28th Anniversary

2023 Current Issues Workers' Compensation Seminar

March 17, 2023
Vizcaya Sacramento

Presented by

The Law Office of Richard Montarbo
Richard L. Montarbo, Esq.
MontarboLaw.com
146 Main Street
Red Bluff, Ca. 96080
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2023 Current Issues -- Workers' Compensation Seminar

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CURRENT ISSUES

WORKERS' COMPENSATION SEMINAR

Friday, March 17, 2023 **Vizcaya Sacramento**

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

2023 Panelists

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

Dudley Phenix, Esq.
Law Office of Dudley Phenix

Zachary Frost, Esq.
Law Office of Raymond Frost

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

Jason Marcus, Esq.
Marcus, Regalado & Marcus

James Witkop, Esq.
Witkop Law Group

Agenda

8:00 a.m. - 11:00 a.m.	**Registration and Brunch**
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.	**At Home Injuries - Liability and Defenses**
1:00 - 2:30	**Raffle -- Wine Tasting**

This years conference will be held both with an in-person audience, as well as virtually/web-casted. Again this year we will have a raffle of over $5,000 in gifts and prized!! With the exception of the MAC Computer, drawing eligibility will be otherwise limited to the limited in-person audience. In-person attendees will receive a lavish brunch, espresso/specialty drink bar, and our signature end of conference wine tasting, along with our signature end of conference wine tasting with hors d'oeuvres pairing.

The cost for virtual attendees wanting 5 MCLE/QME or MCLE Specialization credits is $75. Claims Professional attending virtually is without charge. In-person attendance is as follows: $265 for physicians and attorneys; Legal support staff is $150.00; Claims Professional is $50.00. Live attendance is very limited so register early!

All attendees will receive electronic materials, and link for a free IOS and Droid download of the 2023 Matrix CompCalcPlus. All attendees must register with the Law Offices of Richard L. Montarbo. All registrations should be received prior to March 1, 2023.

This seminar is web-casted 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.

Firm/Office:_____ Registrant Name:_____

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FEATURED AGAIN THIS YEAR

Following this year's Current Issues Workers' Compensation Seminar, the conference will conclude with our annual Prize Drawings and Wine Tasting for the In-person Audience.

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 Workers' 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 Law Offices of Dudley R. Phenix. In June of 2006, *Sacramento Magazine* recognized Mr. Phenix as "One of Sacramento's Best Lawyers." Mr. Phenix was recognized by the California State Bar as the Workers' Compensation Judge of the year.

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

- **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 Workers' Compensation Specialist since July 2014. He has also spoken as a panelist at a number of CAAA Conventions and Seminars and currently serves on the CAAA Executive Board.

- **ZACH FROST, Esq.** Mr. Frost has been representing applicants and plaintiffs for 13 years. He is a Certified Specialist in Workers' Compensation practicing in Fremont (NoCal) with Raymond E. Frost at The Frost Law Office. He has repeatedly been recognized as a Super Lawyer Rising Star and has presented at prior CAAA Conventions.

- **JIM WITKOP, Esq.** Mr. Witkop graduated cum laude from SUNY-Buffalo in 1997 with a major in psychology and a minor in English. He was accepted to the Santa Clara University School of Law in 1997 as a Heafy Law Scholarship recipient. In 1998 he studied abroad at the University of Hong Kong School of Law. During law school, Mr. Witkop was selected for highly-competitive internships with The Oakland Raiders and Temple Chambers in Hong Kong, China. Mr. Witkop successfully competed during on-campus interviews and was selected for a paid clerkship during his second year of law school. He was an Honors Moot Court competitor in his final year of law school.

STATE OF CALIFORNIA Gavin C. Newsom Governor

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

December 21, 2022

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

Re: Continuing Education Course
Provider No.: 620
Course: "2023 Current Issues- Workers' Compensation Seminar"
Approved Date: 12/21/2022

Dear Richard Montarbo, Esq

This letter is to notify you that your course "2023 Current Issues- Workers' Compensation Seminar" requested on 11/10/2022 has been approved for a total of Five Hours of continuing education (CE) 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

OFFICE OF PROFESSIONAL COMPETENCE

180 Howard Street, San Francisco, CA 94105

Providers@calbar.ca.gov
415-538-2100

December 8, 2022

Lacey Hart
Provider #: 422
LAW OFFICE OF RICHARD L. MONTARBO
146 Main St.
Red Bluff, CA 96080

Dear Lacey Hart:

The below referenced educational activity **has been approved**. You do not need to seek approval for repeats of this approved activity during the approval period noted above, provided that the repeated activity is 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.

1. Educational Activity Approved: 2023 Current Issues Workers Compensation Conference
2. Approval Period: March 17, 2023 to March 16, 2025
3. Total Credit Hours Approved = 5.00, including the following subfield credits
    a. .00 = Legal Ethics Hours
    b. .00 = Competence Issues Hours
    c. .00 = Recognition and Elimination of Bias Hours

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 at either via email at jonita.rose@calbar.ca.gov or via phone at 415-538-2137.

Regards,

Jonita Rose
Program Coordinator

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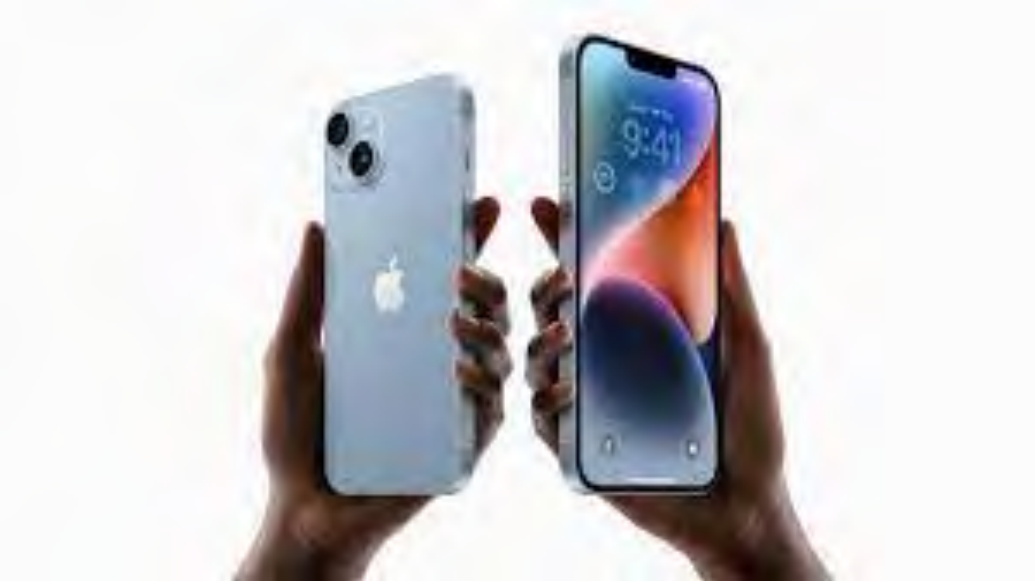

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*** BRIAN JACKS, M.D., PSYCHIATRY**
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Session I

Case Law Update 2023

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 2023

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. Admissibility of Evidence

Christopher Johnson v. Lexmar Distribution (2021) 87 CCC 110 (WCAB noteworthy panel decision).

Applicant was a truck driver who alleged an injury to various parts of body -- orthopedic, psyche, and internal injuries, as the result of being arrested after being pulled over while driving for the employer. Defendant denied the claim under LC 3600(a)(7), asserting that that applicant was initial aggressor as the defense. At trial defendant sought to introduce the dashcam video of the incident from the CHP. Applicant attorney objected to the video evidence on the grounds that Defendant did not list a witness who can testify regarding the video chain of custody or on the issue of whether the film had been edited/altered at all.

The WCJ sustained the objection stating that there was not proper authentication and a lack of foundation to admit the video into evidence. The WCJ, during oral argument on the issue, stated "I suggest that you look at your boss' treatise" and "you clearly don't understand your boss' treatises," and "wow, I think you need to read your boss' treatises" and "you might want to review it, that would be helpful for you to review."

See Jasbir Basi v. A Plus Academics (2021) 87 Cal. Comp. Cases 197 (WCAB noteworthy panel decision) holding that applicant's attempt to quash the deposition of applicant's treater on denied claim of industrial injury improper, holding that Labor Code's medical-legal provisions suggest expansive rather than limiting approach regarding admissibility of medical evidence and the fact that the QME had addressed the issue of causation does not preclude further discovery on the issue. Jasbir Basi v. A Plus Academics (2021) 87 Cal. Comp. Cases 197 (WCAB noteworthy panel decision); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 25.41; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.45[2].]

Defendant filed a Petition for Removal alleging that the dashcam videos should be admitted into evidence and also petitioned for disqualification of the WCJ based on the WCJ's alleged lack of impartiality.

Citing and discussing Johnson v. Tennant Co 2009 Cal Wrk Comp PD LEXIS 234 regarding admissibility of evidence, the WCAB noted that the Board, per LC Section 5708 is not bound by common law or statutory rules of evidence. The Board stated that the WCAB does not require formal authentication of writings. The Panel also noted that it is routine at the WCAB to allow almost all documents into evidence without formal authentication (such as QME reports). The Board next discussed a series of decisions involving photographs (Milla v. United Guard Security (2020)

86 CCC 71); People v. Gonzalez (2006) 38 Cal 4th 932. The Board held that the dashcam videos were improperly excluded and that Defendant should have the opportunity to authenticate the dashcam videos through Applicant's testimony.

On the issue of defendant's petition to disqualify the WCJ, the Board held that LC Section 5311 provides that "Any party to the proceeding may object to the reference of the proceeding to a particular workers' compensation judge upon any one or more of the grounds specified in Section 641 of the CCCP and the objection shall be heard and disposed of by the appeals board." Defendant sought disqualification specifically based on CCCP Sec 641 (f) and (g) which state – "A party may object to the appointment of any person as referee, on one or more of the following grounds: (f) having formed or expressed an unqualified opinion or belief as to the merits of the action, (g) the existence of a state of mind in the potential referee evincing enmity against or bias toward either party." The Board wrote that "due process requires a fair hearing before a neutral, unbiased decision maker, including in administrative proceedings" citing Robbins v Sharp Healthcare (2006) 71CCC 1291.

Furthermore, LC Sec 123.6(a) requires WCJs to subscribe to the Code of Judicial Ethics. Canon 1 of the Code of Judicial Ethics provides – "an independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved." Canon 2 of the Code requires that a judge shall "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

In granting Defendant's disqualification the Board found that the comments from the WCJ may be construed as belittling the attorney's ability to litigate the matter.

II. Apportionment

Cruz v. Wash. Colony Elem. Sch. Dist., 2022 Cal. Wrk. Comp. P.D. LEXIS 185 (BPD).

The WCJ found for the applicant and awarded permanent total disability (100%) for CT injury to her head, neck, wrist, back, psyche, shoulders, and upper extremities. The WCJ refused to apply a 1% apportionment to non-industrial causation related to headaches finding the headache disability rendered her without future earnings capacity, and refusing to apply the CVC to round down the PD award due to 1% apportionment of non-industrial causation.

See also, accord, Gonzales v, Northrop Grumman System Corp./ AIG (7/22) 50 CWCR 113 (BPD), holding that an AMA rating of 97% does not preclude an award of 100% (Total Disability)based on substantial VR evidence which rebutted the medical apportionment.

See also, Santiago v. Cal. Highway Patrol, 2022 Cal. Wrk. Comp. P.D. LEXIS 155, (BPD), holding that apportionment to a prior award pursuant to LC 4664(a) & (b), in a claim found to be presumptively compensable pursuant to § 3212 et seq. (Safety officer heart/cancer presumption) is precluded by the anti-attribution provisions in LC § 4663(e). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[2][c], 8.06[5][d]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.40[1], 7.42[3], 7.45[2]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Chs. 3, 6; SOC, Section 5.17, Presumption of Injury – Public Employee in General].

See also, Field v. L. Brand, 2022 Cal. Wrk. Comp. P.D. LEXIS 234 where award of total disability was upheld based on substantial vocation evidence despite Orthopedic QME found apportionment where orthopedic opinion on apportionment determined not to be substantial evidence as QME failed to explain why and how the pre-existing pathology contributed to the disability.

The PQME in Neurology found PD rating by analogy of 14% of WPI due to the patient's persistent daily and recurrent, severe episodic vascular headaches, which interfere with the patient's activities of daily living. The PQME went on to write that the applicant was "precluded from performing strenuous physical activity that would aggravate her headaches. The patient becomes noise and light sensitive with severe episodic headache attacks, three to five times a week. During this time, if she does not take Imitrex to give her quick relief, she becomes unable to function. Therefore, the patient should be accommodated with frequent absentees because she may have to leave work early or call in sick due to the severe headaches three to five times a week. These types of absentees would have to be accommodated by the patient's employer. It is evident it would be very hard for the patient to be competitive in the open labor market with this type of severe headaches because, three to five times a week she would be rendered unable to function, unpredictably causing frequent absentees. This type of frequent unpredictable absenteeism makes the patient difficult to be employed."

With regards to apportionment, the QME noted that the Applicant did have occasional headaches in her 30's. She did have history of menstrual headaches. She did not have these headaches more than two or three times per year prior to the industrial claim of 05/10/13. "Judging by the intensity and frequency of the patient's current headaches after

the industrial claim of 05/10/13 cumulative injury, I believe that it is 1% apportionable to the patient's preexisting tendency to have headaches and 99% due to the patient's industrial cumulative trauma claim of 05/10/13."

Defendant sought reconsideration contending that the WCJ should have applied the apportionment determination of QME neurologist. Defendant also contended that the WCJ erred in stating in the Opinion on Decision that "The undersigned takes judicial notice to the effect that calling in sick to work three to four times per week, coupled with physical limitations would make it extremely difficult if not impossible to maintain gainful employment."

The WCAB upheld the WCJ noting (1) "the mere fact that a report 'addresses' the issue of causation of the permanent disability does not make it one which the WCAB may rely unless it constitute substantial evidence; (2) even after apportionment, the applicant would have 99% disability solely with regard to her headaches, before 64% disability related to neck, low back, bilateral shoulders, bilateral wrists, and psyche; and (3) although the CVC round down, rounding down when combining 99% with orthopedic disability would lead to an absurdity.

III. Attorney's Fees

Swain v. Pacific Bell Telephone, 2022 Cal. Wrk. Comp. P.D. LEXIS 299 (BPD).

WCAB held that the Counsel for Applicant was not entitled to Labor Code § 5710 fees where applicant failed to appear at deposition because applicant forgot about it and deposition did not go forward, distinguishing Escalante v. Kaiser Foundation Health Plan, 2018 Cal. Wrk. Comp. P.D. LEXIS 549 (Appeals Board noteworthy panel decision), in which WCAB allowed attorney's fees, albeit reduced, where applicant appeared at deposition but was not able to testify due to his medications and mental state. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 20.02[2][h]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.01[9].]

Pena v. Aqua Systems, 50 CWCR 191, 2022 Cal. Wrk. Comp. PD LEXIS 250 (BPD).

Stipulated credit for third-party recover does not apply to 15% applicant attorney's fee where fee is to be commuted from the far end of award, and where applicant attorney did not participate in, or agree to third-party settlement and stipulated credit. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 11.25[1], [2], 29.07[1], [2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 12, § 12.04[2].]

IV. Injury AOE/COE

Dacumos v. Pete's Home, 2022 Cal. Wrk. Comp. P.D. LEXIS 274 (BPD).

The decedent was killed by a co-worker who believed the decedent was having an affair with his wife, also a co-worker. The supervisor was made aware of the situation and made changes to the work schedule so that the decedent and the wife of the assailant did not work together. The assailant, decedent and wife of the assailant all became acquainted at work, with the murder occurring while the decedent was performing services for the employer at one the employer's facilities. The WCJ found the death compensable as within the course and scope of employment. Defendant sought reconsideration.

Editor's comments: In Cal. Comp. and Fire Co. v. Wkrs. Comp. Appeals Bd. (Schick) (1968) 68 Cal. 2d 157 at pg. 163, cited and discussed in Dacumos, the Supreme Court wrote, "There is no sound reason to deny compensation to an employee whose duties expose her to a peculiar risk of assault merely because the assailant was motivated by personal animus. Had Mrs. Schick gone to the home of a customer whom she had not met before and had he committed an assault upon her for purely personal reasons unconnected with her employment, there seems to be no doubt that she would have been entitled to compensation. The mere fact that the "customer" was her former husband who had arranged an elaborate ruse to facilitate the commission of the assault does not, under the rationale of Madin2, exclude her employment as a contributory cause or vitiate the implied finding of the board that the assault was sufficiently connected with her employment to be an incident thereof."

Schick involved the death of an employee, divorced for three years and employed to go to the homes of customers to measure their furniture for table pads. She was shot when her ex-husband shot and killed after he set up his wife to go to a home to measure table pads.

Cal. Comp. and Fire Co. v. Wkrs. Comp. Appeals Bd. (Schick) (1968) 68 Cal. 2d 157 at pg. 163

The Dacumos decision should be viewed as an exception to the general rule that where an assault occurs for purely personal reasons, and simply happens to takes place at work, it does not 'arise out of employment', but rather the work place is merely the 'stage' upon which the incident took place, and thus, does not 'arise out of' and is not 'incident to employment'. See Transactron v. Wkrs. Comp. Appeals Bd. (Spears) (1968) 68 Cal.App.3d 233 [137 Cal. Rptr. 142, 42 Cal.Comp.Cases 236], in which an employee's boyfriend went to employee's place of employment, evaded interference by other employees, and killed employee/girlfriend in the restroom. The Court of Appeal held that the connection with employment was "so remote that it cannot be said to arise therefrom,". . . "A sufficient causal connection between the injury and the employment is shown where the employment was a contributory cause of the injury, that where the injury occurs on the employer's premises while the employee is in the course of his employment the injury also arises out of the employment unless the connection is so remote from the employment that it is not an incident thereof, and that an injury can arise out of the employment even though the employer had no connection with or control over the force which caused the injury. An injury is compensable where the employee is brought into a position of danger by the employment even though the risk could not have been foreseen by the employer, and, finally, that reasonable doubts as to whether an injury is compensable are to be resolved in favor of the employee" Transactron v. Wkrs. Comp. Appeals Bd. (Spears) (1968) 68 Cal.App.3d 233, at pg. 235 .

A closing comment on Dacumos. It is noteworthy that once again WCJ Miller in his written opinion provided another exceptionally opinion which is well-reasoned, and very well written. Recall that WCJ Miller last year took a very convoluted fact pattern with complicated and complex legal issues and wrote an exemplar opinion in *Gonzalez v. AC Transit, 2021 Cal. Wrk. Comp. PD LEXIS 71 (BPD). Gonzalez v. AC Transit, 2021 Cal. Wrk. Comp. PD LEXIS 71 (BPD) involved the complex issue of continuity of post-surgical care outside the MPN and Medical Necessity pursuant to* Labor Code 4616.2 and under 8 Cal. Code Reg. § 9767.9(e)(4). Both attorneys and Judges would be well served to adopted both the style of writing, the analysis and sound judgement of WCJ Miller.

In upholding the WCJ, the WCAB noted that the death has sufficient connection to 'arise out of employment' and was clearly within the 'course of employment'. In reaching the conclusion the WCAB noted that despite the motivation being purely personal animus, the death was within the 'course of employment' where the death was sufficiently connected to decedent's employment AOE/COE where the assailant, the victim and the wife of the assailant all worked together, became acquainted through work, murder occurred at work while decedent was performing services for employer, supervisor was informed of the alleged affair and made requested changes to work schedule. Therefore, the death was sufficiently connected to decedent's employment, even though killing itself was motivated by solely personal animus, to 'arise out of employment'. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.41, 4.53[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.04[3][c]].

Matani v. IHSS, 2021 Ca.l Wrk. Com.p PD LEXIS 57, 86 CCC 507 (BPD).

Applicant was rear ended on September 12, 2014, while driving his father home from Stanford Hospital after a regular medical appointment, and that transporting his father to medical appointments was part of his work as a caregiver for IHSS. The applicant filed the application for adjudication October 20, 2017. Thus, on its face, the claim was untimely filed more than three years after applicant's date of injury. The WCJ found for the defendant holding that claim was barred by the Statute of Limitation pursuant to Labor Code sections LC 5410(a) & LC 5400 & LC 5402(a).

See also, Johnson v. Lexmar Distrib., 2022 Cal. Wrk. Comp. P.D. LEXIS 190 (BPD), holding that an injury AOE/COE resulting from altercation with police officer held barred under Labor Code § 3600(a)(8), where injury was caused by commission of felony or crime punishable as specified in [Penal Code § 17(b)], resulting in conviction even though applicant was not convicted of felony but rather pled guilty of misdemeanor. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.24, 4.95, 4.113(a); Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.03[5].]

Applicant sought reconsideration arguing that the standard required to trigger an employer's duty of notification is that the employer 'should have known' and that failure to provide the DWC-1 claim form with appropriate notices operated to toll the statute of limitations.

In upholding the WCJ, the WCAB citing Honeywell v. WCAB (Wagner), (2005, Cal. Supreme Court) 35 Cal. 4th 24, 24 Cal. Rptr. 3d 179, 70 Cal. Comp. Cases 97, held that the duty to provide the DWC-1 and notice is triggered by defendant having received actual or constructive notice of a work-related injury requiring medical treatment or causing time off work. Further, the WCAB agreed with the WCJ finding "the complete absence of credible evidence that defendant was put on actual or constructive notice that the MVA was a work-related incident that caused lost work time, or required medical treatment." Citing Galland v. LA Unified Sch. Dist. 2018 Cal. Comp. PD LEXIS 28, the Court noted further that "[T]olling of the statute of limitations for failure to provide a claim form is a form of equitable [relief]" and "Ultimately, whether to toll an applicant's statute of limitations is a matter of judicial discretion".

