXIS 8 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 24.04[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 14, § 14.01[2], [4]; SOC, Section 6.17, Estoppel Based on Failure to Provide Notice].

Death Benefits—Statute of Limitations—Death claim not barred by statute of limitation where filed as amendment to inter vivos claim of descendent by surviving spouse, and where filed within 1 year of death and 240 weeks of date of original injury pursuant to LC 5406. Amendment to reflect distinct adjudication number was proper and that amendment will relate back to timely filing of original application/claim. Ca. Department of Social Services v. WCAB (Magoulas) 85 Cal. Comp. Cases 303, 2020 Cal. Wrk. Comp. LEXIS 13 (W/D); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 9.01[4], 24.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 9, § 9.05, Ch. 14, § 14.11; SOC, Section 6.48, Statute of Limitation for Death Benefits].

Medical Treatment—Utilization Review—Change in Condition—WCJ may determine the issue of need for surgery/medical necessity, and then properly award back surgery where prior surgery RFA non-certified, but subsequent surgery RFA sent within one year of original RFA based on change of circumstance not submitted for UR determination. Discussing, interpreting and applying LC 4610(k). Smith v. Marin General Hospital, 2020 Cal. Wrk. Comp. P.D. LEXIS 20 (BPD); [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; SOC, Section 7.36; Utilization Review -- Procedure].

Medical Treatment—Independent Medical Review—Appeals—UR denial of electric mobility scooter upheld when IMR reviewer, relying on Official Disability Guidelines (ODG) stating that powered mobility devices are not recommended if functional mobility deficit can be addressed by prescription of cane or walker and documentation indicating that applicant was able to ambulate with cane. Ledesma v. Clow Valve Co. (McWane), 2020 Cal. Wrk. P.D. LEXIS 4 (BPD); [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; SOC, Section 7.41, Independent Medical Review].

Medical Treatment—Transportation and Mileage Reimbursement—After applicant's relocation he was held entitled to full mileage reimbursement for over 660 miles round-trip from his home to see his treating physicians; Defendant held liable for 15 percent penalty pursuant to Labor Code § 5814 for its failure to fully reimburse applicant for mileage, pursuant to Labor Code § 4600 and longstanding case law, as defendant presented no evidence that treatment was outside "reasonable geographic area". Jones v. Olson Plumbing, 2019 Cal. Wrk. Comp. P.D. LEXIS 573 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 5.08[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.05[1]; SOC, Section 7.53. Medical Provider Network – Establishment and Maintenance].

Permanent Disability—Rating—Rebuttal of Scheduled Rating—Holding PD schedule was not rebutted by vocational evidence where vocational expert found that applicant was amenable/could benefit from vocational rehabilitation in the form of job placement services as applicant had necessary transferable skills to obtain employment within her physical limitations. Citing and discussing, Ogilvie v. WCAB 76 Cal. Comp. Cases 625; Contra Costa County v. WCAB (Dahl) 80 Cal. Comp. Cases 587, and Lebeouf v. WCAB 48 Cal. Comp. Cases 587. Nahmani v. Kabbalah Center, LA, 2019 Cal. Wrk. Comp. P.D. LEXIS 563 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§8.02[3], [4], 32.01[3][a][ii], 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.05[3][d], 7.12[2][a], [d][iii], 7.42[2]; The Lawyer's Guide to the AMA *Guides* and California Workers' Compensation, Ch. 7; SOC, Section 10.19, Rebutting Schedule Under Ogilvie.]

Discrimination—Labor Code § 132a—Termination of applicant's employment while off work in connection with industrial injuries to his knees violated LC 132a finding that defendant singled applicant out for disadvantageous treatment when applicant was off work to undergo surgery for the claimed work injury with existing medical restrictions. Emerson v. First Group America, 2020 Cal. Wrk. Comp. P.D. LEXIS 7. Citing and discussing, Dept. Of Rehab. v. WCAB (Lauher) (2003) 30 Cal. 4th 1281, 68 Cal. Comp. Cases 831. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.11[1]-[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.27[1], [6][a]; SOC, Section 11.8, Discrimination Under 132a].

Fair Employment and Housing Act > Statute of Limitations > Tolling by Workers' Compensation Action >The filing of a workers' compensation claim may equitably toll the one-year deadline for filing a discrimination claim pursuant to the Department of Fair Employment and Housing Act (Government Code Section 12940). Brone v. California Highway Patrol (2020) 44 Cal. App. 5th 786, 85 Cal. Comp. Cases 103; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.72; SOC, Section, 11.38, Enforcement of Fair Employment and Housing Act].

