

SIGNIFICANT REPORTED DECISIONS
California Workers' Compensation
2004

I. Jurisdiction

II. Employment

Sanders v. Workers' Compensation Appeals Board (Alco Transportation, Inc., et al.) (2004), 69 CCC 1346, Court of Appeal, Second Appellate District, writ denied.

Applicant, a long-haul truck driver, was repairing a vehicle owned by defendant, when he was injured on February 6, 2003. Defendant claimed he was not liable for applicant's workers' compensation benefits, since applicant was an independent contractor and not his employee. Applicant had entered into a signed independent contractor agreement with the defendant establishing the intent of the parties as to the characterization of their relationship.

At trial, the WCJ found in favor of defendant citing Labor Code §§2750.5 and 3353. There is a rebuttable presumption that a worker who performs a service for another is an employee. However, §2750.5 sets forth the elements necessary to rebut that presumption and to establish a bona fide independent contractor status. These elements essentially revolve around the worker's "right to control" the performance of his work duties. Labor Code §3353 defines an independent contractor as someone who renders service for a specified recompense for a specified result and who is under the control of his principal as to the result of his work only and not as to the means by which that result is accomplished.

In this case, the WCJ found that applicant was in total control of the means he used to accomplish the end result which was delivery of freight to a designated location. The WCJ "noted that applicant's work required a special license to operate a commercial vehicle; that Applicant provided his own tools for maintaining the trucks...Applicant could decline any work, could request specific runs, and could choose route, gas stops, and layovers. The WCJ indicated that Applicant was paid a set fee or a percentage of the load, with no deductions. These factors indicated that Applicant was an independent contractor; not an employee..."

The Appeals Board affirmed the WCJ and the Court of Appeal denied the writ.

III. Insurance Coverage

Roth v. L.A. Door Company (2004) 115 Cal. App. 4th 1249, 69 CCC 86 (Certified for Publication).

Roth, while working for Nutrilite Products was injured when an overhead trailer door struck him on the head. Nutrilite paid Roth workers' compensation benefits through a third-party administrator although they had a high retention insurance policy with Insurance Company of Pennsylvania whereby Nutrilite was responsible for the first \$250,000 per incident. At various times during this litigation, as the court explained in a footnote, Nutrilite claimed to be either self-insured or insured with a high deductible policy. Roth filed suit against L.A. Door, for negligence, strict products liability and breach of warranty. Nutrilite filed a complaint in intervention seeking reimbursement for the \$78,985.99 in workers' compensation benefits paid to Roth. L.A. Door was insured by United Pacific Insurance Company and Roth's civil claim was covered by that policy. United Pacific was a subsidiary of Reliance Insurance Company who was declared insolvent. Roth settled his claim against L.A. Door, before trial and dismissed his complaint. L.A. Door admitted liability.

The matter was tried on the issue of whether a workers' compensation subrogation claim is considered a covered claim under statutes applicable to CIGA and, if not, whether Nutrilite could proceed directly against L.A. Door. The trial court ruled against Nutrilite because Nutrilite, as a "permissibly self-insured employer", was considered an insurer, Nutrilite's claim was a subrogation claim and Nutrilite was not the original claimant since their claim was derivative by way of subrogation. The Court of Appeal confirmed the trial court's analysis after reviewing relevant statutes and distinguishing prior cases.

Pursuant to Insurance Code §1063.1 et seq, CIGA pays and discharges "covered claims" which are defined as the obligations of the insolvent insurer. Several types of claims are excluded from payment by CIGA to include obligations to insurers, insurance pools, or underwriting associations, and their claims for contribution, indemnity or subrogation. Also exempted are claims to the extent they are covered by other insurance of a class covered by this article or any claim by any person other than the original claimant under the policy of insurance in his or her name, not a claim by right of subrogation. Citing *Denny's Inc. v. WCAB* (2003) 68 CCC 1, the court concluded that a self-insured employer is an insurer for workers' compensation purposes and meets the requirements of "other insurance." Hence, Nutrilite, as a self-insured entity (or apparently a mostly self-insured entity due to a high deductible insurance policy referred to as self-insured retention by the court) was the equivalent of an insurer for the purpose of applying CIGA statutes. CIGA was not created to protect the self-insurer or other insurers, but to protect injured workers by making certain their disability claims would be paid. Since Nutrilite qualifies as an "insurer" providing "other insurance", its claim must be excluded from those covered claims CIGA is responsible for paying.

Leo's Associates v. Department of Industrial Relations (2004) 120 Cal. App.4th 628, 69 CCC 697, Court of Appeal, Second Appellate District, Div. 4, certified for publication.

Leo's Associates (Leo's) had secured payment of compensation by purchasing insurance with State Compensation Insurance Fund (SCIF). On October 24, 2000, SCIF notified Leo's that its policy would be cancelled effective November 7, 2000, unless past-due payroll reports and premium payments were made. Leo's provided reports and submitted premium through January 1, 2001. On January 26, 2001, Division of Labor Standards Enforcement (DLSE) conducted an inspection and found that Leo's was unable to show proof of compensation coverage. DLSE issued a stop order and assessed a penalty of \$18,000 (\$1,000 for each employee). On February 7, 2001, SCIF informed Leo's that the cancellation was withdrawn, and that continuous coverage was provided by the policy. At a DLSE hearing, the employer provided a May 2001 certificate of coverage for a period including January 26, 2001, and requested the stop order and penalty be annulled. Testimony was also received from a SCIF agent that on January 26, 2001 there was no coverage in place. Following the hearing, DLSE upheld the penalty assessment.

Leo's filed a Petition for Writ of Mandate with the Superior Court, which was denied. Leo's appealed. The Court of Appeal held that a retroactive reinstatement of insurance does not satisfy the requirement that the employer be insured where no coverage was in effect on the date of the DLSE inspection. The Court relied upon Woodline Furniture Mfg. Co. v. Department of Industrial Relations (1994) 23 Cal. App. 4th 1653, 59 CCC 271, which held that insurance must be in effect on the date the penalty is assessed and cannot be avoided by procurement of retroactive insurance. The Court distinguished Catalina Car Wash, Inc. v. Department of Industrial Relations (2003) 105 Cal. App. 4th 162; 68 CCC 19, where the penalty assessment was annulled when lack of notice of cancellation was established. In Catalina, the policy had remained in effect as a matter of law, notwithstanding the employer's failure to pay premium.

Milbauer v. Boostan (2004) 69 CCC 246, Appeals Board *en banc*.

Previously, the Appeals Board determined that Erez Boostan, individually, and doing business as American Runner Attorney Service was the proper employer in Milbauer v. Boostan (2003) 68 CCC 1834, Appeals Board *en banc*. Additionally the Appeals Board chastised the Uninsured Employers' Fund (UEF) for perceived dilatory conduct in locating the correct employer and imposed some clear responsibilities on the UEF to include, being compelled to provisionally appear at proceedings and ordered to assist in determining the correct legal identity of the employer pursuant to Labor Code §3716(d)(4) when, after the Applicant having made a good faith attempt to do so, failed in locating the correct uninsured employer. The Appeals Board set forth several procedures intended to obtain the early and active participation of the UEF when either the employee, after making a good faith attempt fails to establish the correct legal identity of the employer, or when the UEF objects to the correct legal identity of the employer as

asserted by the employee. The Appeals Board cautioned the UEF that failure to follow these procedures could result in sanctions and attorney's fees being imposed against them pursuant to Labor Code §5813 and Title 8, California Code of Regulations §10563.

From the original *en banc* opinion, the UEF filed a Petition for Reconsideration alleging that it had been newly aggrieved since new procedures were imposed affecting the UEF's obligations in workers' compensation cases, the Appeals Board went beyond the issue of employment which was the sole question raised by the UEF's original Petition for Reconsideration, that the Appeals Board had mischaracterized the UEF's efforts to establish the correct legal identity of applicant's employer without giving the UEF a fair opportunity to respond to the Appeals Board's concerns and that the Appeals Board failed to comply with the Administrative Procedures Act by imposing provisional joinder standards that conflict with Labor Code §§3716(d) and 5502(f). Although they did not contest the findings of the Appeals Board on the identity of the legally responsible employer, the UEF also argued that the due process rights of employers had been abrogated, that the UEF's discretionary priorities under the Labor Code had been impermissibly reordered which interfered with the UEF's overall enforcement policies and the UEF was subject to the improper announcement that they were liable for Labor Code §5813 sanctions.

The Appeals Board summarily dismissed the UEF's petition by finding that they were not aggrieved by the original *en banc* decision and only aggrieved parties are entitled to the remedy of reconsideration. Further, the Appeals Board explained that reconsideration can only be taken from a final order and the only final order in the Appeals Board's decision had been a finding identifying the legally responsible employer; a finding that the UEF was not contesting. To the extent that the UEF's Petition for Reconsideration actually contests the identity of the correct employer, the UEF's petition is successive, leaving them with either being bound by the determination, or filing a timely petition for writ of review.

The Court of Appeal has granted the writ. A date for oral argument has not yet been set.

General Casualty Insurance, et. al. v. Workers' Compensation Appeals Board; California Insurance Guarantee Association, et al.
(2004) 123 Cal.App.4th 202, 69 CCC 1207, Court of Appeal, Second Appellate District.

Remedy Temp, Inc., provided workers to its clients pursuant to a Service Agreement. The Service Agreement relating to applicant Miceli provided that Remedy Temp would furnish pay and provide workers' compensation insurance through Reliance Insurance Company (Reliance). Remedy Temp's client, Jacuzzi, was an additional named insured on the Reliance insurance policy that was obtained and paid for by Remedy Temp. The Service Agreement further provided that Remedy Temp would hold Jacuzzi harmless from workers' compensation claims. Jacuzzi secured payment of workers' compensation for its regular employees by a policy of insurance issued by American Home Assurance (American).

On March 1, 2000, Miceli sustained an injury while working on the payroll of Remedy Temp in Jacuzzi's shipping and receiving department. On October 3, 2001, Reliance was placed in receivership and the California Insurance Guarantee Association (CIGA) was joined to cover the claim. CIGA sought dismissal on the ground that Jacuzzi was a special employer and was insured by American.

Various claims against Remedy Temp and CIGA, as administrator for Reliance, as well as various alleged special employers and their insurers, were consolidated. After a hearing it was determined that a special employment relationship existed between Miceli and Jacuzzi, and that Remedy Temp and Jacuzzi were jointly and severally liable to Miceli for workers' compensation benefits. Additionally, it was found that Insurance Code §11663 (which provides that liability follows payroll) applies only as between insurers (not including CIGA), and that CIGA was not liable for compensation benefits where other insurance, including here Jacuzzi's policy with American, provided coverage. Therefore, CIGA was ordered dismissed. The WCJ's findings were sustained by the Appeals Board. Remedy Temp, Jacuzzi, and American sought judicial review.

Appellants contended that the contractual intent of the parties was that Remedy Temp and its insurer would bear liability for workers' compensation benefits for any injury sustained by a Remedy employee placed with Jacuzzi. The WCAB had found that to be the parties' intent, and further found that their intent should be enforced pursuant to Labor Code Section 3602(d) and Insurance Code Section 11663. Those sections, it was argued, extinguish the joint and several liability of the special employer and its insurer. CIGA responded that Labor Code §3602(d) applied to situations of tort liability, not joint and several liability, and that CIGA is not an insurer subject to Insurance Code §11663. Jacuzzi and American contended that American had no liability in light of Remedy Temp's insurance policy with Reliance, or its alternative endorsement, and the fact that American never collected premium. CIGA responded that collection of premium does not define the extent of coverage and that policy exclusions must be conspicuous, clear and plain. American responded that none of the approved endorsements could have been used to eliminate coverage for special employees under the relationship that existed between Remedy Temp and Jacuzzi. CIGA and American disputed whether a Form 11 exclusion could be fashioned to exclude general employees of Remedy Temp from coverage by Jacuzzi's insurer. They further disputed whether such an exclusion would be approved by the Workers' Compensation Inspection Rating Bureau (WCIRB) or the insurance commissioner. The Court found that Jacuzzi and American had not attempted to fashion an appropriate exclusion, and that "there is no reason to doubt the Insurance Commissioner would have approved an appropriate endorsement." (69 CCC. 1207, at 1239.)

The Court held that Labor Code §3602(d) and Insurance Code §11663 do not extinguish the joint and several liability of a employers for workers' compensation benefits. Section 3602(d) would preclude duplicate premium and coverage had Jacuzzi been insured by Reliance. However, in this case it had secured workers' compensation coverage from two insurers, and failed to exclude coverage for special employees under the American

policy. Therefore that policy was available to pay compensation to Miceli as a special employee, and CIGA was relieved of the obligation to pay pursuant to Insurance Code §1063.1 (c) (9).

The Supreme Court has granted review.

IV. Injury AOE-COE

Sharp Coronado Hospital.v. WCAB (Brown) (2004) 69 CCC 205 (Not Certified for Publication).

Here the Court annulled the findings of the WCJ, which had been affirmed by the WCAB in a 2-to-1 decision, that Brown's injury was compensable and not barred by the "going and coming" rule, falling within the "special risk" exception to that rule.

In reversing the Board, the Court stated : "Both the WCJ and the Board found Brown was placed at a greater risk of injury because Sharp prohibited her from parking in front of the hospital where she would not have to cross the street. However, the basis for this finding is inconsistent with the holding in *Chairez v. WCAB* (1976) 41 CCC 162, where the employer made onsite parking spaces unavailable to its employees, instead requiring them to park around the corner on public streets. The fact of the employer's parking policy did not change the *Chairez* court's analysis or its holding. Here too, Sharp's employees parked on nearby public streets due to restricted parking adjacent to the hospital. As in *Chairez*, Sharp did not create a special risk by failing to provide employee parking closer to its premises. Requiring that employees "regularly" park on a public street does not make the risk of injury "quantitatively greater than risks common to the public."

The Court also distinguished *Parks v. WCAB* (1983) 48 CCC 208: "In that case, Parks, a teacher, left the school parking lot to drive home. She stopped her car for departing school children crossing the street between cars. While Parks was stopped, three youths opened the driver's door, wrestled her purse away from her and fled. She sought workers' compensation benefits for the disability she suffered as a result of the incident. The court held Parks was "regularly subjected, at the end of each day's work, to the risk of becoming a . . . 'sitting duck' for an assault. . . . Her risk was clearly 'quantitatively greater' than that to which passing motorists might be subjected on a sporadic or occasional basis. Parks' employment required her to pass through the zone of danger each day. As such, her employment created a special risk in leaving the school parking lot. Thus, the going and coming rule did not apply to preclude compensation benefits.

Here, in contrast, there was no "zone of danger" through which Brown was required to pass on a daily basis. Sharp employees were able to park on streets adjacent to the hospital facility, allowing them access to the workplace without crossing a street. The fact that Sharp encouraged or even required its employees to park anywhere other than directly in front of the hospital does not bring

Brown's injury within the special risk exception. Further, crossing Prospect Place presented no *distinctive* risk, as that street is not a thoroughfare. Any member of the public was as likely to be struck as was any employee crossing Prospect Place. Because Brown was not subject to a risk "distinctive in nature or quantitatively greater than risks common to the public, the special risk exception to the going and coming rule does not apply."

State Compensation Insurance Fund v. WCAB (Nichols) (2004) 69 CCC 342 (not certified for publication).

Applicant worked as a plasterer, and he and his co-workers routinely joked and played around while working. On the day of applicant's injury, however, their joking "turned serious" when applicant told a co-worker to "shut up" and grabbed his co-worker's shirt from behind. The co-worker lost his balance, and they both fell from the scaffold on which they were working, with applicant breaking his left ankle.

The WCJ found that applicant's injury was the result of horseplay, but also found his injury compensable under the employer condonation exception. The Appeals Board denied reconsideration and incorporated the WCJ's Report.

On writ, SCIF contended that there was no evidence to suggest the employer condoned the type of physical horseplay that caused applicant's injury.

In affirming, the Court concluded that there was substantial evidence to infer that employees routinely engaged in horseplay of the type resulting in applicant's injury. Not only joking, but also "playing around," occurred on a regular basis. Although grabbing people from behind was not part of the daily routine and the employer did not condone that activity, some forms of grabbing, depending on how it was done, was normal. Also, the employer never informed applicant not to grab another employee.

City of Tulare v. Workers' Compensation Appeals Board (Furtaw)
(2004) 69 CCC 451, Court of Appeal, Fifth Appellate District, writ denied,
not certified for publication.

Applicant (Furtaw) worked as a police officer for the City of Tulare (City). The City expressly "permitted and encouraged" its officers to use police vehicles for any normal domestic business while off-duty and, during such use, the officer's family members could ride in the vehicle. Also, the officer could take the vehicle outside the City with prior approval. As a condition of using a police vehicle for personal use, an officer was required to listen to the police radio and to advise the dispatcher if he or she was able to respond to an emergency call. The off-duty officer also had to be "appropriately attired to effectively perform a police function, while at the same time presenting a favorable image." The purpose of the program permitting personal use of police vehicles was to create "police omnipresence" and "greater [police] visibility" by having an increased

number of police vehicles on the City streets, and also to deter crime and to provide a quicker response time to emergency calls.

Furtaw had an accident in his police vehicle while driving his children to school on his way to work. (Apparently, Furtaw was in his uniform.) The accident occurred outside of the City and outside Furtaw's direct commute to work; however, he had prior approval from a supervising lieutenant to drive his children to school outside the City.

In finding Furtaw's injury *not* barred by the going and coming rule, the Court noted that exceptions to that rule exist where the trip involves an incidental benefit to the employer, not common to commute trips by ordinary members of the work force; or where an employee engages in conduct reasonably directed toward the fulfillment of his employer's requirements, performed for the benefit and advantage of the employer. An employee can still be within the course of employment even where he or she combines a personal act with the performance of acts in furtherance of the employer's business.

Here, Furtaw's conduct at the time of his injury benefited the City because he was driving a marked police vehicle with the radio turned on and could respond to emergency calls if needed. In accordance with the stated purpose of the City's personal use program, Furtaw's use of the vehicle while off-duty was designed to provide an increased police presence and reduce crime. Thus, Furtaw's conduct was reasonably directed toward the fulfillment of his employer's requirements for the benefit and advantage of the employer falling outside the ambit of the going and coming rule.

El Rancho Unified School District v. Workers' Compensation Appeals Board (Seminoff-Silvada) (2004) 69 CCC 1330, Court of Appeal, Second Appellate District, writ denied.

Applicant, a third-grade teacher for El Rancho Unified School District, sustained an injury when she fell while attending a summer workshop sponsored by California State University Los Angeles (CSULA). The workshop was given on El Rancho school premises. Applicant's principal had encouraged her on three occasions to attend the workshop, and all teachers but one also attended. Although the workshop was not required for applicant to obtain her teaching license, she felt coerced to attend, and felt that if she did not go, it might affect her evaluation by the principal. Attendees received a \$500 stipend from CSULA, issued by the University of California (UC), using legislatively appropriated funds. Applicant received pamphlets and books as part of the seminar.

