27th Anniversary

2022 Current Issues Workers' Compensation Seminar

March 11, 2022
Vizcaya Sacramento

Presented by

The Law Office of Richard Montarbo
Richard L. Montarbo, Esq.
MontarboLaw.com
146 Main Street
Red Bluff, Ca. 96080
(T) 530-529-9860 (F) 530-529-9865

CURRENT ISSUES

WORKERS' COMPENSATION SEMINAR

Friday, March 11, 2022 **Vizcaya Sacramento**

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

2022 Panelists

Richard L. Montarbo, Esq.
Law Office of Richard L. Montarbo

Richard M. Jacobsmeyer, Esq. *Shaw, Jacobsmeyer, Crain & Claffey*

Dudley Phenix, Esq.
Timmons, Owens, Jansen & Tichy

Jason Marcus, Esq.
Marcus, Regalado & Marcus

Agenda

8:00 a.m. - 8:45 a.m.	**Registration**
8:45 a.m. - 11:00 a.m	**Introduction and Comments: Case Law Update and Review**
11:00 a.m. - 11:15 a.m.	**Break**
11:15 a.m. - 1:00 p.m.	**Case Law Update and Review**

We were hopeful that this year's conference would be different. After consultation with several trusted physicians regarding the Omicron variant it appears that regardless of whether you are fully vaccinated and/or boosted the incidents of breakthrough infections are substantial. Therefore, I've decided that this year's conference will once again be held virtually and web-casted from the Vizcaya.

All who register before 03/01/22 will be eligible for the drawing. The cost for virtual attendees without MCLE/QME or MCLE Specialization credits is free. For virtual attendees wanting MCLE/QME or MCLE Specialization credits, the cost is $95. The cost for Claims Professional virtual attendance is free.

All attendees will receive electronic materials, and link for free IOS and Droid downloads of the 2022 Gemini CompCalcPlus. All attendees must register with the Law Offices of Richard L. Montarbo. All registrations must be received prior to March 1, 2022.

This seminar is webcasted and streamed live from The Vizcaya Hotel in Sacramento, 2019 21st Street, Sacramento, CA (916) 455-5243 and available at MontarboLaw.com. For more information, please contact the Law Office of Richard L. Montarbo, 146 Main Street, Red Bluff, California 96080, Telephone (530) 529-9860; Fax (530) 529-9865.

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.)

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FEATURED AGAIN THIS YEAR

Following this year's Current Issues Workers' Compensation Seminar, the conference will conclude our annual prize drawings.

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 Topical Guide to California Workers' Compensation Law, published by Lexis/Nexis, and is the developer of CompCalc Plus available at the APP Store, Google Play, and Microsoft store**.**

- **Dudley Phenix, Esq.** Currently a partner with the firm of Timmons, Owens, Jansen & Tichy. In 1990, Mr. Phenix graduated from U.C.D. Law School earning a J.D. From 2007-2019 Mr. Phenix was a Wotkers' Compensation Judge with the Sacramento WCAB. From 1993-1998 he worked as an associate attorney and then as a partner for the firm 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' Compensations and Retirement cases. Between 2006-2007, he owned and operated the aw 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.

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

- **Jason Marcus, Esq.** Education: California State University, Sacramento B.A., 2005. University of the Pacific, McGeorge School of Law, J.D., 2008. Mr. Marcus is a partner with the firm of Marcus, Regalado & Marcus located in Sacramento, CA. He is a Member and Secretary of the Executive Board of the California Applicants' Attorneys Association, as well as being on the Board of Directors from September 2010 to present, he is also a member of the Sacramento County Bar Association and California State Bar Association. Mr. Marcus is a Certified Specialist, Workers' Compensation since July 2014. He has also spoken as a panelist at a number of CAAA Conventions and Seminars and currently serves on CAAA Executive Board.

STATE OF CALIFORNIA
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November 23, 2021

Law Office of Richard Montarbo
146 Main Street
Red Bluff, CA 96080

Re: Continuing Education Course
Provider No: 620
Course: "2022 Current Issues Workers' Compensation"
Approved Date: 11/17/2021

Dear Richard Montarbo:

This letter is to notify you that your course "***2022 Current Issues Workers' Compensation***" *has* been approved for a total of 5 Hours, of continuing education (CE) hours for the Division of Workers' Compensation (DWC) in accordance with Labor Code section 139.2(d)(3) and Title 8 of the California Code of Regulations, section 55.

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

If you have any questions about your approval status, please call DWC Medical Unit and ask to speak with a Workers' Compensation Consultant at 1 (800) 794 6900.

Sincerely,

DWC Medical Unit

THE STATE BAR OF CALIFORNIA

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
The State Bar of California
180 Howard Street
San Francisco, CA 94105
(415) 538-2137
jonita.rose@calbar.ca.gov

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Jan. 2019

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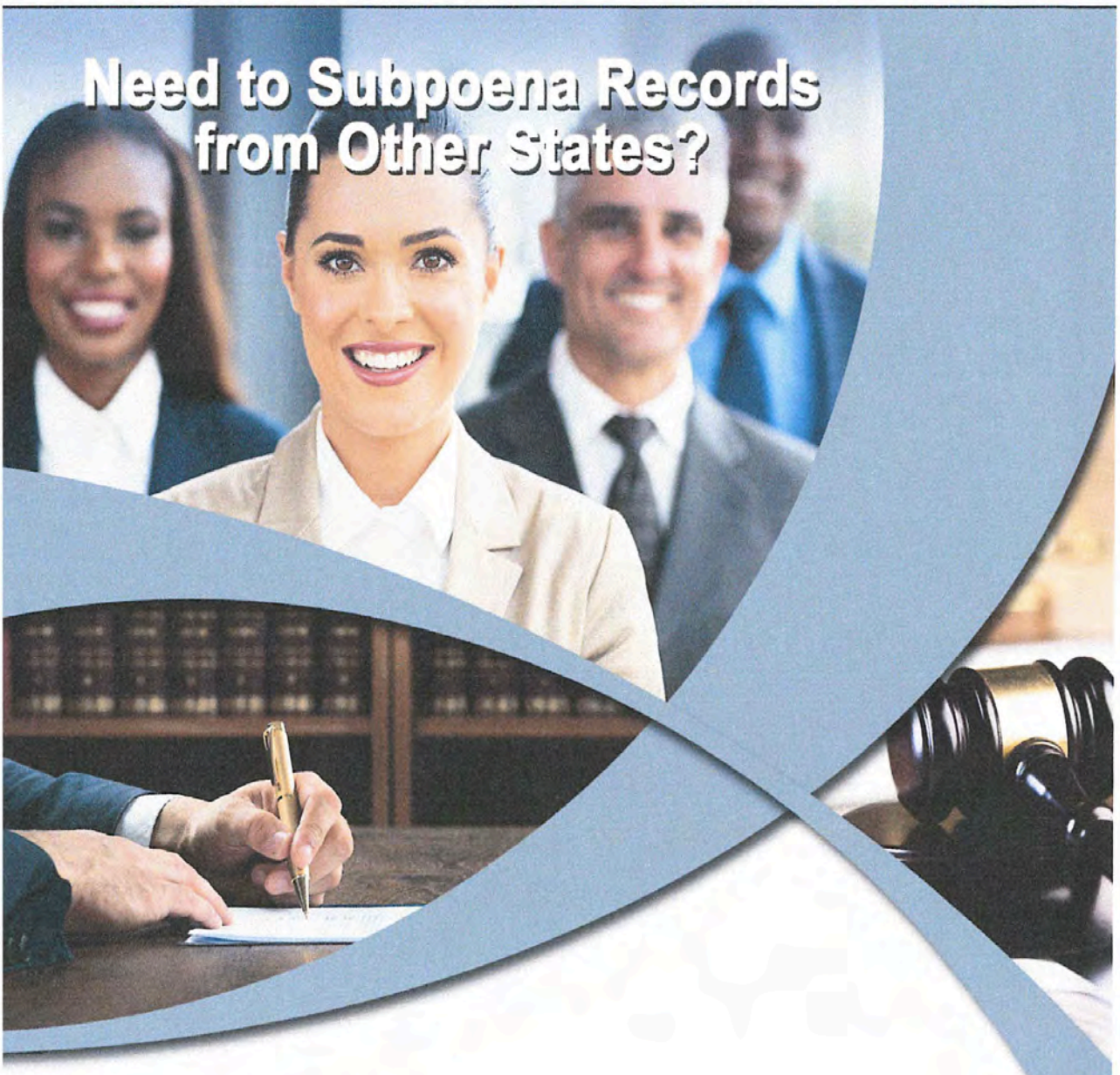

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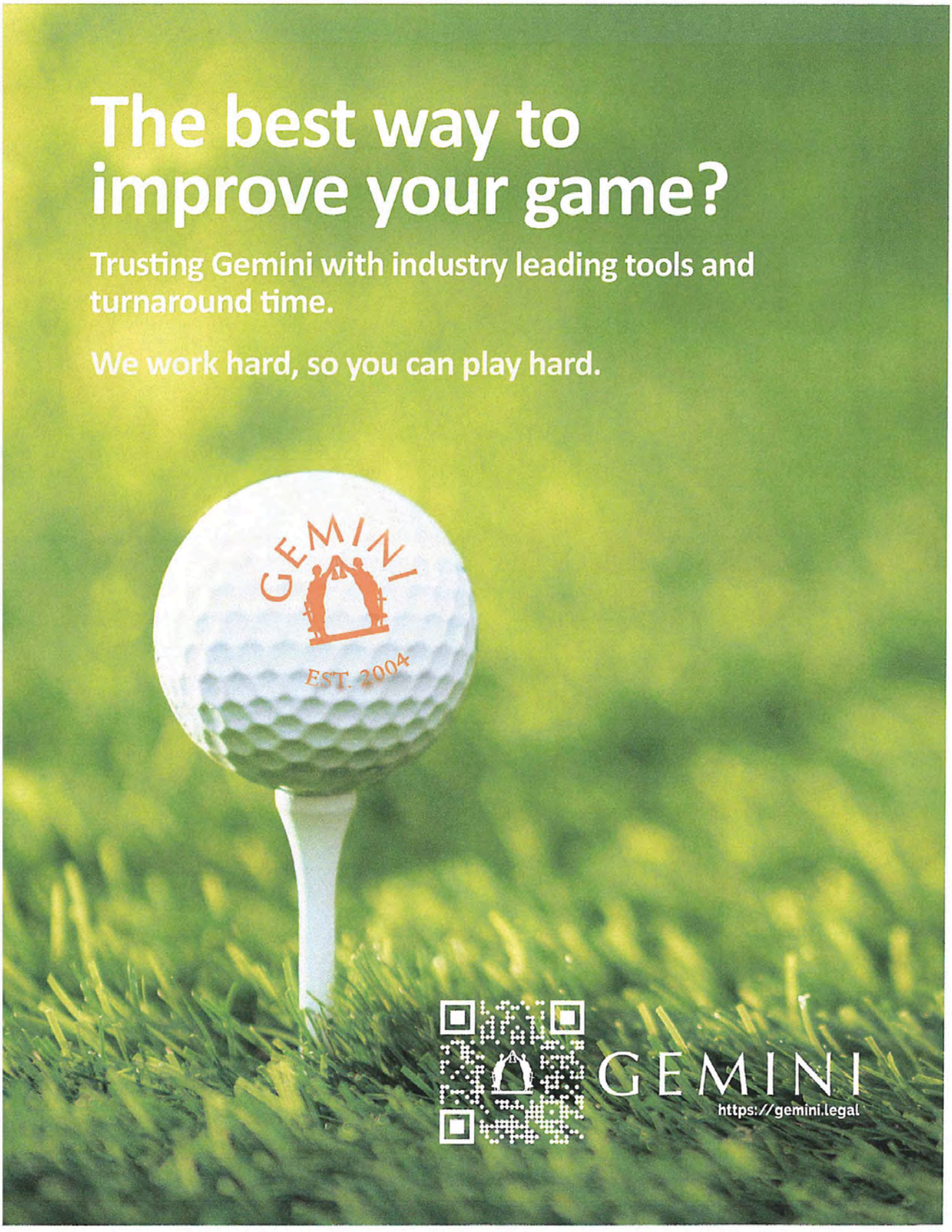
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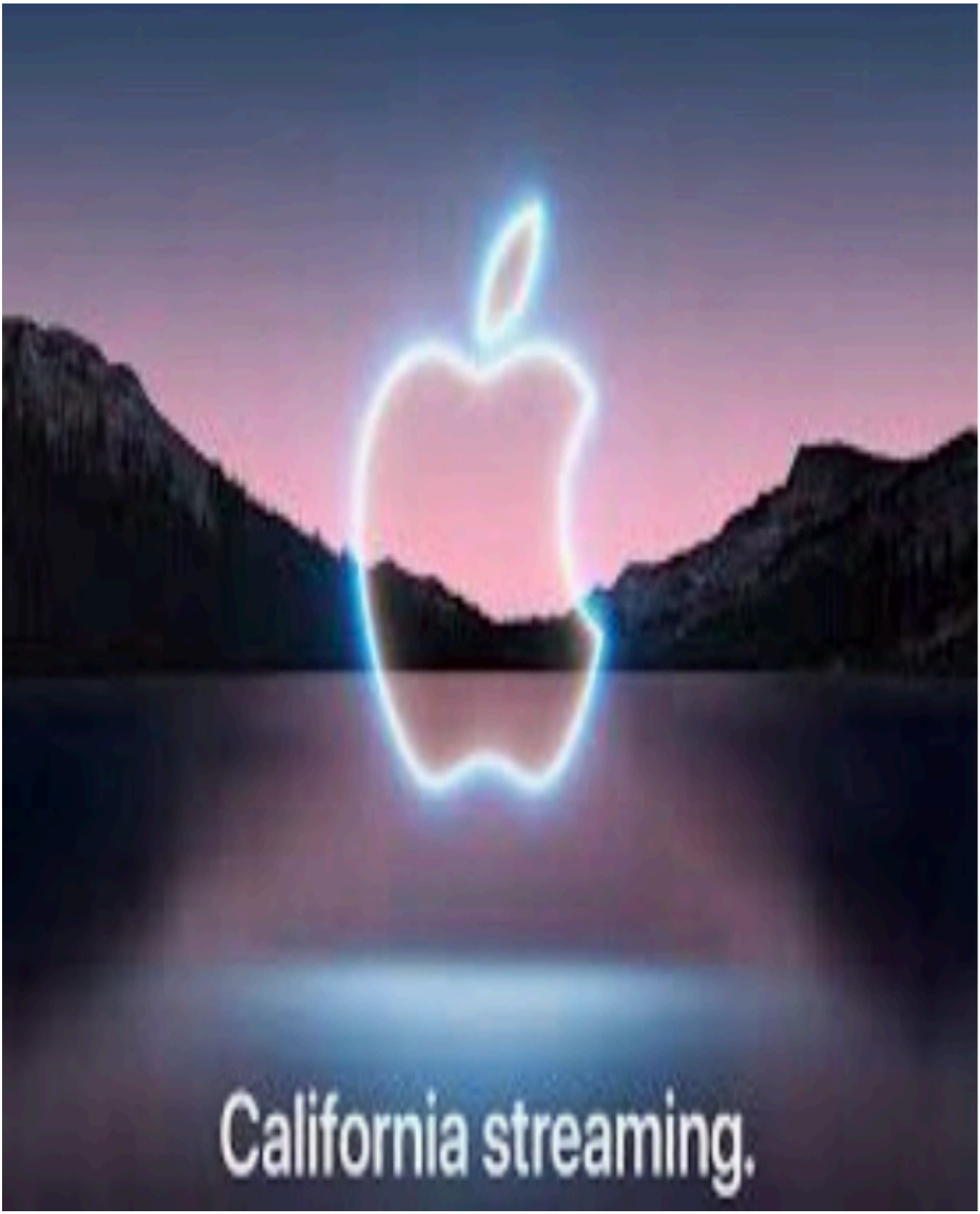
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Table of Contents

2022 Current Issues Workers' Compensation Seminar

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Table of Content

2022 Current Issues – Workers' Compensation Seminar

Session I & II: Case Law Update 2022

CASE LAW UPDATE 2021

Session I & II

Case Law Update 2022

Cases and Decision Originating with the WCAB

Panelist:

Richard M. Jacobsmeyers, Esq.
Shaw, Jacobsmeyers, Crain, & Claffey

Jason Marcus, Esq.
Marcus, Regalado & Marcus

Dudley Phenix, Esq. & WCJ (Retired)
Timmons, Owens, Jansen & Tichy

Richard L. Montarbo, Esq.
Moderator & Presenter
The Law Office of Richard L. Montarbo

CASE LAW UPDATE 2022

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

Ross v California Highway Patrol and SCIF (Oct 20, 2020) 86 Cal Comp Cases 99 (BPD).

Applicant sustained prior injuries for which he received in the aggregate awards of 59%. Applicant sustained an admitted cumulative trauma injury over the period June 30, 2008, to June 30, 2009, to his heart, hypertension, atrial fibrillation and hemorrhoids, while employed as an Officer by the California Highway Patrol.

At trial, defendant offered into evidence the stipulated awards applicant received for the 1993 injuries to his left ankle, nausea and gastric system, resulting in 7% permanent disability for the internal injuries (ADJ1746856), in 1998 in the form of irritable bowel syndrome resulting in 10% permanent disability (ADJ3637126), the cumulative period ending in 2001 involving his skin resulting in 33% permanent disability (ADJ1861656), and a cumulative trauma and specific injury in 2009 to his back, hernia, circulatory system and digestive, resulting in 9% permanent disability for the internal injuries (ADJ8886724, ADJ8885828).

Labor Code 4664 Provides:

(a) The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.

(b) If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof.

(c)(1) The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662. As used in this section, the regions of the body are the following:

(A) Hearing.
(B) Vision.
(C) Mental and behavioral disorders.
(D) The spine.
(E) The upper extremities, including the shoulders.
(F) The lower extremities, including the hip joints.
(G) The head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F), inclusive.

(2) Nothing in this section shall be construed to permit the permanent disability rating for each individual injury sustained by an employee arising from the same industrial accident, when added together, from exceeding 100 percent.

These prior awards of permanent disability, as proved up by defendant, all involve injuries to regions of the body that fall within the catch-all provision in Labor Code section 4664(c)(1)(G), as they involve the "head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F), inclusive." The WCJ by F&A awarded applicant 39% PD. Applicant filed for reconsideration contending that the WCJ erred in finding Labor Code section 4664(c)(1)(G) limits applicant's permanent disability award, arguing defendant failed to meet its burden of proof to establish overlap between applicant's prior awards and the current award.

See also, Russell v. Country of LA, 2021 Cal.Wrk. Comp. P.D. LEXIS 152, applying 4664(c)(1)(G) to apportion 100% disability to a 66% PD award due to the prior award of 83% which in part was within the lifetime accumulation cap of "region of the body" involve in the subject injury, and that issue of overlap between the prior and current PD was not applicable if the 100 lifetime accumulation cap is reached.

Editor's comment: Between the Russel and Ross decisions, defendant now maybe arguing that the applicant is 100% disabled but due to prior award is entitled to a lesser award as this would allow apportion with the need to only establish that the prior award involved the same "region of the body" under 4664(c)(1)(G), rather than overlap pursuant to Kopping v. WCAB (2006) 71 Cal Comp Cases 1229 (3rd DCA).

By panel decision the WCAB held that the prior awards of 59% for injury to heart precluded an award above 41% for subsequent injury to same part or region of body pursuant to LC 4664(c)(1) and because the 100% lifetime cap was reached the issue of overlap between prior and current permanent disabilities was not applicable. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.06[5][d], 8.07[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.42[3].]

Wiest v. California Department of Corrections and Rehab., Centinela State Prison, 2021 Cal. Wrk. Comp. LEXIS 162 (BPD) Malcolm v. CAN (2008) 36 CWCR 176 (BPD).

The applicant was a plumber working for the defendant at the time injury. The applicant was diagnosed and had received treated for diabetes for 10 years prior to the date of injury. Prior to the date of injury the applicant worked full duties without limitations or restrictions. The applicant's job requires 'a lot of walking . . . 80 percent of the time walking and 20% of the time doing things like "tool" control, "inmate time cads" and instruction. He would sit or stand doing these activities.' On the date of injury the applicant twisted his ankle while walking. The injury was reported the same day and treated the next. Symptoms included pain and swelling with a 'boot' and physical therapy prescribed. This cause awkward and difficulty walking and an altered gait with excessive pressure put on the applicant's off/un-injury foot/leg.

Editor's comment: This decision as written contains internal inconsistencies in the rationale for not finding apportionment. On the one had the WCAB relies on the rating of the amputation as purely an 'orthopedic' industrial rating, despite their own admission that the need for the amputation was caused in part by the applicant's diabetes, which they acknowledge ' was a casual factor in the need for the bilateral leg amputation'. The WCAB seemed to believe that because the diabetes as a condition/illness/disease was not separately rated, no apportionment existed. Here, however, the issue was what was the cause of the ratable disability? It appeared to be a specific industrial injury combined with/complicated by the non-industrial diabetes, which lead to the need for surgery/amputation. It was that amputation which was rated and produced/resulted in the disability award. (See, Malcolm v. Can (2008) 36 CWCR 176 (BPD), overruling City of Concord v. WCAB (Steinkamp) 71 CCC 1203 and Kien v. Episcopal Homes Found 34 CWCR 228)

Perhaps the decision can be explained and thus understood by a review of the actual rating. It could be that the holding might simply be a strict interpretation and application of the doctrine of direct causation by the WCAB. Alternatively, the explanation could be the general principle that 'the more serious the injury, the more likely that it will be found compensable'. Without more information I for one view this decision with an ample dose of skepticism.