Medical-Legal Procedure—Replacement Qualified Medical Evaluator Panels—Specialty Designation—Nothing in Labor Code precludes party from submitting panel specialty dispute to WCJ prior to or instead of submitting dispute to Medical Director. Contra to Portner v. Costco, 2016 Cal. Wrk. Comp. P.D. LEXIS 499 (Appeals Board noteworthy panel decision). Porcello v. State of California Department of Corrections & Rehabilitation, 2020 Cal.

Wrk. Comp. P.D. LEXIS 9; CCR 31.5(a), 31.1(b); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[6], [7]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[6], [7].].

Medical-Legal Procedure—Replacement Qualified Medical Evaluator Panels—Specialty Designation—Medical Director's issuance of replacement panel in specialty of orthopedic surgery is not dispositive and may be disregarded if it is not supported by substantial evidence, and pursuant to 8 Cal. Code Reg. § 31.5(a)(10), a replacement panel may only issue when the specialty is "medically or otherwise inappropriate," and the WCJ is not obligated to follow Medical Director's determination. Contreras v. Randstad North America, 2020 Cal. Wrk. Comp. P.D. LEXIS 12; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[6], [7]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[6], [7]].

Injury AOE/COE—Causation of Injury—Burden of Proof—Inference of Injury—Liberal construction pursuant to LC 3202 requires that circumstantial evidence of common injuries frequently suffered in the applicant's employment could support a finding that the applicant sustained a work-related injury absent direct evidence of injury to the left foot or leg. The panel concluded that the WCJ's analysis ignored case law that supports industrial causation where, absent direct evidence of injury, there is a rational connection between the condition where the work is performed and the resulting injury. Ramirez v. Altman Specialty Plant him Travelers Ins. (March 2020) 48 CWCR 25 (BPD)

Medical-Legal Procedures—Admissibility of PTP Reports--A primary treating doctor (PTP) may solicit and adopt a secondary physician's report upon which a PD award may be based. Camara v. Tesla, Inc. /American Zurich Insurance Co., (March 2020) 48 CWCR 35. See also, Harden v. County of Sacramento (February 2020), 48 CWCR 9 (BPD), allowing Medical-legal evaluators, AMEs and QMEs, to review the medical reports and records prepared for a disability retirement claim.

Apportionment—Presumption of Total Disability—Labor codes section 4662(a) presumptions are subject to the section 4663 and 4664 apportionment provisions. Fraire v. California Dept. of Corrections and Rehabilitation, 48 CWCR 52 (April 2020)

Permanent Disability—Combined Value--A QME must give substantive reasoning explaining why 'Additive' vs 'Combined Value Equation' is the most accurate way of combining disabilities in order to rebut the use of the combined values chart. Martinez v. State of California, Dept. of Corrections, 2020 Cal.Wrk.Comp. PD LEXIS 51, 48 CWCR 56 (April 2020)

Injury AOE/COE-- Permanent Disability—Apportionment—LC 4663/4664 mandate that employer "shall" be liable only for the percentage of permanent disability "directly" and exclusively caused by the subject industrial injury, and apportionment is required to non-industrial causation where substantial medical evidence establishes that the applicant's need for TKR surgery was the result in part of 'significant pre-existing non-industrial degeneration" and resulting pathology in both knees in combination with the industrial injury. This case is distinguished from Hikida v. WCAB (2017) 82 Cal. Comp. Cases 679, in which as the result of carpal tunnel surgery the applicant developed an entirely new condition, CRPS, which was found not to be subject to apportionment. County of Santa Clara v. WCAB, (Justice) (2020, 6th Appellate District) 49 Cal. App. 5th 605, 85 Cal. Comp. Cases 467. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 8.06[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.41[3]; SOC, Section 10.34, Apportionment – Pre-Existing Disease or Condition].

Permanent Disability—Apportionment—LC 4663/4664 mandate that employer "shall" be liable only for the percentage of permanent disability "directly" and exclusively caused by the subject industrial injury, and apportionment is required to non-industrial causation where substantial medical evidence establishes that the applicant's need for TKR surgery was the result in part of 'significant pre-existing non-industrial degeneration" and resulting pathology in both knees in combination with the industrial injury. This case is distinguished from Hikida v. WCAB (2017) 82 Cal. Comp. Cases 679, in which as the result of carpal tunnel surgery the applicant developed an entirely new condition, CRPS, which was found not to be subject to apportionment. County of Santa Clara v. WCAB, (Justice) (2020, 6th Appellate District) 49 Cal. App. 5th 605, 85 Cal. Comp. Cases 467. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 8.06[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.41[3]; SOC, Section 10.34, Apportionment – Pre-Existing Disease or Condition].