The WCJ found that applicant sustained an injury arising out of and occurring in the course of her employment with El Rancho. The judge applied the rule of *Ezzy v. WCAB* (1983) 48 CCC 611, a two-pronged test: (1) whether applicant subjectively believed that her participation in the workshop was expected, and (2) whether that belief was objectively reasonable. Applicant credibly testified that she believed her attendance was expected by the principal, who was her supervisor and prepared her evaluations, and pressured her to attend. The belief was objectively reasonable, since the purpose of the

workshop was to enhance teaching skills and the principal represented that the district wanted everyone to attend. The only connection with UC was the \$500 stipend, and CSULA supervised the class, which was designed to enhance the skills of El Rancho teachers. Under *Ezzy*, the injury was sustained in the course and scope of her employment with El Rancho.

A WCAB panel denied reconsideration, agreeing with the trial judge that the two-pronged *Ezzy* test had been satisfied. The panel also agreed with the finding that she was injured in the scope of her employment with El Rancho. The Board rejected an argument that since applicant had failed to attend several prior workshops, with no effect on her career, there was no evidence that she had been previously pressured to attend. The Court of Appeal denied review.

Myhra v. Workers' Compensation Appeals Board. (2004) 69 CCC 1336, Court of Appeal, Third Appellate District, writ denied.

Decedent, a Hayward police officer, finished his shift at 2:00 a.m. on November 14, 2002, changed to civilian clothing, and met with his sergeant and other officers at a bowling alley parking lot for “choir practice,” where they would discuss work, sports and personal matters, and drink beer. Afterward, applicant headed home to Tracy, some 40 miles away, in his personal vehicle, and was killed in an auto accident on the way. His widow sought death benefits, and the claim was denied based on the going and coming rule.

At the hearing, the supervising sergeant testified that the sessions took place on a monthly basis, for about an hour, and some work matters were discussed. Attendance was not required, and beer and soft drinks were available. About half the officers attended, but no lieutenants or captains, and it would be unlikely that attendance would influence promotions. The chief testified that he did not feel attendance would affect an officer’s career. The widow testified that decedent had told her that he felt he had to attend to further his career.

The workers’ compensation judge held the death noncompensable, finding that it did not come within any exception to the going and coming rule. Applicant sought reconsideration, citing the recreational activity case of *Ezzy v. WCAB* (1983) 48 CCC 611 and contending that the “choir practice” was a reasonable expectancy of employment, placing the commute within the special mission exception to the going and coming rule. The trial judge recommended denial of the petition, not being persuaded that *Ezzy* applied. He held that the meeting was an off-duty social get-together, neither organized, sponsored, controlled nor required by the employer. It was the kind of informal activity that the Legislature intended to exclude. The judge found the testimony of the supervisors, who had actually experienced “choir practice,” to be more persuasive than that of the widow.

The WCAB denied reconsideration, adopting the judge's report, and the Court of Appeal denied review.

Talent Tree, Inc. v. Workers' Compensation Appeals Board
(Walerstein), (2004) 69 CCC 1257, Court of Appeal, Second Appellate District, not certified for publication.

Applicant was hired on May 8, 2002, by Talent Tree, a temporary employment agency, to work for outside employers who were clients of Talent Tree. The employees were to complete a weekly time card and have it signed by the supervisor at the temporary work assignment. They could submit the time card by either of two methods: (1) by mailing the time card to the payroll office in Brea in a self addressed envelope provided by Talent Tree, or (2) by depositing the completed time card in a drop box at the Tarzana office of Talent Tree by noon on Monday. Cards mailed to the Brea office had to be received by Tuesday in order to be processed; cards deposited at the Tarzana drop box were sent by messenger to the Brea office on Monday afternoon. Paychecks were prepared at Brea on Wednesday and were available to the employees on Thursday evening or Friday. The process was explained to Walerstein at the time she was hired, and she understood that there was a risk that a mailed time card would not be received in time for payroll processing in which case the paycheck would be delayed by a week.

Applicant lived about two miles from Talent Tree's Tarzana office, and was placed to work at Blue Shield in Canoga Park, about five miles from the Tarzana location. Applicant worked at Blue Shield on May 9, 2002 and May 10, 2002. She drove from home to the Blue Shield work site without reimbursement for time or mileage in the commute. She had her time card signed by her supervisor on May 10, 2002, drove to the Talent Tree office in Tarzana, and deposited the completed time card in the drop box at the Tarzana office. En route to her home from the Tarzana office, after dropping off her completed time card, applicant was injured in a traffic collision.

After a hearing, a WCJ found the claim to be barred by the going and coming rule. Applicant's petition for reconsideration was granted and the Appeals Board reversed the WCJ's determination. The trip to the drop box was found to be a reasonable expectancy of employment because Walerstein had been encouraged to use the box and the employer benefited by maintaining good employee relations due to timely processing the payroll. Talent Tree petitioned for judicial review.

The Court of Appeal, in a split decision, noted that the going and coming rule provides that an injury incurred in a local commute to a fixed place of business, during fixed hours, is not within the scope of employment unless an exception to the rule applies. The going and coming rule applies to employees of temporary employment agencies placed with various businesses to report at a fixed place of business at fixed hours. The Court noted that the workers' compensation law is to be liberally construed. It turned to the special mission exception to the going and coming rule, which applies where the employee is required to work at multiple job sites or at special hours; to provide transportation for tools or equipment required for the job; to travel to a special event,

training course, or union activity; or when he or she is required to wear a uniform and render aid or services during the commute. Travel regularly twice a day to a split shift is not within the special mission exception; travel on irregular occasions to a courthouse to testify is not a special mission.

The Court found no existing authority on the issue of whether travel to turn in a time card was a special mission. It noted that travel required to pick up a paycheck at a time and location specified by the employer had been found to constitute a special mission, but travel to pick up a paycheck at a place or time within the employee's discretion was not. The WCJ had found that the drop box was created for the convenience of the employees and that its use conferred no benefit on or for the employer. The Appeals Board had found the use of the box was a benefit to the employer by facilitating the timely payment of wages.

The majority held that where the employee was provided with alternative means of submitting the time card, the use of the drop box was at the employee's election and that there was no evidence that mailing a time card had resulted in delays in payment of wages. Under these circumstances, there was no substantial evidence that the delivery of the time card to the drop box was a special mission.

The Court turned to other exceptions to the going and coming rule. It noted that applicant was not paid for her time or her travel expenses for delivering the time card to the drop box. She was not required to use her car during work nor to transport tools. Submission of the time card was an ordinary, not an extraordinary part of applicant's work. The majority found that applicant's claim was barred by the going and coming rule.

The dissent by Justice Mosk noted that exceptions to the going and coming rule have been found to apply where a non-routine transit is undertaken for the employer's benefit at its direct or implied request. Taken in conjunction with the liberal construction required by Labor Code §3202, the exceptions to the going and coming rule have "eroded the rule." In the view of the dissent, the Board's opinion was supported by substantial evidence. In his view, the act of turning in a time card, a business tool for the benefit of the employer, made a stronger case for compensability than the act of picking up a paycheck. The special mission exception should therefore have been found to apply. "That employees will make special trips to turn in a time card at the agency was an accepted practice by custom and reasonably to be anticipated by the employer." Justice Mosk would have found the injury to be compensable under either the special mission exception to the going and coming rule or the personal comfort doctrine.

Based on the majority opinion, the decision and order of the Workers' Compensation Appeal Board were reversed.

Time Warner Entertainment Company/Warner Brothers v. Workers' Compensation Appeals Board, (Kimberly) (2004) 69 CCC_____, Court of Appeal, Second Appellate District, writ denied (November 4, 2004).

Applicant, a paint foreman, was involved in an altercation with a co-employee on October 23, 1998 in which he claimed to have injured his back, left shoulder, neck, left upper extremity, and psyche. An additional Application was filed for a cumulative trauma injury to his knees. Both claims were rejected by the employer.

At the trial of November 15, 2001, applicant was the only witness. He testified that on his way to work, he was cut off by another motorist who was driving erratically. Both he and the driver of the other vehicle, Brian Wall, pulled into the company parking lot and exchanged words in the crosswalk. This was when applicant realized that he and Wall worked for the same company. Later, Wall physically assaulted him on the employer's premises. The two men had not previously had any contact with each other.

The WCJ issued a "take nothing" in both cases, finding the specific injury not to be compensable because it arose out of a personal grievance. The Findings and Order was undated, but was served on December 3, 2001.

Applicant filed a Petition for Reconsideration on May 31, 2002 contending that that the injury was compensable as long as the employment was a contributing cause of the altercation. He also claimed violations of due process since defendant's pre-trial brief was served on his former attorney and the WCJ limited the testimony. The WCJ recommended that applicant's petition be dismissed as untimely, or denied as the result of a personal conflict that bore no causal relationship to his job.

The Appeals Board granted reconsideration, holding that the petition was timely filed because the Findings and Order was served on applicant's prior attorney only and was not received by applicant until May 7, 2002. The Board affirmed the WCJ's denial of the cumulative trauma because there was no evidence in the record to support the claim, but found the injury arising out of the altercation to be compensable.

Citing *California Compensation & Fire Co. v. W.C.A.B. (Schick)* (1968) 33 CCC 776, the Appeals Board stated that injuries arising out of "mixed" employment and nonemployment-related risks are compensable. It was noted that applicant's assailant did not testify and the unverified statements of Wall and some security officers did not constitute substantial evidence. Thus, the only reliable testimony was that of applicant.

Regarding the causal connection between the injury and the employment, the Appeals Board commented,

"This does not appear to be purely a personal risk. It is not as if Mr. Wall was unrelated to the employer and sought applicant out at his workplace. There is a job connection, namely, both antagonists are employees of the defendant in this matter. Accordingly, we find this is a mixed risk, and thus the injury is industrial."

Commissioner Cuneo concurred that the petition was filed timely and that the evidence did not establish a cumulative trauma. However, he dissented based on his opinion that the specific injury arose out of a personal grievance and that the employment premises merely provided a stage for the altercation to take place.

Being aggrieved for the first time, the defendant filed a Petition for Reconsideration contending that the specific injury should not have been found compensable and that it was deprived of its right to litigate an initial physical aggressor defense and other issues, that had been bifurcated at trial and deferred. The Appeals Board again granted reconsideration and affirmed its prior decision, but amended the findings to defer the initial physical aggressor defense. The Board noted that the bifurcation violated 8 Cal. Code Reg. § 10560 because there was no obvious reason for it. Commissioner Cuneo again dissented on the ground that the specific injury should not have been found compensable.

Defendant filed a Petition for Writ of Review that was denied by the Court.

V. Conditions of Compensation

Broers v. WCAB (2004) 68 CCC 1767 (Not Certified for Publication).

Applicant, a phone company customer service representative, sustained an admitted industrial low back injury through August 28, 2000, from sitting in an ergonomically incorrect chair. She also claimed injury to her psyche as a consequence. After a hearing the WCJ awarded 15 percent permanent disability for the back injury, but held that applicant failed to meet her burden of proof of a compensable psychological injury. Applicant sought reconsideration, and in her report and recommendation, the WCJ commented that at trial applicant offered little testimony about emotional difficulties, and the reports of the psychiatric QME's reflect that she was addressing perceived employment events rather than the back injury as the genesis of her emotional problems. The WCJ noted applicant's argument that the WCJ should have asked the questions since a doctor stated that a determination as to actual employment events is up to the trier of fact. Not so; under applicant's theory, the trial judge would conduct all of the direct and cross-examination. That is not the job of the trial judge when the parties are represented by counsel. Moreover, if it was up to the WCJ to take testimony on the psyche issue, then why did applicant's counsel offer testimony on the back problem? A Board panel denied reconsideration, adopting the WCJ's recommendation, and applicant sought review.

The Court of Appeal rejected applicant's argument that the Board violated L.C. §5908.5 by failing to state the evidence relied upon. The WCJ's report and recommendation expressly stated that she found the reports of the QMEs inconsistent and that applicant's testimony failed to support an industrial finding as to the psyche. This was sufficient to allow review.

Turning to the evidence, the court noted that L.C. §3208.3(b)(1) requires that a preponderance of evidence show actual events of employment to be predominant (i.e., greater than 50 percent) in causing a psychiatric injury. A precipitating physical injury is such an actual event of employment (*Lockheed Martin Corp. v. WCAB (McCullough)* (2002) 67 CCC 245). Applicant cites portions of the medical record discussing her

troubles at work as meeting the burden of proof. The court, however, cannot substitute its choice of the most convincing evidence for that of the Board, nor can it reweigh the evidence. It may decide only whether the decision is supported by substantial evidence. Her doctor believed applicant suffered a very modest psychiatric impairment caused by reactions to personnel actions rather than directly by the back injury.

Applicant testified only that her emotional problems were “in some respects” related to the back problem, leaving the door open for other causal factors. Although another QME found a greater causal connection between the physical and psychological injuries, it was within the Board’s discretion to find that applicant failed to meet her burden of proof of greater than 50 percent industrial causation.

The court denied the petition for review.

E. & J. Gallo Winery v. WCAB (Sizar) (2004) 69 CCC 7 (Not Certified For Publication).

Applicant worked as a licensed vocational nurse for Gallo at its medical facility during the “graveyard” shift. In January 2001, the company decided that the shifts needed to be rotated every 6 weeks to “promote cross- and competency training.” The LVN’s complained, and on March 5, 2001 the rotation cycle was increased to every 4 months.

Applicant had difficulty adjusting her varying sleeping patterns when she rotated back to the “graveyard” shift on April 2, 2001. She became stressed, irritable, impatient, short-fused, and withdrawn. In July 2001 applicant’s treating physician excused her from work and referred her to a psychologist.

Applicant first saw the psychologist on July 13, 2001. She told the doctor about the shift change and also explained that she was overwhelmed that her granddaughter’s family was moving to Hawaii. The psychologist expressed the opinion that the rotating shift schedule had triggered her psychophysiological distress and extended leave from work “on condition she be allowed to return to a graveyard shift only.” Gallo refused to accommodate her restrictions.

Applicant’s disability was extended to January 8, 2002, at which time applicant returned to work on a fixed graveyard shift.

Applicant’s QME concluded that applicant sustained a depressive disorder as a result of her employment. Defendant’s QME concluded that actual events of employment failed to be predominant as to all causes combined of her psychiatric condition. He attributed her current problems to an alcoholic and abusive father and her reaction to her granddaughter’s move to Hawaii.

The WCJ concluded after trial that applicant failed to prove that actual events of employment predominantly caused her psychological injury as required by L.C. §3208.3(b)(1). The WCJ ordered that applicant take nothing.

Applicant sought reconsideration. The WCJ's report and recommendation affirmed the decision, but admitted that applicant's argument on reconsideration was persuasive in general and had applicant's QME provided a percentage of causation the report would have been more credible. The WCJ indicated that defendant's QME's focus upon non-industrial issues was not well supported by the treating records or applicant's credible testimony.

The WCAB granted reconsideration and concluded that the opinion of applicant's QME sufficiently established that her employment was the predominant cause of the injury. The case was remanded to the WCJ to determine her entitlement to disability benefits. The WCAB then denied defendant's petition for reconsideration.

The court of appeal analyzed the language of applicant's QME and concluded that her discussion of the other stressors was sufficient to support a finding of industrial injury. The court acknowledged that the doctor had not repeated the language of the statute, but did establish a basis for compensability.

Defendant had further objected that applicant's QME had based her opinion on an incomplete and erroneous medical history. The court noted that the supplemental report was inaccurate, but that the doctor's original report had correctly identified the timing of the granddaughter's move to Hawaii. It held that the WCAB could reasonably find that applicant's QME had based her original diagnosis on an accurate factual basis.

Finally, defendant argued that the changing of applicant's work schedule was a "good faith personnel action;" and that the injury was not compensable per L.C. §3208.3(b)(3). It relied upon Arana v. WCAB (1999) 64 CCC 1251 (writ denied), in which a supermarket employee became depressed and eventually committed suicide in part because the employer did not provide him with a different shift. Although the WCAB described the employment decisions in that case as good faith personnel actions, the WCAB did not need to apply the defense because the actual events of employment did not predominate.

The court further distinguished Arana by noting that applicant's symptoms did not manifest immediately when she was given a new schedule, but rather, months later after she developed difficulties with lack of sleep, irritability and increased stress. The court explained that defendant's reasoning would effectively nullify L.C. §3208.3 by precluding compensation in nearly every psychological injury traceable to some prior good faith personnel action.

The court denied defendant's writ.

Pacific Gas and Electric Co. v. WCAB (Bryan) (2004) 114 Cal.App.4th 1174, 69 CCC 21.

Applicant was an employee of PG&E for over 30 years. He first worked as a meter reader and then spent 13 years as a “collector.” A collector would go to the homes of delinquent customers to either collect money or turn off the gas and electric service. He described the job as “thankless” and described times when he was dog-bitten, cursed at, chased out, had rocks thrown at him, guns shoved in his chest, and called everything one can imagine. Nonetheless, he said he loved that job because he could walk away from it.

Applicant’s job was eliminated in 1998. He transferred to a front counter job in the office. He again described a stressful environment. It was a small room serving customers that did not like the company. He had to listen to abusive comments; the smell was atrocious; and some customers would even threaten violence.

It got worse in 2000 when the company began to downsize. The state was going through a period of brownouts and blackouts and the company was in serious debt. There was an increase in customers and customer complaints. Many customers thought it was a big company scam.

It was at this time that the applicant started having chest pains for which he sought medical care.

The pressure increased again in 2001 when the company filed for bankruptcy. Applicant was concerned along with all of the employees, when the bankruptcy was filed. He had savings in stock in the company, he had stock with a value of approximately \$200,000.

The pressure became so great he was forced to leave work on 10/5/01. He filed a claim for industrial injury.

The defense doctor played down the events at work and emphasized the stressors away from work, including applicant’s hernia; that he was a recovering alcoholic; that his father had died recently; and that his daughter had health problems. The defense doctor estimated that the 35 to 40 percent of applicant’s emotional problems were caused by his work.

The applicant’s doctor disagreed in virtually every respect. He expressed that the disability was “entirely industrial.”

After a hearing, the WCJ ruled applicant was not entitled to benefits because work stress was not the predominate cause of his psychiatric injury within the meaning of L.C. §3208.3(b)(1).

The WCAB granted reconsideration and granted benefits. The Board held that “actual events of employment” included: downsizing of the employer; daily interactions with irate customers; loss of value of the company stock; and applicant’s concern about the

future of company stock and retirement funds. The Board found that these were predominate of all causes of his psychiatric injury.