See also, Brophy v. WCAB, 2021 Cal. Wrk. Comp. LEXIS 23 (W/D), holding that the QME's opinion on apportionment constituted substantial evidence where QME opined that the disability related to COPD and restrictive lung disease was 80% cause by non-industrial causation including lifetime of heavy smoking and morbid obesity, and 20% to industrial toxic fumes exposure, where QME by report and at deposition explained the 'how and why' supporting his apportionment opinion, specifically relying on published articles, his own experience as a treater, and factual information provided by the applicant and from medical records review. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[2][a], 8.06[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.40[1], 7.45[2]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Chs. 4, 6; SOC, Section 1035, Apportionment – Pre-Existing Disability].

The applicant testified that upon returning to work he felt his foot had a different shape, and subsequently he noticed blisters. Initially he had his fifth toe amputated, then developed 'collapsed arch', then in 2018 his right leg was amputated below the knee because he developed a sore on his right foot that started as a blister caused by the rubbing in his shoe on the "dropped arch". Next, the applicant saw a wound care doctor who did a debridement. The blister got bigger and worsened. Eventually, he had a below the knee amputation of the right leg. Next, due to worsening wounds

on his left leg he eventually had his left leg amputated below the knee in August 2018. He was fitted for bilateral prosthesis.

A Findings and Award issued on April 21, 2021 finding that the applicant not only sustained injury to his right foot and ankle, but also sustained injury to his bilateral legs resulting in bilateral below the knee amputations, lumbar spine, vascular system, sleep and psyche. The WCJ found the applicant to be 100% disabled without any apportionment.

Defendant sought reconsideration arguing reversable error for the WCJ's application of the Kite Doctrine aggregating PD rather than applying the combined value equation, and that the need for bilateral amputation was due in part to diabetes, and not solely attributable to the industrial injury.

The WCAB held that the award of total disability was proper where based upon additive rating rather than combine value equation where, as here, the QME opined that the additive approach was a 'more accurate description of applicant's severe impairment where industrial injury was to right foot and ankle, both legs resulting in bilateral below-knee amputations, lumbar spine, vascular system, sleep, and psyche, and opinion supported by the evidence.' Citing and discussing Athens Administrators v. W.C.A.B. (Kite) (2013) 78 Cal. Comp. Cases 213 (W/D).

Second, applying strictly the doctrine of direct causation, the WCAB upheld the award of total disability on an industrial basis, despite preexisting, non-industrial diabetes where although applicant's diabetes was causal factor in need for bilateral leg amputations, the resulting permanent disability was rated on basis of applicant's orthopedic impairment alone and was not related to his diabetic condition. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[2][a], 8.06[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.41[3], 7.45[2]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Chs. 4, 6; SOC, Section 10.34, Apportionment – Pre-Existing Disease or Condition].

II. Attorney's Fees

Hernandez v. YRC Freight, 2021 Cal. Wrk,. Comp. P.D. LEXIS 172 (BPD).

The WCAB revised the holding of the WCJ which awarded an attorney's fee of only 20% of 132(a) settlement, despite a written fee agreement between applicant and the Counsel for applicant which provided a 33% attorney's fee from any award or settlement procured. The WCAB in increasing the award to 33% noted that the higher fee was justified given (1) the higher standard of proof for 132(a); (2) The considerable work performed by attorney over five year period; and (3) that the attorney obtained an exceptional result. The WCAB also noted that the applicant was supportive of the higher fee. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 20.02[2][c], 20.05; Rassp & Herlick, California Workers' Compensation Law, Ch. 17, §§ 17.32, 17.53, Ch. 18, § 18.12[1]; SOC, Section 15.101, Attorney Fee – Lien Against Employee's Compensation].

III. Injury AOE/COE

Santa Clara Valley Transportation Authority v. WCAB, 86 Call. Comp. Cases 287 (W/D).

Applicant suffered a specific injury to her neck, left knee, head, and left side when she fell in the shower on 11/29/2018 while employed as a coach operator by Defendant Santa Clara Valley Transportation Authority. She filed a claim for workers' compensation benefits, which VTA denied based on its position that Applicant was not in the course of her employment at the time of her injury. VTA

See also, Chorbagian v. Ormco Corp., 2021 Cal. Wrk. Comp. PD LEXIS 146 (BPD), holding that a regional sales person suffered injury AOE/COE in automobile accident while traveling in employer-provided vehicle between two personal errands, but traveling throughout large regions of California and Nevada to meet with clients; Several of rule's exceptions to "going and coming" rule, including employer-provided transportation exception and personal comfort doctrine applied. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.150, 4.151[a], [b], 4.153; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.05[3][a]; SOC, Section 5.45, Transportation Controlled by Employer].

See also, Alex v. All Nation Security Services, Inc., 2021 Cal. Wrk. Comp. PD LEXIS 139 (BPD), holding that terminal security guard suffered injury when he fell outside terminal while pursuing an individual who had been disrupting passengers inside, and leaving station did not constitute deviation that took applicant outside course of employment. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.115, 4.116, 4.130, 4.152[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.05[2], [3][b], [8]; SOC, Section 5.60, Performance of Work – Unauthorized Manner].

See also, Kazrani v. LA Unified School District, 2021 Cal. Wrk. Comp. PD LEXIS 126 (BPD), holding that MVA resulting in death of applicant during trip from self-procured chiropractic/PT appointment compensable consequence injury, provided the self-procured treatment cures or relieves from effects of industrial injury. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.133; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.04[4][c]; SOC, Section 5.65, Compensable Consequence Injury].

provided its employees with sleeping and showering facilities on its premises, as well as a host of other amenities. Use of the facilities was permitted to all employees, but not required, and no notice or permission was necessary to use them. After several years of employment with VTA, Applicant moved her residence out of the area, greatly increasing the length of her daily commute. To avoid the long commute in the early morning, she often slept at the VTA premises on the nights before her 4:00 a.m. driving shift. On the evening prior to her injury, Applicant slept at the VTA facilities. She was seriously injured the following morning when she slipped and fell while taking a shower before clocking in for work.

The matter proceeded to trial on the issue of injury AOE/COE.

The WCAB upheld the WCJ's finding of injury determining that the applicant was within the 'course of employment" through application of the 'bunkhouse rule'. The Board held that the bunkhouse rule is triggered where overnight stays are contemplated by the employment arrangement, and the fact that overnight stay is not a requirement does not preclude application of rule. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.62, 4.132[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.05[7].]

See also, Miranda, Perez Lopez v. Helmsman Field Logistic, Zenith Insurance, 2021 Cal. Wrk. Comp. P.D. LEXIS 156 (Split BPD), holding death caused by MVA barred by "going and coming" rule, as employer neither explicit or implicit had as a requirement of decedent's employment that he furnish his own transportation, employer did not compensate the travel, and employees traveled from/to single worksite on his normal commute home; the mere use of carpool among employees held not an exception to the bar of the "going and coming" rule. [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].

See also, Garcia v. Rex Signature Services, 2021 Cal. Wrk. Comp. P.D. LEXIS 176 (BPD), holding that substantial medical evidence that the proximate and substantial cause of the injury was intoxication is required to establish the affirmative defense of intoxication under Labor Code § 3600(a)(4), and this will generally require the opinion of a toxicologist that the intoxication was the substantial cause of the injury 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]; SOC, Section 5.22, Intoxication].

See also, Pacatte v. SF Fire Dept, City and County of SF, 2021 Cal. Wrk. Comp. P.D. LEXIS 177 (BPD), holding injury claim not barred by "going and coming rule" based on applicability of "required vehicle" exception to rule, when although employer did not explicitly request applicant to have access to his car for job, there was clear benefit to employer due to reassignment of firefighter to other fire station location during shift; The WCAB noted that application of the 'require vehicle' exception to 'going and coming' rule should be liberal construed/applied (LC § 3202). [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].

Henderson v. City of Glendora, 2021 Cal. Wrk. Comp. PD LEXIS 154 (BPD).

The Applicant, while employed as a police officer claimed injury while working out at the employer premises gym on April 2, 2019, to his head, neck, right wrist, right shoulder, headaches, cardiovascular system, hypertension, and vision. The applicant testified on the date of injury she arrived at the weight room for a 30 minute workout doing over-head triceps extension when the barbell plate apparently came off striking him in the head. To support AOE/COE the applicant introduced his text message to his supervisor which read "Matt have a good cruise. Need to get off the next two Tuesdays at 4pm would it be okay to start early with a workout, and work the afternoon to get off at 4pm for the next to [sic] Tuesday's [sic]. Getting a jump on working out before our DB to beach body challenge." The subject injury occurred during a Tuesday workout referenced in the text. Captain William's response to Applicant's text as, "sounds good to me." The applicant also testified that (1) he had previously used the employer provided weight room during paid break or lunch break; (2) applicant had never been told he could not use the weight room during break or lunch; (3) Applicant worked out to maintain physical fitness for his job; and (4) he had not generally used the weight room as his off-duty gym.

See also, Resendiz v. La Corneta, Inc., 2021 Cal. Wrk. Comp. P.D. LEXIS 207, when applicant was injury as a result of sliding down stair railing. Although this act of descending stairs was unconventionally, and arguable in an unauthorized manner which resulted in injury, claim was not barred as horseplay (insufficient deviation to take applicant outside scope of employment), or self-inflicted injury (LC § 3600(a)(5)) (no evidence applicant intended to injure herself by descending stairs in unauthorized manner). The applicant met her initial burden of proof that she sustained injury AOE/COE in location she was placed by her employment and while engaged in activity reasonably attributable to that employment. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.21, 4.51[3][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, §§ 10.02[2], 10.04[2]; SOC, Section 5.62, Horseplay -- Skylarking].

WCJ found injury noting that the applicant had both a subjective and an objectively reasonable belief that his work out on April 2, 2019 was on duty and had been authorized by his supervisor, Captain Matt Williams consistent with Ezzy v. Workers' Comp. Appeals Bd. (1983) 146 Cal.App.3d 252 [48 Cal. Comp. Cases 611].) The WCJ also found no evidence of an applicable signed waiver, nor was the weight room posted by the employer that use was limited to off-duty use only.

In denying reconsideration, the WCAB upheld the WCJ holding as establishing (1) AOE/COE by text message to supervisor of work schedule bringing applicant within working in on-duty capacity at time of his injury, (2) applicant was never instructed to not use gym while on duty, and (3) therefore applicant had both subjective and objectively reasonable belief that his workout on date of injury was authorized by his supervisor. Further, signed waiver not routinely enforced, nor part of the police union's Memorandum of Understanding, employer also failed to post notice pursuant to Cal. Code Regs tit. 8, § 9881(c)(4) of non-responsibility for injury. Citing and discussing City of Chino v. WCAB (Alvo) (2007) 72 Cal. Comp. Cases 363 (WD). [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]; SOC, Section 5.27, Off-Dity Recreational, Social or Athletic Activity].

Johnson v. Cadlac, Inc., dba Del Taco and Technology Insurance Co., 2021 Cal. Wrk. Comp. P.D. LEXIS 194 (BPD).

Applicant, a fast food worker, claimed injury due to industrial chemical exposure resulting in eczema. The applicant had a childhood history of childhood atopic dermatitis, and five years prior to the claim industrial injury, dyshidrotic eczema. The QME noted that 'in considering causation for these two dermatitis, genetics plays the primary role. . . and 50% of patients with dyshidrotic eczema have atopic dermatitis'. Through reports and at deposition the QME found injury but was equivocal and ambiguous on whether the applicant eczema was permanently made worse by the industrial exposure. The WCJ found for defendant, with applicant seeking reconsideration.

> *". . . An aggravation is an increase in the severity of a pre-existing condition where the underlying pathology is permanently moved to a higher level. An exacerbation is a temporary increase in the symptoms of a pre-existing condition that returns to its prior level within a reasonable period of time. The industrial aggravation of a pre-existing condition constitutes an injury for workers' compensation purposes. (Tanenbaum v. Industrial Acc. Com. (1935) 4 Cal.2d 615, 617 [1935 Cal. LEXIS 590; Zemke v. Workers' Comp. Appeals Bd. (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358]; Reynolds Electrical & Engineering Co. v. Workers' Comp. Appeals Bd. (Buckner) (1966) 65 Cal.2d 438 [31 Cal.Comp.Cases 421].) The Appeals Board has previously held that the aggravation of a prior condition constitutes an injury when the aggravation causes a need for medical treatment and a period of temporary disability. (City of Los Angeles v. Workers' Comp. Appeals Bd. (Clark) (2017 W/D) 82 Cal.Comp.Cases 1404.)*
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> *It is well established that for the purpose of meeting the causation requirement in [*9] a workers' compensation injury claim, it is sufficient if the work is a contributing cause of the injury. (South Coast Framing, Inc. v. Workers' Comp. Appeals Bd. (2015) 61 Cal.4th 291, [80 Cal.Comp.Cases 489].). . ."*
>
> *Johnson v. Cadlac, Inc., dba Del Taco and Technology Insurance Co., 2021 Cal. Wrk. Comp. P.D. LEXIS at pg. 197.*

On reconsideration the WCAB explain the distinction between 'aggravation' and 'exacerbation' as dependent on whether the condition was made permanently worse, or temporarily made, ultimately returning to pre-exposure baseline. The WCAB noted that whether applicant's symptoms constituted "aggravation" or "exacerbation" of her pre-existing condition is determined by permanency, i.e. an "aggravation" is permanent increase in the severity of pre-existing condition, while "exacerbation" is temporary increase in symptoms that return to their prior level within a reasonable period of time. The WCAB instructed the parties that while an 'aggravation' when coupled with disability will constitute an industrial injury, and 'exacerbation' will not. The matter was remanded for further development of the medical record. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[2], 4.04, 27.01[1][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.01[4]; SOC, Section 5.3, Aggravation of Pre-Existing Nonindustrial Disease or Condition].

Gonzalez v. Mathis (Ca Supreme Court, 2021) 12 Cal. 5th 29, 493 P.3d 212, 86 Cal. Comp. Cases 767, 2021 Cal. LEXIS 5823, 282 Cal. Rptr. 3d 658.

The plaintiff was a licensed profession contractor who was hired by a property owner for the purpose of washing windows on property owners' building. During this process one of Plaintiff's employees fell through a skylight and was catastrophically injured. Plaintiff argued that exceptions to the Privette doctrine applied in that the property owned had a duty to warn and/or had retained some level of control over plaintiff's work.

> *". . . There is a strong presumption under California law that a hirer of an independent contractor delegates to the contractor all responsibility for workplace safety. (See generally Privette v. Superior Court (1993) 5 Cal.4th 689 [21 Cal. Rptr. 2d 72, 854 P.2d 721] (Privette); SeaBright Ins. Co. v. US Airways, Inc. (2011) 52 Cal.4th 590 [129 Cal. Rptr. 3d 601, 258 P.3d 737] (SeaBright).) This means that a hirer is typically not liable for injuries sustained by an independent contractor or its workers while on the job. Commonly referred to as the Privette doctrine, the presumption originally stemmed from the following rationales: First, hirers usually have no right to control an independent contractor's work. (Privette, at p. 693.) Second, contractors can factor in "the cost of safety precautions and insurance coverage in the contract price." (Ibid.) Third, contractors are able to obtain workers' compensation to cover any on-the-job injuries. (Id. at pp. 698–700.) Finally, contractors are typically hired for their expertise, which enables them to perform the contracted-for work safely and successfully. (See id. at p. 700; Rest.3d Torts, Liability for Physical and Emotional Harm, § 57, com. c, p. 402.)*
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> *We have nevertheless identified two limited circumstances in which the presumption is overcome. First, in Hooker v. Department of Transportation (2002) 27 Cal.4th 198 [115 Cal. Rptr. 2d 853, 38 P.3d 1081] (Hooker), we held that a hirer may be liable when it retains control over any part of the independent contractor's work and negligently exercises that retained control in a manner that affirmatively contributes to the worker's injury. (Id. at p. 202.) Second, in Kinsman v. Unocal Corp. (2005) 37 Cal.4th 659 [36 Cal. Rptr. 3d 495, 123 P.3d 931] (Kinsman), we held that a landowner who hires an independent contractor may be liable if the landowner knew, or should have known, of a concealed hazard on the property that the contractor did not know of and could not have reasonably discovered, and the landowner failed to warn the contractor of the hazard. (Id. at p. 664.)"*
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> *Gonzalez v. Mathis (Ca Supreme Court, 2021) 86 Cal. Comp. Cases at page 774,*

The Privette doctrine provides that "a hirer presumptively delegates to an independent contractor all responsibility for workplace safety, such that the hirer is not responsible for any injury resulting from a known unsafe condition at the worksite—regardless of whether the contractor was specifically tasked with repairing the unsafe condition and regardless of whether the danger was created by the work for which the contractor was retained.

In reversing the Court of Appeal, the California Supreme Court held that a property owner who hired professional/independent contractor is not liable for injuries of plaintiff's employees when the hired independent contractor was aware of various obvious hazardous conditions stating that when landowner hires independent contractor to perform work on its property, it presumptively delegates to contractor duty to ensure safety of its workers (*Privette v. Superior Court* (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721, 58 Cal. Comp. Cases 420. The Court held that under the Privette doctrine, although exceptions to *Privette* doctrine permit finding of liability for failure to warn of concealed hazard on premises or if hirer retained control over any part of independent contractor's work in manner affirmatively contributing to injury, those exceptions did not apply here, where the hazard was obvious to plaintiff and hirer retained no control over plaintiff's work. Further, that as between landowner and independent contractor, the law assumes independent contractor is generally better positioned to determine how to address obvious safety hazards on worksite, and that case law clearly establishes that where hirer has effectively delegated its duties, it has no independent obligation to assess workplace safety.

See also, accord, Sandoval v. Qualcomm Inc., (Cal. Supreme Court, 2021) 12 Cal. 5th 256, 493 P.3d 487, 86 Cal. Comp. Cases 787, 2021 Cal. LEXIS 6327, 283 Cal. Rptr. 3d 519, holding that the hiring of electrical contractor relieved property owner from liability where burn injury was caused by live circuit and property owner neither retained nor exercised control. . . no duty and thus no negligence. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 3.133 [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 3.133; Rassp & Herlick, California Workers' Compensation Law, Ch. 12, § 12.06[9].]

IV. Discrimination LC 132a

See also, Vaca v. Cons, 2020 Cal. Wrk. Comp. P.D. LEXIS 377 (BPD), holding that civil settlement/release not submitted to or approved by WCAB will not bar claim for workers' compensation benefits including claim for LC 132a and although Labor Code § 132a claims are not claims for workers' compensation benefits provided in Division 4 of Labor Code, a claim pursuant to LC 132a concerns rights incidental to such claims and, therefore, are subject to settlement approval requirements set forth in Labor Code §§ 5000–5006 of Division 4. [Subsequent History: Defendant's petition for writ of review was denied on November 20, 2020, sub nom. Vons v. Workers' Comp. Appeals

Bd. (Vaca) (2020) 85 Cal. Comp. Cases 1036.] [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 29.01[2], 29.07[2]; Rassp & Herlick California Workers' Compensation Law, Ch. 18, § 18.13[1], [3], [4]; SOC, Section 2.23, Effect of Settlement.]

V. Jurisdiction

Neal v. San Francisco 49ers, 2021 Cal. Wrk. Comp. PD LEXIS 68 (BPD).

The applicant was a professional football player who filed a CT claim of injury for the period ending with his employment with Carolina Cobras 7/21/2000. The applicant played for the San Francisco 49ers July 21, 1998 through September 23, 1998.

The matter proceeded to trial on July 19, 2017, on the sole issue of jurisdiction. Applicant testified that the 49ers provided him a plane ticket, flew him to California from New Jersey, and offered him a three-year contract after a workout session. (*Id.* at p. 3.) He accepted the contract in California. No contract terms were discussed while he was in New Jersey. Applicant was never a

> *". . . . 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.)*
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> *It has long been recognized that a hiring in California within the meaning of Labor Code sections 3600.5(a) and 5305 provides this state with sufficient connection to the employment to support adjudication of a claim of industrial injury before the WCAB. (Alaska Packers Assn. v. Industrial Acc. Com. (Palma) (1934) 1 Cal.2d 250, affd. (1935) 294 U.S. 532 (Palma); Bowen v. Workers' Comp. Appeals Bd. (1999) 73 Cal.App.4th 15, 27 [64 Cal.Comp.Cases 745] ["an employee who is a professional athlete residing in California, such as Bowen, who signs a player's contract in California furnished to the athlete here by an out-of-state team, is entitled to benefits under the act for injuries received while playing out of state under the contract"]; Johnson, supra, 221 Cal.App.4th at p. 1126.)"*
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> *Neal v. San Francisco 49ers, 2021 Cal. Wrk. Comp. PD LEXIS 68, at pg. 74.*

LC § 3600.5. Coverage; Out-of-state injury to employee hired or regularly employed in this state; Out-of-state employee temporarily in this state; Professional athletes;

(a) ***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. . .

(c)

(1) With respect to an occupational disease or cumulative injury, ***a professional athlete*** who has been hired outside of this state and his or her employer shall be exempted from the provisions of this division ***while the professional athlete is temporarily within this state doing work*** for his or her employer if both of the following are satisfied:

(A) The *employer has furnished workers' compensation insurance coverage or its equivalent under the laws of a state* other than California.