Apportionment—Hikida--LC 4663/4664 mandate that employer "shall" be liable only for the percentage of permanent disability "directly" and exclusively caused by the subject industrial injury, and apportionment is required to non-industrial causation where substantial medical evidence establishes that the applicant's need for TKR surgery was the result in part of 'significant pre-existing non-industrial degeneration" and resulting pathology in both knees in combination with the industrial injury. This case is distinguished from Hikida v. WCAB (2017) 82 Cal. Comp. Cases 679, in which as the result of carpal tunnel surgery the applicant developed an entirely new condition, CRPS, which was found not to be subject to apportionment. County of Santa Clara v. WCAB, (Justice) (2020, 6th Appellate District) 49 Cal. App. 5th 605, 85 Cal. Comp. Cases 467. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 8.06[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.41[3]; SOC, Section 10.34, Apportionment – Pre-Existing Disease or Condition].

Jurisdiction—Supplemental Job Displacement Benefits-- Article XIV, §4 of the California Constitution and Labor Code §5300 provides for the exclusive jurisdiction of the Board to adjudicate claims involving compensation, including SJDB, which is in conflict and thus invalidate AD Rule §10133.54 which limits adjudication of SJDB entitlement/eligibility to the Administrative Director. Dennis vs. State Department of Corrections and Rehabilitation Inmate Claims (February 2020) 85 Cal. Comp. Cases 389, 2020 Cal. Wrk. Comp. LEXIS 19; 48 CWCR 1 (En Banc Decision); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 1.11[6][b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 1, §§ 1.07[2], 1.16; SOC, Section 11.4, Supplemental Job Displacement Benefit].

Credit--Right to Credit—Long Term Disability— Where employer and employee contribute to disability pension plan, the employer gets a proportional credit against its workers' compensation liability for benefits paid on a pro-rata basis. LA v. Industrial Acci. Com. (Supreme Court, 1965) 63 Cal. 2d 242, 30 Cal. Comp. Cases 243; See also, accord, Padron v. Frito Lay, 2017 Cal. Wrk. Comp. P.D. LEXIS 69 (BPD); See also LC sections 3751(a), 3752, 4909.

Credit--Right to Credit—Long Term Disability—Employer's right to credit for long term disability must be the 'same general character' as the workers' compensation benefits and that the LT Plan was voluntarily paid by employer. Ott v. WCAB (5th Appellate District, 1981) 118 Cal. App. 3d 912, 46 Comp. Cases 545; Appleby v. WCAB (2nd Appellate District) 27 Cal. App. 4th 184, 59 Cal. Comp. Cases 520; Butelo v. Leighton and Ass., AMIC, 2010 Cal. Wrk. Comp. P.D. LEXIS 523 (BPD); See also LC sections 3751(a), 3752, 4909.

Credit—Right to Credit—Long Term Disability—Although the employer is entitled to take credit against workers' compensation benefits for STD/LTD voluntarily paid by employer/same general character, the WCJ has discretion in applying the amount of credit. Chan v. Federated Department Stores, 2014 Cal. Wrk. Comp. P.D. LEXIS 50 (BPD); LC 4909; See also, Sherrod v. WCAB, 80 Cal. Comp. Cases 203 (W/D), holding WCJ has discretion on the amount of credit despite settlement by applicant with LTD lien claimant for sum less than amount of settlement; LTD payment totaled $110K settled for $75K, held defendant entitled to $110k credit.

WCAB Jurisdiction—Professional Athletes—The prohibition of LC 3600.5(c) and (d) is limited in application to professional athletes who have never entered into a 'contract for hire' within California. Where a professional athlete has entered into a 'contract for hire' while within California, the WCAB has jurisdiction provided sufficient 'minimum contacts' exist. Wilson v. Florida Marlins, et al., 2020 Cal. Wrk. Comp. P.D. LEXIS 30 (BPD); See also, accord, Harrison v. Southwest Airlines, 2020 Cal.Wrk. Comp P.D. 153 (BPD), involving transfer out of state after hire made in Ca.; LC 3600.5(a), (c), (d), and 5305; [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], 13.02; SOC, Section 2.9, Jurisdiction Over Out-Of-State Injuries].

Uninsured Employers Benefits Trust Fund—Joinder—Service by publication pursuant to Code of Civil Procedure 415.50 was sufficient to support order joining UEBTF provided the employer could not be located after reasonably diligent efforts to find him failed. Sanchez v. Gonzalez dba Mando's Test Only, 2020 Cal. Wrk. Comp. P.D. LEXIS 55 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 2.13; Rassp & Herlick, California Workers' Compensation Law, Ch. 3, § 3.19[4]; SOC, Section 3.40, Uninsured Employer Benefit Trust Fund].