The WCAB held that the Statute of Limitations in Labor Code § 5405(a), was not tolled by defendant's failure to provide DWC-1 claim form where (1) the defendant had no duty to provide as defendant had no actual or constructive notice that motor vehicle accident was work-related incident that caused applicant to lose time from work or required medical treatment, and (2) any duty to provide notices which might have been triggered by applicant's filing an Application for Adjudication of Claim, was averted by applicant's testimony demonstrated that he had actual knowledge that he sustained potential industrial injury as result of motor vehicle accident more than one year prior to that filing. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 24.03[1], 24.04[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 14, §§ 14.01[4], 14.02[1].]

Kobayashi (Dec'd.) v. DNI Seafood Wholesales/Sompo Int'l. Ins. Co. (February 2022), 50 CWCR 9 (Order Denying Reconsideration).

In September 2019, applicant, while on a business trip, suffered death by catastrophic hypoxic event leading to cardiac arrest. The applicant in a rented car was transporting two boxes of frozen fish packaged in dry ice. After checking into the hotel, the applicant moved the car into the hotel garage and was found 90 minutes later unresponsive, dying months later from catastrophic hypoxic event caused by carbon dioxide exposure.

After reviewing extensive medical records, producing multiple reports, and two depositions, QME, Dr. Robert Noriega, found industrial injury because of exposure to carbon dioxide noting that there was "no other evidence of a causal link to other factors, other than exposure to carbon dioxide". Explaining, Dr. Noriega concluded that the evidence disclosed that the vehicle which contained two boxes of dry ice made it difficult to conclude that the applicant's exposure to carbon dioxide at the time had not 'contributed' to the injury. Defendant argued that death by carbon dioxide was only a possibility, producing an industrial hygienist to testify that he had re-created the applicant's activities and concluded the applicant had not been exposed to a sufficient level of carbon dioxide to cause harm.

At the trial, evidence was presented that dry ice in boxes converts, over time in its solid form to a gaseous form of carbon dioxide, a process known as sublimation. There was conflicting evidence on whether the box of fish and the

dry ice was sealed with tape, and the calculation of the rate of so-called sublimation and the resulting estimated levels of carbon dioxide inside the applicant's vehicle at the time that he re-entered the vehicle.

The WCJ found for the applicant which was upheld on reconsideration by the WCAB. The WCAB noted that the standard of a 'mere contribution' and that the carbon dioxide was a 'contribution' to the applicant's death as and when it occurred citing Maher v. WCAB (1983) 33 Cal. 3d 729, 11 CWCR 109, 48 CCC 325. Further, the WCAB, citing Guerra v. WCAB (2016) 246 Cal. App. 4th 1301, 44 CWCR58, 102, 81 CCC 32, wrote that 'all reasonable doubts as to whether an injury is compensable must be resolved in favor of the employee.' In addition, citing Clemmens v. WCAB, (1968) 261 Cal. App. 2d 1, 33 CCC 186, the Board wrote that under the 'neutral risk doctrine', where medical evidence is insufficient to establish a causal connection between the applicant's employment and his injury or eventual death, a claim may be established where the employee dies under unexplained/mysterious circumstances at the workplace. In this situation there is a presumption that the death is work related.

Rios v. Hummer, 2022 Cal. Wrk. Comp. P.D. LEXIS 242 (BPD).

Applicant sustained a specific injury to his low back, left hip, right ribs, and right clavicle on July 3, 2015. The injury occurred while employed as a roofer when he fell while carrying a heavy roll of roofing material, which ended up on top of his chest, crushing his torso. During the next three years the applicant gained weight of approximately 45 pounds, going from approximately 220 to 265. As a result, the applicant amended his application to include injury to pulmonary, heart and respiratory.

The QME in the field of pulmonology opined that the applicant's weight gain was 'in part' responsible for applicant's reduced ability to engage in physical activities due to the impact on the applicant's respiratory and heart conditions. Thus finding that the weight gain causing respiratory and cardiovascular injury as a compensable consequence.

Distinguishing causation of injury verse causation of disability, the WCAB upheld finding of injury as compensable consequence to lung/heart due to weight gain which in part was caused by the accepted orthopedic industrial injury. The WCAB held that the weight gain contributed to applicant's breathing, pulmonary, and heart symptoms to render these symptoms, at least in part, a consequences of underlying accepted orthopedic injury which reduced applicant's ability to engage in physical activities, thus causing disability sufficient to establish injury. Citing and discussing Escobedo v. Marshalls (2005) 70 Cal. Comp. Cases 604 (Appeals Board en banc opinion), and South Coast Framing, Inc. v. W.C.A.B. (Clark) (2015) 61 Cal. 4th 291, 188 Cal. Rptr. 3d 46, 349 P.3d 141, 80 Cal. Comp. Cases 489. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.05[2], 27.01[1][c], 34.16[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.01[4][c], Ch. 16, § 16.51, Ch. 20, § 20.04.]

Sevillano v. State, 2022 Cal. Wrk. Comp. P.D. LEXIS 255 (BPD).

Applicant claimed injury in the form of COVID-19-related illness while employed as a home health care worker by defendant, State of California/IHSS on June 26, 2020. The applicant lived in a rented room. Applicant worked on provided home health services and taking the clients grocery shopping, cooking food, and other supportive services during the week prior to presentation at the hospital and being diagnosed with Covid. Applicant was not provided with a Spanish interpreter at the hospital.

On July 6, 2020, applicant reported to her attending physicians that her "two roommates are also COVID positive, but she has her own room." Prior to her discharge on July 8, 2020, applicant requested that the hospital social worker contact her landlord Mr. Martinez regarding arrangements for her return home. Mr. Lopez offered living quarters in a converted garage, noting his wife was recently ill and that Mr. Lopez was afraid of contracting COVID-19 as he had other illness which made him concerned about contracting Covid.

On September 2, 2020, defendant denied liability for the claim.

§ 3212.86. Employees with a COVID-19-related illness [Repealed effective January 1, 2024]

(a) This section applies to any employee with a COVID-19-related illness.

(b) The term "injury," as used in this division, includes illness or death resulting from COVID-19 if both of the following circumstances apply:

(1) The employee has tested positive for or was diagnosed with COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment at the employer's direction.

(2) The day referenced in paragraph (1) on which the employee performed labor or services at the employee's place of employment at the employer's direction was on or after March 19, 2020, and on or before July 5, 2020. The date of injury shall be the last date the employee performed labor or services at the employee's place of employment at the employer's direction.

(3) If paragraph (1) is satisfied through a diagnosis of COVID-19, the diagnosis was done by a licensed physician and surgeon holding an M.D. or D.O. degree or state licensed physician assistant or nurse practitioner, acting under the review or supervision of a physician and surgeon pursuant to standardized procedures or protocols within their lawfully authorized scope of practice, and that diagnosis is confirmed by testing or by a COVID-19 serologic test within 30 days of the date of the diagnosis.

(c) The compensation that is awarded for injury pursuant to this section shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division.

(d)

(1) If an employee has paid sick leave benefits specifically available in response to COVID-19, those benefits shall be used and exhausted before any temporary disability benefits or benefits under Section 4800, 4800.5, or 4850 are due and payable. If an employee does not have those sick leave benefits, the employee shall be provided temporary disability benefits or Section 4800, 4800.5, or 4850 benefits, if applicable, from the date of disability. There shall not be a waiting period for temporary disability benefits.

(2) To qualify for temporary disability or Section 4800, 4800.5, or 4850 benefits under this section, an employee shall satisfy either of the following:

(A) If the employee has tested positive or is diagnosed with COVID-19 on or after May 6, 2020, the employee shall be certified for temporary disability within the first 15 days after the initial diagnosis, and shall be recertified for temporary disability every 15 days thereafter, for the first 45 days following diagnosis.

(B) If the employee has tested positive or was diagnosed with COVID-19 before May 6, 2020, the employee shall have obtained a certification, no later than May 21, 2020, documenting the period for which the employee was temporarily disabled and unable to work, and shall be recertified for temporary disability every 15 days thereafter, for the first 45 days following diagnosis.

(3) An employee shall be certified for temporary disability by a physician holding a physician's and surgeon's license issued pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code. If the employee has a predesignated physician pursuant to subdivision (d) of Section 4600, is covered by a medical provider network pursuant to Article 2.3 (commencing with Section 4616) of Chapter 2 of Part 2, is covered by a workers' compensation health care organization pursuant to Article 2 (commencing with Section 4600) of Chapter 2 of Part 2, or is covered by a group health plan, the certifying physician shall be a physician and surgeon in that network, organization, or plan. Otherwise, the certifying physician may be a physician and surgeon of the employee's choosing.

(e) An injury described in subdivision (b) is presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence. Unless controverted, the appeals board is bound to find in accordance with the presumption.

(f) Notwithstanding Section 5402, if liability for a claim of a COVID-19-related illness is not rejected within 30 days after the date the claim form is filed pursuant to Section 5401, the illness shall be presumed compensable. The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 30-day period.

(g) The Department of Industrial Relations shall waive the right to collect any death benefit payment due pursuant to Section 4706.5 arising out of claims covered by this section.

(h) This section applies to all pending matters except as otherwise specified, including, but not limited to, pending claims relying on Executive Order N-62-20. This section is not a basis to rescind, alter, amend, or reopen any final award of workers' compensation benefits.

(i) For purposes of this section:

(1) "COVID-19" means the 2019 novel coronavirus disease.

(2) "Place of employment" does not include an employee's residence.

(j) This section shall remain in effect only until January 1, 2024, and as of that date is repealed.

On September 8, 2020, Dr. Zlotolow issued his first narrative report, wherein applicant reported that the couple she worked for had both been diagnosed with COVID-19 and were still hospitalized. Applicant also reported that the couple from whom she rented a room had tested negative for COVID-19.

In finding for the Defendant, the WCJ noted specifically that applicant's testimony as to whether the married couple she worked for had tested positive for COVID-19 was inconsistent, as was applicant's testimony regarding her roommates' COVID status. (Ibid.) The WCJ assessed applicant's trial testimony as not credible, and further determined that the reporting of Dr. Zlotolow was not substantial evidence.

In reversing the WCJ, the WCAB held that to rebut presumption of industrial COVID-19-related illness under Labor Code § 3212.86, defendant has burden to establish that employee's COVID-19-related illness did not arise out of and in course of employment. To meet this burden defendant must offered substantial evidence such as treatment reports, medical-legal reports or witness testimony indicating that applicant was infected with COVID-19 on non-industrial basis,

and requires more than passing reference in chart notes to statement made without interpreter and otherwise unsubstantiated in records. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.05[2][a]-[c], 27.01[1][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.01[4]; SOC,]

V. Date of Injury -- 5412

Saavedra (Rafael) v. Country Fresh Herbs, 2022 Cal. Wrk. Comp. P.D. LEXIS 145 (BPD).

Applicant worked as a laborer, initially in the fields and then in the warehouse, during the period from 1995 to 2020. The applicant sustained a specific injury on 3/30/16, and although the applicant was off work for about 3 weeks his employer continued to pay his wages. In addition to the 3/30/16 specific injury claim, the applicant filed a CT claim of injury to various parts of body on 4/19/17. A PQME evaluation occurred on 9/12/17. After a thorough review of medical records and diagnostic studies the PQME found both specific and CT injuries noting bilateral "end stage bone on bone knee arthritis", although the applicant continued to work with pain. In a supplement report the PQME described permanent impairment (WPI) for various parts of body, although the applicant was not found to be P&S. The matter proceeded to trial on February 18, 2022 on the issue of date of injury for the purpose of determining liability as between co-defendants.

The WCJ found injury on September 12, 2017, when applicant was first found to have disability by Dr. Silverman, and applicant knew or should have known that it was caused by his employment, despite the fact that the applicant had not been determined to be P&S.

On reconsideration, the WCAB upheld the WCJ finding that the date of injury for the purpose of determining liability as between co-defendants pursuant to LC 5500.5 requires, pursuant to LC 5412, the existence of permanent disability plus knowledge or reason to know that disability was work-related. This may occur prior to the applicant becoming P&S where substantial medical evidence establishes physical findings and factors of impairment. See also, Genlyte Group v. WCAB (Zavala) 73 Cal. Comp. Cases 6; 8 Cal. Code Reg. § 9812(e)(1); [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, Ch. 15, § 15.15.]

Mondragon v. Providence Indus., 2022 Cal. Wrk. Comp. P.D. LEXIS 137 (BPD).

Applicant originally filed a CT for the period ending 4/18/17, but continued to work without evidence of restriction/limitation/accommodations until 5/15/18. Although the applicant received treatment on or about 4/18/17, he missed no time from work. He was declared P&S 5/15/18 and received a formal description of WPI and rating by QME. There was no evidence, either by way of the applicant's deposition testimony or medical opinion/report, which established the presence of disability before the QME report of 5/15/18. ICW provided coverage ending 3/13/17, with the Hartford providing coverage beginning 3/14/17. ICW administered the claim ultimately resolving this claim with a total expenditure for benefits of $18,447.71.

Editor's comments: Date of injury for the Statute of Limitation (LC 5412) vs Apportionment of liability as between co-defendant (LC 5500.5) must be distinguished. Both requires the concurrence of disability (TD or PD), with knowledge or reason to know that there is a cause and effect relationship between the disability and an injurious industrial exposure/activities. Here, the mere need for treatment without more is insufficient to establish disability.

Date of injury for liability as between co-defendants pursuant to LC 5500.5, unlike 5412, additionally requires injurious industrial exposure/activities during a defendant-insurer's period of coverage, with liability rolling forward to the last year of injurious industrial exposure/activities.

On petition for contribution, the arbitrator found a date of injury ending 5/15/18 and awarded ICW's request for reimbursement. The Hartford sought reconsideration.

In upholding the arbitration award, the WCAB held that liability as between defendants for CT injury required the existence of permanent disability, knowledge that disability was work-related, and injurious exposure/activities. The CT period starts and ends under LC 5500.5 with the injurious exposure. Citing and discussing Labor Code § 5412 and State Compensation Insurance Fund v. W.C.A.B. (Rodarte) (2004) 119 Cal. App. 4th 998, 14 Cal. Rptr. 3d 793, 69 Cal. Comp. Cases 579. [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, Ch. 15, § 15.15.]

VI. Jurisdiction

Hansell (Gregory) v. Arizona Diamondbacks, 2022 Cal. Wrk. Comp. P.D. LEXIS 83 (BPD).

Jurisdiction found for claim for cumulative injuries during the period from 6/5/89-10/15/04 while employed with multiple teams as a professional baseball player where hired by multiple teams in California during cumulative injury period, creating jurisdiction over claim pursuant to Labor Code §§ 3600.5(a) and 5305, holding that the phrase "a professional athlete who has been hired outside of this state" in Labor Code § 3600.5(c) is ambiguous as applied to cumulative injury claims such as applicant's, where injured employee has California contracts of hire, though not with particular employer or employers asserting exemption from California jurisdiction.

The WCAB explained that based on purpose of statute, legislative intent and public policy, the most reasonable interpretation of Labor Code § 3600.5(c) and (d) is that these subdivisions are intended to apply only to athletes who have extremely minimal California contacts and cannot establish jurisdiction under Labor Code §§ 3600.5(a) and 5305, and that because it was undisputed applicant was born and raised in California, was employed by Los Angeles Dodgers for five years, and signed multiple contracts of hire in California during his cumulative injury period, California had jurisdiction over his claim. [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].]

Oliver v. Tampa Bay Buccaneers, 2022 Cal. Wrk. Comp. P.D. LEXIS 251 (BPD).

The WCAB held applicant's chronic traumatic encephalopathy (CTE) caused by head trauma he suffered while playing professional football was "insidious progressive disease" permitting extension of jurisdiction beyond five-year limitation in Labor Code § 5804. The WCAB noted that the CTE was not detected or diagnosed until years after applicant stopped playing. Further, the medical evidence indicated employee's condition could progress to more serious disabling condition over time. Citing and discussing Ruffin v. Olson Glass Co. (1987) 52 Cal. Comp. Cases 335 (Appeals Board En Banc Opinion). [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].

VII. Legislation -- 2024

SB 1127 was passed which provides that (1) for injuries on or after 1/1/23, TD is increase to 240 weeks for safety officers claiming injury pursuant to the cancer presumption under LC 3212.1; and (2) reduces the period within which liability must be denied from 90 days to 75 days pursuant to LC 5401; and (3) creates penalties for benefits unreasonably delayed due to rejection of liability of 5 times the benefits withheld up to a max of $50,000.

AB 1751 extended COVID presumption through 1/1/24.

VIII. Medical Treatment

Tikhonoff v. Home Depot, 2021 Cal. Wrk. Comp. P.D. LEXIS 306 (BPD).

Applicant sustained injury on 2/15/15 to right foot, lower extremity and in the form of complex regional pain syndrome (CRPS). Stipulations with Request for Award for total disability was entered into and approved in 2019. The parties stipulated that the injury caused 100% permanent

See also, Erhardt v. U.S. Concrete, 2022 Cal. Wrk. Comp. P.D. LEXIS 198 (BPD) holding that Defendant failed to timely deny RFA when although it was unclear whether claims administrator received RFA, there was (1) no dispute that defendant's attorney received the RFA; that (2) defendant's attorney had the duty to transmit to claims adjuster within reasonable time so dispute could be resolved as expeditiously as possible, and (3) failure to do so made the UR untimely. See also accord, Sevillan v. Kore 1 Inc., 2022 Cal. Wrk. Comp. P.D. LEXIS 205, holding UR untimely for breach of defendant's duty to conduct a good-faith investigation pursuant to CCR 10109. [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], [6]; SOC, Section 7.34, Utilization Review – Request for Authorization

disability and that there is a need for medical treatment. In 2017, the QME in pain management issued two reports in 2017. Applicant was also evaluated by two vocational experts.

On February 9, 2020, an RN prepared an in-home patient care evaluation report "to evaluate the home care needs of applicant which found the applicant "will continue to require assistance in her home, indefinitely. This includes personal care, meal preparation, housekeeping, laundry, shopping and transportation. I estimate the hours required are at least 19 hours per week." The PTP, after reviewing the report of the RN, issued an RFA requesting 19 hours of attendant care/home care assistance per week.

On January 9, 2021, a UR decision non-certifying the request for home health care issued. IMR review upheld the UR denial. In upholding the noncertification, the IMR was using the current MTUS, the injured worker does not meet the aforementioned criteria for the use of home health. In particular, there is no clear objective documentation to indicate that the injured worker is unable to leave the home for healthcare services or has been medically advised to not leave the home for services. Applicant sought appeal.

In upholding the UR denial, the WCAB held that pursuant to CCR § 9792.21.1 the UR/IMR reviewer should use the current version of the MTUS. Second, although the defendant has a duty to investigate, this duty is not unfettered and arose upon the request for authorization for 19 hours of home healthcare which occurred in 2020 with the PTP RFA. Therefore, at that juncture Defendant timely sought UR and thus there was insufficient evidence to establish a failure to investigate by defendant. Distinguishing the defendant's duty under section 4600 to investigate, see Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton) (1983) 34 Cal. 3d 159, 165 [193 Cal. Rptr. 157, 666 P.2d 14, 48 Cal. Comp. Cases 566]; Neri Hernandez v. Geneva Staffing, Inc. dba Workforce Outsourcing, Inc., 79 Cal. Comp. Cases 682, 694 (W.C.A.B. June 12, 2014; and Cal. Code Regs., tit. 8, § 10109.

Lopez v. Power by Spark, 2022 Cal. Wrk. Comp. P.D. LEXIS 305 (BPD).

Applicant, employed as an electrician, sustained injury to head, both knees, upper back, lower back, and fingers of his left hand, and claimed injury to other body parts on August 16, 2018.

> *". . . in Patterson, supra, a panel of the Appeals Board held that:*
> *An employer may not unilaterally cease to provide approved nurse case manager services when there is no evidence of a change in the employee's circumstances or condition showing that the services are no longer reasonably required to cure or relieve the injured worker from the effects of the industrial injury....*
> *[And] It is not necessary for an injured worker to obtain a Request For Authorization to challenge the unilateral termination of the services of a nurse case manager. (Patterson, 79 Cal. Comp. Cases at p. 917.)*
> *The Appeals Board in Patterson concluded that:*
> *Defendant acknowledged the reasonableness and necessity of nurse case manager service[s] when it first authorized them, and applicant does not have the burden of proving their ongoing reasonableness and necessity. Rather, it is defendant's burden to show that the continued provision of the services 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 Request for Authorization and starting the process over again. (Id. at p. 918.)*
> *Applicant has no obligation to continually show that the use of a nurse case manager is reasonable medical treatment. Instead, once defendant authorized nurse case manager services as reasonable medical treatment, it became obligated to continue to provide those services until they are no longer reasonably required under section 4600 to cure or relieve the effects of the industrial injury. Like all medical treatment decisions, that determination must be based upon substantial medical evidence. (Lamb v. Workers' Comp. Appeals Bd. (1974) 11 Cal.3d 274 [113 Cal. Rptr. 162, 520 P.2d 978, 39 Cal. Comp. Cases 310]; LeVesque v. Workmens' Comp. Appeals Bd. (1970) 1 Cal.3d 627 [83 Cal. Rptr. 208, 463 P.2d 432, 35 Cal. Comp. Cases 16].)*
>
> *Lopez v. Power by Spark, 2022 Cal. Wrk. Comp. P.D. LEXIS 305 at pg. 307, (BPD).*

The PTP diagnosed the applicant with significant problems including industrial traumatic brain injury. He noted that applicant suffers from cognitive deficits, multiple orthopedic issues, crippling anxiety, and an inability to safely perform activities of daily living. The PTP sent an RFA for in-facility treatment for four weeks which was UR certified. Although two additional RFA extending the period for in-facility treatment were UR certified. Ultimately, an RFA was submitted and UR denied for "no documented evidence of clinically meaningful improvement in functional deficits" after the initial inpatient program. (Id.)
A further subsequent RFA requested inpatient care, and defendant's February 27, 2021, utilization review determination again denied certification. WCJ found treatment should be continued pursuant to Patterson v. The Oaks Farm (2014) 79 Cal. Comp. Cases 910

> *See also, Gonzalez v. Hospitality Staffing Solutions, 2022 Cal. Wrk. Comp. P.D. LEXIS 286 (BPD), holding that on denied claim of injury, the defendant is not automatically entitled to retrospective UR review where claim is later accepted, rather it is mandatory that the defendant send written notice of decision to defer UR review per 8 Cal. Code Reg. § 9792.9(b). [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], [6].]*

(Appeals Board significant panel decision). The WCJ determined, because defendant denied applicant's residential treatment program without meeting its burden to show changed circumstances, the issue of applicant's continued care should not have been submitted to utilization review.