(B) The employer's ***workers' compensation insurance or its equivalent covers the professional athlete's work while in this state.***

(2) In any case in which paragraph (1) is satisfied, the benefits under the workers' compensation insurance or similar laws of the other state, and other remedies under those laws, shall be the exclusive remedy against the employer for any occupational disease or cumulative injury, whether resulting in death or not, received by the employee while working for the employer in this state.

(3) A professional athlete shall be deemed, for purposes of this subdivision, to be temporarily within this state doing work for his or her employer if, during the 365 consecutive days immediately preceding the professional athlete's last day of work for the employer within the state, the professional athlete performs less than 20 percent of his or her duty days in California during that 365-day period in California.

(d)

(1) With respect to an occupational disease or cumulative injury, ***a professional athlete*** and his or her employer shall be exempt from this division when all of the professional athlete's employers in his or her last year of work as a professional athlete are exempt from this division pursuant to subdivision (c) or any other law, **unless both of the following conditions are satisfied:**

(A) The professional athlete has, over the course of his or her professional athletic career, worked for two or more seasons for a California-based team or teams, or the professional athlete has, over the course of his or her professional athletic career, worked 20 percent or more of his or her duty days either in California or for a California-based team. The percentage of a professional athletic career worked either within California or for a California-based team shall be determined solely by taking the number of duty days the professional athlete worked for a California-based team or teams, plus the number of duty days the professional athlete worked as a professional athlete in California for any team other than a California-based team, and dividing that number by the total number of duty days the professional athlete was employed anywhere as a professional athlete.

(B) The professional athlete has, over the course of his or her professional athletic career, worked for fewer than seven seasons for any team or teams other than a California-based team or teams as defined in this section.

(2) When subparagraphs (A) and (B) of paragraph (1) are both satisfied, liability for the professional athlete's occupational disease or cumulative injury shall be determined in accordance with Section 5500.5.

resident in California, never used a California-based agent, and never signed any other contracts in California.

Defendant argued that section 3600.5, subdivision (d) precludes the exercise of WCAB jurisdiction over a claim if the WCAB cannot exercise personal jurisdiction over at least one employer during the applicant's last year as a professional athlete. In this case, defendant asserts that the WCAB "lacks personal jurisdiction ... pursuant to Labor Code section 3600.5(c)" over applicant's last two employers, the Tampa Bay Storm ("the Storm") and the Carolina Cobras ("the Cobras") and therefore his claim is barred from being adjudicated in this forum.

Applicant argued that section 3600.5, subdivision (d) only applies to applicants who have not been hired in California on at least one of their contracts during the cumulative trauma injury period. Further, applicant asserted that where there is a contract of hire in California, jurisdiction may be exercised under section 3600.5, subdivision (a) and section 5305.

The WCJ found jurisdiction and allowed the matter to proceed.

The WCAB affirmed WCJ's finding that applicant's claim for cumulative injury sustained while employed as a professional football player by defendant San Francisco 49ers and multiple other football teams during period 5/2/95 to 7/21/2000, could be brought in California, and found that Labor Code § 3600.5(c) and (d) did not exempt his claim from California jurisdiction where the provision of LC 3600.5(a) is satisfied, i.e. contract for hire entered into with the State of California. The WCAB, noted that Labor Code § 3600.5(c) and (d) are subject matter jurisdiction exclusions and do not depend on presence or absence of personal jurisdiction over defendant.

The WCAB held that applicant's California hire by defendant, in itself, was sufficient to establish WCAB subject matter jurisdiction over his claim because exemptions in Labor Code § 3600.5(c) and (d) only apply to athletes who cannot establish jurisdiction under Labor Code § 3600.5(a) or 5305, and defendant failed to prove Labor Code § 3600.5(c) applied to either Tampa Bay Storm or Carolina Cobras, applicant's last two employers, because there was no evidence that applicant was ever temporarily in California while performing work for either team which contributed to injury. Further, even if applicant's claim had involved temporary employment in California contributing to his injury, defendant did not prove other necessary elements of LC 3600.5(c) exemptions.

In summary, the WCAB held that subjection matter jurisdiction was established through the evidence establishing that defendant entered into a contract for hire within the state of California with applicant (LC §3600.5(a)). Further, defendant failed to establish that the applicant was ever temporarily in California while performing work for either the last two teams for which he played. The WCAB left open what might have been the outcome if the defendant had established the applicant was temporarily in California while performing work for either of the last two teams for which he played (LC §3600.5(c)).

VI. Medical Treatment

Ceja v. Taylor Farms Pacific, 2021 Cal. Wrk. Comp. PD LEXIS 79 (BPD).

*8 CCR 9792.9.1(e)(3) provides that "Decisions to modify, delay, or deny a request for authorization. . . **(3)** For prospective, concurrent, or expedited review, a decision to modify, delay, or deny shall be communicated to the requesting physician within 24 hours of the decision, and shall be communicated to the requesting physician initially by telephone, facsimile, or electronic mail. The communication by telephone shall be followed by **written notice to the requesting physician, the injured worker, and if the injured worker is represented by counsel, the injured worker's attorney within 24 hours of the decision for concurrent review and within two (2) business days for prospective review and for expedited review within 72 hours of receipt of the request**. . .*

Applicant sustained injury to the bilateral knees and right hip on November 20, 2016, while employed as a laborer. On referral by defendant to PTP surgeon for evaluation knee surgery was recommended. A request for authorization (RFA) dated November 19, 2019, recommending the knee arthroscopy was submitted to defendant. Defendant issued a UR decision dated November 22, 2019, non-certifying the RFA for surgery and related treatment. Although the UR decision was served on the PTP and applicant, it was not served on applicant's attorney.

See, Shelven v. Ral;hs Grocery Co., 2020 Cal. Wrk. Comp. P.D. LEXIS 343 (BPD), holding that second request/RFA for same treatment (epidural injection) but at difference level of the spine was barred by first request where first request was not certified and did not qualify for exception to rule in Labor Code § 4610(k) [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[5]; SOC, Section 7.36, Utilization Review – Procedure.].

See also, Cole v. Kaiser Foundation Hospital, 2020 Cal. Wrk. Comp. P.D. LEXIS 340, citing and discussing Babbitt v. Ow Jing (2007) 72 Cal. Comp. Cases 70 (En Banc Decision), holding that defendant is required to take affirmative action of seeking transfer of applicant's treatment from outside to within the MPN per the procedures outlined in 8 Cal. Code Reg. § 9767.9(f), requiring notice of determination to transfer. See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §5.03[3]; Rassp & Herlick, California Worker Compensation Law, Ch. 4, § 4.12[4]; SOC, Section 7.57, Medical Provider Network – Transfer of Care).

The matter proceeded to trial with the parties stipulating that the November 22, 2019 UR decision was not served on applicant's attorney. Applicant contended that the UR was invalid and untimely not timely served on Counsel for Applicant. Defendant argued that the UR was timely as the requirement service on Counsel for Applicant was incidental and not a requirement for valid UR. At trial Counsel for applicant further argued that the reports of the PTP were sufficient to establish medical necessity for the requested surgery. However, these reports did not include citations to Medical Treatment Utilization Schedule (MTUS) guidelines or other evidence-based treatment guidelines pursuant to Labor Code § 5307.27.

The WCJ found for the applicant holding the UR untimely for lack of service on Counsel for Applicant and awarded the surgery as requested.

See also, UCSF Medical Center v. WCAB (Avist), 86 Cal. Comp. Cases 138, 2020 Cal. Wrk. Comp. LEXIS 105, holding that defendant may not unilaterally terminate home health care services without first establishing that services were no longer necessary to cure or relieve effects of applicant's injury where parties stipulated that applicant's primary treating physician would assess and comment on Applicant's need for ongoing home care services and that physician's commentary and prescription renewal would be subject to "non-UR" statutory requirements, (i.e. no longer reasonably required to cure or relieve effects of applicant's injury), and that in order to terminate home health care defendant had burden to show that applicant's condition had changed. Citing and discussing Patterson v. The Oaks Farm (2014) 79 Cal. Comp. Cases 910 (Appeals Board significant panel decision); [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.]

The WCAB reversed upholding the finding the UR as untimely for lack of timely service on Counsel for Applicant, but holding that an invalid UR then shift burden to applicant to establish medical necessity via citations to Medical Treatment Utilization Schedule (MTUS) guidelines or other evidence-based treatment guidelines pursuant to Labor Code § 5307.27. Because the medical evidence failed to include citations to Medical Treatment Utilization Schedule (MTUS) guidelines or other evidence-based treatment guidelines pursuant to Labor Code § 5307.27, Applicant failed to meet their burden of proof on the issue of medical necessity.

Gonzalez v. AC Transit, 2021 Cal. Wrk. Comp. PD LEXIS 71 (BPD).

Defendant denied liability AOE/COE for a 2013 injury until June 17, 2020. On July 1, 2020, Defendant sent its first MPN notice. The continuity-of-care request by the treater issued on July 15, 2020, and on 9/8/20 the treater requested authorization for surgery. The continuity-of- care request was not directed to the QME until after the hearing held September 11, 2020, when the WCJ order that be done. By the time of the hearing on September 11, 2020, applicant's condition had evidently worsened during the 90 days period prior. She had gone from being reportedly pain-free on May 11, 2020, to needing surgery on September 8, 2020. Although the defendant authorized the surgery, through utilization review, defendant at the same time denying any liability for that surgery outside the defendants MPN. The issue was whether continuation-of-care pursuant to Labor Code 4616.2 and under 8 Cal. Code Reg. § 9767.9(e)(4), allowed the applicant to treat outside the defendant's MPN.

Editor's Comment: This decision is easily summarized by one question, 'what was the defendant's end game. . .merely delay"? The facts appeared whelming: (1) the defendant's original denial was tenuous at best; (2) Claim was ultimately accepted after 7 years of delay; and (3) The recommendation for surgery was UR certified. So the fight was over what?? Whether the surgery could be provided outside of defendant's MPN?? Everyone should read this opinion for two reasons: Defense attorneys as an example of the importance for client control and WCJ's how to effectively write an opinion after decision.

See also, Kazrani v. LA Unified School District, 2021 Cal. Wrk. Comp. PD LEXIS 126 (BPD), holding MPN access standards does not require MPN to have three physicians of each and every possible appropriate specialty to act as primary treating physician (8 Cal. Code Reg. § 9767.5 [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 5.03; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.12.]

At trial the Honorable Christopher Miller took a very convoluted fact pattern with complicated and complex legal issues and wrote exemplar opinion. WCJ Miller first correctly noted that the Labor Code 4616.2 and under 8 Cal. Code Reg. § 9767.9(e)(4), provides for continuity of care when surgery has been "recommended and documented by the provider to occur within 180 days from the MPN coverage effective date ('effective date' is the date defendant first acquired right to transfer applicant's treatment to its MPN). Judge Miller than provided a summary of the relevant timeline to support his conclusion that the applicant should be allowed to treat outside the Defendants MPN.

Last, WCJ Miller addressed and disposed of each argument raised by defendant exposing the flaws for each. Primary was defendant's conflating the issues of 'medical necessity' with the right to treat outside the defendant's MPN. Noteworthy is the fact that is upholding the decision of WCJ Miller is that the WCAB adopted in large part the written opinion of WCJ Miller.

National Cement Company v. WCAB (Rivota) (Court of Appeal, Second Appellate District) 86 Cal.Comp. Cases 595, 2021 Cal. Wrk. Comp. LEXIS 21 (Writ Denied).

Applicant, a cement truck driver, suffered multiple injuries, including a brain injury, when he was involved in a motor vehicle accident on 5/5/2014, and received an award of 100 percent PD and further medical treatment.

On 1/23/2020, Applicant's PTP, requested authorization for Applicant's inpatient residential care. Defendant authorized the treatment but required the PTP to provide ongoing monthly RFA's requesting continued authorization for the inpatient care. According to the nurse case manager's testimony, however, the monthly RFAs were required in order for the PTP & facility to receive payment for Applicant's continued in facility care, and not to establish Applicant's medical need for that continued care.

The 9/25/2020 RFA for continuing in facility care was UR denied. After Expedited Hearing, the WCJ found that Defendant improperly discontinued Applicant's inpatient care, and awarded Applicant further medical treatment in the form of continued interdisciplinary, post-acute in-facility residential rehabilitation in accordance with *Patterson v. The Oaks Farm* (2014) 79 Cal. Comp. Cases 910 (Appeals Board significant panel decision), without need for ongoing RFAs, until such time as Defendant established a change in Applicant's condition or circumstance justifying termination of inpatient care at that that facility.

Defendant filed a Petition for Reconsideration, alleging in relevant part, that the WCJ erred in relying on *Patterson* to find that Applicant was entitled to continued inpatient care, and that there was no substantial evidence to support a finding that the inpatient care was reasonable and necessary medical treatment. The WCJ recommended that reconsideration be denied, noting that Defendant had a duty under Labor Code § 4600 to provide medical treatment reasonably required to cure or relieve Applicant from the effects of his industrial injury.

In upholding the WCJ both the WCAB and Court of Appeal noted that "… [I]n *Patterson*, the defendant unilaterally ceased to provide previously agreed reasonable medical treatment notwithstanding that there was no evidence of a change in the applicant's condition or circumstances that supported cessation of the treatment. In finding that the defendant's unilateral cessation of nurse case manager services in *Patterson* was contrary to the Labor Code § 4600(a) duty to provide reasonable medical treatment, the WCAB recognized that the defendant's agreed obligation to provide that treatment in that case was not eliminated by the adoption of the utilization review and independent medical review statutes subsequent to the parties' agreement."

Both Courts noted that in Patterson, the "Defendant acknowledged the reasonableness and necessity of [the medical treatment at issue], when it first authorized [that treatment], and applicant does not have the burden of proving [its] ongoing reasonableness and necessity. Rather, it is defendant's burden to show that the continued provision of the [treatment] is no longer reasonably required because of a change in applicant's condition or circumstances. Defendant cannot shift its burden onto applicant by requiring a new RFA and starting the process over again. [*Patterson, supra*, 79 Cal. Comp. Cases at p. 918.]. . .that although *Patterson* involved the services of a nurse case manager, the principles advanced in that case apply to other medical treatment modalities as well. Here, [the nurse case manager] testified that based on [the PTP] recommendation, Applicant had continued need for placement at [in facility services]. Further, [the nurse case manager] stated that there was no change in Applicant's circumstance and no reasonable basis to discharge Applicant from care." The WCJ found [the nurse case manager's] testimony to be credible and concluded that Applicant's continued care [in facility] was necessary, without ongoing RFAs, to ensure Applicant's safety and provide him with a stable living situation and uninterrupted medical treatment.

See also, Wiley v. ATT&T, 2021 Cal. Wrk. Comp. P.D. LEXIS 217 (BPD), holding that LC § 4610.5(l)(1) requires employer to provide IMR reviewer with all records relevant to employee's current medical condition and medical treatment generally and treatment specifically being requested, and improperly exclusion of highly relevant in-home assessment report from records provided to IMR organization constitutes a plainly erroneous findings of fact (LC § 4610.6(h)(5)), justifying reversal as without or in excess of Administrative Director's powers per Labor Code § 4610.6(h)(1). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02, 22.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.11; SOC, Section 7.41, Independent Medical Review – Appeal and Implementations of Determination].

Defendant, seeking review further challenged the WCAB's award on the basis that it did not include a finding that the inpatient treatment was reasonable and necessary medical care under Labor Code § 4600. Finally, Defendant asserted that [the PTP] was obligated under 8 Cal. Code Reg. § 9785 to periodically provide updated medical reporting regarding Applicant's need for continued in facility.

In upholding the WCAB and WCJ, the Court of Appeal noted that the *Patterson* decision does not require ongoing authorization. A prior award or stipulation, or relinquishment of the right to conduct UR for continued treatment is sufficient. Where the medical treatment awarded by the WCAB in this matter was reasonable and necessary,

it is Defendant's obligation to continue providing such treatment absent a change in circumstances and a safe discharge plan to ensure Applicant's well-being and continuity of his medical treatment and living situation. Both are defendant's burden.

VII. Medical-Legal Procedures

See also, Hill v. County of Alameda, 2020 Cal. Wrk. Comp. P.D. LEXIS 348 (BPD), holding that 'good cause' not found for replacement panel qualified medical evaluator despite technical defects citing and discussing grounds for replacement panel as set forth in 8 Cal. Code Reg. § 31.5(a), noting that 8 Cal. Code Reg. § 31.5(a)(12), prohibits reliance on technicalities to engage in "doctor shopping," where the applicant had opportunity to review panel qualified medical evaluator's report before objecting to it on technical grounds; The WCAB highlighted that applicant was not substantially prejudiced or irreparably harmed by denial of replacement panel because applicant can present treating physician's report regarding her condition and/or set medical re-evaluation with panel qualified medical evaluator.; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[6]. SOC, Section 14.28, Medical-Legal -- Unrepresented Employee].

See also, Garcia v. Food 4 Less, 2020 Cal. Wrk. Comp. P.D. LEXIS 342 (BPD), citing and discussing in Maxham v. California Department of Corrections and Rehabilitation (2017) 82 Cal. Comp. Cases 136 (Appeals Board en banc opinion), and Suon v. California Dairies (2018) 83 Cal. Comp. Cases 1803 (Appeals Board en banc decision) holding that letter requesting supplemental report served on opposing party was not improper ex parte communication, but phone conversation with QME discussing defendant's objection to letter in detail was improper ex parte communication under LC § 4062.3(e). Applicant's attorney's correspondence to PQME violated Labor Code § 4062.3(b) as it contained "information" including nonmedical records relevant to doctor's determination not serve on defendant 20 days prior to providing it to PQME. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[18], 23.15; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, §§ 15.03[4][d], [e], Ch. 16, 16.35; SOC, Section 14.28, Medical-Legal -- Unrepresented Employee].

See also Jones v Corkscrew Café LLC, 2020 Cal. Wrk. Comp. P.D. LEXIS 341 (BPD), holding that second QME panel held improper where examination by QME from first panel occurred after claims for both specific and subsequently CT were filed prior the examination by QME from first Panel. See also, Navarro v. City of Montebello (2014) 79 Cal. Comp. Cases 418 (En Banc Opinion); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[11]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, §§16.54[11]; SOC, Section 14.52, Subsequent Evaluation and Additional Medical Evaluator Panel in Different Specialty].

See also, Gill v. Cunty of Fresno, (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 51, 86 Cal. Comp. Cases 609 (BPD), holding that Applicant's letter requesting medical evaluation sent to defendant the day after he filed 2019 cumulative injury claim was sufficient triggering event for requesting qualified medical evaluator panel pursuant to Labor Code §§ 4060 and 4062.2, even though defendant had not yet sent delay/denial notice. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.06[1][a], [2], [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 Procedures – Represented Employee].

See also, Baker v. County of Sac., 2021 Cal. Wrk. Comp. P.D. LEXIS 174 (BPD), holding that UR certifying RFA for L5-S1 fusion surgery does not make defendant responsible for L4-5 fusion where surgeon originally mistakenly requested surgical authorization at wrong level although identical procedure. Further, the WCJ may not address medical necessity absent a determination that UR was untimely. [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].

See also, Medeiros v. County of Sonoma Sheriff's Department, 2021 Cal. Wrk. Comp. P.D. LEXIS 161 (BPD), holding the panel QME secured while applicant was unrepresented is proper panel qualified medical evaluator even where applicant subsequently becomes represented; Citing, discussing, and explain Romero v. Costco Wholesale (2007) 72 Cal. Comp. Cases 824 (Appeals Board Significant Panel Decision). Romero merely permits a request for new QME panel where an unrepresented worker subsequently becomes represented, provided the evaluation with unrepresented panel has not yet occurred at time of objection and request for new panel by the party opponent. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.06[1][a], [b], 32.06[2][a], [b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[3]; SOC, Section 14.28, Medical-Legal Process].

See also, Bonnevie v, Fox Studio Lot, 2021 Cal. Wrk. P.D. LEXIS 247 (BPD), holding that a party is not permitted to unilaterally withdraw from an agreement to utilize an AME when pursuant to plain language in Labor Code § 4062.2(f), stipulation to utilize AME may only be canceled by parties' mutual written consent even where the evaluation has yet taken place. Split Panel decision holding contra to Yarbrough v. Southern Glazer's Wine & Spirits (2017) 83 Cal. Comp. Cases 425, which interpreted statutory language as permitting unilateral withdrawal from AME agreement where no evaluation had yet occurred. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.06[1][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[2]; SOC, Section 14.29, Medical-Legal Process – Represented Employee].

See also, Ray v. PRG Insurance Recruiters, 2021 Cal. Wrk, Comp. P.D. LEXIS 226, holding that a request for replacement QME panel properly denied where no showing of prejudice sufficient to justify new panel, and 8 Cal. Code Reg. § 31.5(a)(2) time period do not apply to supplemental evaluations. Citing and discussing, Cheryl Cienfuegos v. Fountain Valley School District, 2011 Cal. Wrk. Comp. P.D. LEXIS 206;; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[5]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[5]; SOC, Section 14.40, Appointment and Cancellation].

VIII. Penalties

Carter v. Country of Alameda, 2021 Cal.Wrk. Comp. P.D. LEXIS 158 (BPD).