California Insurance Guarantee Association—Covered Claims—Other Insurance—Laches—Where there was no prior finding on the issue of general/special employment, nor who applicant's sole employer or who was solely liable

for benefits, and issue of general/special employment relationship was not previously argued or decided, nor was CIGA a party to case or in privity with party until insolvency of general employer, CIGA is not precluded from pursuing reimbursement, as seeking reimbursement by CIGA did not seek to alter, amend or rescind prior Finding and Awards pursuant to LC 5803 and 5804. Stickle v. Staffmark, Inc., 2020 Cal. Wrk. Comp. P.D. LEXIS 41 (BPD); See also, Orozco v. National Staffing, LLC., 2020 Cal. Wrk. Comp. P.D. LEXIS 29, holding that petition to join special employer was not barred by doctrine of laches. [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]; SOC, Section 3.47, CIGA – Coverage Limitations].

Employment Relationships—Residential Employees—LC 3352 was amended in 2016 to include as employees residential workers who have "*contracted to work*" for 52 hours or more, or have *contracted to earn* $100.00 or more. Armbul v. Ortiz, 2020 Cal. Wrk. Comp. P.D. LEXIS 33 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 3.36[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 2, § 2.05[2]; SOC, Section 4.25, Residential Employee].

Medical Treatment—Utilization Review Process—Stipulations— While parties may agree to waive the right to engage in IMR process, it is insufficient for the parties to merely stipulate that medical treatment would be "in keeping with the P&S Rpt. of Dr. Brourman dated 3/1/[2000]" to find a waiver of that right. Archibald v. Spelling Entertainment, 2020 Cal. Wrk, Comp. P.D. LEXIS 45 (BPD); [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; SOC, Section 7.36, Utilization Review Procedure].

Temporary Disability—Offer of Modified Work—Refusal to Accept—Applicant entitled to TD despite rejection of offer of modified work as increase cost of child care held legitimate basis for applicant's rejection of offer. Sandoval v. Residence Inn, 2020 Cal. Wrk. Comp. P.D. LEXIS 43 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, §§ 6.10, 6.11.]

Penalties—Self-Imposed Penalty—Timeframe for Payment of Benefits—Defendant was not liable for self-imposed penalty pursuant to LC 4650(d) on award of death benefits, when payment was made after petition for reconsideration was denied but before the 45 day period for appellate review had expired, as payment is required within 14 days of the award becoming final, citing, Leinon v. Fishermen's Gratto, (2004) 69 Cal. Comp. Cases 995 (En Banc Decision). Knight v. Marisan Group, 2020 Cal. Wrk. Comp. P.D. LEXIS 48 (BPD). Commissioner Sweeney, dissenting. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 10.40[1], 32.04[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.06[2], Ch. 7, § 7.50[1], Ch. 11, § 11.11[1]; SOC, Section 13.2, Penalties Under LC 4650].

Discovery—Good Cause to Reopen—Good cause to reopen discovery exists for a change in case law and/or judicial interpretation of statute, provided and that there has never been final determination. Fitzpatrick v. Department of Corrections and Rehabilitation, 2020 Cal. Wrk. Comp. P.D. LEXIS 37. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 25.40[1], 26.04[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.45[1], Ch. 16, § 16.04[2].]

Exclusive Remedy Rule—Inapplicability--Emotional Injury or Distress Claims—Claim for damages awarded for emotional injury or distress for employer's negligent handling of process for plaintiff's/employees green card application was neither condition of employment nor form of compensation, and that defendant's negligent handling of process was not inherent risk of plaintiff's employment and therefore not barred by the workers' compensation exclusive remedy rule. Reynaud v. Technicolor Creative Services (2nd Appellate District, 2020) 46 Cal. App. 5th 1007, 85 Cal. Comp. Cases 281, 2020 Cal. App. LEXIS 247; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 11.01[1], 4.112[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.01[2], [3]; SOC Section 2.16, Exclusive Remedy Rule].

Third-Party Actions—Employer's Claim for Credit—Employer's Negligence—Applicant has the burden of proof on the issue to employer negligence for the purpose of opposing defendant's petition for credit against defendant's workers' compensation liability. Citing and discussing, LC 3861. Glasshoff v. Millworks by Design, 2020 Cal.Wrk.Comp. P.D. LEXIS 76 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§

11.42[5][a], [d], 11.44[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 12, §§ 12.02[4][d], 12.06[1]; SOC, Section 2.42, Credit Rights].

Injury AOE/COE—Suicide—Decedent's psychiatric injury and subsequent death by suicide held not industrial where actual events of applicant's employment were not predominant cause of applicant's psychiatric injury. McFadden v. Keolis Transit America, 2020 Cal. Wrk. Comp. P.D. LEXIS 97 (BPD) [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].