Defendant, on Petition for Reconsideration, argues that "precisely because there is no change (i.e., no improvement to the applicant's condition) that the requested authorization for further impatient rehabilitation is not medically justified."

On Petition for Reconsideration, the WCAB held that the applicant was entitled to ongoing in-facility treatment despite initial UR authorization was for limited period and subsequent UR for ongoing care not certified, where defendant failed to establish a showing of changed circumstances in order to initiate additional UR pursuant to 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[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.10[7]; SOC, Section 7.2, Scope of Care –Cure or Relieve].

IX. Med-Legal Procedures

Bina Brar v. County of Fresno (2021) 86 CCC 430 (W/D).

Application/opening documents were served by applicant on Defendant on 7/8/20. On 7/9/20, Counsel for Applicant serves letter to defendant proposing AMEs and advising that a "comprehensive medical-legal evaluation is necessary to determine compensability" pursuant to LC 4060. On 7/24/20 (15 days later), panel was procured by Counsel for Applicant online under LC 4060, utilizing 7/9/20 letter. Defendant denies claim on 7/30/20. Defendant challenges arguing that no dispute existed until 7/30/20 denial. WCJ held in Applicant's favor. Defendant sought Removal.

See also, accord, Chavarria v. Crews of California, 2019 Cal. Wrk.. Comp. PD LEXIS 534 (BPD), where the WCAB overturned WCJ's F&O stating: "LC 4060 does not require the denial of a claim before a represented applicant can request a panel of QMEs to address the compensability of an injury. Rather, it specifically refers to a dispute and only excludes the application of the statute where a body part has been accepted. Additionally, LC 4060 allows an evaluation at "at any time after the filing of the claim form" for represented and unrepresented employees. Here, the parties have a dispute because applicant's claim is not accepted. Neither LC 4060 nor LC 4062.2 restricts applicant from requesting a panel of QMEs. Additionally, requiring parties to wait before conducting permissible discovery would violate the public policy favoring the expeditious resolution of workers' compensation claims." Further, citing Narvarro v. City of Montebello (2014) 79 CCC 418, the WCAB wrote "Thus, regardless of whether a subsequent claim of injury is filed with the same employer or a different employer and regardless of whether injury is claimed to the same body parts or to different body parts, when a subsequent claim of injury is filed, the Labor Code allows the employee and/or the employer to request a new evaluator."

Recall also that pursuant to Romero v. Costco Wholesale, (2007) 72 CCC 824 (Significant Panel Decision), which involved an unrepresented applicant who had not yet attended a scheduled PQME, and later became represented, was entitled to a new PQME, switching from unrepresented track under LC 4062.1 to a represented track under LC 4062.2 for selection of a new QME panel. See also Gil v County of Fresno, 2021 Cal. Wrk. Comp. PD LEXIS 51, (2021) 86 CCC 609; Binu Brar v. County of Fresno, 2021 Cal. Wrk. Comp. PD LEXIS 36, (2021) 86 CCC 430.

See also, Ceballos v. Access, 2022 Cal. Wrk. Comp. P.D. LEXIS 81 (Board Panel Decision), holding that In a dispute regarding whether there has been an unreasonable denial of an agreement to a telehealth evaluation, the remedy is to have the dispute addressed before the Appeals Board, not the Medical Unit.

On Removal the WCAB held that either party may trigger LC 4060 with letter requesting an evaluation any time after the filing of a claim form.

Unto v. Dromy Int'l Inv. Corp., 2021 Cal. Wrk. Comp. P.D. LEXIS 338, 87 Cal. Comp. Cases 233 (Board Panel Decision).

DWC Medical Unit issued a panel on 8/14/20. Defendant struck from the QME panel on 8/24/20. Applicant struck on 8/24/20. Both Defendant and Applicant struck the same PQME. Applicant when forward to selection from the remain doctors and set the examination. Defendant objected and filed for expediated hearing arguing that a new PQME was the remedy. The WCJ found for the Applicant's selection denying defendant's request for a new PQME.

Highlighting the WCJ's report and recommendation noted that "Labor Code §4062.2(c) states that each party may strike one name from the panel within 10 days of issuance and that the remaining evaluator will serve as the QME in the case. Subsection (d) goes on to state that the represented employee shall be responsible for arranging the

appointment for the examination within 10 days after the evaluator has been selected. If the employee fails to do so, the employer may arrange the appointment. Relying on LC §4062.2(d) and LC §3202, the WCJ found that the applicant's selection of Dr. Meier was valid. Within 10 days of the completion of the striking process, the Applicant had the right to set the evaluation. The judge disagreed with the defendant's argument requesting a replacement panel and opined that this would result in gamesmanship, giving the party striking second the ability to strike the same doctor and then get a replacement panel. The Board found that there was a hybrid of both threshold and interlocutory issues and thus treated this as a petition for reconsideration, but applied the removal standard to the challenge of the interlocutory finding/order in this decision.

See also, Albarran v. Aramark, 2022 Cal. Wrk. Comp. P.D. LEXIS 218 (BPD), holding that Labor Code §§ 4061 and 4062 both require providing prescribed QME panel request form to unrepresented employee in order to allow employee to promptly engage in statutory dispute resolution process, and failure by defendant to provide the QME panel request from with triggering objection letter rendered the objection invalid and thus the request for QME panel improper and resulting QME panel invalid. [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 14.28, Medical-Legal Process – Unrepresented Employee].

See also, Hazen v. Porterville Unified Sch. Dist., 2022 Cal. Wrk. Comp. PD LEXIS 1734, 87 Cal. Comp. Cases 932 (BPD), holding that the objection letter to trigger request for panel much have clarity of dispute stating specifically the PTP findings/issues which the objecting party disagrees, pursuant to LC 4060, 4061, and 4062.2 [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].]

See also, Kowal v. Country of LA, 87 Cal. Comp. Cases 699 (Noteworthy Panel Decision), holding that QME not timely struck from panel maybe selected and conduct examination of applicant who has the right of scheduling evaluation, and as the scheduling party also has the unilateral right to waive 60-day scheduling timeframe and accept appointment within 90 days of initial appointment request pursuant to Labor Code § 4062.2(d) and 8 Cal. Code Reg. § 31.3. Kowal v. Country of LA, 87 Cal. Comp. Cases 699 (Noteworthy Panel Decision); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[5]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.53[5].]

See also, Dzambik (John) v. W.C.A.B., 87 Cal. Comp. Cases 773 (W/D), holding 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 unilateral withdrawal from AME agreement is based on good cause or where withdrawal will not result in prejudice to other party. Refusing to follow Yarbrough v. Southern Glazer's Wine & Spirits (2017) 83 Cal. Comp. Cases 425 (Appeals Board Noteworthy Panel Decision); Dzambik (John) v. W.C.A.B., 87 Cal. Comp. Cases 773 (W/D);[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].]

The Board declined to disturb the WCJ's decision and affirmed the Findings and Order.

X. Penalties

Stamper (Andrew) v. Bay Area Air Quality Management District, 2022 Cal. Wrk. Comp. P.D. LEXIS 213 (BPD).

An award of penalties under Labor Code § 5814 to applicant held proper where defendant's unreasonably delayed payment to EDD pursuant to stipulated agreement at time of settlement by C&R when applicant conditioned Compromise and Release agreement in case-in-chief on defendant's payment of EDD lien so applicant could resume collection of EDD benefits, and expressly sought enforcement of defendant's agreement to pay EDD lien, yet defendant waited for more than three months to make payment. [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]; SOC, Section 13.21, Unreasonable Delay – Failure to Pay TD].

XI. Permanent Disability

Wilson v. Kohls Dept. Store, 2021 Cal. Wrk. Comp. P.D. LEXIS 322 (BPD).

The applicant sustained injury on 9/20/16 which resulting in CRPS. There was extensive pre-existing medical history which the AME refused to apportion to finding that the CRPS was solely the result of industrial surgeries to injury to left ankle (*Hikida*). Pre-existing medical history included history of taking Norco, Robasin, Motrin, Vicodin, Cymbalta, Dilaudid, for years due to chronic pain. The AME opined that the applicant was precluded from work due to work preclusion which he imposed on an industrial basis. The AME however recommended that a work capacity and vocational evaluation be performed. Arguable, neither the applicant's or defendant's vocations evaluator found the applicant totally disabled on a vocational basis. The WCJ found for the defendant awarding 87% disability. Applicant sought reconsideration.

> *". . . A finding of permanent total disability in accordance with the fact (that is complete loss of future earnings) can be based upon medical evidence, vocational evidence, or both. Medical evidence of permanent total disability could consist of a doctor opining on complete medical preclusion from returning to work. For example, in cases of severe stroke, the Appeals Board has found that applicant was precluded from work based solely upon medical evidence. (See i.e., Reyes v. CVS Pharmacy, (2016) 81 Cal. Comp. Cases 388 (writ den.); see also, Hudson v. County of San Diego, 2010 Cal. Wrk. Comp. P.D. LEXIS 479.)*
>
> *A finding of permanent total disability can also be based upon vocational evidence. In such cases, applicant is not precluded from working on a medical basis, per se, but is instead given permanent work restrictions. Depending on the facts of each case, the effects of such work restrictions can cause applicant to lose the ability to compete for jobs on the open labor market, which results in total loss of earning capacity. Whether work restrictions preclude applicant from further employment requires vocational expert testimony.*
>
> *This case is different from both Fitzpatrick and Applied Materials. A doctor is permitted to opine that applicant is medically precluded from returning to work.*
>
> *If such an opinion constitutes substantial evidence, the board is bound to follow it. The difference here is that the AME's opinions are not based on complete medical preclusion. When partial work restrictions are applied, the question of whether such restrictions preclude employment requires a vocational analysis.*
>
> *Although the AME does opine that applicant is precluded from working, this does not appear to be a medical preclusion and is instead reflective of the AME engaging himself in vocational feasibility opinions outside his area of expertise. While a doctor is permitted to completely preclude applicant from return to work on a medical basis, the AME did not make such a preclusion and instead opined only as to limited work restrictions. While these restrictions limited applicant's employment opportunities, applicant's vocational expert did not feel these restrictions precluded applicant from gainful employment. Accordingly, she failed her burden to rebut the scheduled rating.*
>
> *The AME's opinion as to applicant's ability to participate in rehabilitation is also outside the expertise of a doctor. The doctor may medically preclude applicant from participating in vocational rehabilitation; that did not happen here. The doctor may describe what the effects of a medication are, and the vocational expert may then transfer that to rehabilitation and employability. That did not happen here. Applicant failed her burden of proof on this issue."*
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> *Wilson v. Kohls Dept. Store, 2021 Cal. Wrk. Comp. P.D. LEXIS 322, at pgs 325-327 (BPD)*
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> *Editor's comments: Noteworthy in the Wilson opinion is that the WCJ in analyzing LC 4660.1 for post 12/31/12 dates of injury held that on Post 12/31/12 date of injury, that the clear language in Labor Code § 4660.1, coupled with statute's legislative history and other provisions enacted as part of SB 863, precludes an injured worker from rebutting permanent partial disability schedule using DFEC analysis as set forth in Ogilvie v. W.C.A.B. (2011) 197 Cal. App. 4th 1262, 129 Cal. Rptr. 3d 704, 76 Cal. Comp. Cases 624 [Labor Code § 4660.1(a)]. However, on post 12/31/13 dates of injury an injured worker is permitted to rebut permanent disability rating schedule to show permanent total disability "in accordance with the fact" [Labor Code §§ 4660.1(g), 4662(b)] based on VR opinion that the applicant has a complete loss of earning capacity. [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.].*
>
> *See also, Suh v. Metro. State Hosp., 2022 Cal. Wrk. Comp. P.D. LEXIS 220 (BPD), holding that commencement of payment of life pension shall start immediately after exhausting/ending of PD award even where entirety of PD award was commuted, per LC 4659(a). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 8.08[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.50[1], [2]; SOC, Section 16.45, Award – Commutation].*

On reconsideration the primarily issue to be resolved is whether the AME may provide a vocational opinion based on work restriction/preclusion found by the AME. In upholding the opinion of the WCJ, the WCAB held that the Applicant failed to established total disability pursuant to LC § 4660.1 where agreed medical examiner (AME) imposed only limited work restrictions, which vocational experts arguably did not believe precluded applicant from gainful employment. The AME's may not opine that applicant is precluded from work due to restrictions he imposed as he does not have expertise to opine regarding applicant's vocational feasibility, but rather vocational expert evidence is required on this issue. Therefore, the WCAB held that the opinion of the AME on vocational issues do not constitute substantial evidence on that issue. [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].

Ryan v. Cal. Dept. of Corrections, 2022 Cal. Wrk. Comp. P.D. LEXIS 272 (BPD).

Applicant sustained multiple dates of injuring including a CT ending 12/11/15, and specific injuries occurring on May 29, 2015, July 11, 2011, and November 12, 2012, to cervical and thoracic spine, and to his lumbar spine including back muscles, spine and spinal cord, that the additional body parts of "cervicogenic headaches, sleep disorder, hernia, cardiovascular disease-hypertension, pulmonary embolism, upper gastrointestinal, lower gastrointestinal-IBS, urologic/sexual dysfunction and knees. The WCJ found pursuant to LC 4660.1 that the applicant was totally disabled as a result of the CT ending 12/11/15 without apportionment to the other dates of injury.

In finding for the applicant, the WCJ found that the holding in 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 16807, did not apply. The WCJ explained that given Fitzpatrick involved a 2012 DOI, and Ryan involved a 2015 DOI, that injury LC 4660.1 applied, and not LC 4660 which was applicable in Fitzpatrick. Base on LC 4660.1(g) the WCJ found that he could make an award of total disability pursuant to LC 4662(b) according to the facts. Defendant sought reconsideration.

The WCAB upheld the WCJ holding that the 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 16807, precluding an award of total disability pursuant to the facts per LC 4662 does not apply to DOI on or after 1/1/13 as LC 4660.1(g) expressly provides, "[n]othing in this section shall preclude a finding of permanent total disability in accordance with Section 4662". Fitzpatrick involved a 2012 DOI and interpretation and application of LC 4660. Therefore, LC 4660.1, unlike LC 4660, expressly provides that an award of total disability pursuant to LC 4662(b), in accordance with the facts, is permissible.

Bradley v. State, 2022 Cal. Wrk. Comp. P.D. LEXIS 26 (BPD).

Applicant, employed as a correctional officer, sustained CT ending 10/28/16 to bilateral knees, bilateral wrists, lumbar spine, cervical spine, bilateral elbows, bilateral hips, skin (cancer), and hearing loss. AME Renbaum (Orthopedic) found WPI which rated as follows:

> Cervical Spine 15.01.01.00 - 5 [1.4] 7 – 490I - 11 - 15
> Lumbar Spine 15.03 .01.00 - 7 [1.4] 10 – 490I - 15 - 20
> Left Knee 17.05.10.08 - 15 [1.4] 21 – 490I - 28 - 36
> Right Knee 17.05.10.08 - 15 [1.4] 21 – 490I - 28 - 36
> Left Wrist 16.04.01.00 - 4 [1.4] 6 - 490H - 8 - 11
> Right Wrist 16.04.01.00 - 4 [1.4] 6 - 490H - 8 - 11

QME Kerns (ENT) found hearing loss which rated as follows:

> Hearing Loss .58 (11.01.01.00 - 12 [1.4] 17 - 4901 - 23 - 30) 17

AME Renbaum (orthopedic) determined that the disability of the bilateral knees and bilateral wrist should be added and that thereafter the all others (L-spine, C-spine, hearing) should be rated separately and then combined. Dr. Kern (ENT) ultimately was in agreement, finding no synergy between the hearing loss and the orthopedic injuries, and that the hearing loss should be rated separately and then combined.

The WCJ found followed the opinions of the QME and awarded 90% PD, which include a rating for skin cancer. Applicant sought reconsideration arguing that the impairment should have been aggregated for a 100% award.

On reconsideration, WCAB first addressed whether the skin cancer was a separate injury, and thus should be rated separately. The WCAB held that different, distinct, and separate "exposures" create separate injuries despite the same period of CT exposure. In this case exposure to sun causing skin cancer was separate and distinct from exposure to physical work which cause orthopedic injury.

Next, the WCAB awarded 87% based on the following rating:

Cervical Spine 15.01.01.00 - 5 [1.4] 7 – 490I - 11 - 15
Lumbar Spine 15.03 .01.00 - 7 [1.4] 10 – 490I - 15 - 20

Left Knee 17.05.10.08 - 15 [1.4] 21 – 490I - 28 - 36
Right Knee 17.05.10.08 - 15 [1.4] 21 – 490I - 28 - 36
36 + 36 = 72 (*knees added*)

Left Wrist 16.04.01.00 - 4 [1.4] 6 - 490H - 8 - 11
Right Wrist 16.04.01.00 - 4 [1.4] 6 - 490H - 8 - 11
11 + 11 = 22 (*wrists added*)
Hearing Loss .58 (11.01.01.00 - 12 [1.4] 17 – 490I - 23 - 30) 17

72 C 22 C 20 C 17 C 15 [87]%

In reaching the award, the WCAB held that substantial medical evidence is required to establish that two impairments effectively combine to cause impairment greater than sum of each impairment separately. This requires that the medical evaluator provide the analysis and explain why separate impairments, which were all within evaluator's area of medical expertise, should be added rather than combine under the combined value equitation. Citing and discussing Athens Administrators v. W.C.A.B. (Kite) (2013) 78 Cal. Comp. Cases 213 (writ denied). But see, Quiroz v. State of California, 2022 Cal. Wrk. Comp. P.D. LEXIS 43, holding aggregation of separate injury where PD inextricably intertwined. [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, §§ 7.06[2], 7.11[5], 7.100; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Chs. 2, 6, 7].

Scott v. City of LA, 2022 Ca.l Wrk. Comp. PD LEXIS 14 (BPD).

Applicant sustained injury while driving to an industrial medical appointment when she was involved in a serious car crash and sustained multiple injuries including serious damage to her brain.

The medical evaluators in this case agreed that Officer Scott's industrial injury fell into the category of LC §4662(a)(4), "[a]n injury to the brain resulting in permanent mental incapacity," resulting in a conclusive presumption of permanent total disability. The PTPs all agreed and diagnosed conditions which included post-concussion syndrome, posttraumatic headache, visual disturbances, vestibular dysfunction, posttraumatic headaches and mood disorder, anxiety disorder related to traumatic brain injury post-concussive visual field constriction, and post-traumatic retrobulbar optic neuropathy depression.

The WCAB upheld the WJC's decision which held that the holding in Dept of Corrections & Rehab v. WCAB, (Fitzpatrick) (2018) 83 Cal Comp Cases 1680, does not preclude an award of PD pursuant to LC 4662(a), which allows for a conclusive award to total disability for (1) bilateral loss of eyes or sight therein, (2) bilateral loss of hands or use thereof, (3) mental incapacity, or (4) practicably total paralysis. Thus, LC 4662(a) remain viable and provides additional theories to LC 4660/4660.1, (Standard method under the Standard Method/Chapter/Table of AMA Guides, Guzman/Almarez, Ogilvie/Lebeof). See also, accord, Anderson v. Heritage Provider 2022 Cal Wrk Comp PD LEXIS 52 (BPD).

Green v. A Para Transit Corp., 2022 Cal. Wrk. Comp. P.D. LEXIS 224 (BPD).

Applicant sustained injury to neck, back, and right upper extremity on 1/19/13, and to left knee on 7/8/14. Vocation evidence established the applicant was totally disabled and received an award to total disability on the 1/19/13 injury. Subsequently, the applicant underwent a total knee replacement with respect to the 7/8/14 injury.

At trial, the parties stipulated to a 40% award on the left knee for the 7/8/14 date of injury. The matter proceeded to trial on the 1/19/13 injury. Separate QME's were used for each date of injury. At trial vocational evidence establish the applicant was totally disabled. The WCJ made an award to total disability with respect to the 1/19/13 injury without apportionment.