The court of appeal analyzed each of these factors and found they were properly characterized as “events of employment” within the meaning of L.C. §3208.3(b)(1). It indicated that there must be a two-prong evaluation. First, it must be an “event”, i.e. it must be something that takes place in the employment relationship. Second, it must be “of employment”, i.e. it must arise out of an employee’s working relationship with his or her employer.

A third consideration is based upon the court’s interpretation of the legislative intent. It found that it was the intent of the Legislature to limit psychiatric claims. Thus, any interpretation of the section that would lead to more or broader claims should be examined closely to avoid violating this express intent.

The court held that concern over “downsizing” was a generalized anxiety over one’s future and not an “event” within the meaning of the statute. Similarly, “fear of job loss due to management strategies to improve profitability, such as “outsourcing” to an overseas workforce, is not an “event.”

The court held that the decline in stock value was not an “event of employment” within the meaning of the statute. There was no evidence presented that applicant was obligated to purchase PG&E stock, thus his position was no different than the general public. The court remanded the case back to the WCAB to reconsider the matter in light of the court’s ruling.

Patrick v. State Compensation Insurance Fund (2004) 32 CWCR 43 (Board Panel Decision).

Applicant was hired as an assistant manager by Marina City Club in February 1999. In September 2000, the general manager who hired her, and with whom she had a good relationship, was replaced. In July 2001 the applicant consulted a psychologist for treatment of anxiety, depression and job-related stress. The doctor placed her on disability beginning July 20, 2001. The doctor wrote that the applicant was feeling very harassed and overwhelmed by her female boss and is now severely depressed secondary to that. The doctor also indicated she was struggling to cope with the aftermath of cancer surgery. Defendant, State Compensation Insurance Fund denied liability. The matter came to hearing before a WCJ. The Minutes of Hearing showed, after a review of the record and discussion with the parties, the WCJ ordered that the record be developed by use of an independent medical examiner. The parties were unable to agree on an IME, so the WCJ appointed Robert Faguet, M.D., a qualified medical evaluator in psychiatry, to examine applicant and report. A formal hearing was then set and everything was placed in issue, except for employment and insurance coverage. Received into evidence were medical and personnel records, as well as reports of the IME and the treating doctors and defense QME. Dr. Faguet, reporting as the IME, indicated that the applicant did suffer an industrially related exacerbation of her dysthymic disorder and was temporarily disabled

between leaving her job and being declared P&S in November 2001. The doctor indicated that industrially related psychiatric treatment on a twice monthly basis had been indicated and should continue until she completes vocational rehabilitation. The doctor opined that apportionment was indicated because of her preexisting difficulty relative to breast cancer and subsequent depression and also secondary to her termination, given her admission of inappropriate behavior relative to going into her supervisor's e-mail, printing it, and disseminating it. The doctor said 50% is apportioned to nonindustrial factors.

Her supervisor testified that she determined to eliminate applicant's job and never gave applicant any notice of disciplinary or performance deficiencies. She had decided to terminate applicant before learning that she had read messages on her computer without authorization. After learning of the computer incident, she discharged applicant for cause. Two residents of the Marina City Club, who had been members of the board of directors, testified the applicant was an excellent worker, but that she felt she was being overly criticized, underappreciated and spied on by her supervisor. Another resident, and former board member, testified that he was always pleased with the applicant's work, but that the supervisor did not seem to trust her. The applicant had complained about her supervisor's interference.

The applicant testified that it seemed to her that her supervisor was trying to get rid of her from the very beginning. The supervisor always entered her office when a resident was consulting her. The supervisor took away work from her and assigned it to other employees. The applicant complained to the board that the supervisor was harassing her and described her style of management as a bit hysterical.

The WCJ, on September 4, 2003, relying on the opinion of the IME, found that the applicant sustained an injury as alleged and awarded compensation, including permanent disability based on a 26% rating. The judge felt a good faith personnel action was not involved because the applicant had sought psychiatric treatment before that occurred. Defendant petitioned for reconsideration contending that they had not based their defense on a good faith personnel action. The applicant's doctor's opinion was not persuasive and actual events of employment were not the predominant cause of applicant's disability and the IME did not establish predominant cause because he apportioned 50% to nonindustrial factors. A panel concluded that the WCJ had reached the correct result, but for different reasons. Applicant had the burden of demonstrating, by a preponderance of evidence, that actual events of employment were predominant as to all causes of the psychiatric injury. See L.C. §3208.3(b). Actual events of employment may include an employee's honest perception of mistreatment. The panel noted the WCJ had relied on the IME's report in finding industrial causation. The IME reported that applicant had been receiving psychotherapy twice a month since July 11, 2001. The applicant had stress-related complaints in connection with her supervisor and the board president that began in September 2000. The IME did not, however, make sufficiently clear that the actual events of applicant's workplace were the predominant cause of her psychiatric disability. On the other hand, the panel continued, the applicant's QME reported that shortly after her new supervisor was hired, she told the applicant that if she ever betrayed

her, she would never be trusted again. The supervisor immediately made it clear that she was the boss. The applicant believed that the supervisor's attitude was demeaning, that she took responsibilities away from her, and the supervisor intended to get rid of her. Dr. Friedman's history was corroborated by the trial testimony and the opinion was well reasoned and sufficient to justify the finding of industrial causation. The panel rejected the defendant's argument that the QME'S report was not substantial evidence.

Applicant's testimony and that of the three residents supported his opinion and, in turn, the finding of industrial causation. Conversely, the Board pointed out the defense QME indicated that he could not comment on the veracity of the applicant's mistreatment and that his report was inconsistent with the entire medical record and the medical testimony. The Board cannot base a decision on medical opinion predicated on surprise, speculation, conjecture or guess. A medical opinion is not substantial evidence it is based on facts known to be erroneous, or no longer germane, or based on an incorrect legal theory, or an inadequate medical history. In this light the QME report was insufficient to justify a finding of a no industrial causation. Accordingly, the panel denied reconsideration, justifying the finding of injury based on the applicant's QME and not on the IME upon which the judged had relied.

Metropolitan Water District v. Workers' Compensation Appeals Board (Woo) (2004) 69 CCC 1242, Court of Appeal, Second Appellate District, not certified for publication.

Woo was a senior engineer employed since 1986. He took a leave of absence on June 23, 1997 after receiving a poor performance evaluation. On July 23, 1997, Woo visited his brother in Hong Kong. He was found dead on the side walk below the brother's 21st floor apartment. There were no witnesses, nor was there a suicide note.

Prior to the leave of absence, Woo believed he was being harassed by his supervisor, Finley who unfairly criticized his work. At trial, Finley testified that Woo's work was substandard and the poor performance evaluation was justified. The WCJ found Finley's testimony to be credible and, based on the opinion of Dr. Warick, found that actual events of employment did not cause Woo's depression.

On reconsideration, the Appeals Board disagreed, finding that actual events of employment did cause the depression, based on the opinion of Dr. Halote. The Appeals Board further found that Finley had harassed Woo and implied an admission of bad faith from the fact that Finley consulted with legal and Human Resources before presenting Woo with the evaluation. Dr. Warick's opinion was discounted as conclusionary.

The Court of Appeal rejected defendant's contention that there was no evidence that Woo's death was the result of suicide, nor did it find to be persuasive the contention that there was no substantial evidence to support the finding that Woo had a mental disorder as defined by the Diagnostic and Statistical Manual of Mental Disorders as required by Labor Code § 3208.3(a). However, it disagreed with the Appeals Board's finding that

Finley's lack of credibility regarding her methods and manner of supervision established bad faith. In this regard, the Court commented:

"We are unable to comprehend how consulting with managers in Human Resources and Legal before delivering an evaluation that may prelude a demotion can be considered evidence of bad faith. It appears to us to be evidence of the exact opposite. The court is not bound by an irrational inference..."

Finding that Finley's criticisms of Woo constituted personnel actions, and that there was no substantial evidence they were either discriminatory or in bad faith, the Court annulled the Appeals Board's order.

Watts v. Workers' Compensation Appeals Board (2004) 69 CCC 684, Court of Appeal, Fifth Appellate District, writ denied, not certified for publication.

Watts was a correctional officer for the State of California Department of Corrections at Coalinga. He developed symptoms of job stress to and sought psychological treatment beginning in 1998. He attributed the stress to problems with inmates, retaliation from supervisors and fear of discipline. On November 27, 2000 he filed a workers' compensation claim. State Compensation Insurance Fund, the employer's adjusting agency sent a delay letter, and on Tuesday, February 27, 2001, sent a denial letter. There was evidence that the intent to deny was formed in a discussion between the adjuster and her supervisor on Monday, February 26, 2001, the ninety-first day after the notice of claim.

Applicant claimed that the presumption of compensability and exclusionary rule for failure to deny within ninety days applied. The WCJ admitted defendant's medical reports and found that the claim for psychiatric injury was barred by operation of Labor Code §3208.3 because the injury resulted from the employer's lawful, non-discriminatory, good faith personnel action. Applicant sought reconsideration.

In his report and recommendation on reconsideration, the WCJ recalculated the time between the date of claim and date of denial, and decided the claim had not been timely denied, that Labor Code §5402 applied, but was rebutted by medical reports obtained after the ninety days. There had been testimony that defendant had been unable to obtain appointments for medical legal evaluation within ninety days of the claim. The WCAB denied reconsideration, adopting the WCJ's report and recommendation. Applicant filed a Petition for Writ of Review.

The Court of Appeal denied the Petition for Writ of Review and issued a memorandum opinion "by the Court" addressing two issues: (1) whether the defendant's medical reports were admissible; and (2) whether an employer's lawful, non-discriminatory, good faith personnel action could exist where there had been no actual personnel action taken by the employer. The Court found that the Appeals Board's finding of fact that defendant could not obtain medical legal evaluation within ninety days of the claim was supported

by substantial evidence. The Court further found that good faith personnel action goes beyond transfers, demotions, layoffs, evaluations, or disciplinary actions. It indicated that conduct by those with authority to review, criticize, demote or discipline an employee may constitute an employer's lawful, non-discriminatory, good faith personnel actions even where the conduct does not have an immediate effect on employment. In this case, the Court noted that applicant's QME had reported that applicant's supervisors conduct in negative write-ups and hostility constituted 51% of the cause of the psychiatric disability. The WCJ's finding was that two-thirds of the injurious stresses were caused by lawful, non-discriminatory, good faith personnel actions. The Court found the judge's finding to be supported by substantial evidence.

California Insurance Guarantee Association on Behalf of Fremont Compensation and A-1 Equipment Rentals v. WCAB (Avila) (2004) 69 CCC 1323, Court of Appeal, First Appellate District, writ denied.

Applicant sustained an admitted back injury on June 29, 1998, which resulted in a stipulated award on May 28, 2000. He later filed a Petition to Reopen for New and Further Disability, amending his application to include injury to his psyche as a compensable consequence of the back injury. Defendant denied the psyche claim. Dr. David Green reported on behalf of applicant that he had an industrial psychiatric injury that caused need for medical treatment and continuing temporary disability, while Dr. Ann Allen, defense QME, found an industrial dysthymic disorder complicated by nonindustrial disorders. Medical treatment was provided, but temporary disability was disputed.

At an expedited hearing, the parties tried the issues of temporary disability and psychiatric treatment. A WCJ found that applicant was entitled to medical treatment and temporary disability for injury to his psyche as a compensable consequence of the industrial injury. Defendant sought reconsideration, arguing that applicant may not recover for injury to the psyche, since he had not worked for defendant for at least six months, as indicated in the medical reports. (Labor Code §3208.3(d).) The judge recommended that reconsideration be denied, since defendant had not raised that issue at trial, and was estopped from raising it for the first time on reconsideration. Moreover, although the doctors' reports alluded to the time period, there was no evidence presented about the length of employment.

In a 2-1 decision, a WCAB panel denied reconsideration. The majority noted that it is true that the six-month threshold applies to compensable consequence psychiatric cases (*Wal-Mart v. WCAB (Garcia)* (2003) 68 CCC 1575), but by raising the issue for the first time on reconsideration defendant waived it. Even if it was not waived, it was defendant's burden to establish its applicability by evidence, and it presented none, apart from hearsay statements in various medical reports. The dissenting commissioner would have annulled the judge's decision. He noted that defendant had denied the psyche allegation in its answer to the amended application, thus the judge should have inquired as to whether injury AOE/COE was really in issue. The dissenter would have sent the

matter back for further clarification, before ruling on the six-month employment issue. The Court of Appeal denied review.

VI. *Presumption (except presumption of correctness of primary treating physician)*

Jones v. WCAB (2004) 69 CCC 15 (Not Certified For Publication).

Applicant worked as a correctional officer for Taft Community Correctional Facility between 9/91 and 9/10/01. He claimed an industrial injury caused by continuous trauma to his cardiovascular and respiratory systems, psyche, and an aggravation of his diabetes.

After a hearing, the WCJ held that applicant's position did not entitle him to a statutory presumption of injury and concluded that the medical evidence failed to otherwise demonstrate that he sustained an industrial injury. In August 2003, the WCAB denied applicant's petition for reconsideration after further analyzing the related statutory presumptions.

The court of appeal indicated that its review is limited to a determination of whether substantial evidence exists to support the WCAB's finding. It reviewed the medical reports found they were sufficient, and refused to reweigh conflicting medical evidence.

The court also rejected applicant's argument regarding evidence that his conditions were aggravated by work. Again, they found that defendant's reports opined that there was no aggravation.

Finally, the petition argued that the WCAB should have reopened discovery to develop the record. The court disagreed. The court explained that the record should be reopened sparingly, and only when neither side has presented sufficient evidence upon which a decision may be based. The fact that applicant's doctor had not established industrial injury was not sufficient basis to reopen the record.

Sanchez v. Sierra Insurance Group, (2004) 32 CWCR 16 (Board Panel Decision).

On November 2, 2002, the applicant was burned when he inadvertently sprayed Easy Off on his face. He told his supervisor about the injury. After seeing a doctor, he told the supervisor that his skin itched and felt as if it were burning and that his face was sensitive to heat. This occurred in November 8, 2002. The following January he spoke to the owner who gave him a paper to fill out and said that his bills would be paid. When the medical bills remained unpaid, the applicant sought assistance from the Stanford Community Law Clinic. On March 18, 2003, a student volunteer at the clinic mailed the employer a claim form and requested that they fill out a portion of the form.

On June 27, the clinic wrote the defendant, that if it did not make a decision soon, the applicant would seek an expedited hearing. On July 10, a Declaration of Readiness to Proceed for an expedited hearing was filed. The Declaration recited that the injury was presumed compensable and that applicant sought an expedited hearing on the issues of medical treatment and temporary disability.

On August 1, 2003 defendant objected to an expedited hearing on the ground that applicant had not reported an alleged incident on November 2, nor at the time of his termination in January 2003. On August 4 defendant finally denied liability. Notwithstanding its untimely objection, the presiding WCJ conducted an expedited hearing at which applicant's testimony was uncontradicted. The only evidence presented by the defendant was a copy of the August 4, 2003 denial of liability. On September 10 the presiding WCJ found that defendant had failed to deny applicant's claim within 90 days and awarded TD and Medical treatment. Defendant petitioned for reconsideration, contending, that the finding of injury at an expedited hearing denies a defendant procedural due process, and holding an expedited hearing when injury is in issue is in excess of the powers of the WCAB. On reconsideration a panel was not persuaded that the defendant's arguments had merit. The panel stated that L.C. §5402 provides that knowledge of an injury, obtained from any source, on the part of an employer, foreman, or other person in authority is equivalent to service under L.C. §5400. If liability is not rejected within 90 days after the date the claim form is filed under L.C. §5401, the injury shall be presumed compensable. L.C. §5502 provides for an expedited hearing and decision within 30 days after a Declaration of Readiness if the issues in dispute are, among others, the employee's entitlement to medical treatment, amount or duration of TD, or any other issues requiring an expedited hearing as prescribed by the administrative director.

Applying the law to the facts before it, the panel stated that the unrebutted testimony established that on November 2, 2002 applicant had twice notified his supervisor of the injury and told the owner about it in January 2003. Defendant failed to deny applicant's claim within 90 days after the claim form was filed. Not only was defendant's objection to the Declaration of Readiness to Proceed untimely, but it failed to offer any evidence rebutting applicant's claim of injury. The panel rejected as inappropriate defendant's reliance on *Kearney v. WCAB* (1998) 64CCC101 (writ denied). In *Kearney* the applicant filed a claim form with the employer for a cumulative trauma injury. The employer sent the claim form to the wrong insurance company and an issue arose as to whether the claim had been denied within 90 days. The WCAB scheduled an expedited hearing in which the correct insurer, which had not received the Declaration of Readiness or notice of hearing, appeared for the first time and was joined. Although the WCJ acknowledged that injury was not an appropriate issue for an expedited hearing, he proceeded to find injury and award benefits.

The Board rescinded the award and returned the case to the WCAB for a regular hearing on all issues. Among other things, the Board said that the applicability of the L.C. §5402 presumption required a factual determination that was expressly impermissible at an expedited hearing. The Board went on to state that *Kearney* was distinguishable from

this case. The defendant was unaware of the injury issue in the *Kearney* case before the hearing. In this case defendant had been served with the Declaration of Readiness which expressly relied on the presumption of injury. Petitioner neither objected to the Declaration of Readiness in a timely manner, nor rebutted applicant's evidence. The defendant could not claim that it had been denied notice and opportunity to be heard as had happened in *Kearney*. Reconsideration was denied.

Watson v. WCAB (2004) 69 CCC 41 (writ denied).

Applicant claimed that he sustained a CT injury in the form of a brain tumor during the period 5/13/91 through 11/21/01, while employed as a police officer by the City of Brea. He worked primarily as a motorcycle patrol officer performing traffic law enforcement duties.

He was present during many structural fires and, according to applicant, inhaled smoke and fumes. On the highway he inhaled petroleum products, gasoline fluid, vapors and exhaust, and diesel fuel exhaust.

Applicant's QME concluded that applicant was exposed to known carcinogens during his employment, but did not identify the specific carcinogens to which he was exposed. He opined that applicant's brain tumor was industrially related. The doctor indicated that applicant was exposed to gasoline and that gas station attendants have a higher rate of cancer. He also indicated that diesel exhaust is said to contain carcinogens, as do combustion products from the burning of various materials to which applicant was exposed. Defendant's QME indicated that 18,000 people per year are diagnosed with brain tumors. He indicated that there are hereditary syndromes and genetic factors that also lead to brain tumors. He further opined that applicant's work in an outdoor environment would not expose applicant to chemicals that cause brain tumors and that the type of exposure experienced by applicant would be the same as the general population. Finally, the doctor opined that the chemicals identified by applicant have not been linked of the development of brain tumors.