Psychiatric Injury—Burden of Proof—Predominant Cause Standard—Claim of psychiatric injury held not 'predominantly caused' by actual events of employment in the absence of objective evidence of hostile work environment involving harassment, persecution or other basis for claimed injury. Citing and discussing, Rolda v. Pitney Bowes, Inc. (2001) 66 Cal. Comp. Cases 241 (En Banc). Higgins v. County of LA, 2020 Cal. Wrk. Comp. P.D. LEXIS 81; [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]; SOC, Section 5.30, Psychiatric Injury/Predominant Cause and Actual Events of Employment].

Stipulations—Setting Aside—Extrinsic Fraud or Mistake— Extrinsic fraud or mistake, for the purpose of setting aside a judgement, is a 'stringent' test under which the aggrieved party must demonstrate no knowledge of the action or proceeding, or that they have been prevented from presenting a claim or defense, and demonstrate diligence in seeking to set aside the judgement. Salazar v. James Jones Company, Inc, 2020 Cal. Wrk. Comp. P.D. LEXIS 61; [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]; SOC, Section 6.29, Reopening for Fraud After Five Years].

Medical Treatment—Utilization Review—Time Deadlines—UR denial of requested treatment held untimely despite a faulty fax transmission missing page one of report and one of two RFA from PTP. Defendant has a regulatory duty to conduct reasonable and good faith investigation to determine whether benefits are due. (LC §4600) Miller v. Apple One Employment Services, 2020 Cal. Wrk. Comp. P.D. LEXIS 95. [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].]

Liens—Procedural Rights and Duties—Provider's Criminal Conduct—Lien claimant/physician held not entitled to payment on any liens for medical services rendered to applicant given lien claimant/physician's conviction for seven felony counts for sexual crimes against a minor and that the nature of crimes involved "moral turpitude" rendering lien claimant/physician unfit to practice medicine. Juarez v. Safe Scaffolding, 2020 Cal. Wrk. Comp. P.D. LEXIS 77 (BPD); LC § 139.21(g); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 30.22[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 1, § 1.13[4], Ch. 17, § 17.70[1]; SOC, Section 7.77, Medical Expense].

Average Weekly Wage—Part-Time Employment and Earning Capacity—Minimum Wage Increases—Calculation of AWW pursuant to LC §4453(c)(4) and the 'earning capacity' doctrine should consider and include prior earnings despite a reduced work schedule at time of injury, and a scheduled increase in the minimum wage. Grace v. Panino Santa Ynez, 2020 Cal. Wrk. Comp. P.D. LEXIS 83 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 6.02[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 5, §§ 5.01, 5.04; SOC, Section 8.10 Average Weekly Earnings].

Discrimination—Labor Code § 132a—No violation of LC 132a where only evidence established that applicant was off work on medical leave under Family Medical Leave Act for medical condition unconnected to claimed work injury and was terminated after he exhausted his leave. Mousavirad v. Lafayette Park Hotel and Spa, 2020 Cal. Wrk. Comp. P.D. LEXIS 108 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.11[1]-[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.27[1], [6][a].]

Medical Treatment—Utilization Review—Penalties—Timely and appropriate UR noncertification relied on by defendant in not authorizing RFA, although later overturned by IMR, is not a proper basis to award penalties under

LC 5814. Citing and discussing, LC 4610.1 and Dubon v. World Restoration, Inc. (2014) 79 Cal. Comp. Cases 1298 (En Banc). Diaz v. Southern California Gas Company, 2020 Cal. Wrk. Comp. P.D. LEXIS 68 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02[2], 22.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.10.]

Discovery—Subpoena Duces Tecum—Police Officer Personnel/Medical Records—Applicant/peace officer places his medical condition at issue allowing discovery of medical records by defendant without the need for compliance with Evidence Code Section 1043-1046 citing, Collins v. City of Vacaville (2019) 84 Cal. Comp. Cases 340 (Noteworthy Panel Decision). Eisert v. City of Vacaville, 2020 Cal. Wrk. Comp. P.D. LEXIS 63 (BPD); [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; SOC, Section 14.10, Subpoena and Subpoena Duces Tecum].

Medical-Legal Procedure—Replacement Qualified Medical Evaluator Panels—Specialty Designation—Good cause for additional PQME panel in alternative specialty where original panel was chiropractic, applicant underwent lumbar surgery, and new panel was orthopedic surgery pursuant to 8 Cal. Code Reg. 31.7. Diaz v. RepublicFence Company, Section 14.29, Medical-Legal Process. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 22.11[6], [7], 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[6], [7], Ch. 19, § 19.37; SOC, Section 14.29, Medical-Legal Process].

Medical-Legal Procedure—*Ex Parte* Communications— Defendant's cancellation of panel qualified medical evaluation and rescheduling of evaluation was proper where rescheduling was necessitated by an objection by applicant to defendant's letter to PQME and no improper ex-parte communication occurred as communication was solely related to rescheduling, therefore there was no need for replacement panel. Ramirez v. Waste Management Services, 2020 Cal. Wrk. Comp. P.D. LEXIS 96 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.06[3], 22.11[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[4][e]; SOC, Section 14.41, Communication with AME/QME].