In upholding the WCJ, the WCAB noted the lack of overlap between the neck/back and left knee. Further, the Court highlighted that these claims involved successive/separate dates of injury involving different parts of body, and the absence of overlapping disability. Therefore, separate awards of PD of 100% and 40% for successive/separate dates of

injury involving different/distinct parts of body without overlap is proper. Green v. A Para Transit Corp., 2022 Cal. Wrk. Comp. P.D. LEXIS 224 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], [4], 8.06[5][d], 8.07[2], 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], [3]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Ch. 7; SOC, Section 10.2, Permanent Disability – Partial and Total].

XII. Presumption of Injury

Green v. State of Ca., 2021 Cal. Wrk. Comp. P.D. LEXIS 337 (BPD).

The applicant was a traffic officer for a period of almost 12 years ending 2006. The applicant was exposed to various carcinogens including combustion and diesel exhaust fumes throughout his employment. In 2018, the applicant began coughing up blood, and died from lung cancer a year later. The QME opined that the latency period in this case was 10 years. The issue before the Board was whether the cancer "manifested or developed" prior to March 31, 2013, the date the parties stipulated was the extended date pursuant to LC 3212.1(d) – three months for each year of employment/service.

See also, Villagomez v. Sierra Painting Co., 2022 Cal. Wrk. Comp. P.D. LEXIS 178 (BPD), holding that latency period need not be exact where exposure to carcinogen is represented by 25-year history of working as a painter from which industrial causation maybe inferable. [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.].

The WCAB held that under Labor Code § 3212.1 cancer presumption, "manifestation" occurs when the injured worker's first has symptoms, even if the injured worker has not yet been diagnosed with cancer. "Development" predates manifestation and is determined when a cancer develops or begins developing which requires medical expertise. In this case the latency period according to the QME was 10 years, and put the first date for 'development' as 2008. Because the date for 'development' was prior to the extended date under LC 3212.1(d) of March 31, 2013, the claim was within the statute of limitation pursuant to LC 3212.1, and thus compensable. [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].

XIII. Psychiatric Injury

Emery v. Hertz Corp, 2021 Cal. Work. Comp. P.D. LEXIS 299 (BPD).

Claim of psychiatric injury held the result of "sudden and extraordinary" employment event and therefore fell within exception to six-month employment rule in Labor Code § 3208.3(d), when applicant developed psychiatric symptoms following threatening phone call where caller said he would 'shoot her' or 'hurt her' holding the call was not usual, regular, common, or customary, and was totally unexpected so as to establish "extraordinary" nature. The Court noted also that no specific training was provided by defendant regarding how to deal with threatening customers, supporting inference that defendant itself did not believe threatening phone call was common, usual or routine. Citing and discussing Matea v. WCAB (2006) 144 Cal. App. 4th 1435, 51 Cal. Rptr. 3d 314, 71 Cal. Comp. Cases 1522.n[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].

Gonzalez v. Advanced Constr., 2021 Cal. Wrk. Comp. P.D. LEXIS 336 (BPD).

Falling 10-15 feet onto concrete landing on face resulting in fracturing multiple bones in his face and spine and loss of consciousness for five days, held "violent act" under Labor Code § 3208.3(b)(2) and holding in Wilson v. State of CA Cal Fire (2019) 84 Cal. Comp. Cases 393 (Appeals Board en banc opinion).; [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. 10, § 10.06[3][b][ii].].

Hernandez v. Valley Transit Authority, 2021 Cal. Wrk. Comp. P.D. LEXIS 341(BPD).

Injury was not "catastrophic" pursuant to 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), and, therefore, applicant was not entitled to increased permanent disability rating for his psychiatric condition, where although the applicant underwent significant medical treatment, sometimes used cane or walker to ambulate, he was not placed in highest impairment category with respect to his permanent disability, was not medically ordered to use cane/walker, and was able to perform activities of daily living, other than ambulation, without significant difficulty. See also, accord, Schaan (Douglas) v. Jerry Thompson & Sons, 2022 Cal. Wrk. Comp. P.D. LEXIS 264 (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, PD – Injuries after 1/1/13].

Johnson v. MHX, 2022 Cal. Wrk. Comp. P.D. LEXIS 82, (BPD).

Psychiatric claim not barred by LC Code § 3208.3(d)'s six-month employment requirement where "sudden and extraordinary" found as truck driver hit by commuter train after he became caught in bumper-to-bumper traffic near train tracks. Johnson v. MHX, 2022 Cal. Wrk. Comp. P.D. LEXIS 82, (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].]

Sheppard (Lee) v. County of Kern, 2022 Cal. Wrk. Comp. P.D. LEXIS 74 (BPD).

Labor Code § 3208.3(e) post-termination defense was not a bar to applicant's claim of psychiatric injury resulting from incident during which his supervisor physically grabbed his arm and forcibly directed him back to his work area where (1) allegations of wage theft and advising applicant that defendant sought to terminate applicant's employment did not constitute notice of termination or layoff, as likelihood or expectation of termination is insufficient to establish post-termination defense, and defendant is required to provide actual notice of termination to establish defense pursuant to under Labor Code § 3208.3(e); Notice of possible termination was subject only to Skelly hearing and final decision regarding disciplinary action as afforded to civil service employees in keeping with due process; and (2) that supervisor's conduct of physically grabbing applicant's arm and forcibly directed him back to his work area, albeit unprofessional, could not be considered "sudden and extraordinary" and that defendant's awareness of applicant's incident with his supervisor was insufficient to confer knowledge of psychiatric injury, making exceptions to post-termination defense inapplicable.

Syed v. State, 2022 Cal. Wrk. Comp. P.D. LEXIS 215 (BPD).

The fact that the employer made successive appointments of other staff members to supervise the applicant, a supervisory position which existed prior, and became vacated, is not a 'personnel actions' as contemplated by Labor Code § 3208.3(h), where those appointments were not akin to "transfers, demotions, layoffs, performance evaluations, and disciplinary actions such as warnings, suspensions, and terminations of employment", citing Stockman v. State/Department of Corr. (1998) 63 Cal.Comp.Cases 1042 [1998 Cal. Wrk. Comp. LEXIS 5129. [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].]

XIII. Res Judicata and Collateral Estoppel

Kaur v. Foster Poultry Farms LLC, (5th Appellate District) 83 Cal. App. 5th 320.

The Applicant worked for a meat production plant for Foster Poultry Farms. This job required her to wear certain items including rubberized boots provided by the employer. On the date of injury, the Applicant reported to her supervisor that she needed new boots as hers were slipperier. She was instructed to obtain new boots from the supply

supervisor in the supply-room. The Applicant was Indian. The supply supervisor refused the Applicant's new boots as the Applicant's existing boots were noted to be only 6 months old. Later that day the Applicant slipped and fell breaking her wrist. Evidence presented included that the supply-room supervisor treated Indians poorly often denying requests for supplies.

Upon returning, the Applicant requested job modifications due to limitations to which her direct supervisor responded "If you can't do the work, you should just quit."

Concurrently, the Applicant brought claim for discrimination under LC 132a before the WCAB, and in Superior Court for violation of FEHA. The WCAB was first to rule finding for the Defendant. The Defendant in the civil case for violation of FEHA filed for summary judgement asserting the claim was barred by the prior decision of the WCAB finding no violation of LC 132a. The Trial judge found for the Defendant, and the Plaintiff/Applicant appealed.

The Court of Appeal reversed the Trial Court holding that the FEHA claim was not barred by the doctrines of res judicata (claim preclusion) and/or collateral estoppel (issue preclusion) by prior decision of WCAB denying employee's discrimination claim under Labor Code § 132a. The Court noted that although, there existed identity of parties, FEHA targeted much broader range of discriminatory conduct and involved different inquiries and issues than those relevant to Labor Code § 132a. The Court wrote that res judicata did not apply as it was not the same claim that was being relitigated. Further, for collateral estoppel to apply, identical issues must be being litigation. A FEHA claim involves a much broader and greater range of discriminatory conduct and thus the Court found the absence of identity of issues, and thus the claim was not barred by colateral estoppel. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 10.75, 11.05[4], [5]; Rassp & Herlick California Workers' Compensation Law, Ch. 18, § 18.13[1]; SOC, Section 11.45, Res Judicata and Collateral Estoppel].

XIV. Sanctions (LC 5813)

Gordon v. Marathon Petroleum Corp., 2022 Cal. Wrk. Comp. P.D. LEXIS 248 (BPD).

Notice of Intention to Sanction must provide sufficient notice to allow an opportunity to defend, and although evidence to establish a past pattern of sanctionable behavior may be considered, sufficient notice must be provided through the Notice of Intent. Gordon v. Marathon Petroleum Corp., 2022 Cal. Wrk. Comp. P.D. LEXIS 248 (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[1].].

XV. Supplemental Job Displacement Benefits

Peery v. Cal. Dept. Water, SCIF, 2020 Ca.l Wrk. PD LEXIS 318 (BPD).

The Applicant filed a CT injury on 5/21/13 to lungs for the period of 4/1/96-3/15/13. Applicant was released to work on 4/26/12 and returned to modified work on 5/20/12, and released to full duty on 5/30/12. QME determined the applicant to be P&S on 7/23/16. Claim was accepted on 8/4/16. The Applicant's last day of work for the employer was 10/28/16. The Applicant retired on 11/25/16.

LC 4658.7 provides:
(a) This section shall apply to injuries occurring on or after January 1, 2013.
(b) If the injury causes PPD, the IW shall be entitled to a SJDB, unless the employer makes an offer of regular, modified, or alternative work that meets both of the following criteria:
(1) The offer is made no later than 60 days after receipt by the claims administrator of the first report [by IW's medical evaluator] finding IW is permanent and stationary and that the injury has caused permanent partial disability.
(2) The offer is for regular work, modified work, or alternative work lasting at least 12 months.

See also, Sallago v. Cintas/Travelers Inc. Co. 50 CWCR 217, holding that defendant has burden of proof on an offer of regular, modified, or alternative work, and although an offer of modified work will relieve the defendant of the duty to provide the SJDB voucher, Rule 10133.31 requires the defendant to prove both no missed time from work and return to the same job.

The WCJ found that the "trigger date" the QME finding the Applicant to be P&S on 7/23/16. That date began the time running for defendant to offer applicant "modified work". Therefore, the Defendant would have had until 9/23/16 to make offer for a position "modified work," which lasted at least 12 months. The Applicant was entitled to SJDB as in the case Defendant failed to make a formal offer apparently because the applicant had already returned to his usual and customary duties at that time of P&S. Further, the Applicant's last date of work was less than 4 months after his P&S date, and thus did not last at least 12 months as required by statute.

The WCJ wrote, "There is no evidence that the applicant was provided with the opportunity to continue in a modified or alternate (and possibly less stressful) position for another 12 months. It is possible the applicant may have put off his retirement, if only this option would have been presented to him. The simple offer of continued employment in a modified or alternate position, may have allowed the applicant an opportunity for a change in work duties. That change may have allowed the applicant to continue to work and put off his retirement for at least one year. But, the employer failed to make a timely offer."

The WCAB explained, "We are aware that Rule 10133.31, subdivision (c) states that an "employee who has returned to the same job for the same employer is deemed to have been offered and accepted regular work in accordance with the criteria set forth in LC 4658.7(b). However, LC 4658.7(b) requires that the offer of regular, modified, or alternative work last for at least twelve months. (LC 4658.7(b)(2)) Applicant worked for a little less than 4 months after he was declared permanent and stationary, which falls short of the twelve-month requirement. Therefore, although we acknowledge that applicant has worked modified and regular work for over four years before he was declared permanent. . .

Peery v. Cal Dept Water; SCIF 2020 Cal. Wrk. PD LEXIS 318, at pg. 321.

XVI. Temporary Disability

Sweetnam v. County of L.A., 2022 Cal. Wrk. Comp. P.D. LEXIS 189 (BPD).

The applicant sustained injury and was declared permanent and stationary effective 11/16/2016 by Independent Medical Evaluator. Defendant continued to pay TD benefits 03/31/2017 through 05/10/2018 at the rate of $ 1,128.43 per week based upon the opinion of the treater. Ultimately the Applicant received an award of 73% PD with Defendant seeking credit for TD overpayment. The WCJ held for Applicant on the issue of credit for TD overpayment disallowing Defendant's credit for TD overpayment.

Labor Code § 4909 provides:
Any payment, allowance, or benefit received by the injured employee during the period of his incapacity, or by his dependents in the event of his death, which by the terms of this division was *not then due and payable or when there is any dispute or question concerning the right to compensation, shall not, in the absence of any agreement, be an admission of liability for compensation on the part of the employer, but any such payment, allowance, or benefit may be taken into account by the appeals board in fixing the amount of the compensation to be paid.* The acceptance of any such payment, allowance, or benefit shall not operate as a waiver of any right or claim which the employee or his dependents has against the employer.

Pursuant to CCR § 10555. Petition for Credit provides:

(a) When a dispute arises as to a credit for any payments or overpayments of benefits pursuant to Labor Code section 4909, any petition for credit shall include:
(1) A description of the payments made by the employer;
(2) A description of the benefits against which the employer seeks a credit; and
(3) The amount of the claimed credit.

In upholding the WCJ, the WCAB noted that TD credit is discretionary and is based on the circumstances of the particular case, and in this case the overpayment was entirely due to defendant's own error and allowing the credit would be contrary to purposes of permanent disability benefits and would unfairly deprive applicant of over one year of permanent disability indemnity. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 7.04[9][a], 31.14[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.19[1]; SOC, Section 9.30, Credit for TD Overpayment].

See also, Glick v. Knight-Swift Transp. Holdings, Inc., PSI, 2022 Cal. Wrk.. Comp. P.D. LEXIS 306 (BPD), holding that TD extended pursuant to LC § 4656(c)(3)(F) "high-velocity eye injury" when, while crossing street applicant was struck and thrown nearly 10 feet by motor vehicle traveling approximately 30 mile per hour causing injury by sufficient force to fracture both his right and left temporal bones and subsequently develop vision problems as well as eye pain. Citing and discussing, Glover v. ACCU Construction, 2009 Cal. Wrk. Comp. P.D. LEXIS 301 (Appeals Board noteworthy panel decision). [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].

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.

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.

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).

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 difference 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. WCAB. (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

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].

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 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.

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].

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].]

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 her arrived at the weight room for a 30 minute workout doing over-heard 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

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].

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.

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.)*
>
> *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.*
>
> *See also, Pardilla v. Central Concrete Supply Co. Inc., 49 CWCR 163 (September 2021) holding applicant entitled to TD where causation of injury found to a part of body, although other parts of body were subject to issue whether condition was industrially "aggravated" or merely "exacerbated".*

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 shylight 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.)*
>
> *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.)"*
>
> *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 resident in California, never used a California-based agent, and never signed any other contracts in California.

> *". . . . 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.)"*
>
> *Neal v. San Francisco 49ers, 2021 Cal. Wrk. Comp. PD LEXIS 68, at pg. 74.*

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)).

> **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.***

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.

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.

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

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.

See also, UCSF Medical Center v. WCAB (Avist), 86 Cal. Comp. Cases 138, 2020 Cal. Wrk. Comp. LEXIS 105, holding that defendant may <u>not</u> 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.]

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

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].

[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.

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. WCAB (2011) 197 Cal. App. 4th 1262, 129 Cal. Rptr. 3d 704, 76 Cal. Comp. Cases 624, LeBoeuf v. WCAB (1983) 34 Cal. 3d 234, 193 Cal. Rptr. 547, 666 P.2d 989, 48 Cal. Comp. Cases 587, and Contra Costa County v. WCAB (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.]

See also, Escobedo v. San Luis Coastal Unified School District, 2021 Cal. Wrk. Comp. P.D. LEXIS 213 (BPD), holding 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. WCAB (2011) 197 Cal. App. 4th 1262, 129 Cal. Rptr. 3d 704, 76 Cal. Comp. Cases 624, Contra Costa County v. WCAB (Dahl) (2015) 240 Cal. App. 4th 746, 193 Cal Rptr. 3d 7, 80 Cal. Comp. Cases 1119, and LeBoeuf v. WCAB (1983) 34 Cal. 3d 234, 193 Cal. Rptr. 547, 666 P.2d 989, 48 Cal. Comp. Cases 587. ; [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].

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. WCAB* (*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. WCAB.* (2011) 197 Cal. App. 4th 1262, 129 Cal. Rptr. 3d 704, 76 Cal. Comp. Cases 624, *Contra Costa County v. WCAB* (*Dahl*) (2015) 240 Cal. App. 4th 746, 193 Cal Rptr. 3d 7, 80 Cal. Comp. Cases 1119, and *LeBoeuf v. WCAB* (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. WCAB. (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 not 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.

". . . 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].

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].

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 outa 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 xxxx

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 withing 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

*See also, Berkshire Hathaway Homestate Companies v. WCAB (**Perez**), 86 Cal. Comp. Cases 997, 2021 Cal. Wrk. Comp. LEXIS 36, 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.]*

employer could not legally under federal law employ the applicant. The WCJ found for Defendant with the applicant seeking reconsideration.

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].

Session II

At Home Injuries

Liability and Defenses

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THE RISKS AND LIABILITY FOR HOME-BASED WORK

2023 NAME OF CONFERENCE
MARCH 17, 2023
XX:XX TO XX:XX
VIZCAYA SACRAMENTO
2019 21ST STREET, SACRAMENTO, CA 95818

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DISCLAIMER

This information is not meant to apply to any specific case. Please feel free to contact us with specific questions.

This presentation is not exhaustive. It is meant to provide you with a useful reference to help you determine, on a case-by-case basis, how you might assess the compensability of home-based injuries.

When in doubt, consult legal counsel.

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THE RISKS AND LIABILITY FOR HOME-BASED WORK

The expansion of the workplace post-COVID and the scope of liability

3

4

HOME-BASED INJURIES PRE-*TIDWELL*

Injuries at home while providing service to the employer

- "The general rule is that injuries sustained at home are not covered by the workers' compensation system. On the other hand, injuries occurring at work are covered." *Cypress Ins. Co. v. WCAB (Keramitsis)* (2001, W/D) 66 CCC 1356.
  - **What happens when home ***becomes*** work?**
- The California Supreme Court has held that an employee who is injured while providing "*service* and *benefit*" to the employer sustains injury AOE/COE. *Smith v. WCAB* (1968) 69 Cal.2d 814.
- An injury sustained while actually performing work is compensable no matter where it happens.

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HOME-BASED INJURIES PRE-*TIDWELL* – cont'd.

Injuries at home while providing service to the employer

The California Supreme Court addressed the issue of home-based injuries almost 100 years ago. It was held that an employee who was injured at home did not sustain injury AOE/COE because he was not performing "service to his employer" at the time of injury. *London Guarantee & Acci. Co. v. IAC* (1923) 190 Cal. 587.

In *London Guarantee*, an employee took work home to be in a quieter place. He arrived at home about 11:00 a.m. and finished his work around 12:30 p.m. He had lunch and was injured about 1 p.m. while approaching his door to return to work. The Court concluded that the claimed injury was not AOE/COE because the employee was not actually providing work-related service at the time of his injury.

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HOME-BASED INJURIES PRE-*TIDWELL* – cont'd.

Injuries at home while providing service to the employer

- A policeman who was injured cleaning his gun at home sustained injury AOE/COE. *County of Santa Cruz v. WCAB (Forbus)* (1997, W/D) 62 CCC 506.
- A policeman who was injured at home while training a police dog was also injured AOE/COE. *City of Seaside v. WCAB (Jackson)* (1996, W/D) 61 CCC 850.
- An employee who was injured while cutting baseboards at home for a work project sustained a work injury. *Cover All, Inc. v. WCAB* (2007, W/D) 72 CCC 751.
- An on-call physician who arose from her bed to investigate some noise and, believing her phone was ringing, turned and fell was ***not*** injured AOE/COE because the injury did not occur due to the "**reasonable use of the employer's premises**." *Fox v. WCAB* (1978, W/D) 43 CCC 101.

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HOME-BASED INJURIES PRE-*TIDWELL* – cont'd.

Travel between work and home

- If the employer ***does not offer*** a workplace, then home becomes the workplace. *Détente Technology v. WCAB* (1996, W/D) 61 CCC 866. *Détente* involved a computer programmer's travel between home and the customer's business. The travel was considered AOE/COE because the "employer thus created a situation in which it was reasonable to assume that Applicant *was required* to use his home for part of Defendant's work."
- If the employee chooses to work from home, then the travel between home and work is not AOE/COE. "Unless the employer **requires** the employee to labor at home as a condition of employment, **the fact that an employee regularly works there does not transform the home into a second jobsite**." *Santa Rosa Junior College v. WCAB (Smyth)* (1985) 40 Cal.3d 345 (instructor's travel between home and work was not AOE/COE).

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HOME-BASED INJURIES PRE-*TIDWELL* – cont'd.

Travel between work and home

- The dispositive part of the commute analysis is whether the employee works at "home by choice…[or] *because of the dictates of their employer*." Put another way, "[T]he *circumstances of the employment* -- and not mere dictates of convenience to the employee **must have required the work to be done at home**." *Bramall v. WCAB* (1978) 78 Cal.App.3d 151, 158.
  - After COVID-19 and with modern technology, more people are working from home than ever before. Do these pre-COVID and pre-technology cases still apply?

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HOME-BASED INJURIES POST-*TIDWELL* – cont'd.

Has home become the workplace?

- In *Santa Clara VTA v. WCAB (Tidwell)* (2017, W/D) 82 CCC 1514 an injury sustained in a home bathroom was considered AOE/COE when the employer **allowed**, but did not require, a disabled employee to work from home. Tidwell suffered from a disability which made the use of her employer's restroom facilities difficult. The employer renovated the work restroom to accommodate Tidwell's disability but the progressive nature of her condition did not allow her to return to the workplace.