At trial, applicant relied upon the cancer presumption contained in L.C. §3212.1. The WCJ ruled that the opinion of the defense QME had overcome the cancer presumption.

On reconsideration, applicant contended that he had met the burden of showing that he was exposed to carcinogens and that he had established that the carcinogens were reasonably linked to his brain tumor, thereby triggering the presumption of L.C. §3212.1.

The WCJ's report on reconsideration indicated that applicant's QME was not sufficient evidence as to causation because the doctor did not identify any particular carcinogen to which applicant was exposed that could contribute to his tumor and that the doctor's conclusions were unsupported.

The WCJ felt defendant's QME specifically addressed whether exposure to particular chemicals was linked with brain tumors. The WCJ found the report overcame the

presumption. The WCAB adopted and incorporated the WCJ's report without further comment.

The court of appeal denied the writ.

VII Evidence

Food Maxx v. Workers' Compensation Appeals Board (Lindini)
(2004) 69 CCC 675 Court of Appeal, Fifth Appellate District, writ denied,
not certified for publication.

Lindini claimed specific and cumulative injuries to her neck, shoulders, upper extremities, back, dizziness, and head. The matters came to hearing with applicant relying on opinions of her primary treating physician, Donald deGrange, M. D., and defendant relying on a report of a QME, Alan Sanders, M. D. *Sub rosa* films of applicant had been shown to the physicians, but had not resulted in any change in their opinions. After hearing, the WCJ found on September 11, 2003, that applicant had sustained permanent partial disability to her cervical spine, shoulders, and upper extremities rating 70% based on the opinions of Dr. deGrange; but had not sustained injury to her low back, head, or "dizziness" based on the opinions of Dr. Sanders. The WCJ found that Dr. Sanders' opinions concerning the compensability of the alleged low back, head, and "dizziness" injuries rebutted the opinions of Dr. deGrange on those issues. Defendant sought reconsideration contending that the opinions of Dr. deGrange did not constitute substantial evidence. The Appeals Board denied reconsideration. Defendant filed a Petition for Writ of Review.

The Court of Appeal denied the writ, and in a memorandum, non-published opinion stated that the attack by the defendant, dissecting the medical reports should have been made at the WCAB level. The Court of Appeal may not reweigh the evidence, and the opinion of a single physician, if not based on speculation or surmise, is sufficient to support an award of the Appeals Board. The Court found no reasonable basis for the Petition for Writ of Review and remanded the matter for award of a supplemental attorneys fee to applicant's attorney.

Forsythe & Associates v. Workers' Compensation Appeals Board (Taylor)
(2004) 69 CCC 396, Court of Appeal, Third Appellate District,
writ denied.

Applicant was employed as a driver by Forsythe & Associates and sustained injury to her spine and pelvis on April 4, 2002. Applicant selected Raymond Lombardi, D.C., as her primary treating physician. After defendant disputed Dr. Lombardi's recommendations, applicant selected Dr. Jens O. Jensen as a panel Qualified Medical Examiner (QME). On March 4, 2003, Dr. Jensen examined applicant and reported that she was still temporarily

disabled. On March 4, 2003 and March 5, 2003 defendant obtained *sub rosa* video of applicant and subsequently requested that Dr. Jensen review and comment on the video.

Dr. Jensen reviewed the video and reported that his initial assessment, in which he felt applicant was credible, had been compromised by the video. He opined that applicant's condition was permanent and stationary on March 4, 2003, that she was not in need of left knee evaluation and that she was not depressed. On May 9, 2003 defendant sent a copy of the video to applicant. On May 10, 2003, applicant wrote a letter to defendant asserting that defendant was required to submit the video to her prior to sending it to the panel QME, Dr. Jensen.

On August 19, 2003 applicant filed a Declaration of Readiness, indicating that she had a WE Multimedia assessment of the defendant's *sub rosa* video. Defendant objected asserting that the WE Multimedia assessment had not been served. On October 15, 2003, the matter was heard on an expedited basis on issues of temporary disability, lien of Employment Development Department, and need for further medical treatment. At the hearing, the WCJ ruled that the second report of Dr. Jensen was inadmissible because of defendant's failure to provide the video to applicant prior to sending it to the panel QME. The WCJ also admitted and relied on the WE Multimedia video rather than the original produced at the hearing by defendant. Based on the record, with Dr. Jensen's second report excluded, the WCJ relied upon a final report of Dr. Lombardi, who had reviewed the video and Dr. Jensen's final report, and opined that applicant remained temporarily disabled. The WCJ found continuing temporary disability and need for medical treatment. Defendant sought reconsideration.

The WCJ recommended that reconsideration be denied. The second report of Dr. Jensen had been excluded from evidence due to defendant's violation of L.C. §4062.2, requiring service on applicant of non-medical material to be reviewed by a QME twenty days prior to submission of the material to the QME. Here defendant had clearly violated that requirement. Defendant's contention that the WE Multimedia video was *ex parte* was unfounded because defendant's counsel and the WCJ initially reviewed the video at the same time at hearing. The record reflected that the WCJ had reviewed the WE Media edition of the video only to the first alteration, and thereafter reviewed and relied upon the original. WE Media had not altered the activities depicted in the original, but had inserted black segments at each of 26 stops of the recording on the original. The WCJ had noted nothing in the video refuting applicant's testimony that she was unable to return to her pre-injury duties.

The Appeals Board denied reconsideration and adopted and incorporated the WCJ's report and recommendation as the basis for its decision. Defendant filed a petition for Writ of Review on essentially the same grounds as its petition for reconsideration. The Appeals Board filed an answer contending that exclusion of Dr. Jensen's second report was an appropriate sanction for defendant's violation of Labor Code §4062.2, and that Dr. Lombardi's opinions and recommendations were substantial evidence and presumed correct. Defendant's writ was denied.

Hughes Aircraft Co. v. Workers' Compensation Appeals Board

(Zimarik) (2004) 69 CCC 408, Court of Appeal, Second Appellate District, writ denied.

Applicant was employed by defendant Hughes Aircraft as a custodian. She alleged cumulative injury to her psyche, respiratory system from exposure to asbestos, and fibromyalgia during the period March 1985 through September 4, 1997. Her duties had included sweeping, mopping, dusting and vacuuming defendant's factory. She was treated by Dr. N. Brautbar, and evaluated by Dr. Silverman, a rheumatologist, and Dr. Curtis. She was evaluated at defendant's request by Dr. Markovitz. Applicant testified that she was exposed to toxic chemicals at work, and her testimony regarding the chemical exposure was supported by the testimony of her supervisor, Mr. Hicks. Some Material Safety Data Sheets were discussed in a deposition of Mr. Hicks, but were not attached to the deposition transcript. The employer did not provide applicant with any Material Safety Data Sheets with respect to cleaning agents and other chemicals to which applicant was exposed at work.

The WCJ found that the employer had an affirmative duty to investigate and a duty to provide Material Safety Data Sheets for chemicals and solvents applicant was required to use or to which she was exposed in the course of her duties. These duties arise under Title 8, California Code of Regulations §10109. Apparently Dr. Markovitz had made findings consistent with effects of exposure to some chemicals, but had been unable to relate the findings to exposures due to lack of specificity as to the chemicals. The WCJ applied Evidence Code §412 and drew an adverse inference from the defendant's failure to identify the chemical exposures. He found that applicant was exposed to toxic and potentially hazardous chemicals at work and that that exposure in combination with psychiatric stress, resulted in injury to applicant's psyche and effects of exposure to asbestos and fibromyalgia; that applicant was 100% permanently totally disabled by effects of the fibromyalgia; that she was in need of further medical treatment for fibromyalgia, asbestos exposure, and psyche; and that the record required further development on the issues of injury to applicant's lungs, lower extremities, internal system, and carpal tunnel injury. Defendant sought reconsideration.

Palleschi v. Workers' Compensation Appeals Board (2004) 69 CCC

679, Court of Appeal, Fifth Appellate District, writ denied, not certified for publication.

Applicant was a deputy sheriff who sustained cumulative injury to his hands, wrists and thumbs. He was treated by Dr. Caviale, who opined that his condition was permanent and stationary on January 13, 1999. He was subsequently treated by Dr. Rhodes who opined that his condition was permanent and stationary on April 11, 2001, resulting in total disability. A defense QME, Dr. Richard Goldberg also reported. The case came to Mandatory Settlement Conference (MSC) on October 30, 2001. There were several further hearings, and a Findings and Award issued in October 2003, finding that applicant had sustained 51% permanent partial disability. The WCJ declined to apply the presumption of correctness to the opinions of either Dr. Caviale or Dr. Rhodes; he found

their opinions rebutted by the opinions of Dr. Goldberg. The WCJ declined to admit in evidence reports of Dr. Rhodes prepared after the October 30, 2001 MSC. Applicant sought reconsideration.

In his report and recommendation on reconsideration, the WCJ stated that he had found applicant's testimony not credible; that Dr. Rhodes was not applicant's treating physician when the disability became permanent and stationary; and that Dr. Rhodes' report was incomplete. The Appeals Board did not find a nexus between permanent and stationary status and application of the presumption of correctness of the primary treating physician, but agreed that Dr. Goldberg's opinions overcame the presumption of correctness. Applicant sought review. The Court of Appeal denied the Petition for Writ of Review, and in a memorandum, not certified for publication opinion found that the discovery closure provided Labor Code §5502 precludes admission of evidence produced after the MSC, absent a showing that the evidence could not have been discovered with due diligence prior to the MSC. The Court found the contention that the evidence could not have been produced prior to the MSC because the reports had not yet been written, to be "circular reasoning" and unpersuasive. The Court found Dr. Goldberg's opinions, which were consistent with those of Dr. Caviale, the initial primary treating physician, to adequately rebut the opinions of Dr. Rhodes.

Save A Lot v. Workers' Compensation Appeals Board (Villanueva)
(2004) 69 CCC 337, Court of Appeal, Fifth Appellate District, writ denied,
not certified for publication.

Applicant, Johnny Villanueva, sustained neck and back injuries arising out of and occurring in the course of employment by Save a Lot on October 13, 2000. Defendant furnished temporary disability indemnity and treatment. At a hearing in May 2003, defendant requested restitution of temporary disability indemnity payments for alleged fraud. The fraud allegation was supported by *sub rosa* video taken on six days in December 2000, June 2001, and July 2001. The WCJ found that the subject in the video showing work activities of washing large trucks with a sprayer was obscured and unidentifiable. Applicant was shown to have been bending and stooping with observable pain on one occasion and while one physician had recommended against repeated bending and stooping, another felt applicant had moderate pain on bending. Applicant was called as a witness and asserted a privilege against self incrimination in response to all questions posed to him. The WCJ found that the *sub rosa* video did not establish that applicant worked or could have worked for wages during the temporary disability period, but did undermine the physician's opinions as to extent of permanent disability. Defendant sought reconsideration.

The WCJ noted that injury was admitted and the district attorney had not filed fraud charges against applicant after a six month investigation. She indicated that it was her understanding that "no adverse inference may be drawn from a person's assertion of his right against self incrimination." The Appeals Board denied reconsideration and issued an opinion stating that "the activities depicted in the surveillance do not conflict with the

history given to the doctors, with applicant's ability to work on a temporary basis or with the permanent restrictions." Defendant filed a petition for writ of review.

The Appeals Board filed a letter brief contending that where injury was stipulated to and no timely objection made to the assertion of privilege, defendant had invited any error on the part of the WCJ and the Appeals Board. The Court of Appeal denied the writ and in an unpublished opinion noted that while the privilege against self incrimination is absolute in a criminal proceeding, it is not without consequences in non-criminal proceedings. In a civil case, a witness or party may be required to either waive the privilege or accept the civil consequences of silence. "Such consequences include adverse inferences drawn by the trier-of-fact relevant to the issues presented." The Court indicated that Save a Lot did not invite error or waive its right to review by failing to object to the assertion of privilege. The Court found that the WCJ's misunderstanding of the effect of applicant's assertion of the privilege against self incrimination probably did not result in a less favorable decision to appellant than the Appeals Board would otherwise have reached. Here, the WCJ and the Appeals Board found the activities depicted in the video warranted further development of the record as to extent of disability, but that the video did not establish fraud.

Aranda v. Workers' Compensation Appeals Board (Italian Marble & Tile Co., CIGA), (2004) 69 CCC 1371, Court of Appeal, Second Appellate District, not certified for publication.

Applicant was a marble mason for Italian Marble & Tile Co. On March 19, 1998, a piece of marble weighing several hundred pounds fell on his left foot. He was transported by ambulance to a hospital where he was admitted and found to have sustained a crush injury of the foot with several broken toes. He was treated by Dr. Jaivin whose records were not offered into evidence. On March 30, 1998, he underwent open reduction and internal fixation of his left second toe. On July 25, 1998, an osteotomy was performed and a pin inserted in the left great toe.

On August 17, 1998, applicant was evaluated by Robert Brown, M. D., who noted that applicant had complaints of low back pain and of cracking and popping in the left knee on ambulation after removal of the cast from the second toe in May 1998. Dr. Brown noted extreme wear on the short leg cast at the left heel, and that x-rays revealed non-union of the distal section of the left great toe. The doctor re-evaluated applicant on November 17, 1998, and reported crepitus in the left knee and tenderness on the medial joint line. He recommended a left knee MRI and referred applicant to a foot specialist, Dr. Kwong.

Dr. Kwong evaluated applicant on January 7, 1999 and noted his [left] knee and back complaints. Part of his report was placed in evidence, but the first three pages were missing. In a report dated January 11, 2001, Dr. Kwong noted locking of the left knee joint and referred applicant to Dr. Kvitne. On October 16, 2001, Dr. Kvitne reported that applicant had locking and giving way of the left knee and complaints of sharp pain and

cramping in the knee after walking over 30 minutes. In November 2001 applicant had additional surgeries including partial excision of the left tibial sesamoid, removal of the non-union fragment of the left great toe, and neurolysis.

Dr. Kwong found applicant's condition to be permanent and stationary on June 6, 2002. He recommended that he be limited to sedentary work on level terrain, and have ongoing pain treatment and periodic replacement of his orthotics.

Defendant obtained an evaluation on December 13, 2002 from Jeffrey Berman, M.D. Dr. Berman noted significant crepitus in the left knee; ambulation with the left foot upturned; and an inability to ambulate on the left toes. He opined that the onset of back and knee complaints was a result of compensation for the foot injury. He recommended that applicant be precluded from prolonged standing and walking, repetitive squatting, kneeling, climbing or working on uneven terrain.

The workers' compensation case was tried on March 4, 2003. Applicant described the accident, his treatment, symptoms, and disability. He admitted to several arrests, being a gang member; being convicted of driving under the influence, use of illegal drugs and abuse of alcohol. On July 16, 2003, the WCJ issued Findings and Award finding that the injury was limited to the left foot, and that it resulted in 60% permanent partial disability with need for further medical treatment. Applicant sought reconsideration, contending that the WCJ should have relied on the opinion of Dr. Kwong who had been his treating physician for more than four years, and that injury and need for treatment should have been found with respect to his left knee.

In his Report and Recommendation the WCJ noted that Dr. Kwong's restriction went beyond what was appropriate for a foot injury in limiting applicant's work capacity while sitting; that it exceeded the rating for complete loss of the foot; and that applicant was not credible with respect to his subjective complaints. He further indicated that substantial evidence did not support a finding of injury to the knee where the knee complaints first manifested themselves ten months after the injury and no body mechanics established the knee injury. The Board denied reconsideration relying on the WCJ's Report and Recommendation.

Applicant sought review. The writ was granted, and the Court requested that the Board advise whether it was error to deny the knee injury. The Board requested that the decision be vacated and that the matter be remanded for development of the record because Dr. Berman had not indicated whether or not he felt the knee problems arose out of the work injury. Applicant responded that because Dr. Berman had recommended work restrictions for the knee condition, it should be inferred that he believed it to be work related. Applicant also contended that the medical record placed the onset of knee complaints well before ten months after the date of injury.

The Court noted that the medical record documented the onset of knee complaints within five months of the date of injury, beginning with ambulation two or three months post injury. It noted that Dr. Berman attributed the knee complaints to altered gait and body

mechanics secondary to the injury. The information contemporaneously provided the physicians by Aranda was consistent chronologically and reasonable in light of the entire record. The Court found that the record was not tainted by applicant's credibility problems. Based on Dr. Berman's opinion and the actions of Drs. Kwong and Brown which were consistent with an industrial cause of the knee injury, further explanation or development of the record was not necessary. The findings that applicant did not injure his knee or need further medical treatment for his knee were reversed.

The Court further commented that

“When the trier of fact is faced with divergent views as to the extent of disability, which is further complicated by the possibility of exaggeration by the injured worker, a finding of disability may be made within the range of medical evidence.” (Liberty Mutual Ins. Co. v. Industrial Accident Commission, (1948) 33 Cal. 2nd 89, [at] 93-94 [13 CCC 267].)

The Court noted that although Labor Code §4062.9 had been repealed, the presumption would not have been controlling on this record and a limitation to sedentary work would have been excessive. The matter was remanded for further proceedings.

Select Personnel Services v. Workers' Compensation Appeals Board (Gonzalez), (2004) 69 CCC 1386, Court of Appeal, Second Appellate District, not certified for publication.

Applicant filed a claim for injury on October 9, 2001, involving his shoulders, arms, and hands. The claim was later amended to include injury to his neck and back. He was referred to Dr. Alan Sanders, M. D., for an agreed medical evaluation. Dr. Sanders initially reported on March 7, 2003, that applicant had complaints of neck, shoulder, and low back pain, that he had sustained a permanent disability to his neck, and that the patient's history and mechanism of injury were consistent with an injury caused by work activities. Thereafter Dr. Sanders reviewed additional medical records, including records from October 2001 which indicated that applicant sought treatment with complaints of pain in his hands only. After reviewing those records, Dr. Sanders issued a supplemental report on May 7, 2003, opining that the records seemed to show that applicant had not really sustained injury to his neck, shoulders, or back on October 9, 2001.

After a hearing, the WCJ relied on the Agreed Medical Examiner's initial report, found injury AOE-COE to the neck, back, and hands, and awarded applicant 32% permanent disability and further medical treatment. Defendant sought reconsideration. In his Report and Recommendation on Reconsideration the WCJ indicated that in his second report. Dr. Sanders did not unequivocally conclude that applicant had not sustained injury to his neck, back and shoulders, nor that the mechanism of injury claimed by applicant had not occurred. He had therefore concluded that Dr. Sanders' first report was more persuasive and entitled to reliance. The Appeals Board denied reconsideration.