Stipulations—Setting Aside—Stipulations on compensability of injury are binding on the parties absent good cause to set aside Stipulations based on 'extrinsic' fraud, when (1) defendant did not establish fraud in inducement, *i.e.*, that fraud was committed against defendant at time Stipulations were entered, (2) defendant was in possession of PQME report finding the injury was not compensable at time Stipulations were entered but nonetheless stipulated to compensable injury, and (3) medical reporting regarding stipulated facts in this case did not change after Stipulations were entered, and even if it had, new medical opinions conflicting with parties' stipulations do not, in themselves, constitute good cause to set aside Stipulations. Alsayeh v. Robertson's Ready Mix, 2020 Cal. Wrk. Comp. P.D. LEXIS 80 (BPD); See also, County of Sac. v. WCAB (200, 3rd Appellate District) 77 Cal. App. 4th 1114, 65 Cal. Comp. Cases 1, holding stipulations at MSC binding regarding date of injury. [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.]

Liens—Filing and Service—Untimely Lien Declarations—Lien claimant's lien filed without proper signed lien declaration failed to comply with requirements pursuant to LC 4903.8(d), and was invalid pursuant to LC 4903.8(e) and subject to dismissal by operation of law under 8 Cal. Code Reg. § 10770. Mejia v. TriCoast Builders, 2020 Cal. Wrk. Cop. P.D. LEXIS 85 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 30.20[1], 30.25[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 17, § 17.10[4]; SOC, Section 15.92, Liens – Filing Procedure].

Commutation of Award—Request for commutation to pay off IRS debt was allowed where sufficient evidence was presented that commutation would result in no inequity, undue expense or hardship, and that it was in applicant's best interest to commute part of his future permanent disability indemnity payments in order to satisfy current principal amount of debt he owed to IRS establishing good cause pursuant to LC § 5100. Roque v. State of California Department of Corrections, 2020 Cal. Wrk. Comp. P.D. LEXIS 103 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 27.02; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.30; SOC, Section 16.45, Commutation of Award].

Discrimination 132(a) Claim—Coverage--Reservation of Rights--Doctrines of implied waiver and of estoppel, based upon the conduct or action of the insurer, are not available to bring risks within the coverage of a policy, not otherwise covered or risks which are expressly excluded. However, an insurer can be estopped from raising coverage defenses known and the insurer chooses to provides a defense under the policy without a reservation of rights, and the insured reasonably relies on this apparently unconditional defense to his detriment. Melton v. Industrial Indemnity Co., (5th Appellate District) 86 Cal. App. 4th 222, 66 Cal. Comp. Cases 41, 2001 Cal. App. LEXIS 20.

Presumption of Compensability—Cancer—Firefighters—Rebuttal— Presumption pursuant to LC 3212.1 rebutted where QME determined that it was reasonably medically probable that applicant's current cancer was recurrence of applicant's prior breast cancer, and that there was no reasonable link between applicant's cancer and his exposure to carcinogens during his employment with defendant based upon (1) latency period; (2) the fact that lymph nodes previously removed were positive for breast cancer, making it probable that applicant's current cancer was recurrence of prior cancer that had metastasized rather than new cancer, and (3) applicant's presentation was consistent with usual clinical presentation of recurrent metastatic breast cancer. Blais v. State of California, 2020 Cal. Wrk. Comp. P.D. LEXIS 119 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.138[4][b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.07[5][c]; SOC, Section 5.18, Presumption of Injury].

Psychiatric Injury—Compensable Consequence of Physical Injury—Predominant Cause Standard—Claim of psychiatric injury as compensable consequence held not predominant where evidence established applicant's symptoms of anxiety and depression were caused by behavior of applicant's husband after he learned of diagnosis, including descent into alcoholism and domestic violence, determined to be predominant cause of applicant's psychiatric injury. Husband's behavior held not actual events of employment. Gomez v. State of California, 2020 Cal. Wrk. Comp. P.D. LEXIS 135 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3][a], [b], 4.69[3][a], [b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[3][b].]

Injury AOE/COE—Going and Coming Rule—Special Mission Exception—Applicant's injury held compensable as 'special mission' and thus not barred by the 'going and coming' rule when while walking home from work on his day off (Saturday) after preparing data for a presentation scheduled on following day was struck by vehicle while crossing road three to four minutes after calling his supervisor on cell phone. Kong v. City of Hope National Medical Center, 2020 Cal. Wrk. Comp. P.D.LEXIS 118 (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]; SOC, Section 5.48, Special Mission].