Defendant sought reconsideration, then review by the Court of Appeal of a 100% award. When both unsuccessful, Defendant ultimately decided to accept the decision making payment beyond the 14 day requirement of LC 4650(d), but within the time period for seeking appeal to the California Supreme Court. Defendant upon payment failed to include payment pursuant to 4650(d) the self-assessed 10% penalty.

Applicant sought penalties pursuant to both 4650(d) for untimely payment of the award and 5814 for untimely payment of the 4650(d). The WCJ found for the applicant and awarded a 4650(d) penalty of $51,257, and additionally a 5814 penalty of $10,000.

On reconsideration of the penalty award, the WCAB held that it is not a defense to a claim for penalties pursuant to Labor Code 4650(d) and 5814, that an award was subject to appeal where no appeal was taken, and where payment of the award was made beyond 14 days of the decision. Further, an additional penalty pursuant to LC 5814 is proper where an untimely payment of an award has occurred without an additional increase of the self-assessed 10% penalty pursuant to LC 4650(d). Last, where the award is untimely but is otherwise timely paid with the additional penalty of 4650(d) self-assessed penalty, any claim for penalty pursuant to 5814 will be offset by the 4650(d) self-assessed penalty. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.40[1], [3][a], [c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.11[2], [5]; SOC, Section, 13.2, Penalty Under LC 4650].

IX. Permanent Disability

Lund v. Ryko Solutions Inc., 2020 Cal. Wrk, Comp. P.D. LEXIS 373 (BPD).

Applicant sustained injury to back and underwent low back surgery involving two-disc decompression and fusion. The AME determined that 'aggregation' of the rating strings rather than application of the CVE more accurately reflected actual disability. Further, the WCJ determined that the 'intensity and seriousness of medical treatment involving two-disc decompression and fusion surgery supported finding of "Catastrophic Injury" pursuant to LC 4660.1(c)(2)(B), allowing the psychiatric disability to be compensable. Last, the opinion of the VR expert concluded that the applicant was not amenable to vocational rehabilitation and had a total loss of labor market access based solely upon the effects of the industrial injury. The WCJ awarded a total disability award finding the industrial injury 'catastrophic' allowing an award of PD for compensable consequence psychiatric injury, application of "aggregation" pursuant to Athens Administrators v. WCAB (Kite), and last pursuant to the holdings of Ogilvie/Dahl/LeBeouf decision and VR evidence present. Defendant sought reconsideration.

See also, Gomez v. County of Ventura, 2020 Cal. Work Comp. P.D LEXIS 34 (BPD), holding that vocational evidence and substantial medical evidence supported WCJ's finding of permanent total disability despite opinion of the AME rating less than 100% after apportionment where the 100% disability was cause directly and solely by the industrial injury. Citing and discussing 8 Cal. Code Reg. 10785 [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], [4], 32.01[3][a][ii], 32.02[2], 32.03A[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.12[2], 7.40, 7.41, 7.42[3]; The Lawyers' Guide to the AMA Guide to the AMA Guides and the California Workers' Compensation, Chs. 6, 7, 8.].

See also, Schieffer v. St of Ca, Salinas Valley Prison, 2021 Cal. Wrk. Comp. PD LEXIS 48 (BPD), citing and discussing Ogilvie v. W.C.A.B. (2011) 197 Cal. App. 4th 1262, 129 Cal. Rptr. 3d 704, 76 Cal. Comp. Cases 624, LeBoeuf v. W.C.A.B. (1983) 34 Cal. 3d 234, 193 Cal. Rptr. 547, 666 P.2d 989, 48 Cal. Comp. Cases 587, and Contra Costa County v. W.C.A.B. (Dahl) (2015) 240 Cal. App. 4th 746, 193 Cal Rptr. 3d 7, 80 Cal. Comp. Cases 1119, holding that the decision of WCJ awarding total disability based upon vocational evidence established that applicant's ability to benefit from vocational rehabilitation had been impaired to such degree by his industrial orthopedic injuries that he lost 100 percent of his ability to return to gainful employment, and that vocational expert evidence was sufficient to rebut scheduled AMA Guides rating. Decision also holding that an award of total disability without apportionment combining award of disability for CT and Specific injuries where "inextricably intertwined" and any attempt to apportion would be speculative, and QME was unable to explain the how and why he would apportion between awards or to nonindustrial causation. See also, accord, Heredia v. Treasury Wine Estate Corp., 2021 Cal. Wrk. Comp. PD. LEXIS 46 (BPD); See also Thomas v. Peter Kiewit Sons, Inc 49 CWCR 49 (BPD) discussing VR evidence and the principle of 'synergy'. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], [4], 8.05[1]-[3], 8.07[2][d][ii], 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.12[2], 7.42[2]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Chs. 4, 6, 7.]

In upholding the decision of the WCJ, the WCAB held that 'intensity and seriousness of medical treatment' involving two-disc decompression and fusion surgery supported a finding of "Catastrophic Injury" pursuant to LC 4660.1(c)(2)(B), consistent with the holding of Wilson v. State of CA Cal Fire, (2019) 84 Cal. Comp. Cases 393, allowing an award of PD for a compensable consequence psychiatric. Further, that although LC 4662(b) 'in accordance with the facts' does not provide an independent method/theory for determining PD (See *Dept. of Corrections & Rehabilitation v. W.C.A.B.* (*Fitzpatrick*) (2018) 27 Cal. App. 5th 607, 238 Cal. Rptr. 3d 224, 83 Cal. Comp. Cases 1680), a finding of fact supporting 100% award is proper where 4660/4660.1 methods/theories are utilized. In this case the WCJ found properly that (1) applicant was entitled to separate impairment rating for injury to his psyche based on "catastrophic" physical injury; (2) opinions of agreed medical evaluators supported use of addition rather than Combined Values Chart (CVC); (3) in accordance with *Ogilvie v. W.C.A.B.* (2011) 197 Cal. App. 4th 1262, 129 Cal. Rptr. 3d 704, 76 Cal. Comp. Cases 624, *Contra Costa County v. W.C.A.B.* (*Dahl*) (2015) 240 Cal. App. 4th 746, 193 Cal Rptr. 3d 7, 80 Cal. Comp. Cases 1119, and *LeBoeuf v. W.C.A.B.* (1983) 34 Cal. 3d 234, 193 Cal. Rptr. 547, 666 P.2d 989, 48 Cal. Comp. Cases 587, the scheduled rating was rebutted by opinion of applicant's vocational expert. All methods/theories utilized by WCJ were proper as within LC 4660/4660.1. [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, Chs. 7, 9; SOC, Section 1016, Permanent Disability.]

Fresno Unified School District v. WCAB (Swanson) (5th Appellate District), 86 Cal. Comp. Cases 591, 2021 Cal.Wrk. Comp. LEXIS 17 (W/D).

Applicant sustained a 2004 injury to various parts of body including neck, low back, psyche, cervical spine, esophagus, and bladder. No issue appears to have existed as to whether the applicant was in fact totally disabled. However, the AME apportioned 15% to a prior non-industrial cervical fusion, but otherwise believed the applicant to be 100% disabled. The VR evidence found the applicant to precluded from competing/returning to the open labor market. Further, the VR evidence after considering the AME's opinion, found that the applicant was totally disabled directly due to the subject industrial injury. The WCJ awarded 100% disability without apportionment.

Defendant sought reconsideration and thereafter, writ of review. Both the WCAB and the 5th District Court of Appeal upheld the finding of the WCJ. The Court of Appeal in sustaining the award of total disability discussed extensively the doctrine of direct causation. The Court held that pursuant to the Ogilvie, that when vocational expert evidence established that applicant is, as a direct, sole and exclusive consequence of the subject industrial injury, precluded from returning to the open labor market and also not amenable to vocational rehabilitation, an award of total disability is proper. (Citing and Discussing *Dept. of Corrections & Rehabilitation v. W.C.A.B. (Fitzpatrick)* (2018) 27 Cal. App. 5th 607, 238 Cal. Rptr. 3d 224, 83 Cal. Comp. Cases 1680); [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, Chs. 6, 7; SOC, Section, 10.34, Apportionment – Pre-Existing Disease or Condition].

X. Presumptions

Blair v. City of Torrance Police Department, 2021 Cal. Wrk. Comp. PD LEXIS 100 (BPD).

Applicant was a police officer with the City of Torrance from 5/29/82 through 10/26/01. In 2018 Applicant began noticing symptoms which through diagnostic testing confirmed applicant's having developed bladder cancer. The AME found the bladder cancer to be non-industrial caused confirming that the latency period for this cancer was 20 years. The matter was tried on the issue of whether the claim fell within the presumption of LC 3212.1. The WCJ found the presumption applied and for the applicant. Defendant sought reconsideration.

On reconsideration the defendant argued that the presumption did not apply, and if it did that the presumption had been overcome by the opinion of the AME. The WCAB wrote "The essence of defendant's argument is that the presumption for this covered class of individuals is three months for every year of service for a maximum of 120 months in any circumstance. In the present matter, applicant was employed from 1982 until 2001 in active service. His bladder

cancer did not manifest until 2018, 17 years after retiring from his position as a police officer. Defendant contends that applicant's presumption would not extend past 2006.

In deciding this matter, the Court was presented with evidence by AME that the type of cancer that developed in applicant has a latency period of twenty years. Based on the AME's unrebutted opinion, the applicant's bladder cancer would have begun developing in August of 1998, while the applicant was employed with the City. Assuming development occurred within the period of employment, the claim is compensable through application of the presumption of LC 3212.1.' Citing and discussing LC 3212.1, the WCAB wrote, 'The cancer so *developing* or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption.' Recon denied.

XI. Procedure

See also, California Trucking Assn. v. Bonta, 996 F.3d 644, 2021 U.S. App. LEXIS 12629, 86 Cal. Comp. Cases 382AB-5 (see LC § 2775) which codified the holding in Dynamex Operations W. v. Superior Ct. (2018), 4 Cal. 5th 903 [232 Cal. Rptr. 3d 1, 416 P.3d 1, 83 Cal. Comp. Cases 817], is a generally applicable labor law that affects a motor carrier's relationship with its workforce and does not bind, compel, or otherwise freeze into place the prices, routes, or services of motor carriers, it is not preempted by the FAA; Citing and discussing People ex rel. Harris v. Pac Anchor Transportation, Inc. (2014) 59 Cal. 4th 772; California Trucking Assn. v. Bonta, 996 F.3d 644, 2021 U.S. App. LEXIS 12629, 86 Cal. Comp. Cases 382; See also, accord, People v. Superior Court (Cal Cartage Transportation Express, (LLC) (2020) 85 Cal.Comp. Cases 999; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 3.03; Rassp & Herlick California Workers' Compensation Law, Ch. 2, § 2.06[1], [2].]

XII. Psychiatric Injury

Munoz v. Department of Corrections 2020 Cal. Wrk. Comp. P.D. Lexis 363, 86 Cal. Comp. Cases 86.

The applicant received notice by email from her supervisor that a meeting was scheduled which caused applicant to experience anxiety and a panic attack due to applicant's perception that this meeting was about an impending disciplinary action against the applicant. It was not.

The Psychiatric QME found psychiatric injury predominant as to all causes industrial. The QME also found however that the email was a "substantial cause" of the applicant's psychiatric injury. WCJ found for defendant holding that although the applicant had sustained an industrially caused psychiatric, it was substantially caused by "good faith lawful personnel action", and therefore barred by LC 3208(h). Applicant sought reconsideration.

The WCAB reversed holding that the applicant's claim of psychiatric injury was <u>not</u> barred by good faith personnel action defense (LC § 3208.3(h)), when WCAB by split panel found that the email from applicant's supervisor to applicant and her co-workers stating simply, "[w]e will be having a brief meeting in the Main Records Office at 12:30 today," which led applicant to experience anxiety attack and, according to medical evaluator, was not "personnel action" within meaning of Labor Code § 3208.3(h), citing and discussing *Larch v. Contra Costa County* (1998) 63 Cal. Comp. Cases 831 (Significant Panel Decision). The WCAB wrote that the perception of email/announcement as notice of impending discipline was insufficient where determined otherwise; While it is not necessary for personnel action to have direct or immediate effect on employment status, it must at least have *potential* to do so to be considered "personnel action". [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 5.33, Psychiatric Injury – Good Faith Personnel Action].

". . . In Rolda, the Board determined that a multi-level analysis is required when the good faith personnel action defense is raised. The first two questions are whether the alleged psychiatric injury involves actual events of employment, and if so, whether competent medical evidence establishes the required percentage of industrial causation. If the first two questions are answered in the affirmative, the next question is whether any of the actual employment events were personnel actions. If so, the next issue is whether the personnel action or actions were lawful, nondiscriminatory and made in good faith. Finally, if all these criteria are met, competent medical evidence is necessary as to causation; that is, whether or not the personnel action or actions are a substantial cause, accounting for at least 35 to 40 percent, of the psychiatric injury. . ."

". . .Although the Board stated in Larch that it is not necessary for a personnel action to have a direct or immediate effect on employment status, we believe that it must have the potential to do so. (See Kirby v. Costa (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 417, citing Larch, supra, 63 Cal. Comp. Cases at 834 ["personnel action" does not cover all happenings in the workplace done in good faith]; County of Alameda v. Workers' Comp. Appeals Bd. (Kan) (2006) 71 Cal. Comp. Cases 827 (writ den.); County of Butte v. Workers' Comp. Appeals Bd. (Purcell) (2000) 65 Cal. Comp. Cases 1053 (writ den.) [employer's actions found not to be personnel actions because they did not involve discipline or threat of discipline].)

Munoz v. Department of Corrections 2020 Cal. Wrk. Comp. P.D. Lexis 363, 86 Cal. Comp. Cases 86, at pgs. 90-91

See also, Milla v. United Guard Security, 2020 Cal. Wrk. Comp. PD LEXIS 330 (BPD), holding that it is the defendant who has burden of proof on the issue that psychiatric injury barred by the lack 6 months aggregate employment per LC § 3208.3(d). Accord, Garcia v. Reynolds Packing Co, 2018 Cal. Wrk, Comp PD LEXIS 29; Editor's comment: This holding is consistent with the general rule that the party who benefits from the affirmative of the issue has the burden of proof on that issue, but see the dissenting opinion by Commissioner Lowe. [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, Sturm v. Coranado Unified School District (2021) 86 Cal. Comp. Cases 253 (Split Panel Decision), holding that gate crushing amputation of finger constituted 'violent act' to find psychiatric injury compensable for PD purposes pursuant to LC 4660.1(c)(2)(A).

See also, McKee v. Aerotek, Inc., 2021 Cal. Wrk. Comp. P.D. LEXIS 189 (Split BPD), holding that psychiatric claim not barred by six-month employment rule (LC § 3208.3(d)), where fall from loading dock while walking to cafeteria was not within ordinary risk of her job as nurse case manager and therefor found 'sudden and extraordinary' as not routine or result of routine employment event expected or experienced by all employees working for defendant. Dissenting Commissioner Razo held otherwise writing that walking off loading dock was not uncommon, unusual and unexpected, but due to inattentiveness and thus expected. [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, . Garcia v. Lyons Magus, Inc., 2021 Cal. Wrk. Comp. P.D. LEXIS 208 (BPD), holding that in reaching the predominant cause threshold for psychiatric injury (LC 3208.3(b)(1)), the Court may aggregate both the percentage resulting from causation resulting from both compensable consequence of the physical injury, and that which is a direct caused of the injurious event itself. Garcia v. Lyons Magus, Inc., 2021 Cal. Wrk. Comp. P.D. LEXIS 208 (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]; SOC, Section 10.16, PD – Injury on or After 1/1/13].

Dillard v. County of Tulare, 2021 Cal. Wrk. Comp. PD LEXIS 89 (BPD)

> *'. . . .[where] a third party assaults and injures the employee while in the course of employment and the third party acted out of purely personal motives there is no compensability. However, if the employee can show there was some employment connection or contribution, i.e., an industrial cause of the injury so as to establish the arising-out-of element, then there is compensability. Such cause need not be the sole cause and need only be a contributing cause. Finally, if the third party's assault causing the injury occurs in the course of employment and is committed for unknown motives or no motive at all, i.e., for nonpersonal motives, the injury is compensable. (State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1982) 133 Cal.App.3d 643,655 [184 Cal.Rptr. 111].). . .'*
>
> *Dillard v. Conty of Tulare, 2021 Cal. Wrk. Comp. PD LEXIS at pg. 93 (BPD)*

The applicant was using one of the stalls in the restroom at work, when he noticed an individual in the next stall was pointing a cell phone camera at him from under the wall dividing the two stalls. The applicant told the other individual that it was illegal to point a cell phone camera in a public restroom. The other individual immediately left but the applicant was able to identify him from his shirt and shoes as a co-worker that worked on the other side of the applicant's cubicle wall. The applicant confronted the individual who eventually admitted his involvement.

The AME opined that Applicant's psychiatric injury appears to be a direct result of feeling that his privacy was violated by a coworker who allegedly recorded the applicant while he was using the restroom. The injury was predominantly the result of the applicant's perceived stress due to this single episode of harassment and mistreatment by his coworker. The doctor deferred to the Trier-of-Fact to determine whether or not this injury was caused by "actual events of employment."

The matter proceeded to trial on the issue of injury AOE/COE. The WCJ found for the applicant. Defendant sought reconsideration.

Citing and discussing State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1982) 133 Cal.App.3d 643,655 [184 Cal.Rptr. 111, the WCAB held that 'actual events of employment' occurs when (1) the "event" happens in the employment relationship, and (2) that event must be "of employment," such that it must result from an employee's working relationship with his or her employer. In order to qualify as being "of employment," the employment must play some active or positive role in the development of the psychological condition and not merely provide a stage for the event. Where the third party's assault causing the injury occurs in the course of employment and is committed for unknown motives or no motive at all, i.e., for nonpersonal motives, presents a 'neutral risk', the resulting injury is compensable.

Under these facts Applicant suffered psychiatric injury predominantly caused by actual events of his employment when applicant's privacy was invaded by co-employee who took photographs of him while using employer's restroom facilities. Application of the 'personnel comfort doctrine' brings the use of the restroom within the employment relationship and because the event of videotaping the applicant while using the restroom was committed for unknown motives or no motive at all, i.e., for nonpersonal motives, 'neutral risk' doctrine requires that the resulting injury is compensable. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3][b], 4.69[3][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[3][b]; SOC, Section 5.30, Psychiatric Injury].

Applied Materials v. WCAB, 86 Cal. Comp. Cases 331, 2021 Cal. App. Unpub LEXIS 3020.

Applicant claimed three industrial injuries: a specific injury to her neck and right upper extremity in 2001, a specific injury to her neck and both upper extremities in 2005, and a cumulative trauma injury to her neck, both upper extremities, and psyche ending on her last day worked in January 2008. Worker claimed her injuries were due to the constant, repeated use of a computer keyboard and mouse at work.

The applicant began treatment with Dr. John Massey (an anesthesiologist/pain specialist). During the course of the treatment, the evidence revealed that Dr. Massey began by making inappropriate sexual comments, along with improper touching. Ultimately a sexual relationship with the applicant began at the applicant's house. According to the applicant she did not wish to engage in a sexual relationship but felt compelled and coerced to do so in part out of fear that Dr. Massey would no longer certified her benefits. Later, the applicant reported Dr. Massy to the Medical Board of California, the clinic, and the police. Dr. Massy was ultimately charged with multiple causes of action including unprofessional conduct, sexual misconduct, gross negligence, repeated acts of negligence, and incompetence which resulted in Dr. Massey having his medical license revoked.

As a result of the sexual relationship, the applicant was diagnosed with PTSD and claimed psychiatric injury as a compensation consequence. The WCJ found the psychiatric claim compensable. Defendant sought reconsideration and ultimately review by the 3rd District Court of Appeal. Defendant argued, in the alternative, that applicants

psychiatric condition was either the result of a consensual non-industrial relationship and/or that Hikida doctrine did not apply as the sexual relationship was not treatment.

In upholding both the WCJ and WCAB, the Court of Appeal held that injury arose out of treatment as evidence supported that the sexual relationship was started and part of the treatment provided. Further, that the evidence supported that Dr. Massey was overmedicating the applicant to gain control. In addressing the application of the Hikida Doctrine, the Court wrote, "An employee is entitled to compensation for a new or aggravated injury that results from the medical treatment of an industrial injury, whether the doctor was furnished by the employer, the insurance carrier, or was selected by the employee. (*Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal. App. 5th 1249, 1262 [219 Cal. Rptr. 3d 654] (*Hikida*) citing *Fitzpatrick v. Fidelity & Casualty Co., supra*, 7 Cal. 2d at p. 232.) "Aggravation of the original injury by medical treatment is considered 'a foreseeable consequence of the original compensable injury, compensable within the workers' compensation proceeding and not the proper subject of an independent common law damage proceeding against the employer.'" (*Hikida*, at p. 1261.) This rule derived "from (1) the concern that applying apportionment principles to medical care would delay and potentially prevent an injured employee from getting medical care, and (2) the fundamental proposition that workers' compensation should cover all claims between the employee and employer arising from work-related injuries, leaving no potential for an independent suit for negligence against the employer." (*Id.* at p. 1263.) . . .Petitioners argue that this theory of causation does not apply since it was undisputed that the sexual conduct was not medical treatment, the sexual relationship was consensual, and the sex acts occurred in Worker's home. Worker responds that her treatment was a contributing cause of her PTSD because Dr. Massey prescribed excessive amounts of medication, which made it difficult for her to resist his advances; he was in a superior position in the doctor-patient relationship and controlled both her treatment and disability benefits; and he made sexual advances in his exam room that groomed her for the sexual exploitation that occurred in her home."