Defendant filed a Petition for Writ of Review that was granted. The Court noted that if reliance is to be placed on the opinions of a physician on an issue, “consideration must be given to the entire opinion of the physician and not just selected parts.” (*City of Santa Ana v. WCAB (Taylor)*, (1982) 47 CCC 59) It is improper for the Board to rely on part of a physician’s opinion while ignoring other parts that clarify matters. Since the initial report of Dr. Sanders was not based on his review of all of the relevant medical records, it could not be more persuasive than the subsequent report which had a more complete medical history and factual basis for its conclusions. The Court ordered the case remanded for clarification of its determination or receipt of additional medical evidence.

VIII. Res Judicata and Collateral Estoppel

IX. Earnings; Indemnity Rate Determination

Lake County Vector Control District v. WCAB (Sanders) (2004) 69 CCC 63, (Not Certified for Publication).

Sanders suffered a specific injury to her head, neck, and right shoulder in 1997 while employed as a seasonal mosquito control technician for Lake County. In 1999 she earned \$9.75 an hour and worked 40 hours per week during the season lasting from May to September. Additionally, she was a 51% partner, with her husband, in a construction business. Her 51% share was not dependent on hours worked and no other people worked for this partnership. She worked in 2000 and 2001 for the partnership, but problems with her arms and head prevented her from sitting at her desk for very long. In 1996 Sander’s share of the partnership income was \$20,806.00 and at trial Sanders testified without greater specificity that she earned “a lot less” in 2001. After trial, the unresolved earnings question was analyzed by the WCJ who concluded that Sanders AWE at the time of injury were \$536.12 per week derived from averaging the stipulated AWE at Lake County of \$370.00 per week and the 1996 yearly earnings from the partnership of \$20,806.00. Defendant’s Petition for Reconsideration was denied.

On Appeal, Defendant again contended that the WCJ’s calculation of AWE was erroneous because it used the partnership income while Sanders argued that it was appropriate to use all sources of income to calculate earning capacity pursuant to L.C. §4453(C)(4). Citing the definition from *Argonaut Ins. Co. v. IAC* (1962) 27 CCC 130, earning capacity is “a prediction of what the employee’s earnings would have been had he [or she] not been injured.” Partnership income should only be considered if there was evidence reasonably establishing that Sanders’ injury while working for Lake County diminished her actual earnings from the partnership. The court did not find substantial evidence of an economic loss in the partnership attributable to the work injury since there was no evidence how much partnership income was lost post-injury or evidence that Sanders’ labor needed to be replaced by the partnership. Although the WCJ made an inference that Sanders’ diminished partnership income must have resulted from the work injury, there was no evidence that the decrease in personal effort resulted in a loss of partnership income or profit. Sanders did not meet her burden of proof to demonstrate

that any loss of partnership income was from her work injury and not from other unrelated causes.

The issue of AWE was remanded for further proceedings consistent with the court's opinion. The remaining issue discussed by the court related to a L.C. §5814 penalty that was not summarized since it contained no compelling, interesting or new analysis.

X. Temporary Disability

Acosta v. Workers' Compensation Appeals Board, (2004) 69 CCC 323, Court of Appeal, Fifth Appellate District, writ denied, not certified for publication

Applicant was a sorter for Basic Vegetable Products. On August 22, 1999, she slipped and fell on a wet floor allegedly injuring her spine, left shoulder, and lower extremities. She also filed a cumulative injury claim for upper extremity injury during the year ending July 27, 2000. In February 2001, defendant accepted liability for the upper extremity injury, and applicant was referred to Dr. Donald Pang as agreed medical examiner (AME). The employer refused to provide temporary disability indemnity from February to May 6, 2001, contending that applicant was a seasonal employee with no off season wage loss. After a June 2001 hearing the WCJ found that applicant was entitled to temporary disability indemnity at one rate, uninterrupted, throughout her period of temporary disability. Defendant sought reconsideration.

The Appeals Board granted reconsideration and remanded the case to the trial level to determine whether applicant's earnings history and the prior finding were consistent with the *en banc* decision in Jimenez v. San Joaquin Valley Labor, (2002) 67 CCC 74. At a subsequent hearing on August 22, 1999, injury to applicant's left knee, left hand, low back, and neck was admitted, as well as the cumulative trauma ending July 27, 2000 which involved applicant's right hand.

At the hearing, applicant produced testimony from her vocational rehabilitation counselor, George Meyers. Applicant's counsel sought reimbursement of \$332.66 for Labor Code §5811 costs in producing Myers testimony. Applicant testified that she had looked for off season work in prior years. Myers' testimony was described as non-credible evidence on issues addressed by the AME.

Based on her earnings history in prior years, the WCJ found that applicant was not entitled to temporary disability indemnity during the period February 20, 2001 through May 6, 2001, and that she had sustained 6% permanent disability as a result of the specific injury and 18% as a result of the cumulative trauma. In his opinion on decision, the WCJ noted that neither applicant's testimony nor that of the rehabilitation consultant was credible and that the testimony of the rehabilitation consultant was not relevant. Applicant's counsel filed a declaration from applicant agreeing to a fee of 15% of indemnity awarded. Applicant's counsel's request for \$332.66 in costs was denied and

his attorney fee was fixed at 9% of the permanent disability indemnity awarded. Applicant sought reconsideration.

The WCJ set aside the Findings and Award under Title 8, California Code of Regulations §10859, and issued a second award which provided for 14% permanent partial disability for the specific injury; 30% for the cumulative trauma; further medical treatment for the neck, low back and right hand, and an attorney fee of 12% of indemnity awarded. However, he denied the claims for off season temporary disability and for Labor Code §5811 costs. Applicant again sought reconsideration.

The Appeals Board denied reconsideration and adopted and incorporated the WCJ's Report and Recommendation on Reconsideration as the basis for its denial. Neither the Opinion on Decision nor the Report and Recommendation had made specific reference to the decision in *Jimenez*.

Applicant filed a Petition for Writ of Review contending that the Appeals Board's decision did not comply with the requirements of Labor Code §5908.5 to state the evidence relied upon and specify in detail the reasons for the decision. She further contended that Myers' testimony was relevant under the Appeals Board's panel decision in the unrelated case of *Vargas v. Stanislaus Food Products* (2002) STK 151945. Applicant also alleged that the Appeals Board had erred in denying future medical treatment for the left hand and knee, and that it abused its discretion in denying the 15% attorney fee request and the request for costs under Labor Code §5811 in connection with Myers' testimony.

The Court of Appeal denied the writ, and in an opinion that was not certified for publication stated that the Appeals Board may deny reconsideration on the basis of the WCJ's Report and Recommendation, and that in this case, the Report and Recommendation was sufficient for the Court to review appellant's claims. While neither the decision nor the Report and Recommendation cited *Jimenez*, the analysis did show that the principles of the decision had been considered. Applicant had established a pattern of working during a defined season, and of drawing unemployment benefits during the off season. The WCJ believed that applicant's earnings history refuted her claim that she looked for work during the off season. In *Jimenez* the Appeals Board found an injured worker was not entitled to temporary disability when there was no history of off season earnings nor evidence that applicant would have worked during off season had the injury not occurred. The Appeals Board reached the same conclusion here.

With respect to Myers' testimony, the Court noted that the *Jimenez* decision had discussed the possibility of expert testimony on employment opportunities of seasonal employees, and had noted that such testimony "may often be more costly and time consuming than its value..... Therefore, the WCJ should have wide latitude, within the bounds of due process, to allow or disallow it." The Court also noted that a panel decision in an unrelated matter does not carry precedential value. The denial of further medical treatment for the left hand and knee was supported by substantial medical evidence, specifically the opinion of the AME, Dr. Pang. The Court found no merit in the

contention that the Appeals Board had abused its discretion in denying Labor Code §5811 costs or in awarding attorneys' fees based on 12% of the permanent disability indemnity.

Marroquin v. Zurich American Insurance Company (2004) 32 CWCR 316, Appeals Board panel decision.

At the time of applicant's injury while working for Preferred Personnel, she was an undocumented alien. The parties resolved all issues except earning capacity, and the trial judge found a compensation rate that was up to maximum for temporary disability, based on her earning potential. Defendant sought reconsideration, arguing that the earnings finding lacked evidentiary support, and that the Federal Immigration and Reform Control Act (FIRCA) bars undocumented aliens from being hired and employed. Thus, any earnings she had were fraudulently obtained in violation of FIRCA. In his report on reconsideration, the WCJ noted that his finding on temporary disability was based on *Del Taco v. WCAB (Gutierrez)* (2000) 65 CCC 342, which held that immigration status does not affect temporary disability entitlement. He did not expressly decide the exact earning capacity, but held that it would be determined under Labor Code §4453. The FIRCA argument is defeated by Labor Code §3351, which states that employment includes lawful or unlawful employment, including aliens. While the case was pending before the Appeals Board, applicant obtained a green card and a Social Security card.

A WCAB panel agreed that FIRCA bars as unlawful, continuing employment of illegal aliens. It also preempts state or local laws in punishing such employers. However, there is no authority barring a state from providing workers' compensation benefits to workers lawfully or unlawfully employed, as set forth in §3351. Under that statute and *Del Taco*, an alien need not be a legal resident to merit workers' compensation benefits. Labor Code §1171.5(a) specifically states that all protections, rights and remedies available under state law (except reinstatement barred by federal law) are available to all persons who are employed in California, regardless of immigration status. The judge correctly held that FIRCA does not preempt §3351.

As to earning capacity for temporary disability, the panel stated that under *Del Taco* immigration status does not preclude temporary disability, thus applicant is entitled to the same consideration as anyone else on earning capacity, using the traditional factors. The Social Security card and green card may be taken into account in calculating earning capacity, and once the temporary disability rate is found, it may not be altered. (*Grossmont Hospital v. WCAB (Kyllonen)* (1997) 62 CCC 1649.) The panel received the card in evidence, affirmed the judge's finding and sent the case back to the trial level for further proceedings, including a decision on earnings.

Quinn Company, et. al. v. Workers' Compensation Appeals Board (Coble), (2004) 69 Cal. Comp. Cases 1381; 32 CWCR 305; Court of Appeal, Fifth Appellate District, writ denied, not certified for publication.

Eddie Coble, Jr., began working for Quinn Company (Quinn) in 1965. Initially, he swept floors and steam-cleaned tractors. Over the years, he performed various mechanical duties on large equipment, tractors and engines. In 1997, applicant began experiencing pain in his knees and right shoulder. As his symptoms increased, he reported his complaints and on May 2, 2001 was referred to Quinn's physician, Dr. Christiansen. On May 11, 2001, applicant went on disability leave. Some weeks later, Quinn's personnel director called Coble into the shop and directed him to pick up his personal tools. The personnel director also told him that he should retire because he would be 65 by the time his knees and right shoulder were fixed. Coble had planned to work until he was 62 years old, but agreed to retire at age 59.

In February 2002, Coble filed an Application which was amended at the Mandatory Settlement Conference to allege cumulative injury through May 11, 2001, to his knees and right shoulder, from heavy lifting, standing on cement, and pulling wrenches. After hearing, a WCJ found injury and temporary disability indemnity from May 31, 2001 to May 12, 2004, and continuing. The WCJ also awarded medical treatment and ordered reimbursement of EDD benefits paid from May 21, 2001 to May 19, 2002 from indemnity awarded.

Quinn sought reconsideration contending that applicant voluntarily retired on May 31, 2001, and did not seek employment elsewhere. Therefore it was not liable for temporary disability. It also contested the allowance of the EDD lien on the ground that the physicians certifying entitlement to EDD benefits did not diagnose a work related disability. The WCJ in his Report and Recommendation noted that defendant's physician, Dr. Christiansen, had found applicant's problems to be work related. He noted evidence that applicant's decision to retire was solicited by defendant's personnel director, and that applicant had not then been advised of his potential rights to workers' compensation benefits. The Appeals Board denied reconsideration.

XI. Medical Treatment, Medical Control and Utilization Review

H&F Farms v. Workers' Compensation Appeals Board (Velasquez), 69 CCC 883, Court of Appeal, Fifth Appellate District, writ denied, not certified for publication

When Velasquez began working as a laborer for H&F Farms, he signed a form indicating his intent to enroll in an HCO, but he did not specify which of three available HCOs he was choosing. H&F Farms, however, had previously selected Sierra as its preferred HCO provider.

Velasquez sustained an industrial injury and was initially treated at Sierra. After being instructed to return for treatment in two weeks, however, Velasquez began treating with Accident Helpline. He continued treating there, despite letters from the insurance carrier directing him to treat at Sierra. The carrier responded by informing both Accident Helpline and Velasquez that treatment outside the HCO network was unauthorized and would not be reimbursed. Velasquez refused treatment from any HCO provider and continued treating with Accident Helpline. At trial, Velasquez testified that he stopped treating with Sierra because he “wasn’t feeling any relief” and “wasn’t feeling well.”

The WCJ and the WCAB found Velasquez properly enrolled in the HCO. They also found that defendants were not liable for the costs of Velasquez’ self-procured treatment within the employer’s medical control period where he intentionally refused to cooperate with the provisions of the HCO contract. If Velasquez was unhappy with his medical care, he possessed the statutory right to request a one-time change of physicians within the HCO (§4600.3(e)) or a second opinion under the AME/QME process (§§4061, 4062). His failure to do either precluded him from obtaining retroactive temporary disability or reimbursement for self-procured medical expenses during the period the employer was entitled to exercise medical control under section 4600.3. Lacking a statutory remedy for an employee’s failure to comply with section 4600.3, the WCAB refused to extend the 90-day control period and instead concluded “that it is sufficient that defendant has no liability for benefits during the control period and during the period of intentional lack of cooperation.”

On writ, defendants cited to *Ordorica v. WCAB*, (2000) 65 CCC 950, a non-HCO case in which the Court extended the employer’s 30-day period of medical control by the number of days that the employee intentionally deprived the employer of its right of control during that period. Defendants argued that, consistent with *Ordorica*, its medical control should be extended by additional 74 days to make up for the period Velasquez was being treated outside the HCO.

The Court found *Ordorica* not to be applicable in that Velasquez sought treatment from Accident Helpline because he was not receiving relief from Sierra, commenting that,

“We may not find any deceptive intent in Velasquez’s actions where the WCAB expressly found his conduct reasonable. The *Ordorica* remedy is therefore inapplicable here. Moreover, the benefit of such a remedy to the employer is in doubt in light of the recent elimination of the treating physician’s presumption. ¶ In summary, petitioners fail to demonstrate the WCAB’s remedy of disallowing temporary disability and medical expenses while the treatment Velasquez received outside the HCO network was inadequate to address his failure to comply with the relevant workers’ compensation statutes.”

Therefore, absolving defendant of liability for medical treatment and temporary disability during the 74 day period was an adequate remedy

Wawona Packing v. Workers' Compensation Appeals Board
(Valencia) (2004) 69 CCC 332, Court of Appeal, Fifth Appellate District,
writ denied, not certified for publication.

In *Wawona*, the Court affirmed a 2-1 decision of the WCAB panel (Commissioners Brass, Murray and Rabine (dissenting)), which had affirmed a decision of the WCJ. In essence, the Court concluded that the employer (Wawona) did not properly enroll its employee (Valencia) in HCO and, therefore, Valencia was not required to follow the restrictive change of treating physician procedures of section 4600.3.

Factually, Wawona gave Valencia two pamphlets in Spanish describing its HCO program. Valencia did not know what the pamphlets said because he “hardly knows how to read Spanish” and no one read or explained their content to him. Nevertheless, complying with Wawona’s instruction, Valencia signed his name to a document in English acknowledging: “Employee Receipt of HCO Enrollment Form and Information.”

When Valencia sustained an industrial injury, a Wawona employee drove him to the HCO provider, Sierra-Kings Industrial Health Care (Sierra). Shortly thereafter, however, Valencia began treatment with Accident Helpline Medical Group (Accident Helpline). Valencia continued treating there, even though he received letters from Wawona’s carrier advising him to go to Sierra.

In concluding that Wawona did not properly enroll Valencia in its HCO, the Court observed that an employer must give every employee an affirmative choice at the time of employment and at least annually thereafter to designate or change the designation of an HCO or personal physician (§4600.3(a)(1)). The Court noted that the WCAB and the WCJ found credible Valencia’s testimony he did not comprehend the employer-provided HCO election form. Thus, the Court implicitly concluded that this justified the finding Wawona failed to comply with the requirements of section 4600.3.

The Court also noted Wawona’s failure to comply with AD Rules 9779.3 and 9779.4. Rule 9779.3(a)(3) requires that information concerning the HCO program “shall be provided in written form in a language understandable to employees.” Rule 9779.4 requires that the employee’s HCO enrollment form be maintained in the employee’s personnel file for at least three years. Here, Wawona did not produce Valencia’s HCO enrollment form, even though it was legally required to maintain it for at least three years and produce it upon request. The Court then said: “Lacking any evidence of Valencia’s intent -- coupled with his credible testimony that he was never advised to select either the HCO or personal physician -- the WCAB reasonably concluded Wawona did not properly enroll Valencia in the HCO program and Valencia was therefore not bound by the change of physician procedures of section 4600.3.”

The Court, however, did note there was an issue of whether the employer was liable for the treatment Valencia received from Accident Helpline without Wawona’s approval within the first 30 days. Although the Court said this issue was not before them, it did comment: “Absent Valencia’s enrollment in the HCO, Wawona maintained control over

Valencia's medical treatment for 30 days," citing *Ordorica v. WCAB* (2001) 87 Cal.App.4th 1037 [66 CCC 333].

Of interest, the Court mentioned the section 4062.9 treating physician presumption, but said: "The presumption, however, was recently repealed effective April 19, 2004, and no longer applies, even to injuries occurring before the presumption was abolished. (Sections 22 and 46 to 49 of Stats. 2004, ch. 34 (Sen. Bill. No. 899).)"

Willette v. AU Electric Corporation; State Compensation Insurance Fund
(2004) 69 CCC 1298, Appeals Board *en banc*, 69 CCC ____, Appeals Board *en banc*.

Applicant sustained injury arising out of and occurring in the course of his employment to his low back and tailbone on October 13, 2003. On December 15, 2003, he was examined by Dr. Nguyen pursuant to provisions of former Labor Code Section 4060. Dr. Nguyen was of the opinion that applicant's injury was work related, and recommended six weeks of physical therapy. Applicant began treatment with Dr. Butcher and was referred to Dr. Noralahi for pain management. Subsequently, both Dr. Butcher and Dr. Noralahi recommended a TENS Unit, water therapy, and acupuncture. Defendant's utilization review physician, Dr. Chappelka reported that applicant had been found to be permanent and stationary, that further medical treatment was not required, that the recommended treatment was not justified by the treating physician, and that the treatment did not fall within ACOEM guidelines.

Pursuant to applicant's request, an Expedited Hearing was held on May 12, 2004 and the reports of Dr. Chappelka were excluded from evidence on the ground that he was not an attending or examining physician. On May 17, 2004, Findings and Award issued allowing the treatment prescribed by Dr. Butcher and Dr. Noralahi.