Injury AOE/COE—Going and Coming Rule—Special Risk Exception—Assault and robbery occurring when applicant was entering her car parked across street and off employer's premises was barred by 'going and coming' rule' and the 'special risk exception' did not apply because applicant did not demonstrate that she was placed in 'zone of danger' by employer or that she was at greater risk of being assaulted than the general public. Lu v. Oakland Unified School District, 2020 Cal. Wrk. Comp. P.D. LEXIS 117 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.156[1], [2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.05[3][d][v]; SOC, Section 5.56, Special Risk – Zone of Danger].

Medical Provider Networks—Employer's Liability for Outside Treatment—Defendant's improper refusal to authorize treatment for accepted body parts based solely on the QME report determined not to be substantial evidence was a denial of care/treatment allowing applicant to treat outside of the MPN. Abarca v. America Apparel USA, 2020 Cal. Wrk. Comp. P.D. LEXIS 125 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 5.03; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.12; SOC,]

Temporary Disability—Post-Retirement Period of Disability—Applicant entitled to receive TD after retirement where applicant did not retire from employment for all purposes, and applicant was in fact willing to work, and intended to return to work when able. Brown v. Frito Lay, Inc., 2020 Cal. Wrk. Comp. P.D. LEXIS 121 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.01[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.01[1]; SOC, Section 9.27, Temporary Disability for Retired Employees].

Permanent Disability—Apportionment—Prior Awards—Apportionment to a prior award pursuant to Labor Code 4664 was upheld despite that an alternate AMA methodology was used on successive dates, provided both methodologies utilized were from the 5th edition of the AMA Guides, and overlap exists between the two methodologies; ROM overlaps DRE. Hom v. City and County of SF, 2020 Cal. Wrk. Comp. P.D. LEXIS 124; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[1]-[3], 8.06[5][d], 8.07[2][a]-[c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.42[1]-[3]; The Lawyer's Guide to the AMA *Guides* and California Workers' Compensation, Chs. 6, 8.]

Subsequent Injuries Benefits Trust Fund—Calculating Benefits—In determining liability against SIBTF, the proper method is to calculate the total amount of PD compensation less amount due to applicant from subsequent injury and less credits (LC 4753). In calculating the total PD compensation, the Combined Value Equation/Chart only applies to rating multiple impairments and disabilities caused by single injury, and not in cases involving successive injuries. Todd v. SIBTF, 2020 Cal. Wrk. Comp. LEXIS 35 (En Banc); See also, Bookout v. WCAB (1976) 41 Cal. Comp. Cases 595; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 8.09[3], [4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 8, §§ 8.02[2], [3], 8.04, 8.05[1], [2].]

Serious and Willful Misconduct of Employer—Employer's failure to warn teacher/applicant of student's violent tendencies support finding of LC 4553, Serious and Willful Misconduct on part of employer/school district. Sauceda v. Fresno Unified School District, 2020 Cal. Wrk. Comp. P.D. LEXIS 137 (Split Panel Decision) with Commissioner Razo, dissenting, would not find serious and willful misconduct given balance between employer's duty to warn and student's right to privacy. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.01; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.14.]

Third Party Actions—Claim for Credit—University of California—The individual University of California campuses are not individual legal entities separate from Regents, and a civil settlement with one, where applicant was not employed, is a settlement with applicant's employer, and thus there was no basis to award third-party credit. Regents of University of Ca. Irvine v. WCAB (Klimkiewicz), 2020 Cal. Wrk. Comp. LEXIS 49 (W/D); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 11.42[5][a], [d], 11.44[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 12, §§ 12.02[4][d], 12.06[1]; SOC, Section 2.41, Employer Credit for Civil Recovery].

Alternative Dispute Resolution—WCAB Jurisdiction—WCAB lacked jurisdiction when defendant established that claims were subject to valid alternative dispute resolution carve-out (ADR) Agreement and WCAB did not have authority to invalidate ADR Agreement based on applicant's allegations of unfair labor practices. Citing and discussing, LC § 3201.7 and 8 Cal. Code Reg. § 10200 et seq. Jimenez, Perez v. Samuel Hale, LLC, 2020 Cal. Wrk, Comp. P.D. LEXIS 150 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 1.04A; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 3.04[3]; SOC, Section 3.5, Carve-Out].

Cumulative Injury—Date of Injury—Date of injury for cumulative trauma injury is that date upon which there is the concurrence of (1) injurious industrial events, activities, or exposure, with (2) resulting disability, and (3) knowledge or reason to know there is a cause and effect relationship between the injurious industrial events, activities or exposures and disability. Disability may be temporary disability or permanent disability, and the need for medical treatment alone is not sufficient to establish disability, but is relevant on the issue of the existence of disability. A single date of temporary disability is sufficient to establish disability for the purpose of determining the date of injury pursuant to LC 5412. Brawley Union High School District v. WCAB (Sosal), 85 Cal. Comp. Cases 597, 2020 Cal. Wrk. Comp. LEXIS 37 (W/D); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.71, 24.03[6], 31.13[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[1], Ch. 14, § 14.13; SOC, Section 5.5, Cumulative Injury].