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HOME-BASED INJURIES POST-*TIDWELL* – cont'd.

Has home become the workplace?

Tidwell's duties allowed her to perform all of her essential functions from her dedicated home workspace. The WCAB found that, because the employee had exclusively worked at home for approximately 10 months, her home had become the workplace. The defense's argument that Tidwell was "home" as soon as she left her dedicated workplace was rejected based on the personal comfort rule. Prior to *Tidwell*, no published California case had ever applied the personal comfort rule to an injury sustained at home.

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HOME-BASED INJURIES POST-*TIDWELL* – cont'd.

Has home become the workplace?

Due to COVID and advanced technology (e.g., cloud-based access), many, if not most California employees, now work from home for some portion of the workweek. Based on the *Tidwell* decision, the employer's simple ***allowance*** of home-based work has likely expanded employers' liability for workers' compensation benefits. The argument that home is the workplace is made stronger if the home-based work is due to government order, or if based on other health and safety issues. The decision to work from home post-COVID is likely no longer a mere convenience for the employee.

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HOME-BASED INJURIES POST-*TIDWELL* – cont'd.

Travel between work and home

- In *Zoucha v. Alcal Arcade Insulation* 2010 Cal.Wrk.Comp. P.D. LEXIS 163 the WCAB held that merely transporting work materials to the jobsite did not make the commute AOE/COE. Instead, the WCAB focused on whether the employee needed his vehicle to travel to multiple jobsites within the same day. *Zoucha* relied on the California Supreme Court case of *Hinojosa v. WCAB* (1972) 8 Cal.3d 150, which created the "required vehicle" exception to the coming and going rule. These cases often involve construction workers and technology installation.

- There is the risk of *Hinojosa* being expanded post-COVID. If an employee is authorized to work from home and is injured travelling between home and the workplace during the workday, arguably that is travel between jobsites. That was the holding in the pre-COVID case *New York Marine & Gen. Ins. Co. v. WCAB (Young)* (2017, W/D) 82 CCC 1510.

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HOME-BASED INJURIES POST-*TIDWELL* – cont'd.

Injuries sustained at remote locations

- Based on the *London Guarantee* case, *supra*, an injury sustained while actually working is always compensable. The WCAB therefore found that an employee who was struck and killed by a vehicle at Starbucks was AOE/COE because the employee was engaged in actual work at the time of injury. *CIGA v. WCAB (Willick)* (2002, W/D) 67 CCC 1160.

Travel between work and remote locations

- Based on the *Hinojosa* "required vehicle" rule, travel between the workplace (whether home or the office) and another remote workplace (e.g., Starbucks) might not be AOE/COE if the employer did not authorize work at that remote location.

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HOME-BASED INJURIES POST-*TIDWELL* – cont'd.

Does the "bunkhouse rule" apply to home?

The bunkhouse rule covers injuries when the employee lives/sleeps on the employer premises. In *Santa Clara Valley Transportation Authority v. WCAB* (*Cappucci*) (2021, W/D) 86 CCC 287 an employee's injury sustained in a work shower was covered by the bunkhouse rule since the employee slept on the employer's premises the night before. The WCAB observed the general rule that any injury sustained during the anticipated and reasonable use of the employment premises is AOE/COE. If the bunkhouse rule applies to home-based injuries then any injury resulting from the reasonable use of the employee's home is compensable.

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MITIGATION OF LIABILITY FOR HOME-BASED WORK

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MITIGATION OF LIABILITY FOR HOME-BASED WORK

California has long recognized that the home offers privacy, safety and security that are not offered at a public workplace. *Safeway Stores. v. WCAB* (1980) 45 CCC 410, 416. In *Tidwell* it was argued that injuries at the workplace should be evaluated differently than injuries at home since injuries that occur "off the employer's premises [are] unregulated, [and] the employer can have little knowledge of the physical risks involved, and no opportunity to protect the employee against such risks." *City of Stockton v. WCAB* (2006) 71 CCC 5, 10.

- How does an employer mitigate exposure post-COVID and *Tidwell*?
- What types of home activities can be considered work-related?
- How can an employer confirm that an injury happened while working?

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MITIGATION OF LIABILITY FOR HOME-BASED WORK – cont'd.

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Home-based work presents various challenges such as:

- Difficulties with monitoring an employee's home and making it safe
- Workstation ergonomics
- Changing/assembling/moving what may be workplace equipment such as lightbulbs, computers and furniture
- Employees engaging in unsafe activities at work. See *Ward v. Sarti Enterprises, LLC* 2020 Cal.Wrk.Comp. P.D. LEXIS 170 (employee was injured AOE/COE when investigating a suspicious vehicle after work hours even though on the premises for personal reasons)

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MITIGATION OF LIABILITY FOR HOME-BASED WORK – cont'd.

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If employers allow home-based work, the arrangement should be clearly delineated in writing. Ideally, employers should:

- Inspect employees' work areas (at least by video) and require that work only be performed at a designated workstation deemed safe and ergonomic
- Design work areas where changing a lightbulb or a tray of paper does not require employees to get on a ladder or engage in heavy lifting
- Offer ergonomic assessment
- Prohibit work away from the dedicated workstation
- Clearly define working hours
- Prohibit travel between home and the office during the workday

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MITIGATION OF LIABILITY FOR HOME-BASED WORK – cont'd.

However, even if all of these measures are taken, employers cannot fully protect themselves from home-based injuries.

"Where an employee is in the performance of the duties of his employer, the fact that the injury was sustained while performing the duty in an unauthorized manner or in violation of instructions or rules of his employer does not make the injury one incurred outside the scope of employment." *Williams v. WCAB* (1974) 39 CCC 619.

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Session III

Self-Study Material

2022 Cases and Decision

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Workers' Compensation Index Entries
For 2022 and 2023

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.

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.

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).

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 difference 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. WCAB. (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

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].

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 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.

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].

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].]

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 her arrived at the weight room for a 30 minute workout doing over-heard 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

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].

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.

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].). . ."*
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> *Johnson v. Cadlac, Inc., dba Del Taco and Technology Insurance Co., 2021 Cal. Wrk. Comp. P.D. LEXIS at pg. 197.*
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> *See also, Pardilla v. Central Concrete Supply Co. Inc., 49 CWCR 163 (September 2021) holding applicant entitled to TD where causation of injury found to a part of body, although other parts of body were subject to issue whether condition was industrially "aggravated" or merely "exacerbated".*

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

> *". . . . 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.)*
>
> *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.*

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)).

> **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.***

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.

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.

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

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.

See also, UCSF Medical Center v. WCAB (Avist), 86 Cal. Comp. Cases 138, 2020 Cal. Wrk. Comp. LEXIS 105, holding that defendant may <u>not</u> 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.]

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

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].

[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.

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. WCAB (2011) 197 Cal. App. 4th 1262, 129 Cal. Rptr. 3d 704, 76 Cal. Comp. Cases 624, LeBoeuf v. WCAB (1983) 34 Cal. 3d 234, 193 Cal. Rptr. 547, 666 P.2d 989, 48 Cal. Comp. Cases 587, and Contra Costa County v. WCAB (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.]

See also, Escobedo v. San Luis Coastal Unified School District, 2021 Cal. Wrk. Comp. P.D. LEXIS 213 (BPD), holding 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. WCAB (2011) 197 Cal. App. 4th 1262, 129 Cal. Rptr. 3d 704, 76 Cal. Comp. Cases 624, Contra Costa County v. WCAB (Dahl) (2015) 240 Cal. App. 4th 746, 193 Cal Rptr. 3d 7, 80 Cal. Comp. Cases 1119, and LeBoeuf v. WCAB (1983) 34 Cal. 3d 234, 193 Cal. Rptr. 547, 666 P.2d 989, 48 Cal. Comp. Cases 587. ; [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].

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. WCAB* (*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. WCAB.* (2011) 197 Cal. App. 4th 1262, 129 Cal. Rptr. 3d 704, 76 Cal. Comp. Cases 624, *Contra Costa County v. WCAB* (*Dahl*) (2015) 240 Cal. App. 4th 746, 193 Cal Rptr. 3d 7, 80 Cal. Comp. Cases 1119, and *LeBoeuf v. WCAB* (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. WCAB. (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 not 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.

". . . 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].

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].

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 outa 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 xxxx

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 withing 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

*See also, Berkshire Hathaway Homestate Companies v. WCAB (**Perez**), 86 Cal. Comp. Cases 997, 2021 Cal. Wrk. Comp. LEXIS 36, 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.]*

employer could not legally under federal law employ the applicant. The WCJ found for Defendant with the applicant seeking reconsideration.

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].

Work Comp Index

A Topical Guide to the Law of California Workers' Compensation
2023 Entries

Third-Party Actions--Settlements --Attorney's Fees and Litigation Expenses--The lien of workers' compensation insurance carrier in third-party action was denied where (1) plaintiff rejected valid § 998 settlement offer of $200,000, and (2) net award to plaintiff less than zero (998 Penalty of defendant's fees and cost ($174,830.29) was greater than plaintiff award ($115,000)), and thus (3) there was no net judgement for damages from which LC 3856 workers' compensation lien could be paid. Oakes v. Progressive Transport Services (2021, 2nd Appellate District) 71 Cal. App. 5th 486, 492, 86 Cal. Comp. Cases 1099, 2021 Cal. App. LEXIS 947; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 11.24[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 12, § 12.04[1]].

Compromise and Release Agreements—Issue and Claim Preclusion—Employers' Joint and Several Liability—C&R settlement with employer/property owner was not a bar against the applicant's claim against the employer/contractor holding that neither doctrine of issue preclusion (collateral estoppel) nor doctrine of claim preclusion (res judicata) applied to bar applicant's claim where (1) the C&R settlement against the employer/property owner was not final adjudication of any issues actually litigated and decided in this case, and (2) the employer/property owner and the employer/contractor were not same party, had a conflicting interest in this matter, different defenses to liability, with no privity between them, negating application of either claim or issue preclusion. Vergara v. Bovee, 2021 Cal. Wrk. Comp. P.D. LEXIS 313 (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 4.25, Residential Employee].

Psychiatric Injury—Six-Month Employment Requirement—Sudden and Extraordinary Employment Conditions—Claim of psychiatric injury held the result of "sudden and extraordinary" employment event and therefore fell within exception to six-month employment rule in Labor Code § 3208.3(d), when applicant developed psychiatric symptoms following threatening phone call where caller said he would 'shoot her' or 'hurt her' holding the call was not usual, regular, common, or customary, and was totally unexpected so as to establish "extraordinary" nature. The Court noted also that no specific training was provided by defendant regarding how to deal with threatening customers, supporting inference that defendant itself did not believe threatening phone call was common, usual or routine. Citing and discussing Matea v. W.C.A.B. (2006) 144 Cal. App. 4th 1435, 51 Cal. Rptr. 3d 314, 71 Cal. Comp. Cases 1522. Emery v. Hertz Corp, 2021 Cal. Wrk. Comp. P.D. LEXIS 299 (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].

Medical Treatment—Independent Medical Review—Appeals—WCAB found that medical/vocational reports describing significant impact of applicant's activities of daily living resulting in award of total disability was not sufficient to charge defendant with notice of her need for home health care; That absent substantial evidence that need for home health care as provided by PTP through RFA in 2020, defendant had no duty to investigate. Distinguishing the defendant's duty under section 4600 to investigate as discussed in Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton) (1983) 34 Cal. 3d 159, 165, 193 Cal. Rptr. 157, 666 P.2d 14, 48 Cal. Comp. Cases 566; Neri Hernandez v. Geneva Staffing, Inc. dba Workforce Outsourcing, Inc., 79 Cal. Comp. Cases 682, 694 (W.C.A.B. June 12, 2014, pursuant to Cal. Code Regs., tit. 8, § 10109. Tikhonoff v. The Home Depot, 2021 Cal. Wrk. Comp. P.D. LEXIS 306. [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 Reviewer].

Medical Treatment—Independent Medical Review—Appeals—IMR reviewer properly utilized current MTUS at time of request for UR as required by 8 Cal. Code Reg. § 9792.21.1, to evaluate a treatment request. Tikhonoff v. The Home Depot, 2021 Cal. Wrk. Comp. P.D. LEXIS 306.

Temporary Disability—Rate of Payment—Retroactive temporary disability indemnity paid beyond 2 years from the date of injury is paid at the rate in effect when paid, and not DOI, but is subject to AWW limitations (LC § 4661.5), and this includes reimbursement to EDD for SDI benefits where SDI rate is higher than rate at DOI, and where TD rate is higher than SDI rate applicant is entitled to difference. Bufalino v. Countrywide Home Loan, 2021 Cal. Wrk. Comp. P.D. LEXIS 323 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.04[1][b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.08; SOC, Section 9.6, Temporary Total Disability After Two Years].

Psychiatric Injury—Good Faith Personnel Actions—Rolda analysis—LC § 3208.3(h)'s good faith personnel action defense include administrative actions which are events which do not "reasonably implicated applicant's employment status." Bufalino v. Countrywide Home Loans, 2021 Cal. Wrk. Comp. P.D. LEXIS 323 (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].].

Psychiatric Injury—Catastrophic Injuries—Increased Permanent Disability—"Catastrophic Injury" (LC § 4660.1(c)(2)(B) and Wilson v. State of CA Cal Fire (2019) 84 Cal. Comp. Cases 393 (Appeals Board en banc opinion)), is not established merely by loss of job. Hernandez v. Southwest Airlines, 2021 Cal. Wrk. Comp. P.D. LEXIS 333 (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].

Permanent Disability—Rating—Rebuttal of Scheduled Rating—Diminished Future Earning Capacity—Applicant failed to establish total disability pursuant to LC § 4660.1 where agreed medical examiner (AME) imposed only limited work restrictions, which vocational expert did not believe precluded applicant from gainful employment. The AME may not opine that applicant is precluded from work due to restrictions he imposed, as he does not have expertise to opine regarding applicant's vocational feasibility, but rather, vocational expert evidence is required on this issue, and therefore the opinion of the AME does not constitute substantial evidence on this issue. Wilson v. Kohls Dept. Store, 2021 Cal. Wrk. Comp. P.D. LEXIS 322 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], [4], 32.01[3][a][ii], 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.05[3][d], 7.12[2][a], [d][iii], 7.42[2]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Ch. 7; SOC, Section 10.19, Rebutting Schedule Under Ogilvie].

Discrimination—Labor Code § 132a—Application of Alter Ego Doctrine—The WCAB has jurisdiction to "pierce the corporate veil" through application of the alter ego doctrine in Labor Code § 132a proceeding, where applicant here raised issue of corporation owner's joint and several liability under alter ego doctrine, arguing that there was no difference between owner and his corporation. Walker v. Ararat Adult Day Health Care, Inc., 2021 Cal. Wrk. Comp. P.D. LEXIS 302 (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 11.16 Liability for LC 132a Claim].

Penalties—Delay in Paying Settlement Proceeds—Labor Code § 5814 penalty award rescinded where defendant had no prior history of delayed payments, had timely sent two sets of checks to applicant, and applicant attorney's failure to timely communicate with defendant played a role in payment delay. Gonzalez v. Patin Vineyard Management, 2021 Cal. Wrk. Comp. P.D. LEXIS 320 (Split BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 10.40[1], [3][a], [c], 29.04[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.11[2]; SOC, Section 13.13, LC 5814 – Principal of Reasonable Delay].

Contribution—Division of Liability—When there are multiple employers during a Labor Code § 5500.5 liability period, employers are jointly and severally liable for entire award, but may seek contribution, which is decided de novo, from each other during separate proceedings though arbitration pursuant to Lab. Code, §§ 5273, 5275(a). Smith v. Pac. Southwest Container, 2022 Cal. Wrk. Comp. P.D. LEXIS 10 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 31.13[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.15].

Injury AOE/COE—Valley Fever—In cases of injury caused by communicable disease which may be impossible to determine with certainty when and where disease was contracted, an employee can establish industrial causation by demonstrating that it is more likely disease was acquired at work or that employment subjected employee to special risk of exposure in excess of risk to general population, and, a doctor's opinion is sufficient where doctor explained that applicant's job duties exposed him to a very favorable environment for airborne disease, putting applicant at greater risk of coming into contact with the disease than risk faced by ordinary member of community. Dieball v. State of Cal. Dept. of Correction, SCIF, 2022 Cal. Wrk. Comp. P.D. LEXIS 15 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.71; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[5]; SOC, Section 5.9, Occupational Disease].

Injury AOE/COE—Mysterious Death/Neutral Risk— Applicant is entitled to presumption or inference that injury arose out of and in the course of his employment based on "mysterious death" and "neutral risk" theories where applicant found unresponsive in rental car under uncertain circumstances, and PQME and industrial hygienist, after excluding other potential causes of death, determined applicant had been exposed to some unknown level of carbon dioxide from dry ice sublimation being transported by applicant, and, based on reasonable medical probability, concluded industrial exposure caused applicant's injury/death. Kobayashi v. DNI Seafood Wholesaler, 2021 Cal. Wrk. Comp. P.D. LEXIS 361 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.05[2][b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.01[4][b]; SOC, Section 5.58, Mysterious Death].

Medical Treatment—Utilization Review—Timeframes—utilization review (UR) determination was timely when RFAs were faxed by applicant's counsel to defendant's/claims administration general fax number, rather than to fax number or email address specifically designated for UR requests. Quinones v. Carona Auto Parts Recycling, 2021 Cal. Wrk. Comp. P.D. LEXIS 359 (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], [6]; SOC, Section 7.34, Utilization Review – Request for Authorization].

Medical Treatment—Home Health Care—Defendant held obligated to provide continuation of home health care to permanently disabled applicant 24 hours per day, seven days per week pursuant to prior stipulations where defendant's evaluation for continuation of home health care was (1) not offer of care, (2) not unreasonably refused as insufficient explanation provided by defendant to applicant for evaluation, and (3) thus not an unreasonable refusal of care justifying termination of home health care. Hong v. Am. Age, 2022 Cal. Wrk. Comp. P.D. LEXIS 13 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 5.04[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.06[3]; SOC, Section 7.59, Employee's Unreasonable Refusal to Accept Medical Care].

Permanent Disability—Substantial Medical Evidence—The determination of an award of Total Disability pursuant to Labor Code § 4662(a) is a medical issue to be determined by substantial medical evidence of the PTP/QME/AME framed in terms of reasonable medical probability based on pertinent facts, adequate examination, and accurate history, and it must set forth reasoning in support of its conclusions. Scott v. City of LA, 2022 Cal. Wrk. Comp. P.D. LEXIS 14. See also, accord, Anderson v. Heritage Provider 2022 Cal. Wrk. Comp. PD LEXIS 52 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 27.01[1][c], 34.16[1], [3][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.04, Ch. 16, § 16.51, Ch. 20, § 20.04; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Ch. 4; SOC, 10.21, Permanent Total Disability Under LC 4662].

Credit—Overpayment of Permanent Disability—Credit for PDA was held equitable where (1) medical evidence supported only finding of a single cumulative injury without apportionment, and no specific injury, and (2) there were no bad faith actions by either party, (3) allowing credit would not deprive applicant of receiving any "new money" for cumulative injury, and awarding credit avoided potential double recovery by applicant. (Citing and discussing, Dunehew v. Don Keith Transportation, et. al., 2010 Cal. Wrk. Comp. P. D. LEXIS 407, (Panel Decision - Reconsideration Granted), and Benson v. Workers' Comp. Appeals Bd. (2009) 74 Cal. Comp. Cases 113 and Maples v. Worker's Comp. Appeals Bd. (1980) 45 Cal. Comp. Cases 1106). Gonzalez v. Arconic Fastening Sys., 2021 Cal. Wrk. Comp. P.D. LEXIS 363 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp.

2d §§ 7.04[9][a], 31.14[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.19[1]; SOC, Section 10.66, Credit for Overpayment of Permanent Disability].

Death Benefits—Death Without Dependents—An award of interest against DWD held improper under Labor Code Sections 5800 and 5813 where insurance carrier initially made payment of death benefits to Death Without Dependents Unit's (DWD) and subsequently determined deceased employee had surviving dependent entitled to death benefits dependent, and DWD delayed reimbursement to carrier. Velasquez v. Workforce, 2021 Cal. Wrk. Comp. P.D. LEXIS 308 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d 27.03; Rassp & Herlick, California Workers' Compensation Law, Ch. 9, § 9.17; SOC, Section 12.24, Payment to State].

Penalties—Delay in Paying Settlement Proceeds—Award of 5814 penalty held improper where delay was due to lack of timely communication by counsel for applicant regarding missing checks. Commissioner Sweeney, dissenting, found that even though defendant initially addressed problems with checks delayed by fires, defendant acted unreasonably in stopping payment on second set of settlement checks without notifying applicant, resulting in additional delay and hardship to applicant when she attempted to deposit stopped checks and they bounced. Gonzalez v. Patin Vineyard Management, 2021 Cal. Wrk. Comp. P.D. LEXIS 320 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 10.40[1], [3][a], [c], 29.04[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.11[2]; SOC, Section 13.13. LC 5814].

Permanent Disability—Offers of Work—Adjustment of Permanent Disability Payments—15% increase pursuant to Labor Code § 4658(d)(2), applies if employer does not timely offer injured employee regular, modified, or alternative work, contains no exception for employee who has retired or taken another position. Morales v. AO-Cal Poly Corporation, 2022 Cal. Wrk. Comp. P.D. LEXIS 9; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 7.02[4][d][iii], 32.04[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.51[2]; SOC, Section 11.6, Adjustment of Permanent Disability Payment for an Offer of Work].