Defendant sought reconsideration contending (1) that the utilization review process provides for the admission in evidence of the utilization review physician's report; (2) that the ACOEM Guidelines are presumptively correct on the issue of extent and scope of medical treatment; (3) acupuncture and TENS are not found to be effective modalities of treatment under ACOEM; (4) there was no evidence of any basis from which the WCJ could find (a) that the ACOEM guidelines support the treatment, (b) that a variance from ACOEM was warranted, or (c) that other evidence based guidelines support the acupuncture and TENS treatments. The WCJ recommended that reconsideration be denied. The Appeals Board granted reconsideration and assigned the case to the Appeals Board as a whole for *en banc* decision.

The Appeals Board analyzed the applicable statutes and set forth a procedure for resolving disputes of this type, noting that Labor Code §4610(g)(3)(A) provides that if

the treating physician's request for authorization of medical treatment is not approved in full, disputes shall be resolved in accordance with Labor Code Section 4062. Therefore, an unrepresented employee who disputes the utilization review physician's recommendation must timely object to the opinion, and upon receipt of a timely objection, the employer must immediately provide the employee with a form to request a three physician Qualified Medical Evaluator (QME) panel.

The panel QME should consider the reports of both the treating physician and the utilization review doctor regarding the disputed issues. The panel QME ordinarily should also consider any relevant ACOEM guidelines or other relevant evidence-based medical treatment guidelines under Labor Code Section 4604.5(e). Once the panel QME's report has been obtained, no further medical evidence on the issue may be adduced from the treating physician or the utilization review physician in rebuttal to the opinion of the QME.

At any trial involving a post utilization review medical treatment dispute the report of the utilization review physician is admissible, even though he or she was not an attending or examining physician. The Appeals Board distinguished the contrary holding in the significant panel decision, *Czarnecki v. Golden Eagle* (1998) 63 CCC 742 by noting that the statutory scheme provided by Labor Code Section 4610 specifically provides for utilization review reports to assess the necessity of the treating physician's recommendations. The requirements of Labor Code Section 4610 make "clear that the utilization review physician's report is an essential part of the record in determining a post-utilization review medical treatment dispute." Furthermore, the utilization review physician's report does not require Labor Code 139.5 or 4628(j) declarations because the applicant is not being referred for treatment, nor is the report a medical legal report.

In determining the disputed issues, the WCJ or Appeals Board need not rely on the opinion of a particular physician, but should consider the weight to be given to the respective opinions and render a decision based on substantial evidence.

The Appeals Board rescinded the May 17, 2004 Findings and Award and remanded the matter to the trial level, requiring the defendant to provide the applicant with a QME panel request form, and providing that after the QME evaluation was completed the parties could request further proceedings.

After the Appeals Board issued its *en banc* decision, applicant filed a Petition for Reconsideration that was dismissed as an appeal that was not taken from a final order. However, on December 16, 2004 the Board clarified its prior holding by making the following observations. 1) If either party disagrees with the panel QME's opinion, there is the right to a judicial determination of the issue of applicant's entitlement to the disputed medical treatment, and 2) no determination was made about the weight to be given to any of the medical evidence. The Board reiterated that its prior holding was:

"[I]n determining whether to rely on the panel QME, the treating physician, or the utilization review physician, the WCJ or the Appeals Board will consider the weight to be given to the respective opinions and will consider whether they constitute substantial

evidence. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280-281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 637 [35 Cal.Comp.Cases 16]; see also, Cal. Code Regs., tit. 8, §10606 [compliance with Rule 10606 goes to weight to be given report]; *Insurance Co. of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905, 917 [46 Cal.Comp.Cases 913] [a report that is 'woefully inadequate' in its compliance with Rule 10606 should not be relied upon].)

Grom v. Shasta Wood Products; State Compensation Insurance Fund
(2004) 69 CCC 1567, Appeals Board *significant panel decision*.

Applicant suffered an industrial injury to his back on July 27, 1999. The treating doctor, in conjunction with a pain management specialist, requested authorization of testosterone cream treatment therapy "HRT" to counteract the effects of applicant's pain medication. In support of his request, the doctor quoted a published article from Dr. Daniell that concluded that "chronic opioid administration without testosterone supplementation may contribute to perpetuation of chronic pain and to continued administration of unnecessarily high dose of narcotics."

The Utilization Review (UR) doctor denied authorization for the treatment because it was not consistent with the ACOEM guidelines; the FDA had not approved HRT for use in these types of cases; and there was no medical evidence that applicant's hypogonadism was industrial.

The WCJ "concluded that the applicant's medical and scientific evidence constituted 'evidence-based support'" for the treater's request and that it rebutted the presumption of correctness of the ACOEM Guidelines that formed the basis for the UR doctor's denial.

The defendant filed a Petition for Reconsideration and among other things, argued that "the WCJ applied an incorrect standard to the determination of whether the testosterone treatment was reasonably required to treat applicant's injury. Defendant contends that any recommended treatment must both cure *and* relieve applicant from the effects of his industrial injury."

The Appeals Board issued a *significant panel decision* in this case and explained that the "phrases 'cure or relieve' and 'cure and relieve' have been used interchangeably for decades." In the case of *U.S. Fidelity & Guaranty Co. v. DIR (Hardy)*, (1929) 16 I.A.C. 69, the Supreme Court stated, "the words 'cure and relieve' were intended to mean the same as 'cure or relieve.' In our opinion this is the only reasonable conclusion that can be reached when we consider the act as a whole and its objects and purposes." (See also *Braewood v. WCAB*, (1983) 48 CCC 566.)

The Appeals Board cited several cases which held that "medical treatment which is intend only to relieve, but not cure, the effects of an industrial injury is appropriate under section 4600." As an example, the Board cited with approval, the case of *Smyers v. WCAB*, (1984) 49 CCC 454, which held that housekeeping services, unrelated to nursing

services, were properly prescribed by the treating physician as a palliative measure to relieve the injured worker from the effects of the industrial injury and as such, were allowable medical expenses under Labor Code §4600. The Appeals Board emphasized that this is especially true “in cases of chronic conditions where a cure is not possible, but where relief of symptoms is essential for continued functioning...”

Sandhagen v. Cox & Cox Construction; State Compensation Insurance Fund, (2004) 69 CCC 1452, Appeals Board *en banc*.

Applicant suffered an industrial back injury on October 22, 2003. The consulting physicians issued a report on May 14, 2004 requesting an MRI to determine whether the applicant had a herniated disc at the location of his pain. The report was served on defendant, and was later FAXed to defendant on May 24, 2004. On June 21, 2004, the defendant’s Utilization Review (UR) doctor denied authorization for the MRI.

The WCJ determined at the Expedited Hearing on July 15, 2004 that the defendant had not complied with the Labor Code §4610 time deadlines and therefore, the reports generated from the UR review were not admissible into evidence.

After defendant filed a Petition for Reconsideration, the Appeals Board issued its decision *en banc*, and affirmed the WCJ’s findings. Section 4610 provides that the UR decision must be made no later than 14 days after receipt of the treater’s request. Since the UR decision in this case exceeded that 14 day period, the defendant did not comply with the UR deadline, and therefore the UR report was not admissible.

The Board explained that the §4610 deadlines ensure the constitutional mandate of expeditious delivery of medical treatment to the injured worker. If defendants want to pursue the UR process, they must do so promptly and the deadlines set forth in §4610 are mandatory. If a defendant fails to meet a UR deadline, any UR report generated therefrom will not be admissible as evidence.

The Appeals Board did provide an alternative if the defendants fail to meet a UR deadline in that they may utilize the AME/QME procedures set forth under Labor Code §4062. However, any UR report that is not generated in compliance with the UR deadlines must not be provided to the AME or QME, as it would then constitute “back door” evidence which is prohibited.

In addition, if defendants utilize the AME/QME procedures, they must comply with the time periods in §4062(a), which provides,

“If either the employee or employer objects to a medical determination made by the treating physician concerning any medical issues not covered by Section 4060 or 4061 and not subject to Section 4610, the objecting party shall notify the other party in writing of the objection within 20 days of receipt of the report if the employee is represented by an attorney or within 30 days of receipt of the report if the employee is not represented by an attorney.”

In this case, the Appeals Board stated, the defendant received the treater's request on or before May 24, 2004 and did not notify the applicant within 20 days of this date of their objection to the request. Therefore, defendant would be "precluded from obtaining a QME report in rebuttal to" the treater's request.

The Appeals Board noted that although the defendants in this case had not met the Labor Code §4062 time limits, this limitation period may be extended for "good cause or mutual agreement." The Board recognized that "the statutory procedures established by §§4610(g)(1) and 4062(a) are relatively new and that no binding Appeals Board or Court of Appeal decision has previously interpreted the interplay between them." Therefore, the Board found "good cause" to extend the time limits in this case and the case was returned to the trial level to allow defendants a "reasonable opportunity" (20 days from the date of the Board's decision) to obtain a section 4062(a) evaluation."

It is not clear if the Board intends to allow defendants the option of ignoring the UR process, in favor of the AME/QME procedure where deadlines can be extended for good cause or agreement of the parties, (which is not available with the UR process.) This would seem contrary to the explicit language of the statute.

In any event, UR review under Labor Code §4610 should generally precede the AME/QME process. In cases of prospective review of medical treatment, such as in this case, the statutory language provides the AME/QME option to employees only, and not to employers. Section 4610 (g)(3)(A) provides that "if the request is not approved in full, disputes shall be resolved in accordance with Section 4062." Therefore, if the UR review doctor approves the treater's recommendation in full, the defendant must comply with that authorization, and is not permitted to move on to the AME/QME process. This is confirmed by the language in §4062(a) that provides, "If the employee objects to a decision made pursuant to Section 4610 to modify, delay, or deny a treatment recommendation, the employee shall notify the employer of the objection in writing within 20 days of receipt of that decision." There is no corresponding language if the employer objects to the UR determination.

Shearson v. St. Paul Ins. Company (2004) 32 CWCR 318, Appeals Board panel decision.

Applicant, a research assistant, sustained a cumulative neck injury through January 2003. Her primary treating physician recommended pain counseling to treat the psychological aspects of the injury, but the carrier obtained a utilization review opinion that the treatment was not in accordance with the ACOEM Guidelines. An expedited hearing was requested. At the hearing, applicant testified and her doctor's reports were admitted in evidence, but the utilization review (UR) reports were not because the UR physician had neither examined nor treated applicant.

The WCJ found need for the requested treatment, and awarded reimbursement for expenses of self-procured psychiatric care. The carrier sought reconsideration, arguing

that applicant had not been employed by defendant for six months prior to the injury, and was thus not entitled to psychiatric care; that the UR reports were improperly excluded; and that the ACOEM guidelines were presumptively correct and had not been rebutted.

A WCAB panel granted reconsideration and returned the matter to the trial level for further proceedings. The panel held that the parties had failed to follow the procedures set forth in *Willette v. SCIF* (2004) 69 CCC 1298. Where treatment is denied after timely UR under Labor Code §4610(g)(3)(B), the dispute must be resolved pursuant to §4602, which in turn requires that a represented party must object within 20 days of receiving the denial, and must then obtain a QME evaluation under §4062.2. The issue will then be decided on the entire record, including the UR reports, which are admissible. The procedure is summarized in *Willette* for unrepresented workers, and is the same in a represented case except for the use of §4062.2 rather than §4062.1. The parties must attempt to agree on an AME and, failing that, must request a panel QME.

The panel also held that UR reports are admissible since they are an essential part of the record in determining post-UR disputes. They are not “medical reports” within the meaning of Labor Code §4628. Further, the anti-self-referral provisions of §139.3 do not apply, and failure to sign the reports does not make them inadmissible. The panel rejected the “six months of employment” argument, noting that the issue was not psychiatric injury, but psychological treatment to cure or relieve from the effects of a neck injury.

XII. Medical-Legal, QME Process & Other Discovery

Avance v. WCAB (2004) 69 CCC 1 (Not Certified For Publication).

This case arises from a discovery dispute during the deposition of applicant that began on June 10, 2002. The defense attorney asked applicant to show his driver’s license. Applicant’s attorney objected on the grounds that there had not been a Notice to Produce for the deposition.

Defense attorney filed a Petition to Compel the deposition in front of a WCJ and she also requested sanctions per L.C. §5813, noting that applicant’s attorney had filed a DOR. Applicant’s attorney objected to the request for sanctions; and instead requested sanctions against defendant under L.C. §5813 and Code of Civil Procedure §2025. Defense attorney in turn objected.

The MSC was conducted in July 2002. The defense attorney abandoned her request for sanctions and instead noticed applicant’s deposition with an accompanying Notice to Produce 11 documents, including applicant’s driver’s license.

At the second deposition, applicant’s attorney objected to some of the documents and produced others, including a redacted copy of applicant’s driver’s license. Applicant’s attorney immediately sent the attorney for defendant a demand for payment of \$2,566.80 in attorney fees and \$1,741.20 for Applicant’s travel and 10 days missed work. Defendant agreed to pay \$366.80 as attorney fees per L.C. §5710.

There was an MSC on applicant's Petition for Attorney Fees of \$2,566.80 in December 2002, at which time the matter was submitted for decision. On March 24, 2003, the WCJ awarded reasonable discovery-related attorney fees of \$516.80 for client preparation, actual deposition time and travel time. The WCJ advised applicant's attorney that he could file a supplemental request for a "couple of hours" of services "for helping applicant respond to the Notice to Produce. The issue of 10 days missed time from work was deferred.

Applicant's attorney filed a Petition for Reconsideration of the Award, which was affirmed by the WCAB.

Applicant's appeal objected to the denial of fees and sanctions under the California Discovery Act. He argued that defendant's failure to serve a subpoena duces tecum before demand for the driver's license mandated sanctions under Code of Civil Procedure §§2023 and 2025(j)(3).

The Court of Appeal agreed that sanctions under the Code of Civil Procedure do not apply. L.C. §5710 incorporates only the procedures of the Discovery Act and the imposition of sanctions is substantive.

The Court of Appeal also agreed with the WCAB's denial of costs per L.C. §5813. The WCAB had reasoned that each party had participated in accelerating the "tempest in a teapot." The Board had been quite critical of the action of both sides and concluded that each party should bear their own costs. The WCJ had indicated that he did not want to do anything to encourage either party to this kind of action.

The Court of Appeal stated: "We could not agree more..." The Petition for writ of review was denied.

Lopez v. Nestle (2004) 32 CWCR 166, Appeals Board Panel Decision.

Dr. Abrams, the defense QME, refused to proceed with the orthopedic exam when the applicant insisted on tape recording it. Defendant rescheduled the exam and requested an order from the WCAB to compel applicant's attendance. Applicant opposed the motion on the ground that it was frivolous and requested sanctions under Labor Code §5813, arguing that he had been ready and willing to go forward with the exam, but was prohibited from doing so by Dr. Abrams who would not allow him to tape record their conversations

Without a hearing on the issue, the WCJ issued an order directing applicant to attend the exam, prohibiting him from making a tape recording, and suspending his right to maintain workers' compensation proceedings pursuant to Labor Code §4053.

Applicant filed a Petition for Removal with the Appeals Board alleging that he had been denied due process; that he had a right to tape record the defense QME exam; that he was

deprived of his right to a hearing on the issue; and that defendant's right to another QME exam was an issue yet to be decided.

The Appeals Board granted the Petition and reviewed Labor Code §4052 which allows an applicant to "employ at his own expense, a physician, to be present at any examination required by his employer." The Appeals Board referred to writ denied cases which expanded this statute to allow an applicant to record a defense medical exam (by court reporter or tape recorder) consistent with Code of Civil Procedure §2032(g) which permits a plaintiff to tape record a defense exam.

In the writ denied case of *Fireman's Fund v. Workers' Compensation Appeals Board (Landeros)* (1980) 45 CCC 37, the Appeals Board had explained, "that the reasons for giving civil plaintiffs the right to have an attorney and reporter present at medical examinations were equally applicable in workers' compensation proceedings." (*County of Alameda v. WCAB (Weems)* (1979) 44 CCC 452, the Appeals Board allowed an applicant to tape defense psychiatric exam.)

The Appeals Board sent the case back to the trial level for a hearing to determine whether the applicant should be allowed to tape record the defense QME exam. Citing *Penman v. WCAB* (1995) 60 CCC 793 the Appeals Board noted that there may be circumstances where it might not be appropriate for the applicant to record an exam and emphasized that the decision as to whether or not the recording would be disruptive, was purely within the discretion of the WCJ.

XIII. Liens and Lien Claimants

CIGA v. WCAB (Karaiskos) (2004) 117 Ca.App.4th 350 69 CCC 183
(Published).

Applicant, Jeannie Karaiskos, alleged that she sustained an October 5, 1998 industrial injury while employed by Metagenics, Inc., the insured of Cal Comp. Cal Comp timely rejected liability and did not pay benefits.

Karaiskos then applied to the EDD for UCD benefits, which were paid from November 5, 1998 through February 15, 1999. Later, EDD filed a \$2,104.13 lien.

Subsequently, Karaiskos and Cal Comp entered into a \$5,000.00 C&R, which provided that Cal Comp would "negotiate, pay or litigate" EDD's lien. The C&R was approved, with any outstanding liens "to be paid and/or adjusted as set forth in the Compromise and Release agreement, with jurisdiction reserved."

Cal Comp then became insolvent, so CIGA became responsible for its "covered claims." (Ins. Code, §§1063 et seq.)

Thereafter, a trial took place on the sole issue of whether EDD's lien was a "covered claim." The WCJ found that CIGA "may be required to make payment" to EDD.

On recon/removal, CIGA contended that the EDD/UCD lien was not a "covered claim" for which CIGA was liable because, among other things, the lien is an obligation to the State. (See Ins. Code, §1063.1(c)(4)).

On July 15, 2002, the WCAB issued its en banc decision. The WCAB acknowledged that EDD is a "state" agency, but it concluded, in essence, that a UCD benefits lien filed by EDD is an obligation to the injured employee, not to the "state." Basically, the WCAB reached this conclusion because UCD benefits are funded by employee contributions, which are then deposited into the Unemployment Compensation Disability Fund (UCD Fund), a special trust fund in the state treasury used exclusively for UCD benefits. A particular worker may receive a "maximum" amount of UCD benefits depending on his or her earnings during a "base period." When an employee makes a UCD claim, EDD sets up a "claim balance." When UCD benefits are paid to the worker, his or her "claim balance" is depleted. If, however, EDD is reimbursed by a defendant or by allowance of a UCD lien, the reimbursement is added to the employee's individual "claim balance," utilizing procedures set forth in EDD's internal Determinations and Procedures Manual (DPM). Then, the employee may receive further UCD benefits if he or she is still disabled. Thus, the employee is returned to the position he or she would have been in had the defendant paid workers' compensation benefits in the first instance. Accordingly, the WCAB held that reimbursement of a UCD lien is a payment of workers' compensation benefits, and that CIGA's obligation is to the injured worker rather than to EDD.