Writ denied.

Chavira v. Southland Gunite, Inc., 2021 Cal. Wrk. Comp. P.D. LEXIS 270 (BPD).

Applicant sustained injury when he was hit by a piece of dried cement while cleaning out a cement tank. As a result of the industrial injury the Applicant was hospitalized multiple occasions for life threatening conditions including cellulitis, sepsis, congestive heart failure, and kidney failure. The evidence established that the injury caused a permanent and lasting substantial impact on activities of daily living. Applicant sought PD associated with compensable consequence psychiatric injury. The WCJ found the injury "catastrophic" within the meaning of Labor Code § 4660.1(c)(2)(B) and Wilson v. State of CA Cal Fire (2019) 84 Cal. Comp. Cases 393 (Appeals Board en banc opinion), but in part relied on earning capacity.

The WCAB in upholding the decision of the WCAB discussed extensively the holding under Wilson v. State of CA Cal Fire noting that whether injury is "catastrophic" is not measured by injury's impact on employee's earning capacity. Rather, the focus should be on factor including treatment, and impact which the injury has on activities of daily living. In this case the applicant underwent treatment for life-threatening conditions requiring multiple hospitalizations, and the ability to perform activities of daily living were substantially impacted. Last, whether the injury is catastrophic is not to be measured by injury's impact on employee's earning capacity. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.02[3][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]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Chs. 5, 6, 9; SOC, Section 10.16, Permanent Disability – Injury on or After 1/1/13].

XIII. Serious and Willful Misconduct

Perez v. Dynamic Auto Images, Inc, 2021 Cal. Wrk. Comp. P.D. LEXIS 245 (BPD).

The decedent was the operations manager for defendant/employer, with vast experience with broad autonomy, extensive job authority, and without any job duty oversight from other management employees. The decedent, while on the job site roof without proper safety equipment fell off and was killed. His dependent/wife sought death benefits as well as an increase due to the employer's violation of LC § 4553 for Serious and Willful Misconduct.

WCAB upheld WCJ's finding that defendant did not engage in serious and willful misconduct as decedent was the operations manager and had broad autonomy regarding how to conduct his job duties without oversight from other management employees, and given this broad authority and extensive experience, the decedent's own failure to use safety equipment can not form basis for a Petition for Serious and Willful Misconduct. Further, the WCAB held that the

mere violation of Cal/OSHA safety is not sufficient to establish S&W under these circumstances. [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].

XIV. Supplemental Job Displacement Benefits

See, Marisa Singerman v. Nike, Inc., 2021 Cal. Wrk. Comp. P.D. LEXIS 81 (BPD) holding that the applicant was entitled to further discovery to establish entitlement to SJDB post-settlement, under the rationale that prohibiting employee from engaging in discovery post-settlement to prove entitlement to SJDB voucher effectively abrogates employee's right to this benefit. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§35.01; Rassp & Herlick, California Workers' Compensation Law, Ch. 21, §21.01.].

See also, Nelson v. SP Plus, 2020 Cal. Wrk. Comp. P.D. LEXIS 166 (BPD), holding 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 and thus Applicant held entitled to temporary disability benefits; See also, Ramos v. Global Foods Services, 2020 Cal. Wrk. Comp. P.D. LEXIS 383, holding abandoned of job after suitable and proper offer of modified work sufficient to support finding of no entitlement to TD. [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].

XV. Temporary Disability

Gonzalez v. Tres Generaciones and Security National Insurance (Jan 4, 2021) 49 CWCR 33 (BPD).

§ 4656. Aggregate disability payments for single injury causing temporary disability; Number of compensable weeks

(a) Aggregate disability payments for a single injury occurring prior to January 1, 1979, causing temporary disability shall not extend for more than 240 compensable weeks within a period of five years from the date of the injury.

(b) Aggregate disability payments for a single injury occurring on or after January 1, 1979, and prior to April 19, 2004, causing temporary partial disability shall not extend for more than 240 compensable weeks within a period of five years from the date of the injury.

(c)
(1) Aggregate disability payments for a single injury occurring on or after April 19, 2004, causing temporary disability shall not extend for more than 104 compensable weeks within a period of two years from the date of commencement of temporary disability payment.
(2) Aggregate disability payments for a single injury occurring on or after January 1, 2008, causing temporary disability shall not extend for more than 104 compensable weeks within a period of five years from the date of injury.
(3) Notwithstanding paragraphs (1) and (2), for an employee who suffers from the following injuries or conditions, aggregate disability payments for a single injury occurring on or after April 19, 2004, causing temporary disability shall not extend for more than 240 compensable weeks within a period of five years from the date of the injury:

(A) Acute and chronic hepatitis B.
(B) Acute and chronic hepatitis C.
(C) Amputations.
(D) Severe burns.
(E) Human immunodeficiency virus (HIV).
(F) High-velocity eye injuries.
(G) Chemical burns to the eyes.
(H) Pulmonary fibrosis.
(I) Chronic lung disease.

Applicant sustained injury to eye when an object struck him in the face knocking him unconscious and fracturing the orbital wall of his left eye macular choroidal rupture and optic neuropathy. This incident resulted in ongoing headaches and cognitive problems which extended TD beyond104 weeks. Pursuant to LC 4656(c)(2) applicant sought to establish by circumstantial evidence that the injury to the eye resulted from a high velocity blow justifying extending TD up to 240 weeks. Defendant denied asserting that the object striking applicant could not be identified and there was no quantifiable measure of the speed of the object. WCJ found for the applicant based on circumstantial evidence including the nature of injury suffered. Defendant sought reconsideration.

By panel decision the WCAB rejected the Petition for Reconsideration. The Panel held that a high velocity eye injury extending TD to 240 Weeks pursuant to Labor Code section 4656(c)(3) may be determined by the circumstances and facts of the case, and inferences regarding velocity may be drawn from the extent of the damage caused by the

impact even in the absence of the identification of the object causing the impact or a quantifiable speed at which the object struck the eye.

Flores v. Westside Accurate Courier Services, 2021 Cal. Wrk. Comp. P.D. LEXIS 191.

The applicant was employed as a driver when she sustained injury due to a MVA. After a period of being off work following the accident, the applicant was release to return to modified duty, which the employer was able to accommodate. Sometime after returning to work the employer discovered a discrepancy with the applicant social security number and as a result determine the applicant to be within the United State illegally. The facts were controverted, but it appears the applicant subsequently either voluntarily resigned or was coerced into resigning. The issue became whether the applicant was entitled to further payments of TD where the employer could not legally under federal law employ the applicant. The WCJ found for Defendant with the applicant seeking reconsideration.

> See also, Mota Perez v. Spr Op Co. Inc., 2021 Cal. Wrk. Comp. P.D. LEXIS 193 (BPD), holding that the unavailability of modified work due to COVID-19 pandemic shut down is not a basis to end defendant's TD liability; The availability of unemployment would place the burden on the applicant to seek and the government to provide a benefit otherwise falling within the workers' compensation system. But see, Escobar v. Wood Ranch BBQ, 2021 Cal. Wrk. Comp. P.D. LEXIS 218 (BPD), holding that termination for cause or rejection by applicant of available modified work which subsequently become unavailable due to COVID shut down will terminate defendant liability for TD. [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.]

The WCAB held that the applicant not entitled ongoing temporary disability indemnity as once the defendant learned that applicant could not legally be employed because she was undocumented, federal law prevented the defendant from re-hiring the applicant. Citing and discussing *Salas v. Sierra Chemical Co*. (2014) 59 Cal. 4th 407, 327 P.3d 797, 173 Cal. Rptr. 3d 689, 79 Cal. Comp. Cases 782, the WCAB held that because the employer was precluded from (re)hiring undocumented worker due to federal law, and because the defendant demonstrated that otherwise the employer could provide medically appropriate modified work, Defendant was not required to pay the applicant further periods of TDI. [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 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 40% of the applicants disability related to ear and eye impairment to non-industrial diabetes and 60% 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.]

Goa v. Chevron Corp, 86 Cal. Comp. Cases __, 49 CWCR 1; (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.). . ."

Goa 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 genuine issues involving creditability 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].

Session III

Self-Study Material

2021 Cases and Decision

&

Workers' Compensation Index Entries
For 2021 and 2022

Entries for Work Comp Index 2022 -- Post March 2021 Conference

Psychiatric Injury—Good Faith Personnel Actions—Perception of email/announcement as notice of impending discipline was insufficient where determined otherwise to establish bar by good faith personnel action defense (LC 3208.3(h)). While it is not necessary for personnel action to have direct or immediate effect on employment status, it must at least have *potential* to do so to be considered "personnel action". Citing and discussing *Larch v. Contra Costa County* (1998) 63 Cal. Comp. Cases 831 (Significant Panel Decision); Munoz v. Department of Corrections, 2020 Cal. Wrk. Comp. P.D. LEXIS 363 (BPD); [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 5.33, Psychiatric Injury – Good Faith Personnel Action].

Medical Treatment—Utilization Review—Timeframes—Bar—Second request/RFA for same treatment (epidural injection) but at a different level of the spine was barred by first request where first request was not certified and did not qualify for exception to rule in Labor Code § 4610(k). Shelven v. Ralphs Grocery Co., 2020 Cal. Wrk. Comp. P.D. LEXIS 343 (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[5]; SOC, Section 7.36, Utilization Review – Procedure].

Medical Provider Networks—Transfer of Care—Defendant is required to take affirmative action of seeking transfer of applicant's treatment from outside to within the MPN per the procedures outlined in 8 Cal. Code Reg. § 9767.9(f), requiring notice of determination to transfer. Cole v. Kaiser Foundation Hospital, 2020 Cal. Wrk. Comp. P.D. LEXIS 340 (BPD), citing and discussing Babbitt v. Ow Jing (2007) 72 Cal. Comp. Cases 70 (En Banc Decision); See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §5.03[3]; Rassp & Herlick, California Worker Compensation Law, Ch. 4, § 4.12[4]; SOC, Section 7.57, Medical Provider Network – Transfer of Care).

Sanctions—Defendant held liable for sanction pursuant to LC 5813 where without legal grounds, refused to pay for supplemental report from applicant's treating physician as ordered by WCJ to resolve contested issues, and penalties pursuant to LC 5814 as failure to pay medical legal report delayed benefits to the applicant. Rojas v. ABC Farms, 2020 Cal. Wrk. Comp. P.D. LEXIS 344 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 23.15; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.35[2]; SOC, Section 13.30, Unreasonable Delay – Failure to Pay Medical-Legal Benefits].

Penalties—Delay in Payment of Medical-Legal Expenses—Defendant held liable for sanction pursuant to LC 5813 where, without legal grounds, refused to pay for supplemental report from applicant's treating physician as ordered by WCJ to resolve contested issues, and penalties pursuant to LC 5814 as failure to pay medical legal report delayed benefits to the applicant. Rojas v. ABC Farms, 2020 Cal. Wrk. Comp. P.D. LEXIS 344 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.40[1], [3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.11[2], [3]; SOC, Section 13.30, Unreasonable Delay – Failure to Pay Medical-Legal Benefits].

Attorney's Fees—Penalties for Delayed Payment of Benefits—Attorney's fees awarded pursuant to LC 5814.5 where applicant's attorney undertook legal efforts to enforce order requiring defendant to pay medical-legal expenses. Rojas v. ABC Farms, 2020 Cal. Wrk. Comp. P.D. LEXIS 344 (BPD); See also, Turner v. Baltimore Ravens, 2013 Cal. Wrk. Comp. P.D. LEXIS 30 (Noteworthy Panel Decision); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 10.42, 20.02[2][e]; [Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.11[2]; SOC, Section 13.30, Unreasonable Delay – Failure to Pay Medical-Legal Benefits].

Medical-Legal Procedure—Replacement of Panel Qualified Medical Evaluators—'Good cause' not found for replacement panel qualified medical evaluator despite technical defects citing and discussing grounds for replacement panel as set forth in 8 Cal. Code Reg. § 31.5(a), noting that 8 Cal. Code Reg. § 31.5(a)(12), prohibits reliance on technicalities to engage in "doctor shopping," where the applicant had opportunity to review panel qualified medical evaluator's report before objecting to it on technical grounds; The WCAB highlighted that applicant was not substantially prejudiced or irreparably harmed by denial of replacement panel because applicant can present treating physician's report regarding her condition and/or set medical re-evaluation with panel qualified

medical evaluator. Hill v. County of Alameda, 2020 Cal. Wrk. Comp. P.D. LEXIS 348 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[6]. SOC, Section 14.28, Medical-Legal -- Unrepresented Employee].

Medical-Legal Procedure—Exchange of Information—Ex Parte Communications—Citing and discussing in Maxham v. California Department of Corrections and Rehabilitation (2017) 82 Cal. Comp. Cases 136 (Appeals Board en banc opinion), and Suon v. California Dairies (2018) 83 Cal. Comp. Cases 1803 (Appeals Board en banc decision) holding that letter requesting supplemental report served on opposing party was not improper ex parte communication, but phone conversation with QME discussing defendant's objection to letter in detail was improper ex parte communication under LC § 4062.3(e). Applicant's attorney's correspondence to PQME violated Labor Code § 4062.3(b) as it contained "information" including nonmedical records relevant to doctor's determination not served on defendant 20 days prior to providing it to PQME. Garcial v. Food 4 Less, 2020 Cal. Wrk. Comp. P.D. LEXIS 342 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[18], 23.15; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, §§ 15.03[4][d], [e], Ch. 16, 16.35; SOC, Section 14.28, Medical-Legal -- Unrepresented Employee].

Procedure—Assignment of Qualified Medical Evaluators—New Injuries—Second QME panel held improper where examination by QME from first panel occurred after claims for both specific and subsequent CT were filed prior the examination by QME from first Panel. Jones v Corkscrew Café LLC, 2020 Cal. Wrk. Comp. P.D. LEXIS 341 (BPD); See also, Navarro v. City of Montebello (2014) 79 Cal. Comp. Cases 418 (En Banc Opinion); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[11]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, §§16.54[11]; SOC, Section 14.52, Subsequent Evaluation and Additional Medical Evaluator Panel in Different Specialty].

Costs—Medical-Legal—Physician's Deposition Fee—Applicant's attorney not entitled to reimbursement for PTP deposition fees where claim accepted and where UR denial upheld by IMR without appeal, as deposition fees held not AOE/COE med-legal expense and applicant was limited to UR/IMR process to resolve medical dispute; There is no process available by which physician's testimony could be used to challenge existing UR and IMR. Silverie v. Shell Gas Station DBA Humboldt Petroleum, 2020 Cal. Wrk. Comp. P.D. LEXIS 345 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 5.08[2], 22.09[1], [2], 30.05; Rassp & Herlick, California Workers' Compensation Law, Ch. 1, §§17.72; SOC, Section 14.64, Defining Medical-Legal Expense].

Medical-Legal Procedure—Reports of Treating Physician—Reimbursement for Medical-Legal Reports—Comprehensive medical-legal PR-4 report by primary treating physician is billed per the medical-legal billing rate per schedule of fees in 8 Cal. Code Reg. § 9795, even where prior QME panel process pursuant to LC 4062.2 completed. Loza v. Goldblatt/By Area Restaurant Management, 2020 Cal. Wrk. Comp. P.D. LEXIS 361 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.08[3][b], 22.09[1], [3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.09[1]; SOC, Section 14.64, Defining Medical-Legal Expense].

Credit for Third-Party Action—Defendant/employer has the burden of proof to establish credit pursuant to Labor Code § 3861, and credit not allowed where defendant failed to present evidence establishing net proceeds from settlement, on the issues of comparative fault of employer, and to prevent double recovery by the applicant. Sanchez v. Pacheco Labor Services, 2020 Cal. Wrk. Comp. P.D. LEXIS 374 (BPD); See also, Ozuna v. Triple S Steel Holdings, Inc. 2020 Cal. Wrk. Comp. P.D. LEXIS 397 (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 2.18, Judicially Created Exception to Exclusive Remedy Rule].

Penalties—Delay in Payment of Award—Applicant's claim for Labor Code § 5814 penalty deferred during pendency of writ of review and/or petition for review. Citing and discussing Ramirez v. Drive Financial Services (2008) 73 Cal. Comp. Cases 1324 (Appeals Board en banc opinion). Sanchez v. Pacheco Labor Services, 2020 Cal. Wrk. Comp. P.D. LEXIS 374 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 10.40[1], [3], 27.12[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.11[2], [3]].

Permanent Disability—Rating—Rebuttal of Scheduled Rating—Vocational evidence and substantial medical evidence supported WCJ's finding of permanent total disability, despite opinion of the AME rating less than 100%

after apportionment where the 100% disability was cause directly and solely due to the industrial injury. Gomez v. County of Ventura, 2020 Cal. Work Comp. P.D LEXIS 34 (BPD). Citing and discussing 8 Cal. Code Reg. 10785 [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], [4], 32.01[3][a][ii], 32.02[2], 32.03A[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.12[2], 7.40, 7.41, 7.42[3]; The Lawyers' Guide to the AMA Guide to the AMA Guides and the California Workers' Compensation, Chs. 6, 7, 8].

Permanent Disability—Apportionment—Rebuttal of Scheduled Rating—Award of total disability without apportionment which combined award of disability for CT and Specific injuries where "inextricably intertwined" upheld provided any attempt to apportion would be speculative, and QME was unable to explain the how and why he would apportion between awards or to nonindustrial causation. Schieffer v. St of Ca, Salinas Valley Prison, 2021 Cal. Wrk. Comp. P.D. LEXIS 48 (BPD). See also, accord, Heredia v. Treasury Wine Estate Corp., 2021 Cal. Wrk. Comp. PD. LEXIS 46 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], [4], 8.05[1]-[3], 8.07[2][d][ii], 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.12[2], 7.42[2]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Chs. 4, 6, 7].

Permanent Disability—Vocational Evidence —Rebuttal of Scheduled Rating—Citing and discussing Ogilvie v. W.C.A.B. (2011) 197 Cal. App. 4th 1262, 129 Cal. Rptr. 3d 704, 76 Cal. Comp. Cases 624, LeBoeuf v. W.C.A.B. (1983) 34 Cal. 3d 234, 193 Cal. Rptr. 547, 666 P.2d 989, 48 Cal. Comp. Cases 587, and Contra Costa County v. W.C.A.B. (Dahl) (2015) 240 Cal. App. 4th 746, 193 Cal Rptr. 3d 7, 80 Cal. Comp. Cases 1119, decision of WCJ awarding total disability based upon vocational evidence established that applicant's ability to benefit from vocational rehabilitation had been impaired to such degree by his industrial orthopedic injuries that he lost 100 percent of his ability to return to gainful employment, and that vocational expert evidence was sufficient to rebut scheduled AMA Guides rating. Schieffer v. St of Ca, Salinas Valley Prison, 2021 Cal. Wrk. Comp. P.D. LEXIS 48 (BPD). See also, accord, Heredia v. Treasury Wine Estate Corp., 2021 Cal. Wrk. Comp. PD. LEXIS 46 (BPD); See also Thomas v. Peter Kiewit Sons, Inc 49 CWCR 49 (BPD) discussing VR evidence and the principle of 'synergy' to rebut PD Schedule. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], [4], 8.05[1]-[3], 8.07[2][d][ii], 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.12[2], 7.42[2]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Chs. 4, 6, 7].

Evidence—Admissibility and Authentication—Instagram Photographs—Formal authentication of Instagram photos was not required before they could be introduced into evidence, absent genuine question regarding accuracy or reliability as photos are presumed to be accurate representation of images they represent. Milla v. United Guard Security, 2020 Cal. Wrk. Comp. P.D. LEXIS 330 (BPD). Citing and discussing People v. Goldsmutg (2014) 59 Cal. 4th 258, 266; Cal. Evidence Code Sections 250, 350, 1401; 8 Cal. Code Reg. 10680(c); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 23,12[2][h], 25.06A[5]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.45[1]].

Psychiatric Injury—Six-Month Employment Requirement—Burden of Proof—Defendant has burden of proof on the issue that psychiatric injury barred by the lack 6 months aggregate employment per LC § 3208.3(d). Milla v. United Guard Security, 2020 Cal. Wrk. Comp. P.D. LEXIS 330 (BPD). Accord, Garcia v. Reynolds Packing Co, 2018 Cal. Wrk. Comp P.D. LEXIS 29 (BPD); Editor's comment: Holding consistent with the general rule that the party who benefits from the affirmative of the issue has the burden of proof on that issue; but see dissenting opinion by Commissioner Lowe. [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]].

Psychiatric Injury—Increased Permanent Disability—Violent Acts—Gate crushing amputation of finger constituted 'violent act' to find psychiatric injury compensable for PD purposes pursuant to LC 4660.1(c)(2)(A). Sturm v. Coranado Unified School District (2021) 86 Cal. Comp. Cases 253, 2021 Cal. Wrk. Comp. P.D. LEXIS 4, (Split Panel Decision)

Injury AOE/COE—Bunkhouse Rule— Where overnight stays are contemplated by employment arrangement, the bunkhouse rule is triggered, and the fact that overnight stay is not a requirement does not preclude application of this rule. Santa Clara Valley Transportation Authority v. WCAB, 86 Cal. Comp. Cases 287, 2021 Cal. Wrk. Comp. LEXIS 9 (W/D); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.62, 4.132[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.05[7]].