Evidence—Surveillance Video—Submission of Nonmedical Records to Medical Evaluator—Cal Civ. Code 17708.8, which precludes physical invasion to capture visual image, does not preclude a party from providing sub rosa films obtained by defendant to the QME for review as nonmedical records relevant to determination of medical issue pursuant to Labor Code § 4062.3(a)(2). Per Labor Code §§ 5708 and 5709, the WCAB is not bound by common law or statutory rules of evidence and may decide issues in more informal, flexible manner in order to achieve substantial justice. Licea (Juan) v. Screwmatic, 2022 Cal. Wrk. Comp. P.D. LEXIS 12 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.06[3], 25.29[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[4][e], Ch. 16, § 16.65; SOC, Section 14.13, Surveillance].

Medical-Legal Procedure—Unrepresented Employees—Participation In Medical-Legal Examination—'Participation' occurs when the examination is attended by the applicant, but where the examination is scheduled but not attended by the applicant, and the applicant later becomes represented, a second medical-legal panel may be requested. Citing and discussing, Romero v. Costco Wholesale (2007) 72 Cal. Comp. Cases 824 (Appeals Board Significant Panel Decision). Garcia-Cervantes v. Pitman Farms, 2022 Cal. Wrk. Comp. P.D. LEXIS 3 (Split BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.06[1][b], 32.06[2][b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[3], Ch. 16, § 16.53[18].]

Discovery—Depositions—Labor Code 4062.3(a) suggest expansive rather than limiting approach regarding admissibility of medical evidence, and the deposition of a treating podiatrist is appropriate despite not being the PTP or QME. Basi (Jasbir) v. A Plus Academics, 2021 Cal. Wrk. Comp. P.D. LEXIS 318 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 25.41; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.45[2]; SOC, Section 14.12, Depositions].

Medical-Legal Procedure—Self-Procured Medical Reports—Secondary Physicians—Although a medical report obtained pursuant to Labor Code § 4605 from consulting physician (8 Cal. Code Reg. § 9785(a)(2)) cannot be sole basis for award of compensation, that report is admissible unless obtained solely to rebut the PQME opinion. Losurdo (Sally) v. United Parcel Service, 2021 Cal. Wrk. Comp. P.D. LEXIS 331 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.04; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.51[6]; SOC, Section 14.36, Reporting Under LC 4605].

Liens—Filing Requirements—Billing and Collection Services—Billing/collection service may act as medical provider's non-attorney representative with authority to represent and adjudicate lien on medical provider's behalf. Rebolledo v. New Cure, 2021 Cal. Wrk. Comp. P.D. LEXIS 300. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 30.20[1], 30.25[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 17, § 17.10[4]].

California Insurance Guarantee Association—Other Insurance—Reimbursement and Contribution—Prior settlement of liability as between codefendants ends joint and several liability for the purpose of contribution/reimbursement even where the carrier assuming full liability through settlement becomes insolvent. Suarez (Juan) v. Haley Bros/TM Cobb Company, 2022 Cal. Wrk. Comp. P.D. LEXIS 25 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 2.84[3][a], [c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 3, § 3.33[3].]

Permanent Disability—Rating—Combining Multiple Disabilities—Substantial medical evidence is required to establish that two impairments effectively combine to cause impairment greater than sum of each impairment separately, and this requires that the medical evaluator provide the analysis and explain why disparate impairments, which were all within evaluator's area of medical expertise, should be added rather than combined under the combined value equitation. Citing and discussing Athens Administrators v. W.C.A.B. (Kite) (2013) 78 Cal. Comp. Cases 213 (writ denied). Bradley v. State, 2022 Cal. Wrk. Comp. P.D. LEXIS 26 (BPD). But see, Quiroz v. State of California, 2022 Cal. Wrk. Comp. P.D. LEXIS 43, holding aggregation of separate injury where PD inextricably intertwined. [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, §§ 7.06[2], 7.11[5], 7.100; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Chs. 2, 6, 7].

Cumulative Trauma—Multiple Injuries—Different, distinct, and separate exposures create separate injuries despite same period of CT exposure. Bradley v. State of California, 2022 Cal. Wrk. Comp. P.D. LEXIS 26 (BPD). But see, Quiroz v. State of California, 2022 Cal. Wrk. Comp. P.D. LEXIS 43, [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.71, 24.03[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[1], Ch. 14, § 14.13.]

Statute of Limitations—Notice Requirements—Tolling of Statute—Defendant has burden of proof on the affirmative defense of the statute of limitations, and document establishing last payment of benefits for commencement of one year statute of limitations required foundation verifying/authenticating document. Doney v. Burbank Housing Development Corp., 2022 Cal. Wrk. Comp. P.D. LEXIS 44 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 24.03[1], [6], 24.04[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 14, §§ 14.01[4], 14.02, 14.13[1].]

Statute of Limitations—Tolling—Applicant's claim not barred by statute of limitations where Defendant failed to put applicant on notice that applicant was required to take additional steps to secure workers' compensation benefits pursuant to Labor Code § 5401 and Reynolds v. W.C.A.B. (1974) 12 Cal. 3d 726, 117 Cal. Rptr. 79, 527 P.2d 631, 39 Cal. Comp. Cases 768. Melton v. United Staffing Assocs., 2022 Cal. Wrk. Comp. P.D. LEXIS 22 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 24.03[1], [6], 24.04[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 14, §§ 14.01[4], 14.02, 14.13[1]].

Death Benefits—Statute of Limitations—Labor Code § 5412 "date of injury" in death claim is determined by reference to applicant's, not decedent's, knowledge of industrial causation of death for the purpose of 420-week limitation period in Labor Code § 5406.7 barring death claim. Citing Berkebile v. W.C.A.B. (1983) 144 Cal. App. 3d 940, 193 Cal. Rptr. 12, 48 Cal. Comp. Cases 438, overruling Gonzales v. City of Montebello, 2019 Cal. Wrk. Comp. P.D. LEXIS 500 (Appeals Board noteworthy panel decision); Gonzales v. City of Montebello, 2022 Cal. Wrk. Comp. P.D. LEXIS 38 (BPD); [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].

Liens—Medical Treatment—Official Medical Fee Schedule—Federal Preemption—Labor Code § 5307.1/ California Official Medical Fee Schedule, is preempted by federal law pursuant to 38 U.S.C. § 1729 and 38 CFR §

17.106(e). Brow v. Sepragen Corp., 2022 Cal. Wrk. Comp. P.D. LEXIS 37 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.05[2], [3], 30.04[9][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, §§ 4.20[2], 4.21; Ch. 17, § 17.70[6]; SOC, Section 7.81, Allowable Charge Under the OMFS].

Stipulations—Enforcement of Stipulated Award—Stipulation as between co-defendants on percentage of liability for future medical was enforceable and was not nullified by one defendant's subsequent C&R settlement agreement between that defendant and the applicant. Novation of a contract requires the participation of all parties to the original contact. Reino v. Armstrong World Industries, 2021 Cal. Wrk. Comp. P.D. LEXIS 346 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 26.06[2], 27.10[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, §§ 16.23, 16.39, 16.45[2]].

Presumption of Industrial Causation—Cancer—Peace Officers—Under Labor Code § 3212.1 cancer presumption, "manifestation" occurs when the injured worker first has symptoms, even if the injured worker has not yet been diagnosed with cancer. "Development" predates manifestation and determining when a cancer develops or begins developing is a medical question requiring expert medical opinion. Green v. State of Ca., 2021 Cal. Wrk. Comp. P.D. LEXIS 337 (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—Violent Acts—Substantial Cause Standard—Falling 10-15 feet onto concrete landing on face resulting in fracturing multiple bones in his face and spine and loss of consciousness for five days, held "violent act" under Labor Code § 3208.3(b)(2) and holding in Wilson v. State of CA Cal Fire (2019) 84 Cal. Comp. Cases 393 (Appeals Board en banc opinion). Gonzalez v. Advanced Constr., 2021 Cal. Wrk. Comp. P.D. LEXIS 336 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3][a], [b], [f], 4.69[1], [3][a], 8.02[4][c][ii], [5], 32.02[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[3][b][ii]].

Medical Treatment—Utilization Review—Non-Medical Transportation—The WCAB/WCJ had jurisdiction to address necessity of applicant's need for transportation when both utilization review (UR) and independent medical review (IMR) determined that request for transportation was not subject to review. Notwithstanding timely UR, defendant effectively declined to conduct UR for transportation based on lack of medical guidelines addressing transportation, that this was further bolstered by Administrative Director's determination that UR decision was "ineligible for review". Onruang v. UCLA, 2021 Cal. Wrk. Comp. P.D. LEXIS 348 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02[2][c], [d], 22.05[6][b][iii]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.10[3], [4].]

Psychiatric Injury—Catastrophic Injuries—Increased Permanent Disability— Injury was not "catastrophic" pursuant to 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), and, therefore, applicant was not entitled to increased permanent disability rating for his psychiatric condition, where although the applicant underwent significant medical treatment, sometimes used cane or walker to ambulate, he was not placed in highest impairment category with respect to his permanent disability, was not medically ordered to use cane/walker, and was able to perform activities of daily living, other than ambulation, without significant difficulty. Hernandez v. Valley Transit Authority, 2021 Cal. Wrk. Comp. P.D. LEXIS 341(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, PD – Injuries after 1/1/13].

Medical-Legal Procedure—Specialties—Medical Director's opinion is not dispositive on medical specialty and may be disregarded by WCAB the decision is not based on substantial evidence. Lopez-Contreras v. Randstad North America, 2020 Cal. Wrk. Comp. P.D. Lexis 12 (BPD); See also, Porcello v. State of CA Dept. of Corrections and Rehabilitation, 2020 Cal. Wrk. Comp. P.D. Lexis 9 (BPD).

Medical-Legal Procedure—Additional Specialties—Applicant allowed to file DOR for Expedited Hearing for additional QME Panel specialties even where injury denied. Corado v. Ghodsian, 2021 Cal.Wrk. Comp. P.D. Lexis 261 (BPD).

Subsequent Injuries Benefits Trust Fund—Payment of Funds to Special Needs Trust—SIBTF benefits are governed by Labor Code and are under exclusive jurisdiction of WCAB; SIBTF benefits constitute "compensation" for purposes of invoking WCJ's power to fix awards and dictate how they are paid, and that WCJ has broad discretion to determine how benefits are paid out, including into a special needs fund. Cisco v. SIBTF, 2021 Cal. Wrk. Comp. PD LEXIS 128, 86 CCC 719 (BPD). Citing and interpreting LC 5300(f), and WCAB Regulation 8 CCR 10330 (formerly 10348); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.09, 31.20[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 8, §§ 8.01, 8.02.]

Permanent Disability—Apportionment—Joint Awards—A joint award of permanent disability without apportionment between dates of injury is appropriate where two presumptive injuries which contribute to permanent disability, even if non-overlapping, non-presumptive body parts are involved. Quiroz v. State of California, 2022 Cal. Wrk. Comp. P.D. LEXIS 43 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], 8.05[1]-[3], 8.07[2][d][ii], 32.03A[1]; 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. 5, 6].

Presumption of Industrial Causation—Cancer—Police Officers—A joint award of permanent disability without apportionment between dates of injury is appropriate where two separate presumptive injuries contribute to permanent disability, even if non-overlapping, non-presumptive body parts are involved. Quiroz v. State of California, 2022 Cal. Wrk. Comp. P.D. LEXIS 43 (BPD); Citing Delia v. County of Los Angeles (2010) 2010 Cal. Wrk. Comp. P.D. LEXIS 282 (BPD), and Zuniga v. County of Los Angeles (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 549 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], 8.05[1]-[3], 8.07[2][d][ii], 32.03A[1]; 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. 5, 6].

Employment Relationships—Employers—Trusts—A Trust held liability for industrial injury where the Trustee, hired the applicant, controlled and directed his work, and the residential property where work was performed was solely for the benefit of the trust beneficiaries, Trustee held title to subject property, and both the trust, Trustee and individual beneficiaries were all named under the policies of workers' compensation insurance; Further, the holding in Portico Management Group, LLC v. Harrison (2011), 202 Cal. App. 4th 464, 136 Cal. Rptr. 3d 151, does not preclude finding of employment by trust or prevent action from proceeding through trustees who hold title to property in trust. Markel Insurance Company v WCAB (Amos) (2022) 87 CCC 302 (Writ denied, 1st Dist Court of Appeal). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 3.01, 3.03, 3.05, 3.06; Rassp & Herlick, California Workers' Compensation Law, Ch. 2, §§ 2.02, 2.07].

Medical-Legal Procedure—Replacement Qualified Medical Evaluator Panels—Telehealth Appointments—In a dispute regarding whether there has been an unreasonable denial of an agreement to a telehealth evaluation, the remedy is to have the dispute addressed before the Appeals Board, not the Medical Unit; Interpreting and applying 8 Cal. Code Reg. § 46.2; *Ceballos v. Access, 2022 Cal. Wrk. Comp. P.D. LEXIS 81 (BPD).* [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[5], [6], [14]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.53[6], [14]].

Medical-Legal Procedure—Replacement Qualified Medical Evaluator Panels—Applicant is required to attend another QME panel requested by the defense despite defendant's scheduling errors for the original panel while the applicant was unrepresented and thereafter represented. Garcia-Cervantes v. Pitman Farms, 50 CWCR 17 (BPD).

Medical-Legal Procedure—Assignment and Selection of Panel Qualified Medical Evaluators—Where both applicant and defendant strike same physician from assigned qualified medical evaluator panel, applicant is entitled to select either of two remaining physicians from panel pursuant to Labor Code § 4062.2(d). Unto v. Dromy Int'l Inv. Corp., 2021 Cal. Wrk. Comp. P.D. LEXIS 338, 87 Cal. Comp. Cases 233 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d Workers' Comp. 2d §§ 1.11[3][g], 22.06[1][a], 22.11[5], 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[2], Ch. 16, § 16.53[5], Ch. 19, § 19.37].

Evidence—Admissibility—Dashcam Video—Videos may be authenticated through applicant's testimony, or any person who witnessed event being recorded and can testify that the video is a fair and accurate representation of scene depicted, although the WCAB is not bound by statutory rules of Evidence Code and may admit documents into evidence without formal authentication. Johnson v. Lexmar Distribution, et al., 2021 Cal. Wrk. Comp. P.D. LEXIS 289, 87 Cal. Comp. Cases 110 (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]].

Discovery—Depositions—Deposition of applicant's treater on denied claim of industrial injury allowed holding that Labor Code's medical-legal provisions suggest expansive rather than limiting approach regarding admissibility of medical evidence. Jasbir Basi v. A Plus Academics (2021), 87 Cal. Comp. Cases 197 (WCAB noteworthy panel decision); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 25.41; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.45[2]].

Apportionment—Substantial Evidence—A medical opinion on apportionment will not constitute substantial evidence where that opinion merely identify potential nonindustrial causes of disability without specific analysis explaining the how and why the identified causes contributed to cause the disability. Habib v. Lithia Motors (02/25/2022) 50 CWCR 47 (BPD).

Permanent Disability—Rating—Rebuttal of Scheduled Rating—Diminished Future Earning Capacity—On Post 12/31/12 date of injury, given the clear language in Labor Code § 4660.1, coupled with statute's legislative history and other provisions enacted as part of SB 863, an injured worker is not permitted to rebut permanent partial disability schedule using DFEC analysis as set forth in Ogilvie v. W.C.A.B. (2011) 197 Cal. App. 4th 1262, 129 Cal. Rptr. 3d 704, 76 Cal. Comp. Cases 624 [Labor Code § 4660.1(a)]. Wilson v. Kohls Dep't Store, 2021 Cal. Wrk. Comp. P.D. LEXIS 322, (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].

Permanent Disability—Rating—Rebuttal of Scheduled Rating—Diminished Future Earning Capacity—On a post 12/31/12 date of injury, an injured worker is permitted to rebut permanent disability rating schedule to show permanent total disability "in accordance with the fact" [Labor Code §§ 4660.1(g), 4662(b)] based on complete loss of earning capacity through the use of VR evidence [Labor Code § 5703(j)]. Wilson v. Kohls Dep't Store, 2021 Cal. Wrk. Comp. P.D. LEXIS 322, (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].

Insurance Frauds Prevention Act—Liability—Insurers and Agents—Claims Handling Practices.
The purpose of Ins. Code, § 1871.7 is the prevention and punishing the making of fraudulent claims to insurance companies, and not to create in the insurers and their agents a cause of action against the insurance carrier based upon claims handling practices. People ex rel. Ellinger v. Magill, 77 Cal. App. 5th 287, 87 Cal.Comp.Cases 267; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 2.03[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.30.].

Contribution—Burden of Proving Injury AOE/COE—The defendant seeking contribution has the burden of proof to establish by substantive medical evidence an industrial injury AOE/COE that is the responsibility of another defendant. Pattee v. Med., 2022 Cal. Wrk. Comp. P.D. LEXIS 59, (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 31.13[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.15, Ch. 16, § 16.16].

Presumption of Industrial Causation—Heart Trouble—Peace Officers—Labor Code § 3212.5 presumption of industrial causation is applicable to a claim for stroke/neurological injuries where substantial medical evidence established that the stroke/neurological injuries were caused in part by an industrially presumptive heart condition. Snowden v. City of Los Angeles, 2022 Cal. Wrk. Comp. P.D. LEXIS 53, 87 Cal. Comp. Cases 554 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.138[4][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.07[b].].

Petition to Reopen—Five-Year Statute of Limitations—The need for new and further disability to establish a claim for Petition to Reopen may be established by PD, TD or evidence of changes in employee's medical condition and/or treatment regimen arising within 5 years from the date of injury. Pascacio (Javier) v. Jacobo Farm Services, 2022 Cal. Wrk. Comp. P.D. LEXIS 67 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 24.03[3], 31.05; Rassp & Herlick, California Workers' Compensation Law, Ch. 14, § 14].

Credit—Overpayment of Permanent Disability— Whether or not to allow a credit for overpaid compensation is within the discretion of the court requiring that the WCAB weigh the equities and consider whether granting such a credit will result in an undue burden and hardship to the Applicant. Citing and Discussing Munroe v. USC Verdugo Hills Hosp. LLC, 2015 Cal. Wrk. Comp. P.D. LEXIS 722, citing Maples v. Workers' Comp. Appeals Bd. (1980) 45 Cal. Comp. Cases 1106, 1112; Goolsby v. Northrop Grumman Corp., 2022 Cal. Wrk. Comp. P.D. LEXIS 50, (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 7.04[9][a], 31.14[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.19[1]].

Medical-Legal Procedure—Ex Parte Communications—QME's post-examination telephone calls with applicant did not constitute impermissible ex parte justifying replacement QME panel as the communications were found to be "in the course of the examination or at the request of the evaluator in connection with the examination" pursuant to Labor Code § 4062.3(i). Lewinstein (Mina) v. ABRA Management, 2022 Cal. Wrk. Comp. P.D. LEXIS 54, (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.06[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[4][e]].

Medical-Legal Procedure—Assignment and Selection of Panel Qualified Medical Evaluators—Where both applicant and defendant strike same physician from QME panel, applicant is entitled to select either of two remaining physicians from panel pursuant to Labor Code § 4062.2(d). Unto v. Dromy Int'l Inv. Corp., 2021 Cal. Wrk. Comp. P.D. LEXIS 338 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d Workers' Comp. 2d §§ 1.11[3][g], 22.06[1][a], 22.11[5], 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[2], Ch. 16, § 16.53[5], Ch. 19, § 19.37.]

WCAB Jurisdiction—Professional Athletes—Exemptions—Jurisdiction found for claim for cumulative injuries during the period from 6/5/89-10/15/04 while employed with multiple teams as a professional baseball player where (1) hired by multiple teams in California during cumulative injury period, creating jurisdiction over claim pursuant to Labor Code §§ 3600.5(a) and 5305. The WCAB held that the phrase "a professional athlete who has been hired outside of this state" in Labor Code § 3600.5(c) is ambiguous as applied to cumulative injury claims such as applicant's, where injured employee has California contracts of hire, though not with particular employer or employers asserting exemption from California jurisdiction. The WCAB explained that based on purpose of statute, legislative intent and public policy, the most reasonable interpretation of Labor Code § 3600.5(c) and (d) is that these subdivisions are intended to apply only to athletes who have extremely minimal California contacts and cannot establish jurisdiction under Labor Code §§ 3600.5(a) and 5305, and that because it was undisputed applicant was born and raised in California, was employed by Los Angeles Dodgers for five years, and signed multiple contracts of hire in California during his cumulative injury period, California had jurisdiction over his claim. Hansell (Gregory) v. Arizona Diamondbacks, 2022 Cal. Wrk. Comp. P.D. LEXIS 83, (BPD); See also, Lauter v. Ravens, 2022 Cal. Wrk. Comp. P.D. LEXIS 270 (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]].

Employment Relationships—Dual Employment—Union Members—Union member injured in automobile accident while traveling to union office for union business as union's regional officer while employed by Southern California Gas Company held employed by both SCGC, as general employer, and by union, as special employer, with joint and several liability as at time of injury, evidence supported union had requisite amount of control over applicant's activities while engaged in union business. Robles (Alex) v. Southern California Gas Company, 2022 Cal. Wrk. Comp. P.D. LEXIS 92, (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 3.65, 3.141, 3.142; Rassp & Herlick, California Workers' Compensation Law, Ch. 2, §§ 2.02, 2.07].