The Court concluded that an EDD lien claim for UCD benefits is an obligation to the "state" that is excluded from the definition of "covered claims" by Ins. Code § 1063.1(c)(4).

The court said that an EDD/UCD lien claim constitutes an obligation to the "state" because EDD is a state agency and because the Unemployment Insurance Code (UI Code) contemplates that UCD reimbursements are to be made to the UCD Fund in general, rather than to a particular disabled worker's account. Specifically, the Court observed that: (1) UI Code § 2629.1(e) states that UCD reimbursements made by insurance carriers "shall be deposited in the *Disability Fund*" (emphasis added); (2) UI Code § 2742 states that reimbursements "shall be deposited *in the fund from which the overpayment was made*" (emphasis added); and (3) UI Code § 3012(b), which requires EDD to keep a record of the payments to and disbursements from the UCD Fund, does not require the maintenance of individual accounts for each disabled worker. The Court then said:

"In short, the Unemployment Insurance Code talks in terms of funds and requires that reimbursements are returned to the *Disability Fund* generally. Therefore, the EDD is the lien claimant in its own right, seeking reimbursement as trustee on behalf of the

Disability Fund for the benefit of all bona fide claimants for money mistakenly paid out. The fact that the EDD administers the Disability Fund as a trustee does not convert a particular lien into a payment to a specific worker. A lien claim to reimburse the Disability Fund remains an obligation to the State because the payment is returned to the Disability Fund generally, which is maintained by the EDD and the State Treasurer for all employed and disabled workers in California. Thus, when filing a lien, the EDD is not seeking reimbursement for a specific employee."

The court also rejected the WCAB's decision to "look behind the statutes" to see how EDD administers the Disability Fund through the internal procedures set forth in EDD's DPM. The Court said that the Unemployment Disability statutes do not discuss "claim balances" and do not provide that recovery through an EDD lien claim "restores" a particular worker's eligibility for additional benefits. Further, the DPM "does not have the force or sanction of statute, decisional law, or even regulation," but instead "is merely the internal guidebook of EDD procedures." Moreover, according to the statutes (and contrary to the inferences drawn from the DPM), reimbursements of UCD payments have no effect on the availability of benefits for a particular employee's subsequent disabilities. And, although reimbursement of a lien might "potentially" cause a particular employee to be eligible for additional benefits for the *same* disability, this is not the usual case. The court then said:

"To characterize the EDD's lien as an obligation to the State depending on whether the EDD's receipt of reimbursement affects a particular worker's entitlement to additional benefits creates absurd results. Such a conclusion is tantamount to holding that satisfaction of the EDD's lien is or is not a payment to the State, depending on the facts of each case."

Finally, the Court rejected the Appeals Board's public policy rationale that, if CIGA is not required to reimburse EDD liens, then the UCD Fund will be depleted at a faster rate, which could result in either an increase in the rate of employee wage contributions to the Fund, an increase in the waiting period for UCD benefits, or a decrease in the rate of UCD benefits. The Court said "CIGA makes the same argument about its funds if it is ordered to pay the EDD's lien." Also, it is "the Legislature's decision as to who should bear a loss as between [EDD] and CIGA." Although denying payment to the state under these circumstances may increase EDD's financial burden, allowing recovery from CIGA could result in greater insurance costs to the involuntary members of CIGA, which costs could be passed on in part to the insured public. It is up to the Legislature to balance these concerns.

[NOTE: It appears that this decision is limited to circumstances in which the injured employee has C&R'd his or her claim, with a hold harmless on the EDD lien. That is, it does not appear to apply in situations where there is no C&R, and the insurance carrier fails to reimburse EDD before the carrier becomes insolvent.

First, this latter situation was the one presented in Viveros v. North Ranch Country Club, which was the companion case to Karaiskos and was part of the WCAB's en banc decision at 67 CCC 900. CIGA did not seek appellate review of Viveros at the time it sought appellate review of Karaiskos. Therefore, Viveros is (arguably, at least) still good law. (Although the Court "reversed" the WCAB's "decision," the only decision before the Court was the one in Karaiskos.) Moreover, in its petition for writ of review in Karaiskos, CIGA expressly distinguished Viveros. CIGA's brief in Karaiskos stated:

"[In Viveros,] the employee (who had not settled) proved his claim of industrial injury and was awarded temporary disability benefits for the same period he received UCD benefits; the award was made in favor of the employee and was subject to liens against the employee's award, including the UCD lien. In contrast, Karaiskos settled out without having sought to prove her claim of industrial injury and no longer has any right to an award for temporary disability benefits."

Second, in a case where there has been no C&R with a hold harmless provision, it is much clearer that the lien claimant stands in the shoes of the injured employee and that its rights are entirely derivative of the employee's rights. (Kaiser Foundation Hospitals v. WCAB, (Martin) (1985) 50 CCC 411. Therefore, the only direct liability is a liability to the injured employee, *and an award in favor of the injured employee must be made before a lien thereon can be imposed in favor of the lien claimant*. Because a lien claimant's rights are merely derivative of the injured employee's rights, and because an award relating to a lien must be issued in favor of the injured employee, then any obligation by CIGA to pay a UCD lien is more clearly an obligation to the injured employee, and not an obligation to EDD, the state agency.

It is possible that the Court's rationale could be extended to cases where there is no C&R with a hold harmless on the EDD/UCD lien.

Clayworth v. WCAB (2004) 69 CCC 28 (writ denied).

The Petitioner is a pharmacist, dba Clayworth Healthcare Pharmacy. The Petition for Writ of Mandamus requested the court of appeal to immediately stay the AD from implementation of the recently enacted amendments to the pharmacy fee provisions of L.C. §5307.

The petition alleged that the lower fees violated the California Constitution on various grounds. The AD filed a response by letter contending that an individual pharmacy did not have standing to challenge the amendment, that the Legislature acted reasonably; and that there was sufficient information provided to the Legislature for it to determine that Medi-Cal rates constitute reasonable payment.

The court of appeal denied writ without comment.

Messinese v. Automatic Heating; State Compensation Insurance Fund (2004) 69 CCC 480, Appeals Board Significant Panel Decision.

The applicant suffered an admitted specific injury on April 14, 2003. The insurer, State Compensation Insurance Fund, began paying temporary disability at \$400.00 per week. Prior to the injury the applicant divorced. He had two children from that marriage for whom he was ordered to pay child support, but failed to make some of the ordered payments. On July 22, 2003 the Superior Court ordered monthly child support payments of \$69.00 retroactive to May 2003. While the order did not specifically address the issue of arrearages, it did authorize San Bernardino County to collect the support payments.

On August 18, 2003 the County sent an earnings assignment to SCIF directing the carrier to deduct \$69.00 per month from the applicant's current temporary disability payments, as well as \$280.00 per month for the arrearages. The assignment directive was not judicially authorized. The applicant received a copy of the directive and was advised that if he objected he could request a hearing in the Superior Court. When the applicant did not object, SCIF commenced the deductions.

The applicant filed a Declaration of Readiness requesting an expedited hearing claiming that defendant's deduction of more than \$69.00 from his temporary disability benefits violated the Superior Court order. He requested penalties under Labor Code §§4650(d) and 5814 and sanctions under §5813.

On January 6, 2004 the WCJ issued a decision finding that the Superior Court order was invalid to the extent that it required SCIF to deduct pre-injury child support payment arrearages. The WCJ also noted that the assignment had not been approved by the WCAB before SCIF commenced the deductions. The WCJ likened the assignment to a pre-injury living expense lien in violation of Labor Code §4903(c) and (e), ordering SCIF to reimburse the applicant for the amounts it had paid to the County and awarding §4650 (d) penalties on the delayed payments. The WCJ further denied SCIF credit for the arrearage payments of \$280.00 per month.

SCIF and the County of San Bernardino filed Petitions for Reconsideration. SCIF argued that the WCAB is a court of limited jurisdiction such that it cannot override an otherwise valid earnings assignment directive issued by County Child Support Services. SCIF further argued that no Labor Code §4650(d) penalty should have been found because it was merely complying with a valid assignment order and following the Administrative Directors' guidelines.

The County of San Bernardino argued that the validity of the assignment is not subject to review by the WCAB because the applicant failed to follow the statutory procedure to seek review in the Superior Court. The County pointed out that Family Code §5246 and Code of Civil Procedure §704.160 allow child support agencies to issue earnings assignment orders without further judicial approval. The County argued that public policy favors allowance of child support payments and pointed out that the WCJ failed to follow the Administrative Director's guidelines per memorandum dated January 11, 1993.

The WCAB granted reconsideration. The panel stated that as a general rule the WCAB has exclusive jurisdiction over workers' compensation matters pursuant to Labor Code §§5300 and 5301. Under §4902, all compensation must be paid directly to the applicant unless the WCAB orders otherwise. Per §4900, compensation is not assignable before payment and §4901 provides that no compensation is subject to be taken for the debts of an injured worker except as provided by the Labor Code. The panel also reviewed §4903, subsections (c) and (e) which authorizes liens for living expenses, including for child support, but only for expenses incurred after the date of injury.

The panel further noted that pursuant to Code of Civil Procedure §1859, the Legislature may create specific statutory exceptions such as Family Code §5246 which authorizes a child support agency to serve an employer with an earnings assignment to withhold child support. Pursuant to Family Code §5206 (d), "earnings" includes temporary disability indemnity and "employer" includes any entity paying temporary disability benefits. The assignment order does not require the signature of a judicial officer, but has the same force and effect as if signed by a judge. Family Code §5246 (d)(2) provides that if the underlying court order does not cover arrearages, the assignment order may direct an additional amount to be withheld and applied to the past due amounts. An employee has 10 days to object and request a hearing in the Superior Court to quash or modify the assignment. Additionally, Code of Civil Procedure §704.160 authorizes a local child support agency to apply temporary disability payments to satisfy a child support judgment, including arrearages. However, the earnings assignment cannot exceed 25% of the amount of the temporary disability payments.

The panel rescinded the WCJ's decision, including the penalties, and issued an order directing the defendant to withhold from temporary disability benefits and pay to the County \$69.00 per month for current child support and \$280.00 per month for arrearages.

Ladin v. Vons Grocery (2004) 32 CWCR 193, Appeals Board Panel Decision.

On August 11, 2003, the WCJ issued a Findings and Order that applicant take nothing in his workers' compensation case. When the applicant and a lien claimant both filed petitions for reconsideration, the WCJ rescinded the Findings and Order under 8 CCR 10859 and scheduled a conference at which time the parties were given 30 days to submit a Compromise and Release. A Compromise and Release in the amount of \$175,000 with request for a *Thomas* finding was submitted for approval with a provision that the defendant would pay, adjust or litigate all lien claims of record.

On March 1, 2004, the WCJ reinstated the Findings and Order and on March 10, 2004, approved the Compromise and Release with a *Thomas* finding. The lien claimant then filed a timely Petition for Reconsideration of the decision reinstating the Findings & Order.

The Appeals Board granted the lien claimant's petition and remanded the case back to the trial level to resolve the lien claim in accordance with Title 8, California Code of Regulations, §10888, clarifying that the Compromise and Release remained in place. The Appeals Board emphasized the importance of adhering to §10888 before approving a C&R noting that the parties must make a good faith attempt to resolve all lien claims before a Compromise and Release can be approved. An agreement to "pay, adjust or litigate" a lien is not sufficient.

If a Compromise and Release is approved without resolving the liens, the WCJ must set the case for a lien conference; or issue a 10 day notice of intention to order payment of the lien; or issue a 10 day notice of intention to disallow the lien and schedule a lien conference upon a showing of good cause.

XIV. Vocational Rehabilitation

Pebworth v. WCAB. (2004) 116 Cal.App.4th 913, 69 CCC 199 (Certified for Publication).

Pebworth had a specific injury in 1997 and a CT injury through August 2002. He entered into a Compromise and Release in November 2002 in which all issues were resolved, except vocational rehabilitation. In January 2003, Pebworth and his employer submitted a stipulation to the Rehabilitation Unit (RU) agreeing to settle his rehabilitation claim for \$10,000 pursuant to L.C. §4646(b). The RU rejected the stipulation on the ground that the statute applies only to injuries occurring after January 1, 2003. Both parties appealed and the WCJ agreed with the RU. After both parties filed petitions for reconsideration, the Appeals Board issued an *en banc* opinion agreeing with the RU and WCJ reasoning that applying the amendments to L.C. §4646 would be an impermissible retroactive application of the statute. Pebworth filed a writ with the Court of Appeal.

Generally, whether a statute is applied prospectively or retroactively is a question of statutory construction. The court must attempt to first ascertain legislative intent to effectuate the purpose of the law and avoid absurd consequences. Effective January 1, 2003, L.C. §4646 was amended to allow represented employees to settle prospective vocational rehabilitation services with a one time payment not to exceed \$10,000. Any settlement of prospective vocational rehabilitation benefits must be approved by the RU. Whether these amendments could be applied in this case depends on whether they are procedural or substantive; a procedural change, by definition, is prospective only since it relates to the procedure to be followed in the future.

In finding the 2003 amendments to L.C. §4646 to be procedural, the Court departed from the reasoning of the Appeals Board. Since no new or additional liability is created or vested contractual rights are affected by these amendments they relate only to the manner in which established rights or liabilities are invoked in the future. Once it is established that a statute is procedural, it can be applied even if the cause of action occurred before the effective date of the statute. The amendments to L.C. §4646 become operative only when the statute is invoked and therefore operate in the future and they do not increase

the cost of benefits due from the employer to the employee so no new liability is created. From a policy viewpoint the court reasoned the legislature intended prospective release of vocational rehabilitation benefits for those people injured on or after January 2003. The court could not understand why this policy should be withheld from those people injured previous to the effective date of these amendments, especially when all parties stipulated to be bound by the application of the new statute.

Godinez v. Buffets, Inc. (2004) 69 CCC 1311, Appeals Board Significant Panel Decision.

Applicant sustained an injury arising out of an occurring in the course of her employment on June 18, 2000. On July 17, 2003, the Rehabilitation Unit issued a determination and order with respect to applicant's claim for vocational rehabilitation. On August 5, 2003, the Workers' Compensation Appeals Board district office received defendant's Appeal from the Determination and Order addressed to the Rehabilitation Unit. The appeal was date stamped "DWC/WCAB-RECD/Filed Aug 5 2003-San Jose". The document was then routed as addressed to the Rehabilitation Unit.

On May 25, 2004, a WCJ issued an Amended Findings and Order denying defendant's appeal as not timely filed. Defendant sought reconsideration contending that the repeal of Labor Code §4645(d) by AB 227 applied retroactively, eliminating the requirement that an appeal from a Rehabilitation Unit Determination and Order be filed with the Workers' Compensation Appeals Board within twenty days after service.

The Workers' Compensation Appeals Board found that some provisions of former Article 2.6 of Chapter 2 of Part 2 of Division 4 of the Labor Code (former §§4635 through 4647) "still have a shadowy existence for injuries prior to January 1, 2004," and that former §4645 "continues to govern the timeliness of appeals from decisions of the Rehabilitation Unit." The Appeals Board went on to hold that when the defendant's appeal was received and date stamped by the Worker's Compensation Appeals Board District Office on August 5, 2003, nineteen days after the issuance of the Determination and Order appealed from, it was timely filed, notwithstanding that it was addressed to and forwarded to the Rehabilitation Unit. The Amended Findings and Order determining that the appeal was not timely filed was rescinded and a finding entered that defendant was entitled to a hearing on the merits of its appeal. The case was remanded for proceedings consistent with that finding.

Los Angeles Unified School District v. Workers' Compensation Appeals Board (Babcock) (2004) 69 CCC 1121, Court of Appeal, Second Appellate District, not certified for publication.

Applicant was an English and Drama teacher for Los Angeles Unified School District (LAUSD) from 1988 through September 1, 1999. On September 1, 1999, she fell and fractured her left ankle. She underwent ankle surgery during which fixation devices were

implanted in her ankle on September 2, 1999. Her treating physician recommended that the fixation devices would be removed in June or July 2001. The treating physician recommended that applicant could return to work without restrictions on January 10, 2000. On November 21, 2000, the treating physician found applicant's condition permanent and stationary, recommending that she be restricted from work at high places and from climbing stairs. Applicant returned to work from January 2000 to June 24, 2001. Applicant then relocated from Valencia to Ventura and too a regular retirement.

In October 2001, applicant underwent surgery for removal of the fixation devices from her ankle. On February 15, 2002, applicant's treating physician reported that applicant could do light duty desk work only. On March 11, 2002, LAUSD wrote to applicant advising that it would accommodate the restriction, and advised her to contact Principal Arturo del Rio. Initially the principal advised applicant that he was unaware of the assignment at Fernando Middle School, and that there was a hiring freeze. He later testified applicant could have "unretired" and taken the position, but applicant's case manager at LAUSD advised her that the offer was not valid. The case manager asked if applicant would accept the offer if it were made. Applicant's response at that time was not recorded; subsequently it appeared that applicant would not have accepted the offer due to distance from her new residence.

On May 10, 2002, the treating physician issued a permanent and stationary report opining that applicant was medically eligible for vocational rehabilitation. He recommended that applicant be limited to work with no prolonged standing, no walking on uneven ground, no repetitive stair climbing, no ladder climbing, and ability to stand or sit at will.

On May 29, 2002, the employer advised applicant that it denied liability for vocational rehabilitation due to applicant's retirement. On June 12, 2002, applicant filed a request for dispute resolution (RU103) with the Rehabilitation Unit. On July 24, 2002, applicant was evaluated by defense medical legal evaluator, Dr. Jonathan Jaivan. Dr. Jaivan opined that applicant was unable to return to her duties at the time of injury, but could perform modified duties, if available.

On September 26, 2002, the Rehabilitation United issued a Determination and Order finding applicant to be entitled to vocational rehabilitation. The Unit determined that the notice of modified work was in adequate due to questions of good faith in light of the hiring freeze. LAUSD appealed the Determination and Order of the Rehabilitation Unit. The WCJ sustained the Rehabilitation Unit determination, and LAUSD sought reconsideration. In its petition for reconsideration, LAUSD did not argue the offer of modified work, but contended that applicant was not feasible for vocational rehabilitation due to her retirement. The Appeals Board denied reconsideration because it found the retirement was a result of her disability from her work injury, because she had requested vocational rehabilitation, and because she had indicated interest in modified work. Finally, the Appeals Board noted that retirement from LAUSD employment did not remove applicant from the labor market. LAUSD sought review.