Medical-Legal—QME Panel Request—AOE/COE Denied Claim—A party need not await the notice of denial or delay but may request a medical-legal panel pursuant to LC 4060 after the filing of the claim form. Brar v. County of Fresno, 49 CWCR 59 (BPD).

Temporary Disability – Extension To 240 Weeks – High Velocity Eye Injury—High velocity eye injury extending TD to 240 weeks pursuant to Labor Code section 4656(c)(3) may be determined by the circumstances and facts of the case, and inferences regarding velocity may be drawn from the extent of the damage caused by the impact even in the absence of the identification of the object causing the impact or a quantifiable speed at which the object struck the eye. Gonzalez v. Tres Generaciones and Security National Insurance (Jan 4, 2021), 2021 Cal Wrk. Comp. P.D. LEXIS 1, 49 CWCR 33 (BPD); [See generally Hanna, Cal. Law of Emp. Inj and Workers' Comp. 2d § 7.02[2][b]; Rasp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.12; SOC, Section 9.14, Time Limits on Payments on or After 4/19/04].

Supplemental Job Displacement Benefits—Discovery—WCAB held that the applicant was entitled to further discovery to establish entitlement to SJDB post-settlement. Prohibiting employee from engaging in discovery post-settlement to prove entitlement to SJDB voucher effectively abrogates employee's right to this benefit. Marisa Singerman v. Nike, Inc., 2021 Cal. Wrk. Comp. P.D. LEXIS 81 (BPD); See also, accord, Singerman v. Nike, Inc., 2021 Cal. Wrk. Comp. P.D. LEXIS 81 (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].

Evidence – Procedure —Belated request to obtain a defense vocational expert at the time of trial was untimely and the defendants were not denied due process prohibiting additional time for the defense to obtain their own vocational evaluation where defendant had notice that applicant would be introducing VR evidence. Thomas v. Peter Kiewit Sons, Inc., 49 CWCR 49 (BPD)

Permanent Disability—Calculating Apportionment—Lifetime Cap on Benefits—Prior award of 59% for injury to heart precluded an award above 41% for subsequent injury to same part or region of body pursuant to LC 4664(c)(1) and because the 100% lifetime cap was reached the issue of overlap between prior and current permanent disabilities was not applicable. Ross v. California Highway Patrol and SCIF (Oct 20, 2020) 86 Cal Comp Cases 99 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.06[5][d], 8.07[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.42[3]].

Employee Classifications -- Motor Carriers/Truck Drivers -- Application of "ABC" Test -- Federal Preemption--AB-5 (see LC § 2775) which codified the holding in Dynamex Operations W. v. Superior Ct. (2018), 4 Cal. 5th 903 [232 Cal. Rptr. 3d 1, 416 P.3d 1, 83 Cal. Comp. Cases 817], is a generally applicable labor law that affects a motor carrier's relationship with its workforce and does not bind, compel, or otherwise freeze into place the prices, routes, or services of motor carriers, it is not preempted by the FAAAA; Citing and discussing People ex rel. Harris v. Pac Anchor Transportation, Inc. (2014) 59 Cal. 4th 772; California Trucking Assn. v. Bonta, 996 F.3d 644, 2021 U.S. App. LEXIS 12629, 86 Cal. Comp. Cases 382; See also, accord, People v. Superior Court (Cal Cartage Transportation Express, (LLC) (2020) 85 Cal.Comp. Cases 999; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 3.03; Rassp & Herlick California Workers' Compensation Law, Ch. 2, § 2.06[1], [2]; SOC, Section 4.58, Independent Contractor].

Medical Treatment—Home Health Care—Improper Termination of Services—Defendant may not unilaterally terminate home health care services without first establishing that services were no longer necessary to cure or relieve effects of applicant's injury where parties stipulated that Applicant's primary treating physician would assess and comment on Applicant's need for ongoing home care services and that physician's commentary and prescription renewal would be subject to "non-UR" statutory requirements, (i.e. no longer reasonably required to cure or relieve effects of applicant's injury), and that in order to terminate home health care defendant had burden to show that applicant's condition had changed. UCSF Medical Center v. WCAB (Avist), 86 Cal. Comp. Cases 138, 2020 Cal. Wrk. Comp. LEXIS 105; Citing and discussing Patterson v. The Oaks Farm (2014) 79 Cal. Comp. Cases 910 (Appeals Board significant panel decision); [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].

Settlements—Settlement of Civil Claims Against Employer—Release of Workers' Compensation Claims—Labor Code § 132a—Civil settlement/release not submitted to or approved by WCAB will not bar claim for workers' compensation benefits. Although Labor Code § 132a claims are not claims for workers' compensation benefits provided in Division 4 of Labor Code, a claim pursuant to LC 132a concerns rights incidental to such claims and, therefore, are subject to settlement approval requirements set forth in Labor Code §§ 5000–5006 of Division 4. Vaca v. Cons, 2020 Cal. Wrk. Comp. P.D. LEXIS 377 (BPD); [Subsequent History: Defendant's petition for writ of review was denied on November 20, 2020, sub nom. Vons v. Workers' Comp. Appeals Bd. (Vaca) (2020) 85 Cal. Comp. Cases 1036]. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 29.01[2], 29.07[2]; Rassp & Herlick California Workers' Compensation Law, Ch. 18, § 18.13[1], [3], [4]; SOC, Section 2.23, Effect of Settlement].

Psychiatric Injury—Catastrophic Injuries—Increased Permanent Disability— Intensity and seriousness of medical treatment involving two-disc decompression and fusion surgery supported finding of "Catastrophic Injury" pursuant to LC 4660.1(c)(2)(B), consistent with the holding of Wilson v. State of CA Cal Fire, (2019) 84 Cal. Comp. Cases 393. Lund v. Ryko Solutions Inc., 2020 Cal. Wrk, Comp. P.D. LEXIS 373 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.02[3][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.05[3][b][i], [ii], 7.06[6], Ch. 10, § 10.06[3][a], [b][i]; SOC, Section 1016, Permanent Disability].

Permanent Disability—Rating—Permanent Total Disability—Combining Multiple Impairments—LC 4662(b) 'in accordance with the facts' does not provide an independent theories/method for determining PD (See Dept. of Corrections & Rehabilitation v. W.C.A.B. (Fitzpatrick) (2018) 27 Cal. App. 5th 607, 238 Cal. Rptr. 3d 224, 83 Cal. Comp. Cases 1680), a finding of fact supporting 100% award is proper where 4660/4660.1 theories/methods are utilized including that (1) applicant was entitled to separate impairment rating for injury to his psyche based on "catastrophic" injury; (2) opinions of agreed medical evaluators supported use of addition rather than Combined Values Chart (CVC); (3) in accordance with Ogilvie v. W.C.A.B. (2011) 197 Cal. App. 4th 1262, 129 Cal. Rptr. 3d 704, 76 Cal. Comp. Cases 624, Contra Costa County v. W.C.A.B. (Dahl) (2015) 240 Cal. App. 4th 746, 193 Cal Rptr. 3d 7, 80 Cal. Comp. Cases 1119, and LeBoeuf v. W.C.A.B. (1983) 34 Cal. 3d 234, 193 Cal. Rptr. 547, 666 P.2d 989, 48 Cal. Comp. Cases 587, scheduled rating was rebutted by opinion of applicant's vocational expert. All theories utilized by WCJ were within LC 4660/4660.1. Lund v. Ryko Solutions Inc., 2020 Cal. Wrk, Comp. P.D. LEXIS 373 (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, Chs. 7, 9; SOC, Section 1016, Permanent Disability].

Lien Claims—Medical-Legal Liens—Burden of Proof—Lien claimant has 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 pursuant to Labor Code § 4620; and (2) its medical-legal services were reasonably, actually, and necessarily incurred pursuant to Labor Code § 4621(a); Defendant does not waive the defense that the expenses incurred were not reasonable, actually, and necessarily by untimely objection. Norton v. Western Medical Center, 2020 Comp. P.D. LEXIS 367 (BPD); Colamonico v. Secure Transportation, 84 Cal. Comp. Cases 1059, 2019 Cal. Wrk. Comp. LEXIS 111 (En Banc Decision); [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]; SOC, Section 14.64, Defining Medical-Legal Expense].

Costs—Interpreting Services—Defendant held not liable for interpreter costs pursuant to LC 5811, nor sanctions pursuant to LC 5813, where defendant specifically informed applicant on its notice of deposition that it would provide interpreter both for prep and at time of deposition., and lien claimant was second interpreter. Li v. Kaiser Permanente, 2020 Cal. Wrk. Comp. P.D. LEXIS 389 (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. 16.35[1], 16.49; SOC, Section 15.111 Interpreter].

Post-Termination Claims—Claim not barred as post-termination (LC 3600(a)(10) where contemporaneous with termination applicant reported injury evidenced by swollen foot demonstrating injury occurred prior to termination. Citing and discussing Dover v. Fresh Start Bakeries, Inc., 2006 Cal. Wrk. Comp. P.D. LEXIS 53 (Appeals Board

Noteworthy Panel Decision). Acosta v. J&J Acoistics, Inc. 2020 Cal. Wrk. Comp. P.D. LEXIS 395 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 11.02[3][a], 21.03[1][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.03[7]; SOC, Section 5.28, Post-Termination Defense].

Psychiatric Injury—Six-Month Employment Requirement—The requirement of 6 months of employment pursuant to LC 3208.3(d) need not be continuous, but rather aggregate, and may be separated by other periods of employment. Citing and discussing Gottschalks Department Stores v. W.C.A.B. (Garcia) (1998) 63 Cal. Comp. Cases 315 (writ denied); Avila v. Sutter Santa Cruz, 2020 Cal. Wrk. Comp. P.D. LEXIS 413 (BPD). [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]].

Injury AOE/COE—Notice of Injury Claim—Resignation letter stating "this job is very hard and demanding . . . my elbow and wrist are hurting everyday [*sic*]," together with applicant's verbal report of orthopedic injury to defendant triggered defendant's duty to provide claim form and notice of potential eligibility for benefits. Szcezzinski v. Butler Chemicals, 2020 Cal. Wrk. Comp. P.D. LEXIS 398 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 24.01, 25.03[1], 25.20[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 14, § 14.01; SOC, Section 6.5 Post-Injury Notice].

Average Weekly Wages—Differences in Determining Earning Capacity When Computing Temporary and Permanent Disability—The calculation of earning capacity for purposes of permanent disability indemnity may be different than for temporary disability indemnity. Roach v. Royalty Ambulance, 2020 Cal. Wrk. Comp. P.D. LEXIS 414 (BPD); [See generally Hanna, Ca. Law of Emp. Inj. and Workers' Comp. 2d §6.03; Rasp & Herlick, California Workers' Compensation Law, Ch. 5, § 5.07; SOC, Section 8.10, Average Weekly Earnings].

Penalties—Delay in Payment of Compensation—Applicant entitled to award of penalties based on defendant's unreasonable delay in restoring applicant's sick leave and vacation time for a period of 158-days following award of temporary disability indemnity under Labor Code § 4850. Neufeld v. County of San Bernardino Fire Dept., 2021 Cal. Wrk. Comp. P.D. LEXIS 2 (Split BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.40[1], [3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.11[2], [3], [5]; SOC, Section 13, Penalties and Sanctions].

Employment Classifications —Employees vs. Independent Contractors—Retroactive Application of Dynamex—The holding in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal. 5th 903, 416 P.3d 1, 232 Cal. Rptr. 3d 1, 83 Cal. Comp. Cases 817 adopting the 'ABC' test for resolving the issue of employees from independent contractors, shall apply to all nonfinal cases that predate *Dynamex* in all wage order case. Vazquez v. Jan-Pro Franchising International, Inc. (2021) 10 Cal. 5th 944 [478 P.3d 1207, 86 Cal. Comp. Cases 107, 2021 Cal. LEXIS 1, 273 Cal. Rptr. 3d 741]; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 3.03, 3.06[2]; Rassp & Herlick California Workers' Compensation Law, Ch. 2, § 2.06[1]; SOC, Section 4.58, Independent Contractor].

Medical Treatment—Independent Medical Review—Appeals—The failure of the IMR reviewing physician to review three research studies submitted by applicant was plainly erroneous and in excess of Administrative Director's authority justifying the granting of appeal for a new IMR. Mackie v. Planada Elementary School District, 86 Cal. Comp. Cases 245, 2021 Cal. Wrk. Comp. P.D. LEXIS 19 (BPD); Citing and discussing, Sanchez v. Central Contra Costa Transit, 2020 Cal. Wrk. Comp. P.D. LEXIS 189 (Appeals Board noteworthy 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].

Average Weekly Wages—Calculation Based on Actual Earnings—For the purpose of determining temporary disability indemnity rate, average weekly wages shall only include those earnings which the applicant has a reasonable expectation of continuation. Miller v. California Department of Social Services, IHSS, 2021 Cal. Wrk. Comp. P.D. LEXIS 52 (BPD); Labor Code § 4453(c)(1);); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 6.02[1], [2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 5, § 5.01[2]].

Average Weekly Wages—Calculation Based on Earning Capacity—Earning capacity after voluntary retirement post injury are calculated considering market conditions, willingness to work, and multiple other relevant factors which may justify the exclusion of pre-retirement earnings. Godinez v. City of Los Angeles, 2021 Cal. Wrk. Comp. P.D. LEXIS 28 (BPD); Labor Code § 4453(c)(4); See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 6.02[2], [7]; Rassp & Herlick, California Workers' Compensation Law, Ch. 5, § 5.04; SOC, Section 9.27, Temporary Disability for Retired Employees].

Permanent Disability—Rating—Rebuttal of Scheduled Rating—Although the standard rating may be reduced through application of Guzman doctrine, the physician must provide considered and reason analysis explaining why the applicant's impairment is not accurately addressed by the standard rating. Savoie v. State of California, 2021 Cal. Wrk. Comp. P.D. LEXIS 41 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], 3201[3][a][ii], [d]d, 3203A[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §7.12[1]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Chs. 3, 4, 7; SOC, Section 10.18, Rebutting Schedule Under Almaraz/Guzman].

Credit—Overpayment of Permanent Disability—Credit allowed for PD overpayment where AME found subsequent CT injury on petition to re-open and increased PD was due to subsequent CT and not new and further, and where overlapping symptomatology and treatment between two injuries existed. The Court noted that the award allowing credit did not cause significant interruption of benefits or disruption to applicant. Tull v. California Department of Corrections and Rehabilitation, 2021 Cal. Wrk. Comp. P.D. LEXIS 53 (BPD).); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.04[9][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, §7.19[1]].

WCAB Subject Matter Jurisdiction—Professional Athletes—Exemptions—Where the contract for hire is entered into within the State of California, and the exclusions for professional athletes pursuant to Labor Code § 3600.5(c) and (d) therefore do not apply. Defendant failed to establish the elements of LC 3600.5(c) applied to applicant's last two employers. Distinction must be made between subject matter jurisdiction (whether the court may hear the issue), personal jurisdiction (whether the defendant may be held to answer), and conflict of law (what law applies). Neal v. San Francisco 49ers, 2021 Cal. Wrk. Comp. P.D. LEXIS 68 (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, Section2.9, Jurisdiction over Out-Of State Injuries].

Medical Treatment—Utilization Review—Medical Treatment Guidelines—Substantial Evidence—UR decision denying treating physician's request for surgery held was untimely, and invalid, where defendant failed to serve UR decision on applicant's attorney. Invalid UR shift burden to applicant to establish medical necessity via citations to Medical Treatment Utilization Schedule (MTUS) guidelines or other evidence-based treatment guidelines pursuant to Labor Code § 5307.27. Ceja v. Taylor Farms Pacific, 2021 Cal. Wrk. Comp. P.D. LEXIS 79 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02[2][d], 22.05[6][b][iv]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.10[7]; SOC, Section 7.36, Utilization Review].

Medical Provider Networks—Continuity of Care—Labor Code 4616.2 and under 8 Cal. Code Reg. § 9767.9(e)(4), provides for continuity of care when surgery has been "recommended and documented by the provider to occur within 180 days from the MPN coverage effective date ('effective date' is the date defendant first acquired right to transfer applicant's treatment to its MPN). Gonzalez v. AC Transit, 2021 Cal. Wrk. Comp. P.D. LEXIS 71 (BPD); [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[7]].

Credit—Payments Under Occupational Accident Policy—Defendant not entitled to credit for payments under Occupational Accident Policy required by independent contractor agreement wholly funded by applicant. Fields v. Knight-Swift Transportation, 2021 Cal. Wrk. Comp. P.D. LEXIS 64 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.04[9][a], [b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, §§ 6.19[1], 6.20[2]; SOC, Section 9.32, Credit for Payment of Benefits].

Discrimination—Labor Code § 132a— Employer's actions violated LC 132a where (1) the employer deviated from its usual employee policies and procedures evidencing disadvantageous treatment of applicant; and (2) in the

absence of legitimate business necessity for terminating applicant; and (3) despite a finding of proper termination of the applicant by employment at employment arbitration; Citing and discussing, Jones v. AC Transit, 2020 Cal. Wrk. Comp. P.D. LEXIS 213 (Appeals Board noteworthy panel decision), and Rehabilitation v. W.C.A.B. (Lauher) (2003) 30 Cal. 4th 1281, 135 Cal. Rptr. 2d 665, 70 P.3d 1076, 68 Cal. Comp. Cases 831. Jones v. AC Transit, 2021 Wrk. Comp. P.D. LEXIS 66 (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]; SOC, Section 11.8, Discrimination Under LC 132a].

Medical-Legal Procedure—Exchange of Information—Ex Parte Communications—Sanctions—A party seeking a replacement QME panel based upon violation of Labor Code § 4062.3(b) must establish that the information improperly sent was received, reviewed or considered by the PQME. Wcartz v. Saratoga Retirement Community, 2021 Cal. Wrk. Comp. P.D. LEXIS 77 (BPD); [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; Section 14.41, Communication with Agreement Medical Examiner and Qualified Medical Evaluator].

California Insurance Guarantee Association—Reimbursable Expenses—Cost Containment Expenses—CIGA entitled to reimbursement for bill review and utilization review (UR) services as expenses that defendant is required to incur as part of workers' compensation benefit delivery system in that they are required expenses under Labor Code when providing medical treatment. Duenas v. Workforce Solutions, Inc., 2021 Cal. Wrk, Comp. P.D. LEXIS 83 (BPD); [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].

Presumption of Industrial Causation—Cancer—Police Officers—Applicant entitled to presumption of industrial causation pursuant to Labor Code § 3212.1, when although applicant's cancer first 'manifested' 17 years after employment ended, a latency period of 20 years established that the cancer was "developing" when applicant was actively employed as police officer. Blair v. City of Torrance Police Department, 2021 Cal. Wrk. Comp. P.D. LEXIS 100 (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 – Public Employee's Covered Condition].

Psychiatric Injury—Actual Events of Employment as Predominant Cause—Invasion of Privacy—Applicant suffered psychiatric injury predominantly caused by actual events of his employment when applicant's privacy was invaded by co-employee who took photographs of him while using employer's restroom facilities. Where the third party's assault causing the injury occurs in the course of employment and is committed for unknown motives or no motive at all, i.e., for nonpersonal motives, 'neutral risk', the injury is compensable. Citing and discussing State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1982) 133 Cal.App.3d 643,655 [184 Cal.Rptr. 111. Dillard v. Conty of Tulare, 2021 Cal. Wrk. Comp. P.D. LEXIS 89 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3][b], 4.69[3][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[3][b]; SOC, Section 5.30, Psychiatric Injury].

Psychiatric Injury—Compensable Consequence Injury—Conduct by treater resulting in improper sexual comments, touching, and intercourse resulted in compensable consequence psychiatric injury citing and discussing South Coast Framing, Inc. v. WCAB (2015) 61 Cal. 4th 291, 188 Cal. Rptr. 3d 46, 349 P.3d 141 on causation of injury threshold, and Dept. of Corrections & Rehabilitation v. W.C.A.B. (Fitzpatrick) (2018) 27 Cal. App. 5th 607, 238 Cal. Rptr. 3d 224, 83 Cal. Comp. Cases 1680, on not allowing alternative path/theory of establishing disability, and Hikida v. Workers' Comp. Appeals Bd. (2017) 12 Cal. App. 5th 1249, 1262 [219 Cal. Rptr. 3d 654], on the issue of employer liability for injury arising out of industrial medical treatment. Applied Materials v. WCAB (2021) 86 Cal. Comp. Cases 331, 2021 Cal. App. Unpub. LEXIS 3020.

Permanent Disability—Rating—Rebuttal of Scheduled Rating—Alternative path theory in Labor Code § 4662(b), permitting awards of permanent total disability "in accordance with the fact," held improper pursuant to *Dept. of Corrections & Rehabilitation v. W.C.A.B.* (*Fitzpatrick*) (2018) 27 Cal. App. 5th 607, 238 Cal. Rptr. 3d 224, 83 Cal. Comp. Cases 1680. Applied Materials v. WCAB (2021) 86 Cal. Comp. Cases 331, 2021 Cal. App. Unpub. LEXIS 3020; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], [4], 32.03A[5], [6]; Rassp &

Herlick, California Workers' Compensation Law, Ch. 7, § 7.12; The Lawyer's Guide to the AMA *Guides* and California Workers' Compensation, Chs. 4, 7, 9].