Psychiatric Injury—Six-Month Employment Requirement—Sudden and Extraordinary Employment Conditions—Psychiatric claim not barred by LC § 3208.3(d) six-month employment requirement where "sudden and extraordinary" found as truck driver hit by commuter train after he became caught in bumper-to-bumper traffic near train tracks. Johnson v. MHX, 2022 Cal. Wrk. Comp. P.D. LEXIS 82, (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]].

Psychiatric Injury—Post-Termination Defense—Exceptions—Labor Code § 3208.3(e) post-termination defense was not a barred to applicant's claim of psychiatric injury as neither notice of proposed disciplinary action by employer, or applicant voluntarily resigned from his job, involving allegations against the applicant of wage theft. But note the well reasoned dissenting opinion of Commissioner Razo, concluding that defendant met burden of establishing post-termination defense, where (1) applicant was informed of defendant's decision to terminate his employment on 8/28/2018, subject only to Skelly hearing and final decision regarding disciplinary action as afforded to civil service employees in keeping with due process, and (2) that conduct of applicant's supervisor conduct of physically grabbing his arm and forcibly directed him back to his work area , albeit unprofessional, could not be considered "sudden and extraordinary" and that defendant's awareness of applicant's incident with his supervisor was insufficient to confer knowledge of psychiatric injury, making exceptions to post-termination defense inapplicable. Sheppard (Lee) v. County of Kern, 2022 Cal. Wrk. Comp. P.D. LEXIS 74 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3][e], 4.65[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[3][e].]

Petitions to Reopen—New and Further Disability—Where first medical treatment provided to a part of body not previously included in Stipulation, claim may be amended to include additional part of body through petition for new and further, as until treatment was provided to additional part of body, no compensable injury occurred. Wall v. County of Sacramento, 2022 Cal. Wrk. Comp. P.D. LEXIS 78, (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 31.05; Rassp & Herlick, California Workers' Compensation Law, Ch. 14, §§ 14.04, 14.06].

Average Weekly Earnings—Calculation Based on Actual Earnings—Stipulations—Good cause exists to set aside stipulation on AWW where defendant knew or should have known wage stipulation was incorrect, and stipulation did not reflect a 10 percent scheduled raise applicant received shortly after injury established by evidence present at trial. Sather v. Trion Solutions, 2022 Cal. Wrk. Comp. P.D. LEXIS 90, (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 6.02[1], [2], 26.06[2], 27.10[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 5, § 5.01[2], Ch. 16, §§ 16.23, 16.39, 16.45[2].]

Employer's Serious and Willful Misconduct—Calculation of Increased Compensation Due—Industrial Disability Leave—The WCAB may increase by 50% compensation awarded pursuant LC § 4553 to includes industrial disability leave calculated based on enhanced IDL applicant received in lieu of temporary disability benefits as Labor Code § 4553 provides for 50 percent increase in amount of "compensation otherwise recoverable". Ayala v. Dep't of Corr. & Rehabilitation/Lancaster State Prison, 2022 Cal. Wrk. Comp. P.D. LEXIS 101, (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], [7]; SOC, Section 13.40, Penalty for Serious and Willful Misconduct].

Medical-Legal Procedure—Stipulation to Use Agreed Medical Examiner—Per Labor Code § 4062.2(f), AME agreement may only be cancelled by parties' mutual written consent even if evaluation by AME has not yet occurred. Upholding Dzambik v. Ishaan Enterprise, Inc., 2021 Cal. Wrk. Comp. P.D. LEXIS 279 (Noteworthy Panel Decision)]. Dzambik v. Ishaan Enter., 2022 Cal. Wrk. Comp. P.D. LEXIS 86, (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—Replacement Qualified Medical Evaluator Panels—Telehealth Appointments—8 Cal. Code Reg. § 46.2 expressly states that party cannot unreasonably deny agreement to telehealth evaluation, and a replacement panel is not a remedy where a party unreasonable refuses to agree to PQME examination by telehealth evaluation. 8 Cal. Code Reg. § 31.5(a)(2) timeframe for scheduling appointment only applies to initial appointment

with QME, not to re-evaluation appointments. Ceballos v. Access, 2022 Cal. Wrk. Comp. P.D. LEXIS 81, (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[5], [6], [14]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.53[6], [14]; SOC, Section 14.44, Evaluation Requirements and Rights].

Workers' Compensation Exclusivity—Derivative Injury Doctrine—COVID-19—U.S. Court of Appeals, Ninth Circuit, certified questions for determination by California Supreme Court pursuant to California Rules of Court, Rule 8.548(b)(2), regarding (1) whether California's derivative injury doctrine bars spouse's claim against employer if employee contracts COVID-19 at workplace and brings virus home to spouse, and (2) whether, under California law, employer owes duty to households of its employees to exercise ordinary care to prevent spread of COVID-19. Kuciemba v. Victory Woodworks, Inc., 31 F.4th 1268, 1270, [2022 U.S. App. LEXIS 10786, 87 Cal. Comp. Cases 408]; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 11.01[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 12, § 12.09[1]].

Cumulative Injury—Election by Employee—Carrier's share of liability based on length of coverage is one factor to consider in determining proper carrier to administer claim and appropriateness of election by applicant. Additional factors to be considered in determining the appropriateness of applicant's election includes delay of providing benefits to the applicant. Arevalo (Lorenzo) v. Limoneira Company, Inc., 2022 Cal. Wrk. Comp. P.D. LEXIS 127 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 1.11[3][g], 26.01[2][c], 26.03[4], 31.13[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[1][d][v], Ch. 15, § 15.15, Ch. 19, § 19.37].

Average Weekly Wages—Concurrent Employment—Defendant did not show good cause to withdraw from stipulation regarding AWW which included earnings from concurrent employment with IHSS at time of injury but which ended two months after DOI due to death of client. Further, evidence established through applicant's testimony that she had rejected other jobs from IHSS after her mother's death which confirmed that her disability, and not death of her mother, was reason she could not concurrently earn wages from IHSS. Vayman v. Mednax Inc., 2022 Cal. Wrk. Comp. P.D. LEXIS 131 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 6.02[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 5, § 5.02.].

Imposition of Sanctions—Due Process—Order of 5813 sanction rescinded where WCJ's finding that applicant's attorneys engaged in conduct intentionally designed to harass defense counsel in order to obtain strategic litigation advantage holding that an evidentiary hearing providing the party with notice, and an opportunity to be heard, consistent with due process, prior to imposition of sanctions, and not merely an NOI to impose sanctions and applicant's attorneys' written objection to NOI. Instead, a pretrial conference to frame the specific issues and stipulations, with a pretrial conference statement, and hearing. Also of concern was that the conduct occurred outside of court, applicant's attorney was not fully apprised of evidence against them or provide a meaningful opportunity for them to offer evidence in opposition to sanctions. Scott (Terri) v. City of Los Angeles, 2022 Cal. Wrk. Comp. P.D. LEXIS 107 (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; SOC, Section 14.12, Deposition].

Discovery—Depositions—The deposition of opposing counsel are presumptively improper, severely restricted, and require "extremely" good cause—a high standard. (Carehouse Convalescent Hospital v. Superior Court (2006) 143 Cal. App. 4th 1558, 1562). The circumstances under which opposing counsel may be deposed are limited to where (1) no other means exist to obtain the information than to depose the opposing counsel; (2) the information sought is relevant and not privileged; and (3) the information is crucial to the preparation of the case. (Spectra-Physics, Inc. v. Superior Court (1988) 198 Cal. App. 3d 1487, 1496; Carehouse, supra, 143 Cal. App. 4th 1558, at p. 1563). Scott (Terri) v. City of Los Angeles, 2022 Cal. Wrk. Comp. P.D. LEXIS 107 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 25.41; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.45[2]; SOC, Section 14.12, Depositions; SOC, Section 14.12, Deposition].

Medical-Legal Procedure—Selection of Qualified Medical Evaluators—Either party may schedule QME Panel examination where doctor untimely struck from QME panel, as an untimely strike is invalid, with either party thereafter having the legal right to schedule appointment at any time after initial 10-day post-selection period elapses. (Labor Code § 4062.2(d); 8 Cal. Code Reg. § 31.3(d)). Kowal (Gus) v. County of Los Angeles, 2022 Cal.

Wrk. Comp. P.D. LEXIS 109 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[5]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.53[5].].

Medical-Legal Procedure—Ex Parte Communications—Defendant's claims adjuster did not engage in prohibited ex parte communication with PQME where the communication involved no direct communication with PQME, anyone in PQME's office, but with the PQME's third-party administrative support agency to obtain copy of prescription for right shoulder MRI; The inconsequential communication was non-substantial communication as described in Labor Code § 4062.3(f). De Gonzalez v. Le Provence Bakery, 2022 Cal. Wrk. Comp. P.D. LEXIS 105 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.06[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[4][e]].

Dismissal—Inactive Cases—Although defendant followed proper procedure to request dismissal pursuant to 8 Cal. Code Reg. § 10550, and WCJ appropriately responded with required NIT to dismiss, dismissal for lack of prosecution is discretionary not mandatory. Evidence established that the applicant was actively treating for industrial injury as recently as 12/2021, that applicant did not receive NIT (defendant designated to serve), raising procedural due process concerns, and there is a strong public policy in favor of adjudication on merits. Ramos v. D & F Agric. Enters., 2022 Cal. Wrk. Comp. P.D. LEXIS 115 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 23.11[5][c], 23.14[2][j]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.38; Ch. 16, § 16.07[5].]

Petitions for Reconsideration—Time to File Petition—Where service of decision is on out-of-state defendant, the time period for either party for filing a Petition for Reconsideration is 30 days (20 days plus 10 for mailing), despite the applicant receiving service within the State of California. Thomas v. Volt Info. Scis., 2022 Cal. Wrk. Comp. P.D. LEXIS 104 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 28.20; Rassp & Herlick, California Workers' Compensation Law, Ch. 19, § 19.13[1].]

Discovery—Scope—Medical Records-- An applicant cannot be compelled to answer deposition questions regarding her lifetime medical history as to conditions or treatment not placed at issue by the nature of the claim; The mere filing of a claim for injury does not waive the applicant's patient-physician privilege, and it is incumbent on the attorney claiming the privilege to so advise opposing counsel so that opposing counsel can, if he or she wishes, bring the matter before a workers' compensation judge for determination of the validity of the claim of privilege. Allison v. WCAB, (1999 2nd App. Dist.) 72 Cal. App. 4th 654, 84 Cal. Rptr. 2d 915, 1999 Cal. App. LEXIS 534, [64 Cal. Comp. Cases 624]; Citing, discussing and contrasting Britt v. Superior Court (1978) 20 Cal. 3d 844 [143 Cal. Rptr. 695, 574 P.2d 766], and Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355 [15 Cal. Rptr. 90, 364 P.2d 266] [See 2 Witkin, Summary of Cal. Law (9th ed. 1987) Workers' Compensation, § 396.].

Cumulative Trauma—Date of Injury—Date of injury for the purpose of determining liability as between co-defendants pursuant to LC 5500.5 requires the existence of permanent disability plus knowledge that disability was work-related (LC 5412), which may be established prior to the applicant becoming P&S by substantial medical evidence of physical findings of disability and factors of impairment. Saavedra (Rafael) v. Country Fresh Herbs, 2022 Cal. Wrk. Comp. P.D. LEXIS 145 (BPD); See also, Genlyte Group v. WCAB (Zavala) 73 Cal. Comp. Cases 6; 8 Cal. Code Reg. § 9812(e)(1); [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, Ch. 15, § 15.15; SOC, Section 5.7, Cumulative Injury -- Injury].

Contribution and Reimbursement—Cumulative Trauma—Date of Injury—Liability as between defendants for CT injury required the existence of permanent disability, knowledge that disability was work-related, and injurious exposure/activities. The CT period starts and ends under LC 5500.5 with the injurious exposure with liability limited to the last year of injurious exposure. Citing and discussing Labor Code § 5412 and State Compensation Insurance Fund v. W.C.A.B. (Rodarte) (2004) 119 Cal. App. 4th 998, 14 Cal. Rptr. 3d 793, 69 Cal. Comp. Cases 579. Mondragon v. Providence Indus., 2022 Cal. Wrk. Comp. P.D. LEXIS 137 (BPD). [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, Ch. 15, § 15.15; SOC, Section 5.7, Cumulative Injury -- Injury].

Permanent Disability—Apportionment to Prior Awards—Anti-Attribution—Apportionment to a prior award (LC 4664(a) & (b)), in a claim found to be presumptively compensable under the safety officer heart/cancer presumption (LC § 3212 et seq) is precluded by the anti-attribution provisions of LC § 4663(e). Santiago v. Cal. Highway Patrol, 2022 Cal. Wrk. Comp. P.D. LEXIS 155, (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[2][c], 8.06[5][d]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.40[1], 7.42[3], 7.45[2]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Chs. 3, 6; SOC, Section 5.17, Presumption of Injury – Public Employee in General].

Compromise and Release Agreements—Rescission—OACR may be set aside where acceptance of settlement was obtained by undue influence (excessive pressure by a dominate person over a subordinate person) exerted by applicant's attorney, and undue influence exerted by applicant's own attorney and not by defendant, does not preclude rescission of the agreement. Maxwell v. Global Cash Card, 2022 Cal. Wrk. Comp. P.D. LEXIS 168 (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.].

Medical Provider Networks—Validity—Employer's Liability for Outside Treatment—Pursuant to LC 4616, the Administrator Directors' approval of an MPN is binding on all persons and courts, and the issue of invalidating an MPN must be submitted to the Administrator Director for determination, and not the WCAB which lacks jurisdiction. Dicato v. Good Samaritan Hosp., 2022 Cal. Wrk. Comp. P.D. LEXIS 142 (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.]

Permanent Disability—Apportionment—Disability From Medical Treatment—Following the holding in County of Santa Clara v. W.C.A.B. (Justice) (2020) 49 Cal. App. 5th 605, 262 Cal. Rptr. 3d 876, 85 Cal. Comp. Cases 467, rather than the holding in to Hikida v. W.C.A.B. (2017) 12 Cal. App. 5th 1249, 219 Cal. Rptr. 3d 654, 82 Cal. Comp. Cases 679, the WCAB upheld WCJ's finding of LC 4663 apportionment to a prior history of knee injury, degenerative changes, surgeries, and morbid obesity which led to bilateral total knee replacement surgery. Jackson v. Fedex Ground Package Sys., 2022 Cal. Wrk. Comp. P.D. LEXIS 170 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[1]-[3], 8.06[5]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.40, 7.41, 7.42[3]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Chs. 4, 6].

Subsequent Injuries Benefits Trust Fund—Eligibility Requirements—The applicant was permitted to use different QME for his SIBTF claim than he used for case-in-chief, and the new QME could properly request additional diagnostic studies as part of that examination. Fernando v. State of California, 2022 Cal. Wrk. Comp. P.D. LEXIS 171 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.09, 31.20[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 8, §§ 8.01, 8.02].

Serious and Willful Misconduct of Employer—An award of increased compensation pursuant to LC 4553/4553.1, upheld where applicant was injured due to operation of ATV, without protective gear or training, applicant had no operation experience, and evidence established employer knew of applicant's discomfort riding ATV. Whether an applicant is a 'managing representative' within meaning of Labor Code § 4553, turns on actual control exerted and not merely on job title. Flores v. County of L.A., 2022 Cal. Wrk. Comp. P.D. LEXIS 180 (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].

Liens—Employment Development Department—Payment of TD to applicant by defendant in the face of the lien of EDD is at defendant's peril, and does not relieve the defendant from liability for the lien or obviate EDD's entitlement to repayment pursuant to Labor Code §§ 4903 and 4904. Paul v. Icon, Inc., 2022 Cal. Wrk. Comp. P.D. LEXIS 161 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 30.08; Rassp & Herlick, California Workers' Compensation Law, Ch. 17, § 17.85].

Injury AOE/COE—Felony/Crime Conviction—Claim of injury from altercation with police officer held barred under Labor Code § 3600(a)(8), where injury was caused by/during commission of felony or crime punishable as specified in [Penal Code § 17(b)], which resulted in conviction by plea to misdemeanor. Johnson v. Lexmar Distrib., 2022 Cal. Wrk. Comp. P.D. LEXIS 190 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.24, 4.95, 4.113(a); Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.03[5]}.

Medical Treatment—Utilization Review—Employer's Duty to Investigate Treatment Requests—Defendant failed to timely deny RFA when although it was unclear whether claims administrator received RFA, there was (1) no dispute that defendant's attorney received the RFA; that (2) defendant's attorney had the duty to transmit to claims adjuster within reasonable time so dispute could be resolved as expeditiously as possible, and (3) failure to do so made the UR untimely. Erhardt v. U.S. Concrete, 2022 Cal. Wrk. Comp. P.D. LEXIS 198 (BPD); See also accord, Sevillan v. Kore 1 Inc., 2022 Cal. Wrk. Comp. P.D. LEXIS 205, holding UR untimely for breach of defendant's duty to conduct a good-faith investigation pursuant to CCR 10109. [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], [6]; SOC, Section 7.34, Utilization Review – Request for Authorization].

Medical-Legal Procedure—Assignment and Selection of Panel Qualified Medical Evaluators—Where both applicant and defendant timely strike same physician from assigned qualified medical evaluator panel, applicant is entitled to select from either of two remaining physicians from panel pursuant to Labor Code § 4062.2(d), and defendant is not entitled to replacement panel in such circumstances. Unto v. Dromy Int'l. Corp., 87 Cal. Comp. Cases 233, 2021 Cal. Wrk. Comp. P.D. LEXIS 338 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d Workers' Comp. 2d §§ 1.11[3][g], 22.06[1][a], 22.11[5], 26.03[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[2], Ch. 16, § 16.53[5], Ch. 19, § 19.37].

Medical Treatment—Utilization Review—Timeframes—UR determination held untimely based on lack of evidence that it was timely communicated to applicant, applicant's attorney or applicant's primary treating physician pursuant to Labor Code § 4610(i)(4), and thus WCJ had jurisdiction to address medical necessity citing and discussing Dubon v. World Restoration, Inc. (2014) 79 Cal. Comp. Cases 1298 (Appeals Board en banc opinion) (Dubon II), and Bodam v. San Bernardino County/Department of Soc. Servs., (2014) 79 Cal. Comp. Cases 1519 (Appeals Board significant panel decision). Kokkinias v. Sonfarrel, Inc., 2022 Cal. Wrk. Comp. P.D. LEXIS 183 (BPD); See also, accord, Pulido v. Caabunga, 2022 Cal. Wrk. Comp. P.D. LEXIS 186 (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], [6]; SOC, Section 7.36, Utilization Review – Procedure].

Temporary Disability—Offers of Modified or Alternative Work—Offer of modified work by employer subsequently withdrawn after applicant attorney's communication with employer in the exercise of due diligence questioning the efficacy of such offer, both in terms of the pertinent work restrictions and other statutory and regulatory requirements, was in the interests of protecting his client, will not operate to terminate TD. Ball v. Quality Drivers Sols., 2022 Cal. Wrk. Comp. P.D. LEXIS 203 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[4][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.11; SOC, Section 9.24, Termination for Liability for Payment].

Credit—Overpayment of Temporary Disability—Decision upheld disallowing credit for TD overpayment as allowing credit is discretionary and is based on the circumstances of the particular case, and in this case the overpayment was entirely due to defendant's own error and allowing the credit would be contrary to purposes of permanent disability benefits and would unfairly deprive applicant of over one year of permanent disability indemnity. Sweetnam v. County of L.A., 2022 Cal. Wrk. Comp. P.D. LEXIS 189 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 7.04[9][a], 31.14[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.19[1]; SOC, Section 9.30, Credit for TD Overpayment].

Permanent Disability—Apportionment—Preexisting Factors—Applicantion of the CVC to round down the combining of a 99% disability related to headaches with 64% orthopedic disability held not proper as resulting in an absurd result. Cruz v. Wash. Colony Elem. Sch. Dist., 2022 Cal. Wrk. Comp. P.D. LEXIS 185 (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 10.20, Combining Impairment and Disabilty].

Hearings—Minutes of Hearing—Minutes of hearing stating that 'parties settled lien for $750 and taking the matter off calendar had no legal effect other than taking the matter off calendar. Chan v. Hollywood Park Casino, 2022 Cal. Wrk. Comp. P.D. LEXIS 181 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.08, 30.22[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 17, § 17.113; SOC, Section 15.94, Lien – Procedures and Payments].

Liens—Procedural Rights and Duties—Effect of Compromise and Release Agreement— Lien claimant was not aggrieved either directly or indirectly by OACR which resolved only applicant's entitlement to benefits, and thus lacked standing to seek reconsideration of OACR. Banaag v. State, 2022 Cal. Wrk. Comp. P.D. LEXIS 200 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 30.24[1], [2][4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 17, § 17.110].

Peculiar Risk Doctrine/Premises Liability > Application of Privette Doctrine > The "retained control" exception to Privett Doctrine of hirer nonliability per Hooker v. Department of Transportation/State of California (Caltrans) (2002) 27 Cal. 4th 198, 38 P.3d 1081, 115 Cal. Rptr. 2d 853, 67 Cal. Comp. Cases 19, did not apply where undisputed material facts established that defendant did not exercise its retained control over subcontractor's work in manner that affirmatively contributed to plaintiff's injury, and facts that defendant knew ice was present and even might have caused it to form were insufficient to support application of this exception to the Privette Doctrine. McCullar v. SMC Contracting, Inc., (2022, 3rd Appellate District) 83 Cal. App. 5th 1005, 87 Cal. Comp. Cases 758, 2022 Cal. App. LEXIS 851; See also, accord Miller v, Roseville Lodge no. 1293 (3rd Appellate District) 83 Cal.App. 5th 825, 87 Cal. Comp. Cases 886. [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]; SOC, Section 2.32, Civil Remedy Against Third Party].