Petitions for Reconsideration—Standing to Seek Reconsideration—Non-elected defendant does not have to seek reconsideration from final award against elected defendant as liability for any benefits owing is contingent upon filing timely petition for contribution against the non-elected defendant by the elected defendant at which time the non-elected defendant will be entitled to fully defend itself against contribution claim. De La Garza v. Archurus Manufacturing, 2020 Cal. Wrk, Comp. P.D. LEXIS 154 (BPD); See also, Lasko v. Entertainment Partners, 2019

Cal. Wrk. Comp. P.D. LEXIS 383 (Split BPD); See also, Greenwalf v. Carey Dist. Co. (Greenwald) (1981) 46 Cal.Comp.Cases 703 (En Banc); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 28.01; Rassp & Herlick, California Workers' Compensation Law, Ch. 19, § 19.04[3].]

Contribution--Petitions for Reconsideration—Standing to Seek Reconsideration—Non-elected defendant does not have standing to seek reconsideration from final award against elected defendant as liability for any benefits owing is contingent upon a filing timely petition for contribution against the non-elected defendant by the elected defendant at which time the non-elected defendant will be entitled to fully defend itself against contribution claim. De La Garza v. Archurus Manufacturing, 2020 Cal. Wrk, Comp. P.D. LEXIS 154 (BPD); See also, Lasko v. Entertainment Partners, 2019 Cal. Wrk. Comp. P.D. LEXIS 383 (Split BPD); See also, Greenwalf v. Carey Dist. Co. (Greenwald) (1981) 46 Cal.Comp.Cases 703 (En Banc); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 28.01; Rassp & Herlick, California Workers' Compensation Law, Ch. 19, § 19.04[3]. SOC, Section 5.8, Contribution Among Defendants].

Presumption of Industrial Causation—Cancer—Firefighters—Rebuttal—Applicant met burden of proof establishing presumption of industrial caused cancer (LC 3212.1) despite evidence that the form of cancer began as germ cell in utero, because medical evidence also established that applicant's exposure to certain chemicals while working as firefighter could have increased his risk of developing testicular cancer, and defendants did not establish that there was "no reasonable link" between applicant's exposures and development of testicular cancer. City of Victorville v. WCAB (Cruz), 85 Cal. Comp. Cases 608, 2020 Cal. Wrk. Comp. LEXIS 43 (W/D); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.138[4][b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.07[5][c]; SOC, Section 5.18, Presumption of Injury].

Injury AOE/COE—Intoxication—Injury resulting from motorcycle accident was not barred by intoxication defense (LC 3600(a)(4)) despite applicant testing positive for methamphetamine because defendant failed to meet its burden of proving intoxication was substantial factor or proximate cause of his injury as and when it occurred. Southern Insurance Co. v. WCAB (Hindawi) 2020 Cal. Wrk. Comp. LEXIS 46 (W/D); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.20, 4.24; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.03[1], [5]; SOC, Section 5.22, Intoxication].

Temporary Disability—Offers of Suitable Modified Work—Refusal of Offer—Applicant not entitled to TDI when applicant turned down modified position based on the alleged belief that modified position was with a religious organization. Douglass v. Hertz Corp., 2020 Cal. Wrk. Comp. P.D. LEXIS 139 (BPD); See also, Guillen v. Hub Group Trucking, 2020 Cal. Wrk. Comp. P.D. LEXIS 159 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[4][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.11; SOC, Section 9.24, Termination of Liability for Payment].

Temporary Disability—Offers of Suitable Modified Work—Inadequate Offer—Applicant entitled to TD where offer of modified work determined not to be medically appropriate, failed to accommodate physical restrictions with regards to standing, walking and lifting restrictions, and modified job was significantly farther from applicant's residence than his regular job causing transportation problems which defendant had prior knowledge. Guillen v. Hub Group Trucking, 2020 Cal. Wrk. Comp. P.D. LEXIS 159 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[4][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.11; SOC, Section 9.24, Termination of Liability for Payment].

Attorney's Fees—Calculation of Reasonable Fee—The amount of a prior offer of settlement made before applicant-attorney was fired by applicant is proper to calculate quantum meruit award of attorney's fee for services rendered, rather than the much higher amount of settlement secured by applicant representing himself. Cohen v. WCAB, 2020 Cal. Wrk. Comp. LEXIS 51 (W/D); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 20.03; Rassp & Herlick, California Workers' Compensation Law, Ch. 17, § 17.31.]