Statute of Limitations—Furnishing of Medical Treatment By Employer— medical treatment for her injury through employer-provided health plan will not toll statute of limitation without notice to employer of industrial injury discussing and distinguishing Mihesuah v. W.C.A.B. (1972) 29 Cal. App. 3d 337, 105 Cal. Rptr. 561, 37 Cal. Comp. Cases 790. Chavez v. Lobel Financial Corp., 2021 Cal. Wrk. Comp. P.D. LEXIS 88 (BPD); Labor Code § 5405(c); . [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 24.04[3]; Rassp & Herlick California Workers' Compensation Law, Ch. 14, § 14.03; SOC, Section 6.15, One Year From Last Provision of Benefits].

Medical Treatment—Expenses of Treatment—Collecting Payment From Employee—Reimbursement to applicant for authorized self-procured surgery is limited to the OMFS, per Labor Code §§ 4603.2 and 4603.6, 3751. Hoadley v. American Airlines, 2021 Cal. Wrk. Comp. P.D. LEXIS 92; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.05[1]-[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.21; SOC, Section 7.67, Submission of Bill and Employer's Response].

Permanent Disability—Rating—Rebuttal of Scheduled Rating—To rebut scheduled PD rating the applicant has the burden of establishing through VR evidence that the applicant is not amenable to vocational rehabilitation to enable him to return to labor market. Citing and discussing Contra Costa County v. W.C.A.B. (Dahl) (2015) 240 Cal. App. 4th 746, 193 Cal Rptr. 3d 7, 80 Cal. Comp. Cases 1119; Diaz v. E&F Demolition, 2021 Cal. Wrk. Comp. P.D. LEXIS 82 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], [4], 32.01[3], 32.03A[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.12[2]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Ch. 7; SOC, Section 10.19, Rebutting Schedule Under Ogilvie].

Costs—Vocational Experts—Cost of vocational expert will be allowed if it was reasonable and necessary at time it was incurred, even if vocational evidence does not successfully rebut permanent disability rating. Diaz v. E&F Demolition, 2021 Cal. Wrk. Comp. P.D. LEXIS 82 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 27.01[8][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, §§ 16.35[1], 16.61].

Permanent Disability—Rating—Rebuttal of Scheduled Rating—VR evidence not substantial where it failed to consider/address apportionment of nonindustrial causation found by the AME, failed to address applicant's amenability to VR, and WCJ improperly refused to apportion based on the lack of applicant's preexisting disability where asymptomatic pathology/conditions contributed to cause disability. Walsh v. Skyline Steel Erectors, 2021 Cal. Wrk. Comp. P.D. LEXIS 84 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], [4], 32.01[3], 32.03A[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.12[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-employee consistent with employer procedures/policies initiated prior to injury, although termination occurring after date of injury did support a finding that defendant-employer did not violate Labor Code § 132a. Charletta v. Barrett Business Services, Inc. 2021 Wrk. Comp. P.D. LEXIS 86 (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]; SOC, Section 11.8, Discrimination Under LC 132a].

Penalties—Employer's Delay in Providing Medical Treatment—Defendant held not labile for 5814 penalty for refusal to authorize UR certified left shoulder surgery where PQME determined left shoulder not industrially injured part of body. Castaneda v. Aramark, 2021 Cal. Wrk. Comp. P.D. LEXIS 101 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 10.40[1], [3][a], [c], 27.12[2][c], [e]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.11[2], [5]; SOC, Section 13.23, Unreasonable Delay – Failure of Payment for Medical Treatment Benefits].

Medical-Legal Procedure—Admissibility of Medical Reports—Medical Reports Provided to Qualified Medical Evaluator—Prior reports of QMEs are admissible and could be sent for review by the subsequent/replacement QME

where prior reports were properly obtained by the parties in accordance with Labor Code § 4062.2. The trier of fact has the authority to determine what information may be provided to the QME if the parties cannot informally agree on what information to provide to the QME. (Suon v. California Dairies (2018) 83 Cal.Comp.Cases 1803, 1814 (Appeals Board en banc).) Cervantes v. Pacific American Fish Co., 2021 Cal. Wrk. Comp. P.D. LEXIS 93 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.06[1][a], 22.08[3][c], 22.11[18]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, §§ 16.51[6], 16.54[4]; SOC, Section 14.41, Communication with AME/QME].

Injury AOE/COE—Going and Coming Rule—Regional sales person suffered injury AOE/COE in automobile accident while traveling in employer-provided vehicle between two personal errands, but traveling throughout large regions of California and Nevada to meet with clients; Several of rule's exceptions to "going and coming" rule, including employer-provided transportation exception and personal comfort doctrine applied. Chorbagian v. Ormco Corp., 2021 Cal. Wrk. Comp. P.D. LEXIS 146 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.150, 4.151[a], [b], 4.153; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.05[3][a]; SOC, Section 5.45, Transportation Controlled by Employer].

Injury AOE/COE—Deviations From Employment—Premises Line Doctrine—Terminal security guard suffered injury when he fell outside terminal while pursing individual who had been disrupting passengers inside, and leaving station did not constitute deviation that took applicant outside course of employment. Alex v. All Nation Security Services, Inc., 2021 Cal. Wrk. Comp. P.D. LEXIS 139 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.115, 4.116, 4.130, 4.152[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.05[2], [3][b], [8]; SOC, Section 5.60, Performance of Work – Unauthorized Manner].

Injury AOE/COE—Injuries While Traveling To or From Medical Appointment—MVA resulting in death of applicant during trip from self-procured chiropractic/PT appointment held compensable consequence injury, as treatment determined to cures or relieves from effects of industrial injury. Shepard v. County of LA, 2021 Cal. Wrk. Comp. P.D. LEXIS 151 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.133; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.04[4][c]; SOC, Section 5.65, Compensable Consequence Injury].

Medical Provider Networks—Access Standards—MPN access standards does not require MPN to have three physicians of each and every possible appropriate specialty to act as primary treating physician (8 Cal. Code Reg. § 9767.5). Kazrani v. LA Unified School District, 2021 Cal. Wrk. Comp. P.D. LEXIS 126 (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].

Average Weekly Earnings—Calculation Based on Actual Earnings—The absence of annual earnings during three year period preceding date of injury support AWE based on actual earning during preceding year of employment and not earning capacity (LC § 4453(c)(4)). Uribe v. Tri-State Employment Services, 2021 Cal. Wrk. Comp. LEXIS 135 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 6.02[1], [2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 5, § 5.01[2]; SOC, Section 8.10, Average Weekly Earning – Capacity].

Death Benefits—Dependency—24-year-old son held totally dependent based on facts at time of death; Where father/decedent was son's only source of income at time of death, and Pell Grant was for living and tuition expense to start in the fall and not at time of death found total dependency. Manzur v. Carpet Land Mills/Vartan Avedisszadehn, 2021 Cal. Wrk. Comp. P.D. LEXIS 134 (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, Section 12.11 Factual Determination of Dependency].

Death Benefits—Rate of Payment—Labor Code § 4661.5 applies to death benefits in same way as it does to regular temporary disability payments, i.e., after two years from date of injury, benefits increase to any new maximum rates as long as earnings at time of injury warrant increase, that once earnings are fixed as required by Labor Code § 4458.5, they do not continue to increase to maximum rates indefinitely every time there is maximum rate increase. Miercynski v. City of Fullerton, 2021Cal. Wrk. Comp. P.D. LEXIS 144 (BPD); [See generally Hanna, Cal. Law of

Emp. Inj. and Workers' Comp. 2d §§ 6.05[3], 9.03[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 5, § 5.07, Ch. 9, § 9.07[2]; SOC, Section 12.20, Compensation Rate – Death Benefit].

Medical-Legal Procedure—Medical Reports Provided to Qualified Medical Evaluator—Labor Code § 4062.3(a)(2) and 8 Cal. Code Reg. § 35(a)(2) permit any party to provide medical records relevant to determination of medical issues to qualified medical evaluator, and that there was nothing in the record to indicate that review of prior qualified medical evaluator's report would prevent current qualified medical evaluator from conducting objective evaluation of record and rending impartial opinion regarding contested medical issues. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.06[1][a], 22.08[3][c], 22.11[18]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, §§ 16.51[6], 16.54[4]].

Medical-Legal Procedure—Information Provided to Qualified Medical Evaluator—Party's advocacy letter allowed to state reasons for denial as QME must be apprised of all contested medical issues. Barrett v. City of Yuba City, 2021 Cal. Wrk. Comp. P.D. LEXIS 137 (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 Agreed Medical Examiner and QME].

Liens—Procedural Rights and Duties—Consolidation of Lien Discovery Proceedings—Defendant had right to petition for consolidation of cases and stay lien claims based on allegations of illegal business practices; Consolidation for purposes of common discovery is most common and efficient procedure for purposes of adjudicating of common issues of law and fact, and that order of consolidation and stay of these limited number of liens did not violate lien claimant's monetary, property or due process rights. Erhahon v. Kaiser Foundation Hospital, 2021 Cal. Wrk. Comp. P.D. LEXIS 150 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 30.04[7][d]; Rassp & Herlick, California Workers' Compensation Law, Ch. 17, § 17.70[3], Ch. 19, § 19.37[3]; SOC, Section 15.53, Consolidation of Cases].

Stipulations—Validity—Subsequent realization due to a lack of due diligence by a party of a valid defense does not constitute good cause to set aside an otherwise valid and enforceable stipulation where stipulation demonstrated parties' intention to settle, although not yet approved by WCJ. Kesheshi v. Early Behavior Intervention, LLC, 2021 Cal. Wrk. Comp. P.D. LEXIS 129 (BPD); [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].

Entries for Work Comp Index 2023

Third-Party Actions—Employer's Claim for Credit—Defendant barred from obtaining third-party credit pursuant to Medical Injury Comprehensive Reform Act of 1975 (MICRA), codified in Civil Code § 3333.1, when applicant's civil lawsuit was settled, and WCAB found substantial evidence that settlement of civil action was "demonstrably reduced" to reflect collateral source contributions. The WCAB noted that it was not necessary that MICRA settlement agreement allocate amount of settlement for general damages and amount for special damages in order for Civil Code § 3333.1 to bar subrogation. Citing, discussing, and relying on *Graham v. W.C.A.B.*(1989) 210 Cal. App. 3d 499, 258 Cal. Rptr. 376, 54 Cal. Comp. Cases 160. Quintanilla v. Sun Healthcare Group (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 94, 86 Cal. Comp. Cases 642 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[6], 11.21[2][c][i]; Rassp & Herlick, California Workers' Compensation Law, Ch. 12, § 12.10[2]; SOC, Section 2.41, Employer Credit for City Recovery].

WCAB Procedure—Joinder of Parties—Petition for Joinder of Party Defendant denied where date of injury as filed and settled was specific and not CT injury. However, Defendant seeking joinder has the right to pursue reimbursement/contribution after establishing a separate CT date of injury pursuant to LC 5500.5(c). Abdulkareem v. Dimension Development Two, 2021 Cal. Wrk. Comp. PD LEXIS 160 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 26.01[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, §§ 15.11, 15.14; SOC, Section 5.8, Contribution Among Defendants].

Injury AOE/COE—Off-Duty Recreational/Athletic Activities—Injury AOE/COE found while working out at gym located on defendant's premises; established by change via text message to supervisor of work schedule bringing applicant within on-duty capacity at time of his injury, applicant was never instructed to not use gym while on duty, and therefore applicant had both subjective and objectively reasonable belief that his workout on date of injury was authorized by his supervisor. Further, signed waiver not routinely enforced, not part of the police union's Memorandum of Understanding, and employer failed to post notice pursuant to Cal. Code Regs tit. 8, § 9881(c)(4) of non-responsibility for injury. Citing and discussing City of Chino v. WCAB (Alvo) (2007) 72 Cal. Comp. Cases 363 (WD). Henderson v. City of Glendora, 2021 Cal. Wrk. Comp. PD LEXIS 154 (BPD). [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]; SOC, Section 5.27, Off-Dity Recreational, Social or Athletic Activity].

Injury AOE/COE—Going and Coming Rule—Required Vehicle Exception—Death caused by MVA held barred by "going and coming" rule, as employer neither explicit or implicit had as a requirement of decedent's employment to furnish his own transportation, employer did not compensate the travel, and employees traveled from/to single worksite on his normal commute home; the mere use of carpool among employees held not an exception to the bar of the "going and coming" rule. Miranda, Perez Lopez v. Helmsman Field Logistic, Zenith Insurance, 2021 Cal. Wrk. Comp. P.D. LEXIS 156 (Split BPD); [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].

Medical Treatment—Utilization Review—Assisted Living Facility—It is the defendant's burden to established a change in applicant's condition or circumstance, in order to terminate a modality of treatment when defendant had been providing ongoing authorization for that modality of treatment previously authorized. (Patterson v. The Oaks Farm (2014) 79 Cal. Comp. Cases 910 (Appeals Board significant panel decision)); The applicant's is not required to provide ongoing requests for authorization to receive previously authorized treatment; National Cement Company v. WCAB (Rivota) (Court of Appeal, Second Appellate District) 86 Cal.Comp.Cases 595, 2021 Cal. Wrk. Comp. LEXIS 21 (Writ Denied). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 5.02[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.10[7]; SOC, Section 7.2, Scope of Care – Cure or Relieve].

Permanent Disability—Rating and Apportionment—Rebuttal of Scheduled Rating—2004 injury resulted in award of total disability pursuant to *Ogilvie v. W.C.A.B.* (2011) 197 Cal. App. 4th 1262, 129 Cal. Rptr. 3d 704, 76 Cal. Comp. Cases 624, when vocational expert evidence established that applicant was precluded from returning to labor market and was not amenable to vocational rehabilitation as a direct consequence solely, and exclusively from the subject industrial injury. (Citing and Discussing *Dept. of Corrections & Rehabilitation v. W.C.A.B. (Fitzpatrick)* (2018) 27 Cal. App. 5th 607, 238 Cal. Rptr. 3d 224, 83 Cal. Comp. Cases 1680); Fresno Unified School District v. WCAB (Swanson) (5th Appellate District), 86 Cal. Comp. Cases 591, 2021 Cal.Wrk. Comp. LEXIS 17 (Writ Denied); [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, Chs. 6, 7; SOC, Section, 10.34, Apportionment – Pre-Existing Disease or Condition].

Permanent Disability—Rating and Apportionment—Rebuttal of Scheduled Rating—Opinion of AME finding apportionment to prior nonindustrial cervical fusion not proper where vocational evidence established that applicant's inability to engage in gainful employment and vocational infeasibility were entirely/solely/exclusively caused by her industrial injury. Fresno Unified School District v. WCAB (Swanson) (5th Appellate District), 86 Cal. Comp. Cases 591, 2021 Cal.Wrk. Comp. LEXIS 17 (Writ Denied); [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, Chs. 6, 7; SOC, Section, 10.34, Apportionment – Pre-Existing Disease or Condition].

Statute of Limitations—Latent Injuries—WCAB granted removal and deferred issue of statute of limitations with respect to applicant's claim for 8/7/2016 specific injury to his right knee/lower extremity, pending further development of medical record on issue of injury's causation, when WCAB found that although reporting of panel qualified medical evaluator was not substantial evidence upon which to base finding of causation, it raised viable possibility that applicant sustained latent injury when he stepped in pothole at work in 2016 and hyperextended his knee, which triggered applicant's subsequent knee injury while skiing on 3/14/2019 and resulted in need for surgery to repair torn ACL, that if, in fact, applicant suffered latent injury in 2016 resulting in subsequent injury it would be akin to "occupational disease" caused by specific injury and date of injury for purposes of statute of limitations would be determined utilizing Labor Code § 5412 rather than Labor Code § 5411, and that further development of medical record is necessary to determine medical implications of applicant's claim. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 24.03[1], [6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 14, §§ 14.02[1], 14.13[1].]

Permanent Disability—Calculating Apportionment—Lifetime Cap on Benefits—Apportionment to a prior award pursuant to Labor Code 4664(c)(1)(G) reduced a 100% disability to a 66% PD award due to the prior award of 83% which in part was within the lifetime accumulation cap of "region of the body" involve in the subject injury, and that issue of overlap between the prior and current PD was not applicable if the 100 lifetime accumulation cap is reached. Russell v. Country of LA, 2021 Cal.Wrk. Comp. P.D. LEXIS 152 (BPD); See also, accord Ross v. California Highway Patrol and SCIF (Oct 20, 2020) 86 Cal Comp Cases 99 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.06[5][d], 8.07[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.42[3]].

Penalties—Delay in Paying Benefits—It is not a defense to penalties pursuant to Labor Code 4650(d) and 5814, that an award was subject to appeal where no appeal was taken. Further, an additional penalty pursuant to LC 5814 is proper where an untimely payment of an award has occurred without an additional increase of the self-assessed 10% penalty pursuant to LC 4650(d). Last, where the award is untimely paid, but is paid with the additional self-assessed penalty pursuant to 4650(d), any claim for penalty pursuant to 5814 will be offset by the 4650(d) self-assessed penalty. Carter v. Country of Alameda, 2021 Cal.Wrk. Comp. P.D. LEXIS 158 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.40[1], [3][a], [c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.11[2], [5]; SOC, Section, 13.2, Penalty Under LC 4650].

Medical-Legal Procedure—Qualified Medical Evaluator Panel Requests—Compensability Disputes— Applicant's letter requesting medical evaluation sent to defendant the day after he filed 2019 cumulative injury claim was sufficient triggering event for requesting qualified medical evaluator panel pursuant to Labor Code §§ 4060 and 4062.2, even though defendant had not yet sent delay/denial notice. Gill v. Cunty of Fresno, (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 51, 86 Cal. Comp. Cases 609 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.06[1][a], [2], [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 Procedures – Represented Employee].

Injury AOE/COE—Intoxication— Substantial medical evidence that the proximate and substantial cause of the injury was intoxication is required to establish the affirmative defense of intoxication under Labor Code § 3600(a)(4), and this will generally require the opinion of a toxicologist that the intoxication was the substantial cause of the injury as and when it occurred. Garcia v. Rex Signature Services, 2021 Cal. Wrk. Comp. P.D. LEXIS 176 (BPD); [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].

Psychiatric Injury—Six-Month Employment Requirement—Sudden and Extraordinary Employment Conditions—Claim not barred by six-month employment rule (LC § 3208.3(d)), where fall from loading dock while walking to cafeteria was not within ordinary risk of her job as nurse case manager and therefor found 'sudden and extraordinary' as not routine or result of routine employment event expected or experienced by all employees working for defendant. Dissenting Commissioner Razo held otherwise writing that walking off loading dock was not uncommon, unusual and unexpected, but due to inattentiveness and thus expected. McKee v. Aerotek, Inc., 2021 Cal. Wrk. Comp. P.D. LEXIS 189 (Split BPD); [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].

Injury AOE/COE—Going and Coming Rule—Required Vehicle Exception—Injury claim was not barred by "going and coming rule" based on applicability of "required vehicle" exception to rule, when although employer did not explicitly request applicant to have access to his car for job, there was clear benefit to employer as due to reassignment of firefighter to other fire station during shift; WCAB noted that application of the 'require vehicle' exception to 'going and coming' rule should be liberal construed/applied (LC § 3202); Pacatte v. SF Fire Dept, City and County of SF, 2021 Cal. Wrk. Comp. P.D. LEXIS 177 (BPD); [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].

Medical Treatment—Utilization Review—UR certifying RFA for L5-S1 fusion surgery does not make defendant responsible for L4-5 fusion where surgeon originally mistakenly requested surgical authorization at wrong level although identical procedure. Baker v. County of Sac., 2021 Cal. Wrk. Comp. P.D. LEXIS 174 (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 Treatment—Utilization Review—WCJ may not address medical necessity absent a determination that UR was untimely. Baker v. County of Sac., 2021 Cal. Wrk. Comp. P.D. LEXIS 174 (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].

Permanent Disability—Rating—Combining Multiple Disabilities—Award of total disability upheld based upon additive rating rather than combine value equation determined by QME to be more accurate description of applicant's severe impairment where industrial injury was to right foot and ankle, both legs resulting in bilateral below-knee amputations, lumbar spine, vascular system, sleep, and psyche, and opinion supported by the evidence. Citing and discussing Athens Administrators v. W.C.A.B. (Kite) (2013) 78 Cal. Comp. Cases 213 (W/D). Wiest v. California Department of Corrections and Rehab., Centinela State Prison, 2021 Cal. Wrk. Comp. LEXIS 162 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[4][d], 32.03A[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.11[2], 7.100; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Chs. 2, 3, 7; SOC, Section 10.34, Apportionment – Pre-Existing Disease or Condition].

Permanent Disability—Apportionment—Preexisting Non-Industrial Conditions—Applicant found 100 percent permanent disability on an industrial basis, despite preexisting, non-industrial diabetes where although applicant's diabetes was causal factor in need for bilateral leg amputations, resulting permanent disability was rated on basis of applicant's orthopedic impairment alone and was not related to his diabetic condition. Wiest v. California Department of Corrections and Rehab., Centinela State Prison, 2021 Cal. Wrk. Comp. LEXIS 162 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[2][a], 8.06[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.41[3], 7.45[2]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Chs. 4, 6; SOC, Section 10.34, Apportionment – Pre-Existing Disease or Condition].