Psychiatric Injury—Good Faith Personnel Actions—The successive appointments by Defendant/employer of staff members to supervise the applicant was not a personnel action as contemplated by Labor Code § 3208.3(h), where those appointments were administrative due to a vacated position, and not akin to "transfers, demotions, layoffs, performance evaluations, and disciplinary actions such as warnings, suspensions, and terminations of employment"; Citing Stockman v. State/Department of Corr. (1998) 63 Cal. Comp. Cases 1042 [1998 Cal. Wrk. Comp. LEXIS 5129. Syed v. State, 2022 Cal. Wrk. Comp. P.D. LEXIS 215 (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]].

Serious and Willful Misconduct—Statute of Limitations—Timely filed petition for serious and willful misconduct held not barred by statute of limitations, when although the petition misidentifying defendant within the petition, the caption correctly identified defendant, thereby providing sufficient notice to defendant of proceeding against it, and the subsequently-filed amended application correctly naming defendant related back to date of timely-filed original pleading for purposes of statute of limitations. Muniozguren v. Sancon Eng'g, Inc., 2022 Cal. Wrk. Comp. P.D. LEXIS 210, (Cal. Workers' Comp. App. Bd. August 8, 2022); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 10.01[1][e], 24.03[5][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 14, § 14.12[1]].

Fair Employment and Housing Act—Collateral Estoppel—Effect of Other Proceedings on Claims Under Fair Employment and Housing Act—FEHA claim held not barred by the doctrines of res judicata (claim preclusion) and/or collateral estoppel (issue preclusion) by prior decision of WCAB denying employee's discrimination claim under Labor Code § 132a. The Court noted that FEHA targeted a much broader range of discriminatory conduct and involved different inquiries and issues than those relevant to Labor Code § 132a. Kaur v. Foster Poultry Farms

LLC, (5th Appellate District) 83 Cal. App. 5th 320, 328-329. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 10.75, 11.05[4], [5]; Rassp & Herlick California Workers' Compensation Law, Ch. 18, § 18.13[1]; SOC, Section 11.45, Res Judicata and Collateral Estoppel].

Death Benefits—Conclusive Presumption of Total Dependency—Decedent adult son found total dependent for death benefits under Labor Code § 3501(a) where diagnosed with multiple serious mental disabilities and found to be disabled by Social Security Administration, where evidence established that Applicant/Decedent's son was living with decedent at time of death (although he had spent time in homeless shelter beforehand). Labor Code § 3501(a) provides conclusive presumption of total dependency for child of any age who is found to be physically or mentally incapacitated from earning and is wholly dependent for support upon deceased parent with whom child is living at time of fatal injury. Sullivan v. Comcast & Helmsman Mgmt. Servs., 2022 Cal. Wrk. Comp. P.D. LEXIS 208 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 9.05[3][a], [b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 9, § 9.11[3]].

Penalties—Delay in Payment of Employment Development Department Lien—Award of penalties under Labor Code § 5814 to applicant held proper where defendant's unreasonably delayed payment to EDD pursuant to stipulated agreement at time of settlement by C&R when applicant conditioned Compromise and Release agreement in case-in-chief on defendant's payment of EDD lien so applicant could resume collection of EDD benefits, and expressly sought enforcement of defendant's agreement to pay EDD lien, yet defendant waited for more than three months to make payment. Stamper (Andrew) v. Bay Area Air Quality Management District, 2022 Cal. Wrk. Comp. P.D. LEXIS 213 (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]; SOC, Sectiofn 13.21, Unreasonable Delay – Failure to Pay TD].

Medical-Legal Procedure—Panel Qualified Medical Evaluator Requests— Labor Code §§ 4061 and 4062 both require providing the prescribed QME panel request form to unrepresented employee in order to allow employee to promptly engage in statutory dispute resolution process, and failure by defendant to provide the QME panel request form with triggering objection letter rendered the objection invalid and thus the request for QME panel improper and QME panel invalid. Albarran v. Aramark, 2022 Cal. Wrk. Comp. P.D. LEXIS 218 (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 14.28, Medical-Legal Process – Unrepresented Employee].

Permanent Disability—Commencement of Life Pension Payments—Commencement of payment of life pension shall start immediately after exhausting/ending of PD award even where entirety of PD award was commuted, per LC 4659(a). Suh v. Metro. State Hosp., 2022 Cal. Wrk. Comp. P.D. LEXIS 220 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 8.08[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.50[1], [2]; SOC, Section 16.45, Award – Commutation].

Third-Party Settlements—Approval of Settlement By WCAB—Credit and Attorney's Fees—Third party settlement between defendant and plaintiff assigning credit against applicant's life pension (and potentially against award of future medical care) but not against applicant's attorney's fee was not enforceable as to the applicant attorney's fee where (1) applicant's attorney was never notified of third-party settlement, (2) did not execute or consent to Stipulation to Credit (which was signed only by third-party defense attorney and applicant's civil attorney, and (3) parties did not obtain WCAB approval prior to executing Stipulation to Credit in third-party settlement. Pena (Miguel) v. Aqua Systems, 2022 Cal. Wrk. Comp. P.D. LEXIS 250 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 11.25[1], [2], 29.07[1], [2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 12, § 12.04[2]].

Injury AOE/COE—Bunkhouse Rule—Injury to applicant while unloading horse from trailer, neither belonging to defendant, held compensable based on application of "bunkhouse rule" because applicant lived on defendant's premises, injury occurred on defendant's premises, and while applicant was performing services incidental to his employment and making reasonable use of employment premises. Aguilar v. Hector O. Palma Racing Stable, 2022 Cal. Wrk. Comp. P.D. LEXIS 222 (BPD); [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]; SOC, Section 5.63, Bunkhouse Rule].

Injury AOE/COE—Substantial Evidence—Compensable Consequence Weight Gain—Distinguishing causation of injury verse causation of disability, the WCAB upheld finding of injury as compensable consequence to lung/heart due to weight gain due in part to accepted orthopedic industrial injury, where the weight gain contributed to applicant's breathing, pulmonary, and heart symptoms to render these symptoms, at least in part, a consequences of underlying accepted orthopedic injuries which reduced applicant's ability to engage in physical activities. Citing and discussing Escobedo v. Marshalls (2005) 70 Cal. Comp. Cases 604 (Appeals Board en banc opinion), and South Coast Framing, Inc. v. WCAB (Clark) (2015) 61 Cal. 4th 291, 188 Cal. Rptr. 3d 46, 349 P.3d 141, 80 Cal. Comp. Cases 489. Rios v. Hummer, 2022 Cal. Wrk. Comp. P.D. LEXIS 242 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.05[2], 27.01[1][c], 34.16[3]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.01[4][c], Ch. 16, § 16.51, Ch. 20, § 20.04].

WCAB Jurisdiction—Permanent Disability—Reservation of Jurisdiction for Progressive Insidious Diseases—WCAB held applicant's chronic traumatic encephalopathy (CTE) caused by head trauma he suffered while playing professional football was "insidious progressive disease" permitting extension of jurisdiction beyond five-year limitation in Labor Code § 5804, where (1) disease was not detected until years after applicant stopped playing, and (2) the evidence indicating employee's condition could progress to more serious disabling condition per the opinion of the QME. Citing and discussing Ruffin v. Olson Glass Co. (1987) 52 Cal. Comp. Cases 335 (Appeals Board En Banc Opinion). Oliver v. Tampa Bay Buccaneers, 2022 Cal. Wrk. Comp. P.D. LEXIS 251 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.03, 8.04, 32.02[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.30, Ch. 14, §§ 14.04, 14.06[3]; SOC, Section 6.26, Disability Awarded After Five Years].

Compromise and Release Agreements—Setting Aside For Good Cause—Undue Influence—Order Approving Compromise and Release (OACR), was set aside for good cause based upon duress and undue influence where evidence included medical reports documented applicant's severe psychiatric distress, that she was depressed, anxious and suicidal during treatment, and uncontradicted testimony regarding actions of her attorney and how they influenced her decision to settle her claim. Jackson (Marachelle) v. Door to Hope, 2022 Cal. Wrk. Comp. P.D. LEXIS 237 (BPD). See also, Hayashida v. PG&E, 2022 Cal. Wrk. Comp. P.D. LEXIS 227 (BPD), addressing approval of Stips signed but not yet approved. [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 6.28, Reopening a Compromise and Release].

Permanent Disability—Rating—Successive Injuries—Separate awards of PD of 100% and 40% for successive/separate dates of injury involving different parts of body without overlap held proper. Green v. A Para Transit Corp., 2022 Cal. Wrk. Comp. P.D. LEXIS 224 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.02[3], [4], 8.06[5][d], 8.07[2], 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] & [3]; The Lawyer's Guide to the AMA Guides and California Workers' Compensation, Ch. 7; SOC, Section 10.2, Permanent Disability – Partial and Total].

Psychiatric Injury—Increased Permanent Disability—Violent Acts—Applicant held not entitled to award of permanent disability for psychiatric consequences of industrial injuries where injury did not constitute "violent act" under Labor Code § 4660.1(c)(2)(A), as evidence established force of injury was neither extreme nor intense noting that applicant did not lose consciousness, nor seek immediate medical treatment initially after her fall. McCain v. Wallis Constr., 2022 Cal. Wrk. Comp. P.D. LEXIS 231(BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3][a], [b], [f], 4.69[1], [3][a], 8.02[4][c][ii], [5], 32.02[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.05[3][b][i][ii], 7.06[6], Ch. 10, § 10.06[3][a], [b][i]].

Sanctions—Notice of Intention to Sanction must provide sufficient notice to allow an opportunity to defend; Although evidence establishing a past pattern of sanctionable behavior may be considered, adequate of notice must be provided. Gordon v. Marathon Petroleum Corp., 2022 Cal. Wrk. Comp. P.D. LEXIS 248 (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[1]].

Attorney's Fees—Depositions—Labor Code § 5710 fees not allowed for one hour of time reviewing deposition transcript, and time spent on production of documents where applicant attorney not directly involved. Prior payment at an hourly rate of $450 does not waive a subsequent objection to that hourly rate. Cowens v. ABC Unified Sch. Dist., 2022 Cal. Wrk. Comp. P.D. LEXIS 239 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 20.02[2][h]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.01[9]].

Injury AOE/COE—COVID-19—Burden of Proof—Rebuttal of COVID-19 Presumption—To rebut presumption of industrial COVID-19-related illness under Labor Code § 3212.86, defendant has burden to establish that employee's COVID-19-related illness did not arise out of and in course of employment; To meet this burden defendant must offered substantial evidence such as treatment reports, medical-legal reports or witness testimony indicating that applicant was infected with COVID-19 on non-industrial basis, and requires more than passing reference in medical chart notes to statement made without interpreter and otherwise unsubstantiated in records. Sevillano v. State, 2022 Cal. Wrk. Comp. P.D. LEXIS 255 (BPD); See also, Espinoza v. Browning Fire Protection, Inc., 2022 Cal. Wrk. Comp. P.D. LEXIS 277, holding medical opinion required on issue of causation of injury resulting in diagnosis of Covid; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.05[2][a]-[c], 27.01[1][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.01[4]; SOC, Section 5.19, Presumption of Injury – Covid 19].

Psychiatric Injury—Catastrophic Injuries—Increased Permanent Disability—"Catastrophic" injury pursuant to 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), not found despite 7 successive surgeries to bilateral shoulders; Schaan (Douglas) v. Jerry Thompson & Sons, 2022 Cal. Wrk. Comp. P.D. LEXIS 264 (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].

Psychiatric Injury—Catastrophic Injuries—Increased Permanent Disability— To determine the issue of 'catastrophic' injury factors including (1) intensity and seriousness of medical treatment required by injury; (2) outcome of employee's physical injury when employee is permanent and stationary; (3) impact of injury on activities of daily living (ADLs); and (4) whether injury is analogous to one of injuries specified in Labor Code § 4660.1(c)(2)(B) (loss of limb, paralysis, severe burn, or severe head injury) or is incurable and progressive, are to be considered. Schaan (Douglas) v. Jerry Thompson & Sons, 2022 Cal. Wrk. Comp. P.D. LEXIS 264 (BPD); Wilson v. State of CA Cal Fire (2019) 84 Cal. Comp. Cases 393 (Appeals Board en banc opinion). [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—Rating—Rebuttal of Scheduled Rating— The holding in Dept. of Corrections & Rehabilitation v. WCAB (Fitzpatrick) (2018) 27 Cal. App. 5th 607, 238 Cal. Rptr. 3d 224, 83 Cal. Comp. Cases 16807, precluding an award of total disability in accordance with the facts per LC 4662 does not apply to DOI occurring on or after 1/1/13; LC 4660 apply to DOI prior to 1/1/13, while LC 4660.1 applies to DOI on or after 1/1/13, and LC 4660.1(g) expressly provides, "[n]othing in this section shall preclude a finding of permanent total disability in accordance with Section 4662. Ryan v. Cal. Dept. of Corrections, 2022 Cal. Wrk. Comp. P.D. LEXIS 272 (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, Section10.21, Permanent Total Disability Under LC 4662].

Workers' Compensation Insurance Policies — Notice of Premium Rate Increases—Insurance Code § 11664(e)(6)(A) which requires insurers intending to renew policies to provide 30 days written notice of premium rate increase if premium rate in insured's governing classification is to be increased by 25 percent or greater, held

not applicable where WCIRB made change to classification for employer, and not due to the insurance carrier making a rate increase; i.e. did not result from any change in premium rate of its governing classification, but rather from third party's change (WCIRB) to applicable governing classification criteria which caused insured employer to be assigned new governing classification with higher premium rate. Cover Right Roofing v. State Comp. Ins. Fund, (4th District Court of Appeal) 85 Cal. App. 5th 415, 87 Cal. Comp. Cases 1071; [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 2.61[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 3, § 3.24; SOC, Section 3.9, Cancellation of Insurance].

Medical Treatment—Utilization Review—Assisted Living Facility—Applicant entitled to ongoing in-facility treatment despite initial UR authorization was for limited period and subsequent UR for ongoing care not certified, where defendant failed to establish a showing of changed circumstances in order to initiate additional UR pursuant to Patterson v. The Oaks Farm (2014) 79 Cal. Comp. Cases 910 (Appeals Board significant panel decision). Lopez v. Power by Spark, 2022 Cal. Wrk. Comp. P.D. LEXIS 305 (BPD); Zepeda v. Starview Adolescent Center, 2022 Cal. Wrk. Comp. PD LEXIS 166 (BPD); Nat'l Cement Co., Inc. v. WCAB (Rivota), 86 Cal.Comp.Cases 595 (W/D); Rabenau v, San Diego Imperial Counties Development Services Inc., 2018 Cal. Wrk. Comp. PD LEXIS 97 (BPD); [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].

Medical Treatment—Utilization Review—Timeframes—On denied claim of injury, the defendant is not automatically entitled to retrospective UR review where claim is later accepted, rather it is mandatory that the defendant send written notice of decision to defer UR review per 8 Cal. Code Reg. § 9792.9(b). Gonzalez v. Hospitality Staffing Solutions, 2022 Cal. Wrk. Comp. P.D. LEXIS 286 (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], [6]].

Temporary Disability—Exceptions to Two-Year Cap on Benefits—High-Velocity Eye Injuries—TD extended pursuant to LC § 4656(c)(3)(F) "high-velocity eye injury" when, while crossing street applicant was struck and thrown nearly 10 feet by motor vehicle traveling approximately 30 mile per hour causing injury by sufficient force to fracture both his right and left temporal bones and subsequently develop vision problems as well as eye pain. Citing and discussing, Glover v. ACCU Construction, 2009 Cal. Wrk. Comp. P.D. LEXIS 301 (Appeals Board noteworthy panel decision). Glick v. Knight-Swift Transp. Holdings, Inc., PSI, 2022 Cal. Wrk. Comp. P.D. LEXIS 306 (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].

Medical-Legal Procedure—Qualified Medical Evaluator Panel Requests—Request for QME panel on 16th days from date of mailing by defendant the notice of delay of claim was proper, where notice was mailed from outside of California but served only on parties in California, where applicant waited requisite 15 days (10 days pursuant to Labor Code § 4062.2(b), plus five days for mail service pursuant to 8 Cal. Code Reg. § 10605) to request QME panel. Trigueros v. Gonzalez Ag, 2022 Cal. Wrk. Comp. P.D. LEXIS 296 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.06[1][a], 22.11[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[2]; Ch. 16, § 16.53[1]].

Attorney's Fees—Depositions—Counsel for Applicant not entitled to Labor Code §5710 fees where applicant failed to appear at deposition because applicant forgot about it and deposition did not go forward, distinguishing Escalante v. Kaiser Foundation Health Plan, 2018 Cal. Wrk. Comp. P.D. LEXIS 549 (Appeals Board noteworthy panel decision), in which WCAB allowed attorney's fees, albeit reduced, where applicant appeared at deposition but was not able to testify due to his medications and mental state. Swain v. Pacific Bell Telephone, 2022 Cal. Wrk. Comp. P.D. LEXIS 299 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 20.02[2][h]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.01[9].

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Medical-Legal Procedure—Selection and Assignment of Qualified Medical Evaluators—Applicant's letter sent to defendant requesting medical evaluation and waiting 10 days, plus five days for mailing, before requesting qualified medical evaluator panel from Medical Unit pursuant to procedure in Labor Code §§ 4060 and 4062.2; Applicant need not await notice of denial of injury or notice of delay in determining liability for injury to trigger qualified

medical evaluator panel process. Brar (Binu) v. County of Fresno, 86 Cal. Comp. Cases 430, 2021 Cal. Wrk. Comp. P.D. LEXIS 36 (BPD). See also, accord, Trigueros v. Gonzalez Ag, 2022 Cal. Wrk. Comp. P.D. LEXIS 296 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.06[1][a], [b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[1], [3]].

Injury AOE/COE—Assault By Co-Worker—Decedent's death was sufficiently connected to decedent's employment AOE/COE even though killing was motivated by personal animus involving an alleged affair, where the assailant, the victim and the wife of the assailant all worked together, became acquainted through work, murder occurred at work while decedent was performing services for employer, supervisor was informed of the alleged affair and made requested changes to work schedule, and thus death was sufficiently connected to decedent's employment even though killing was motivated by personal animus. Dacumos v. Pete's Home, 2022 Cal. Wrk. Comp. P.D. LEXIS 274 (BPD); See also, Transactron v. Wkrs. Comp. Appeals Bd. (Spears) (1968) 68 Cal.App.3d 233 [137 Cal. Rptr. 142, 42 Cal.Comp.Cases 236], holding no AOE finding any connection with employment "so remote that it cannot be said to arise" where employee's boyfriend merely went to her place of employment to killed employee/girlfriend unrelated to work. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.41, 4.53[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.04[3][c].]

Petitions for Reconsideration—Citations to Record—A party who Petition for Reconsideration may have their petition dismissed on procedural grounds for failure to specifically cite to record in this matter pursuant to 8 Cal. Code Reg. §§ 10945 and 10972. Chittick v. Heart of Humanity Home Health Care Services, 20922 Cal. Wrk. Comp. PD LEXIS 292 (BPD); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 28.21; Rassp & Herlick, California Workers' Compensation Law, Ch. 19, § 19.06.]

Medical-Legal Procedure—Selection and Assignment of Panel Qualified Medical Evaluators—Objection letter to trigger request for Panel much have clarity of dispute stating specifically the PTP findings/issues which the objecting party disagrees, pursuant to LC 4060, 4061, and 4062.2. Hazen v. Porterville Unified Sch. Dist., 2022 Cal. Wrk. Comp. PD LEXIS 1734, 87 Cal. Comp. Cases 932 (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].]

Medical-Legal Procedure—Selection of Qualified Medical Evaluators—QME not timely struck from panel maybe selected and conduct examination of applicant having the right of scheduling evaluation, and having unilateral right to waive 60-day scheduling timeframe and accept appointment within 90 days of initial appointment request pursuant to Labor Code § 4062.2(d) and 8 Cal. Code Reg. § 31.3. Kowal v. Country of LA, 87 Cal. Comp. Cases 699 (Noteworthy Panel Decision); [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[5]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.53[5].]

Medical-Legal Procedure—Stipulation to Use Agreed Medical Examiner— 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 unilateral withdrawal from AME agreement is based on good cause or where withdrawal will not result in prejudice to other party. Refusing to follow Yarbrough v. Southern Glazer's Wine & Spirits (2017) 83 Cal. Comp. Cases 425 (Appeals Board Noteworthy Panel Decision); Dzambik (John) v. W.C.A.B., 87 Cal. Comp. Cases 773 (W/D); [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].]

Third-Party Settlements—Approval of Settlement By WCAB—Credit and Attorney's Fees—Stipulated credit for third-party recover does not apply to 15% applicant attorney's fee where fee is to be commuted from the far end of award, and where applicant attorney did not participate in, or agree to third-party settlement and stipulated credit. Pena v. Aqua Systems, 50 CWCR 191, 2022 Cal. Wrk. Comp. PD LEXIS 250 (BPD). [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 11.25[1], [2], 29.07[1], [2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 12, § 12.04[2].]

Cumulative Injury—Date of Injury—Latency period need not be exact where exposure to carcinogen is represented by 25-year history of working as a painter from which industrial causation maybe inferable. Villagomez v. Sierra Painting Co., 2022 Cal. Wrk. Comp. P.D. LEXIS 178 (BPD). [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.].