Permanent Disability—Apportionment—Substantial Medical Evidence—QME opinion constituted substantial evidence on apportionment of COPD and restrictive lung disease finding that 80% to non-industrial causes including lifetime of heavy smoking and morbid obesity, and 20% to industrial toxic fumes exposure, where QME by report and at deposition explained the 'how and why' supporting his apportionment opinion. Brophy v. WCAB, 2021 Cal. Wrk. Comp. LEXIS 23 (W/D); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[2][a], 8.06[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.40[1], 7.45[2]; The Lawyer's Guide to the AMA *Guides* and California Workers' Compensation, Chs. 4, 6; SOC, Section 1035, Apportionment – Pre-Existing Disability].

Medical-Legal Procedure—Selection and Assignment of Panel Qualified Medical Evaluators—Panel QME secured while applicant was unrepresented is proper panel qualified medical evaluator even where applicant subsequently becomes represented; Citing, discussing, and explain Romero v. Costco Wholesale (2007) 72 Cal. Comp. Cases 824 (Appeals Board Significant Panel Decision). Romero merely permits a request for new QME panel where an unrepresented worker subsequently becomes represented, provided the evaluation with unrepresented panel has not yet occurred at time of objection and request for new panel by the party opponent. Medeiros v. County of Sonoma Sheriff's Department, 2021 Cal. Wrk. Comp. P.D. LEXIS 161 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.06[1][a], [b], 32.06[2][a], [b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[3]; SOC, Section 14.28, Medical-Legal Process].

Medical-Legal Procedure—Scheduling Appointments With Qualified Medical Evaluator—Replacement Panels—COVID-19 Pandemic—Party not entitled to replacement QME panel where QME would not schedule in-person appointment to evaluate applicant's within 120 days of request as required under 8 Cal. Code Reg. § 46.2(b)(1) since statewide COVID-19 pandemic stay-at-home order was in effect during that period, precluding qualified medical evaluator from scheduling in-person appointment. Rojas v. Jackel Enterprises, 2021 Cal. Wrk. Comp. P.D. LEXIS 175 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.07[2][a], 22.11[16]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[17]; SOC, Section 14.44, Evaluation Requirements and Rights].

Attorney's Fees—WCJ's Reduction of Stipulated Fee—Award of attorneys fee of one-third of 132(a) settlement per written fee agreement was proper based upon the higher standard of proof necessary for 132(a) claim, that considerable work performed by attorney over a period of five years, that attorney obtained an exceptional result, and no objection by applicant. Hernandez v. YRC Freight, 2021 Cal. Wrk,. Comp. P.D. LEXIS 172 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 20.02[2][c], 20.05; Rassp & Herlick, California Workers' Compensation Law, Ch. 17, §§ 17.32, 17.53, Ch. 18, § 18.12[1]; SOC, Section 15.101, Attorney Fee – Lien Against Employee's Compensation].

WCAB Jurisdiction—Concurrent State and Federal Jurisdiction—Maritime Workers— To determine whether Concurrent state and federal jurisdiction exists the following factors may be considered: (1) Whether a reasonable argument can be made either that applicant was a seaman under the Jones Act, and the WCAB will have concurrent jurisdiction as within a 'wide circle of doubt' all waterfront cases involve aspects pertaining to both land and sea; (2) Whether the injury occurred in territorial waters and whether the local California entity has control over the floating dock; (3) The extend of the injured employee's contacts with California, coupled with the state interest in the welfare of its citizens. (Citing and discussing CNA Ins. Co. v. W.C.A.B. (Baker) (1997) 58 Cal. App. 4th 211, 68 Cal. Rptr. 2d 115, 62 Cal. Comp. Cases 1371.) Figueroa v. American Marine Corp., 2021 Cal. Wrk. Comp. P.D. LEXIS 206 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 21.01[5]; Rassp & Herlick, California Workers' Compensation Law, Ch. 13, § 13.04; SOC, Section 2.11, State Versus Federal Jurisdiction].

Injury AOE/COE—Aggravation vs. Exacerbation of Prior Condition—Substantial Medical Evidence—Whether applicant's symptoms constituted "aggravation" or "exacerbation" of her pre-existing condition is determined by permanency, i.e. an "aggravation" is permanent increase in severity of pre-existing condition, while "exacerbation" is temporary increase in symptoms that return to their prior level within reasonable period of time; While an 'aggravation' when coupled with disability will constitute an industrial injury, an 'exacerbation' will not. Johnson v. Cadlac, Inc., dba Del Taco and Technology Insurance Co., 2021 Cal. Wrk. Comp. P.D. LEXIS 194 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[2], 4.04, 27.01[1][c]; Rassp & Herlick,

California Workers' Compensation Law, Ch. 10, § 10.01[4]; SOC, Section 5.3, Aggravation of Pre-Existing Nonindustrial Disease or Condition].

Presumption of Industrial Causation—Cancer—Police Officers—Defendant failed to rebut Labor Code § 3212.1 cancer presumption, which requires that evidence explicitly demonstrating that medical or scientific research shows no reasonable link between exposure to known carcinogen and development of cancer, and that defendant did not rebut presumption based on latency period because agreed medical evaluator could not rule out possibility that applicant's thyroid cancer had shorter latency period than most common 10-year period. De La Cruz v. City of Fountain Valley, 2021 Cal. Wrk. P.D. LEXIS 190 (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].

Injury AOE/COE—Horseplay—Self-Inflicted Injury—Applicant's act of descending stairs unconventionally, and arguable in an unauthorized manner which resulted in injury was not barred as horseplay (insufficient deviation to take applicant outside scope of employment), or self-inflicted injury (LC § 3600(a)(5)) (no evidence applicant intended to injure herself by descending stairs in unauthorized manner), and applicant had met her initial burden of proof that she sustained injury AOE/COE in location she was placed by her employment and while engaged in activity reasonably attributable to that employment. Resendiz v. La Corneta, Inc., 2021 Cal. Wrk. Comp. P.D. LEXIS 207; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.21, 4.51[3][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, §§ 10.02[2], 10.04[2]; SOC, Section 5.62, Horseplay -- Skylarking].

Medical Treatment—Independent Medical Review—Appeals—LC § 4610.5(l)(1) requires employer to provide IMR reviewer with all records relevant to employee's current medical condition and medical treatment generally and specifically being requested, and improperly exclusion of highly relevant in-home assessment report from records provided to IMR organization constitutes a plainly erroneous findings of fact (LC § 4610.6(h)(5)), justifying reversal as without or in excess of Administrative Director's powers per Labor Code § 4610.6(h)(1). Wiley v. ATT&T, 2021 Cal. Wrk. Comp. P.D. LEXIS 217 (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 – Appeal and Implementations of Determination].

Medical Provider Networks—Second Opinions—Applicant's request for second opinion based on treating physician's failure to provide diagnosis or treatment of her back complaints, part of body denied by defendant, was sufficient to trigger applicant's right to second opinion in defendant's MPN pursuant to Labor Code § 4616.3(c). Ruiz v. Pride Industries, 2021 Cal. Wrk. Comp. P.D. LEXIS 214 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 5.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.12[8][b]; SOC, Section 7.55, Medical Provider Network – Dispute Resolution].

Temporary Disability—Exceptions to Two-Year Cap on Benefits—Amputations—Surgery reducing the left tibia and fibula resulting in shortening of left leg by two inches constituted an amputation within the exception to the 104 week TD cap pursuant in Labor Code § 4656(c); The amputation exception does not require severance of entire body part; A "limb shortening surgery" is sufficient to constitute removal of part of limb and entitle applicant to 240 weeks of temporary disability. Parker v. AC Transit, 2021 Cal. Wrk. Comp. P.D. LEXIS 205 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[2][b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.12; SOC, Section 9.14, Time Limit on Payment on or After 4/19/04].

Temporary Disability—Undocumented Workers—Applicant not entitled temporary disability indemnity after defendant learned that applicant could not legally be employed because she was undocumented. (Citing and discussing *Salas v. Sierra Chemical Co*. (2014) 59 Cal. 4th 407, 327 P.3d 797, 173 Cal. Rptr. 3d 689, 79 Cal. Comp. Cases 782; Holding that the (re)hiring undocumented worker is a violation of federal law. Flores v. Westside Accurate Courier Services, 2021 Cal. Wrk. Comp. P.D. LEXIS 191; [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].

Temporary Disability—Modified Duties—Unavailability of Work Due to COVID-19—Unavailability of modified work due to COVID-19 pandemic shut down is not a basis to end defendant's TD liability; Mota Perez v. Spr Op Co. Inc., 2021 Cal. Wrk. Comp. P.D. LEXIS 193 (BPD). But see, Escobar v. Wood Ranch BBQ, 2021 Cal. Wrk. Comp. P.D. LEXIS 218 (BPD), holding that termination for cause or rejection by applicant of available modified work which subsequently become unavailable due to COVID shut down will terminate defendant liability for TD. [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.]

Psychiatric Injury—Predominant Cause Standard—In reaching the predominant cause threshold for psychiatric injury (LC 3208.3(b)(1)), the Court may aggregate both the percentage resulting from causation resulting from both compensable consequence of the physical injury, and that which is a direct caused of the injurious event itself. Garcia v. Lyons Magus, Inc., 2021 Cal. Wrk. Comp. P.D. LEXIS 208 (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]; SOC, Section 10.16, PD – Injury on or After 1/1/13].

Permanent Disability—Rating—Rebuttal of Scheduled Rating— Total disability award supported by substantial medical evidence, vocational evidence and the applicant's limited ability to work at home, at her own pace, for up to four hours per day, which was akin to sheltered workplace, and not open labor market, and found sufficient to rebut scheduled rating. Citing and discussing Ogilvie v. W.C.A.B. (2011) 197 Cal. App. 4th 1262, 129 Cal. Rptr. 3d 704, 76 Cal. Comp. Cases 624, Contra Costa County v. W.C.A.B. (Dahl) (2015) 240 Cal. App. 4th 746, 193 Cal Rptr. 3d 7, 80 Cal. Comp. Cases 1119, and LeBoeuf v. W.C.A.B. (1983) 34 Cal. 3d 234, 193 Cal. Rptr. 547, 666 P.2d 989, 48 Cal. Comp. Cases 587. Escobedo v. San Luis Coastal Unified School District, 2021 Cal. Wrk. Comp. P.D. LEXIS 213 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], [4], 32.01[3], 32.03A[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.12[2]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Ch. 7; SOC, Section 10.19 Rebutting Schedule Under Ogilvie].

WCAB Jurisdiction—Concurrent Jurisdiction—Uninsured Employers—When two or more tribunals have concurrent jurisdiction, the tribunal first assuming jurisdiction retains jurisdiction to exclusion of all other tribunals; In the concurrent jurisdiction situation, the deferral of employment issue in applicant's workers' compensation case pending final resolution of issue in the civil case in necessary to prevent further "unseemly conflict between courts" or any further duplicative litigation. Guzman v. Chavez, Alvarez, 2021 Cal. Wrk. Comp. P.D. LEXIS 228 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 21.05[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 13, §§ 13.06[1], 13.08[1], [2]; SOC, Section 2.2, Exclusive Jurisdiction].

Peculiar Risk Doctrine/Premises Liability > Exceptions to Privette Rule > Known Hazards on Premises> Property owner who hired professional/independent contractor is not liable for injuries sustained by employee of independent contractor when independent contractor was aware of various obvious hazardous conditions stating that when landowner hires independent contractor to perform work on its property, it presumptively delegates to contractor duty to ensure safety of its workers (*Privette v. Superior Court* (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721, 58 Cal. Comp. Cases 420); Discussing and explaining the Privette doctrine, the Court wrote that although exceptions to *Privette* doctrine permit finding of liability for failure to warn of concealed hazard on premises or if hirer retained control over any part of independent contractor's work in manner affirmatively contributing to injury, those exceptions did not apply where the hazard was obvious to plaintiff and hirer retained no control over plaintiff's work. Further, that as between landowner and independent contractor, the law assumes independent contractor is generally better positioned to determine how to address obvious safety hazards on worksite, and that case law clearly establishes that where hirer has effectively delegated its duties, it has no independent obligation to assess workplace safety. Gonzalez v. Mathis (Cal. Supreme Court, 2021) 12 Cal. 5th 29, 493 P.3d 212, 86 Cal. Comp. Cases 767, 2021 Cal. LEXIS 5823, 282 Cal. Rptr. 3d 658; See also, accord, Sandoval v. Qualcomm Inc., (Cal. Supreme Court, 2021) 12 Cal. 5th 256, 493 P.3d 487, 86 Cal. Comp. Cases 787, 2021 Cal. LEXIS 6327, 283 Cal. Rptr. 3d 519; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 3.133; Rassp & Herlick, California Workers' Compensation Law, Ch. 12, § 12.06[9].]

Illegal Patient Referrals > Physician's Office Exception > Insurance Fraud > Physician held in violations of Labor Code § 139.3(a) (precluding doctors from referring workers' compensation patients to other providers or entities in which doctor has financial interest) by billing workers' compensation insurer for services he rendered to patients through two other legal entities he owned and controlled, and petitioner's compliance with disclosure requirements in Labor Code § 139.3(e) did not excused any non-compliance with Labor Code § 139.3(a); Also holding that Physician could still be prosecuted for insurance fraud because evidence supported strong suspicion petitioner specifically intended to present false and fraudulent claims for health care benefits in violation of Penal Code § 550(a)(6). Banerjee v. Superior Court (4th District Court of Appeal, 2021), 69 Cal. App. 5th 1093, 86 Cal. Comp. Cases 865, 2021 Cal. App. LEXIS 828, 284 Cal. Rptr. 3d 908. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 2.03[1], [2], 22.14; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, §§ 11.30[9], 11.31.]

Serious and Willful Misconduct of Employer—WCAB upheld WCJ's finding that defendant did not engage in Serious and Willful Misconduct as decedent was the operations manager and had broad autonomy regarding how to conduct his job duties without oversight from other management employees, and given this broad authority the decedent's own failure to use safety equipment can not form basis for serious and willful misconduct. The mere violation of Cal/OSHA safety is not sufficient to establish S&W under these circumstances. Perez v. Dynamic Auto Images, Inc, 2021 Cal. Wrk. Comp. P.D. LEXIS 245 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.01; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.14.]

Medical-Legal Procedure—Stipulation to Use Agreed Medical Examiner—A party is not permitted to unilaterally withdraw from an agreement to utilize an AME when pursuant to plain language in Labor Code § 4062.2(f), stipulation to utilize AME may only be canceled by parties' mutual written consent even where the evaluation has yet taken place. Split Panel decision holding contra to Yarbrough v. Southern Glazer's Wine & Spirits (2017) 83 Cal. Comp. Cases 425, which interpreted statutory language as permitting unilateral withdrawal from AME agreement where no evaluation had yet occurred. Bonnevie v, Fox Studio Lot, 2021 Cal. Wrk. P.D. LEXIS 247 (BPD); See also, Dzambik v. Ishaan Enterprise, Inc., 2021 Cal. Wrk. Comp. P.D. LEXIS 279 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.06[1][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[2]; SOC, Section 14.29, Medical-Legal Process – Represented Employee].

Medical-Legal Procedure—Scheduling Appointment With Qualified Medical Evaluator—Request for replacement QME panel denied where no showing of prejudice sufficient to justify new panel, and 8 Cal. Code Reg. § 31.5(a)(2) time period does not apply to supplemental evaluations. Citing and discussing, Cheryl Cienfuegos v. Fountain Valley School District, 2011 Cal. Wrk. Comp. P.D. LEXIS 206; Ray v. PRG Insurance Recruiters, 2021 Cal. Wrk, Comp. P.D. LEXIS 226 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[5]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[5]; SOC, Section 14.40, Appointment and Cancellation].

Compromise and Release Agreements—Rescission—Mutual Mistake—Good cause found to set aside Order Approving Compromise and Release based on mutual mistake of the parties where both parties believed at time of settlement that CMS would approve a zero-dollar Medicare Set-Aside, but did not. Harrison v. Canyon Springs Pools and Spas, Inc. 2021 Cal. Wrk. Comp. P.D. LEXIS 234 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 29.05[1], [2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 18, § 18.11; SOC, Section 14.83, Compromise and Release – Medicare Set-Aside].

Dismissal of Claim at Applicant's Request—Notice of Intent to Dismiss—Order of dismissal which issued approximately one year and eight months after request requires notice of intention to dismiss claim, to ensure that applicant's due process rights are not violated. Moreno v. Advanced Pattern and Mold, Inc., 2021 Cal. Wrk. Comp. P.D. LEXIS 241 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 31.14[5]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.07[3]; SOC, Section 15.82, Dismissal of Claim].

WCAB Jurisdiction—Settlement of Prior Claims—Issue and Claim Preclusion—Burden of Proof— The burden of proof is defendant's on the affirmative defense that a claim is barred by claim preclusion (res judicata) or issue preclusion (collateral estoppel); Where prior settlement documentation had been destroyed, and where applicant does not appear at trial to testified, defendant through substantial evidence failed to meet this burden. Hart v, Oakland Invaders, 2021 Cal. Wrk. Comp. P.D. LEXIS 269 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 21.08[2], 29.01[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 13, § 13.10; Ch. 18, § 18.13[1], [2]; SOC, Section 5.6, Defining Multiple Injury Dates].

Injury AOE/COE—Death Under Unknown Circumstances—Death found compensable solely on circumstantial evidence where medical evidence established decedent's work activities supported nexus to his fatal ventricular fibrillation so long as activities were proximate to death; The evidence supported the reasonable inference that decedent performed physical work activities for defendant proximate to his ventricular fibrillation resulting in his sudden death. Johnson v. Lawler's Woodcrest Service, 2021 Cal. Wrk. Comp. P.D. LEXIS 268 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.05[2][b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 9, § 9.02[2], Ch. 10, § 10.01[4][b]; SOC, Section 5.58, Mysterious Death].

Temporary Disability—Exceptions to Two-Year Cap on Benefits—Chronic Lung Disease—The determination of whether Valley Fever constitutes "chronic lung disease" within meaning of Labor Code § 4656(c)(3)(I) to extend TD beyond 104 weeks is a medical question requiring a medical evidence/opinion. Diaz v. State of California, 2021 Cal. Wrk. Comp. P.D. LEXIS 262 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.12; SOC, Section 9.14, Time Limit on Payment On or After 4/19/04].

Psychiatric Injury—Catastrophic Injuries—Increased Permanent Disability— Industrial injury found "catastrophic" under Labor Code § 4660.1(c)(2)(B) and Wilson v. State of CA Cal Fire (2019) 84 Cal. Comp. Cases 393 (Appeals Board en banc opinion), where treatment for applicant's injury was significant and life-threatening, requiring multiple hospitalizations for serious conditions resulting from industrial physical injury, and the ability to perform activities of daily living were substantially impacted; Whether injury is catastrophic is not measured by injury's impact on employee's earning capacity. Chavira v. Southland Gunite, Inc., 2021 Cal. Wrk. Comp. P.D. LEXIS 270 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.02[3][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]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Chs. 5, 6, 9; SOC, Section 10.16, Permanent Disability – Injury on or After 1/1/13].

Permanent Disability—Apportionment—Preexisting Disability—Apportionment to prior award pursuant to Labor Code § 4664 upheld where reporting physician found overlap between injuries and was able to assign whole person impairment under AMA Guidelines for 2002 injury without speculation based on his review of medical records and diagnostic studies. Ortiz v. South County Packing, Inc., 2021 Cal. Wrk. Comp. P.D. LEXIS 297 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[1]-[3], 8.06[5][d], 8.07[2][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.42; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Ch. 6; SOC, Section 10.35, Apportionment – Pre-Existing Disability].

Discrimination—Labor Code § 132a—Mitigation of Damages—Reinstatement—Duty to mitigate damages to recover wage loss pursuant to LC 132a is established where applicant credibly testified to filing applications seeking employment, and applicant's failure to apply for unemployment is not a basis credit to reduce wage loss recovery. Scagliotti v. Elmore Toyota, 2021 Cal. Wrk. Comp. P.D. LEXIS 273 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.11[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.27[1]; SOC, Section 11.10, Penalty for Violation of LC 132a].

Evidence—Admissibility—Dashcam Video—WCJ improperly excluded dashcam video without allowing defendant the opportunity to authenticate as the WCAB is not bound by statutory rules of Evidence Code and may admit documents into evidence without formal authentication. Johnson v. Lexmar Distribution, 2021 Cal. Wrk. Comp. P.D. LEXIS 289 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 26.06[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.45[1].]

Workers' Compensation Judges—Disqualification—Disqualification of WCJ based on appearance of impropriety proper where defendant presented sufficient grounds for disqualification based on affidavit of defense counsel attributing two comments to WCJ which could be construed as belittling of defense counsel and her ability to litigate. Johnson v. Lexmar Distribution, 2021 Cal. Wrk. Comp. P.D. LEXIS 289 (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].]

Medical-Legal Procedure—Assignment of Qualified Medical Evaluators—New Injuries—New PQME panel proper where new date of injury occurring after prior examination for prior injury, but both QME's are required to address all injury claims filed prior to doctor's evaluation irrespective of which QME evaluates applicant first. Citing and discussing Navarro v. City of Montebello, (2014) 79 Cal. Comp. Cases 418. Marguez v. Roman Catholic Bishop of Monterey, 2021 Cal. Wrk. Comp. P.D. LEXIS 277 (BPD); See also, accord, Noble v. Ascena Retail Group, Inc., 2021 Cal. Wrk. Comp. P.D. LEXIS 288 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[11]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[11]; SOC, Section 14.52, Subsequent Evaluation and Additional Qualified Medical Evaluator Panel in Different Specialty].