The Court of Appeal sought input on the impact of SB 899 on the issues in the case. The urgency legislation had repealed prior Labor Code §139.5, and added a Labor Code §139.5. The parties agreed that the statutory scheme in effect in 2002 remained controlling of the issues in this case. The Court denied LAUSD's petition for review. It noted that vocational rehabilitation must be offered to qualified injured workers in the form prescribed by RU-94. A qualified injured worker is one who is precluded from returning to his or her pre-injury occupation (medical eligibility) and can reasonably be expected to return to suitable gainful employment through vocational rehabilitation (vocational feasibility). The opinion of the treating physician established medical eligibility. When that requirement is met, the determination of vocational feasibility must be made by a qualified rehabilitation representative. Here, the opinion that applicant's retirement from LAUSD amounted to vocational unfeasibility was not persuasive. The communication of that opinion to applicant did not meet the requirements of RU-94. Applicant is entitled to vocational rehabilitation services.

XV. Permanent Disability

Graves v. Travelers Insurance Company, (2004) 32 CWCR 45 (Board Panel Decision).

Applicant sustained multiple injuries arising out of and occurring in the course of her employment as a bus driver. The applicant chose Steven Nagelberg, M.D. to be her primary treating physician. In a report dated November 19, 2001 the primary treating physician said applicant's disability was permanent and stationary and imposed separate work limitations for the injured parts of body. After a hearing, the WCJ, relying on the primary treating physician, requested a rating for the following factors of disability: (1) lumbar spine: no heavy work; (2) cervical spine: no heavy work and repetitive head movement. Applicant should avoid use of either upper extremity at or above shoulder level; (3) right hand, no repetitive or forceful gripping and grasping and continuous use of vibrator or pounding tools; and (4) right knee: no repetitive kneeling, squatting, crawling, climbing, jumping and running. The disability evaluation specialist recommended a 66% permanent disability rating that she computed according to the following formula:

12.1-55-250-F.-55-57
10.10-13-250-F-13-14
14.5-5-250-F-5-5
MDT66

Defendant objected to the recommended rating and cross-examined the disability evaluation specialist. The disability evaluation specialist testified that she considered that some duplication occurred between no use of the arms at or above shoulder level and no repetitive neck motion. After eliminating that duplication the disability evaluation specialist found the various factors of disability added up to 57 1/2% which she rounded down to 55% because ratings above 20% are stated only in increments of 5%. She explained that she rounded down rather than up because the examples in the rating

schedule are computed that way. The disability evaluation specialist added that she reduced the standard rating for no repetitive kneeling, squatting, crawling, climbing, jumping and running to allow for duplication and no heavy work.

A Findings and Award issued in accordance with the recommended rating that the injury caused 66%. Applicant sought reconsideration. A panel granted reconsideration for further study. After completing its study, the panel indicated that disability evaluation specialists are experts in translating factors of disability into rating. Although a disability evaluation specialist may consider factors not covered by the schedule for rating permanent disability, the schedule is prima facie evidence of the percentage of permanent disability to be attributed to each disability covered by the schedule. Because the rating schedule cannot possibly cover every conceivable disability, a disability evaluation specialist may have to prepare a nonscheduled rating by comparing the disability with the one most similarly in the schedule, either by analogy to a scheduled disability or by comparison with the entire scheme of the relative severity of disabilities.

The panel indicated multiple factors of disability may result from a single injury. Because simply adding ratings of separately rated disabilities may cause pyramiding or duplication, which must be avoided, the multiple disabilities table is used. Duplication occurs when disability in different parts of the body call for the same or overlapping work restrictions. When disabilities duplicate each other, an injured employee cannot receive payment for both. Under the circumstances of duplication the use of the table may not be appropriate, and the disability evaluation specialist must apply his or her expertise to produce an unscheduled combined rating based on comparison with the entire scheme of relative severity of the disabilities.

The final rating is determined after consideration of the whole picture of disability and the injured employee's diminished capacity to compete in the open labor market. Applying these principles to the facts before it the panel said it was satisfied that the rating instructions included all the factors of disability reported by Dr. Nagelberg.

The Board said that the disability evaluation specialist's method of calculating the rating, moreover, appropriately avoided duplication and produced a realistic reflection of applicant's permanent disability. There was some duplication between the preclusions from using the arms above shoulder level and from repetitive head movement because applicant will no longer be engaged in looking up and down on a repetitive basis. The disability evaluation specialist did not entirely discount the repetitive head movement factor, but assigned it an undisputed 5%; similarly some of the right knee restrictions were included in the preclusion from heavy work. Turning to the next issue which was the rounding of the 57 1/2% down to 55% rather than up to 60%, the panel was persuaded that this was error and said the disability evaluation specialist did not identify any rule or disability evaluation unit directive mandating rounding midpoint numbers down. The Board said that being aware of no rule requiring rounding down, the panel concluded that the L.C. §3202 mandate that it liberally construe the law with the purposes of extending benefits requires rounding up rather than down a standard disability rating at the midpoint between increments of five. This was consistent with the provision of the schedule that

as between a rating for impairment and one for a work restriction, the one producing the higher rating is used.

Accordingly, as its decision after reconsideration, the panel rescinded the WCJ's December 11, 2002 findings and award, and order and returned the case to the WCJ to request a new recommended rating on the same factors, but with the instructions to the disability evaluation specialist to round the 57 1/2% rating up, rather than down, and to issue a new decision consistent with the Board's decision.

Ruiz v. Raley's, (2004) 32 CWCR 321, Appeals Board panel decision

Applicant, a pharmacy clerk, sustained an injury in December 1989 to her right leg and back, with psychiatric consequences. Her major disability was reflex sympathetic dystrophy. Over the years, she was evaluated many times. In July 2003 Bruce Gorlick, D.P.M., applicant's podiatric QME, opined that she was limited to sedentary work with need for a cane when ambulating. Donald L. Ansel, M.D., defendant's QME neurologist, reviewed surveillance films and in March 2003 found applicant to be limited to between semi-sedentary and sedentary work. He stated that she could undertake vocational rehabilitation if she were so inclined. Michael G. Adelberg, M.D., applicant's neurologist, agreed with Dr. Ansel. Bruce Kaldor, M. D., a psychiatric QME, found certain work function impairments related to the injury.

At trial on February 10, 2004, a vocational rehabilitation counselor, Gary Nibbelink, testified that applicant was unable to engage in activities necessary to compete in the open labor market, while another rehabilitation expert testified on behalf of defendant that applicant's problem with employment was primarily lack of motivation.

The WCJ requested a recommended rating based on the opinions of Drs. Ansel and Kaldor, and received an 84 percent rating, in accordance with which an award was issued. Applicant sought reconsideration, arguing that the WCJ ignored evidence that she was completely unable to compete in the open labor market; that Dr. Ansel's opinion was based on old videotapes; and that any lack of motivation was due to her psychiatric injury. In his report, the judge addressed the substantial evidence question, and then turned to applicant's contention that under *Le Boeuf v. WCAB* (1983) 48 CCC 587, she must be held totally disabled.

In a scholarly analysis of the effect of *Le Boeuf*, the WCJ observed that the case stands for the proposition that the worker's inability to undertake vocational rehabilitation should be taken into account in assessing the degree of permanent disability. Testimony and rehabilitation reports of counselors may be received in evidence even though there has been no Rehabilitation Bureau determination. (*Gill v. WCAB* (1985) 50 CCC 258.) The judge noted that use of *LeBoeuf* and *Gill* have evolved to the point where often no attempt is made by the counselor to determine whether applicant is qualified for vocational rehabilitation. Almost always the expert tries simply to persuade the judge that the permanent disability is higher than what is justified by the medical evidence. The law,

however, requires medical evidence to support a permanent disability award, and the courts cannot have intended to abrogate that requirement. *LeBoeuf* and *Gill* provide no method for deciding which medical findings are necessary for the rehabilitation expert's opinion to be considered. There is no method of transferring from the medical findings to the use of the rehabilitation expert's opinion, because the rehabilitation testimony is usually offered to supplement or rebut the medical evidence. The proper use of *LeBoeuf* and *Gill* is for the rehabilitation witness's testimony to be used in rebuttal to a rating based on factors of disability derived from the medical reports.

The judge noted that the degree of disability is determined by use of the rating schedule, which is *prima facie* evidence of permanent disability, with the factors constituting findings of fact on the nature and extent of permanent disability. (*Heggin v. WCAB* (1971) 36 CCC 93.) Since the administrative director presumably considered the diminished ability to compete in an open labor market when adopting the schedule, the rater considered that factor, and the rehabilitation expert's testimony fits into the scheme by probing whether the rater properly considered that factor. In the instant case, Nibbelink's testimony did not relate to the rating, since it came before the rating was issued. its purpose "was to trump the medical findings and convince the WCJ that [Nibbelink] rather than physicians had more accurately described applicant's medical condition." It was not substantial evidence, since it assumed facts that were not part of the rating instructions. The testimony could not rebut the recommended rating. The WCJ did, however, advise the Board that he had inadvertently omitted use of a cane, and recommended that it be added to the rating.

An Appeals Board panel obtained a new rating of 87 3/4 percent permanent disability, and issued an amended award, otherwise affirming the judge's decision.

XVI. Apportionment

Davis v. City of Sacramento (2004) 32 CWCR 132, Appeals Board Panel Decision

Prior to the enactment of SB 899 (April 2004), the WCJ awarded applicant permanent disability for the industrial injury to his gastrointestinal systems. The WCJ reduced the PD award by apportioning a percentage of the PD to applicant's 1977 PD award of 17% for psychiatric injury, (which had manifested itself as colitis.)

Applicant filed a Petition for Reconsideration contesting the WCJ's finding of apportionment. Applicant argued that since he had returned to full duty as a police officer, with no restrictions, after his 1977 psychiatric injury, he had sufficiently rehabilitated himself. The Appeals Board granted applicant's petition and agreed that prior to enactment of SB899, apportionment of a prior PD award might not be appropriate, if the injured worker had fully rehabilitated himself before the second injury. (*Robinson v. WCAB*, (1981) 46 CCC 78.) However, in April 2004, Section 4664 had been added to the Labor Code which changed the law on apportionment. This new section

provided that "...it is now conclusively presumed that if the applicant has received a prior award of permanent disability, that disability existed at the time of the subsequent injury." Considering the fact that Mr. Davis had a prior PD award of 17% and a pre-existing condition of colitis, the Appeals Board returned the case to the trial level in order to allow the trial judge to re-analyze the issue of apportionment "consistent with SB 899."

On July 19, 2004, the Appeals Board, on its own motion, granted reconsideration of their May 19, 2004 decision in this case, and amended it "by interlineation to reflect that the Appeals Board has not decided whether SB 899 applies to the apportionment issues in this matter."

Key v. Workers' Compensation Appeals Board (2004) 69 CCC 1117,
Court of Appeal, Fifth Appellate District, writ denied, not certified for
publication

Applicant sustained injuries in June 1993 to his low back and right knee, and on May 16, 1996 to his neck and back. In September 1996, stipulations entered that the 1993 injury had resulted in 42:3% permanent partial disability, and entitled to other benefits. On January 5, 2003, applicant was found to be 100% disabled following the 1996 injury, and that 57:1% disability was apportionable to the 1996 injury. Both parties sought reconsideration, and both petitions were denied on March 17, 2004. Applicant sought review, contending that the first injury was not labor disabling at the time of the second injury.

The Court found that prior to April 19, 2004, apportionment under Labor Code Section 4750 was allowed for a pre-existing disability which was actually labor disabling at the time of the subsequent injury. In this case the parties' agreed medical examiner had opined that the prior disability from the 1993 injury remained at the time of the 1996 injury. It noted evidence that applicant at the time of the 1996 injury was receiving treatment, using a leg brace, and using medical leave time due to the effects of the 1993 injury. Further,

"Effective April 19, 2004, 'regardless of the date of injury,' The legislature enacted a new, directly relevant conclusive presumption applicable to apportioning [disability from] prior injuries. Ö. Section 4664, subdivision (b) now provides: '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.' Accordingly, even if the record lacked substantial evidence to support [the finding that] Key was actually labor disabled at the time of his second injury, the WCAB would be bound to apportion."

The applicant's Petition for Writ of Review was denied.

Scheftner v. Rio Linda School District (2004) 69 CCC 1281, Appeals Board *en banc*.

Janelle Scheftner sustained a work related injury to her low back on February 12, 2002. At the time of injury she was having ongoing symptoms in her back, had suffered a back strain in 1997, had been receiving medical treatment her back, and had a scheduled appointment for treatment for her back on February 13, 2002. On January 31, 2002, applicant's treating chiropractor noted in applicant's medical records that she had "constant pain in the lower left side of her back going down into [her] leg, butt and side." The pain was reported to be aggravated by sitting, bending, twisting, pushing, lifting, reaching, stooping, kneeling, standing, pulling, and arising from sitting. Following the February 12, 2002 injury applicant received further back treatment and evaluation, including an applicant's QME evaluation by Dr. Nijjar.

The case came to trial on February 18, 2004, and the WCJ issued a disposition indicating that the case might be referred to the disability evaluation unit, or in the absence of such referral was submitted. Thereafter the WCJ did not refer the matter for formal rating, but on April 23, 2004, issued Findings and Award determining, in part, that the injury had resulted in 34% permanent partial disability without apportionment, and finding that applicant was in need of further medical treatment. On April 19, 2004, urgency legislation took effect, requiring, in part, changing the legal standard and basis for apportionment of permanent disability and requiring that any discussion of permanent disability include discussion of causation of the disability.

Defendant sought reconsideration of the findings of extent of permanent disability and of need for medical treatment, contending, among other things, that Dr. Nijjar's report was not substantial evidence because it failed to discuss apportionment based on causation as required by newly amended Labor Code §4663. The WCJ indicated in his Report and Recommendation that a rating of Dr. Nijjar's report should have been obtained, but that the provisions of SB 899, including new Labor Code §4663, were not applicable because the case had been submitted for decision on February 18, 2004.

Section 47 of Senate Bill 899 enrolled as Chapter 34 of the Statutes of 2004, provides that the amendments provided by the statute apply:

“[P]rospectively from the date of enactment,’ regardless of date of injury, unless otherwise specified, but shall not constitute good cause to reopen, rescind, alter, or amend any existing order, decision, or award of the Workers’ Compensation Appeals Board.”

The Workers’ Compensation Appeals Board granted reconsideration, and assigned the matter for decision by the Appeals Board *en banc*. The split *en banc* decision addresses, first, the meaning of the provision in Section 47 of SB 899 providing that changes enacted by the statute “shall not constitute good cause to reopen, rescind, alter, or amend any existing order, decision, or award.” After discussing general standards for statutory construction, the Appeals Board stated that there are three categories of orders, decisions, and awards authorized by the Labor Code. Firstly, there are orders which have become final because the parties have not pursued or have exhausted all appeal rights. Secondly,

there are final orders subject to reconsideration under Labor Code Section 5900. Thirdly, there are interlocutory orders which are subject to removal under Labor Code Section 5310.

“Existing order” as used in Section 47 of SB 899 must include orders subject only to reopening, but must exclude orders not affected by SB 899, such as orders changing venue or allowing deposition fees. Between those benchmarks, the Appeals Board finds it must look to the entire statutory scheme to construe the meaning of the term “existing order.” An existing order is not the same as a final order, but is more inclusive. The Appeals Board decision goes on to state that, with respect to the standard in Section 47 of SB 899, an order closing discovery at an MSC is an existing order, and is not subject to being reopened due to a change in law resulting from enactment of SB 899. Likewise, an order of submission after a case had been tried and the record closed is an existing order. While the interpretation results in application of the new standards in the act to fewer cases, it is consistent with the Constitutional mandate to “accomplish substantial justice in all cases expeditiously...”

“To interpret ‘existing order’ narrowly would thwart the Constitutional mandate by allowing discovery to be reopened, trials postponed, cases retried, and additional costs incurred.”

If discovery was closed or the matter submitted for decision prior to April 19, 2004, the orders closing discovery or submitting for decision are existing orders not to be set aside or reopened to apply the new apportionment standards enacted in SB 899. The Appeals Board found Dr. Nijjar’s report to constitute substantial evidence on the issues of permanent disability, apportionment, and need for further medical treatment. It also found that the WCJ had authority to rate and correctly rated Dr. Nijjar’s report based on the subjective factors of disability set forth in the report. The WCJ’s recommendation that the matter be remanded for formal rating instructions was therefore rejected and the Award was affirmed. However, it was noted where there is no existing order, decision, or award, the apportionment statutes enacted by SB 899 must be applied regardless of the date of injury.

Commissioners Brass and Cuneo dissented. Commissioner Brass contended that procedural orders should be construed to mean final orders subject to reconsideration under Labor Code Section 5900.

Commissioner Cuneo contended that the clear legislative intent of SB 899 was to apply the changes made therein at the earliest possible date to relieve the state from the effects of the current workers’ compensation crisis. The delay in applying new Labor Code §§4663 and 4664 is contrary to that clear legislative intent. Both dissenting commissioners would rescind the WCJ’s Findings and Award, and remand the matter for development of the record to meet the requirements of SB 899.

A petition for writ of review has been filed in this case.

XVII. *Death Benefits*

XVIII. *Hearings, Discovery Closure and Development of Record*

Crestwood Hospitals, Inc v. Workers' Compensation Appeals Board (Ochoa) (2004) 69 CCC 470, Court of Appeal, Fifth Appellate District, not certified for publication.

The Court of Appeal annulled the Appeals Board's decision adopting and incorporating the Report and Recommendation of the WCJ based on the WCJ's failure to explain how he reached his conclusion that the applicant was totally disabled.

The Court's opinion, which was rendered without granting the writ of review, followed the Appeals Board's written request to vacate the its decision and remand for further proceedings to further develop the record on the issue of nature and extent of permanent disability

The Court concluded the following:

“As the WCAB concedes, this court lacks sufficient analysis from the WCAB to conduct a meaningful judicial review. The WCAB's failure to comply with Labor Code §5908.5 constitutes a sufficient basis to annul the WCAB's decision and remand for further proceedings. (*LeVesque v. WCAB* (1970) 1 Cal.3d 627; *City of Fresno v. WCAB* (1985) 163 Cal.App.3^d 467, 470.) Such a failure makes a review of the substantive issues ‘not appropriate.’ (*Painter v. WCAB*. (1985) 166 Cal.App.3^d 264, 268.) Because the error is apparent from the face of the WCAB's decision, certification of the record and further briefing would add nothing to the presentation already submitted. (See *Goodenough v. Superior Court* (1971) 18 Cal.App.3^d 692, 697.)”

XIX. *Compromise and Release and Stipulated Award*

Claxton v. Ray Waters, et. al. (2004) 34 Cal.4th 367, 69 CCC 895, Supreme Court.

Carolyn Claxton was employed by Pacific Maritime Association (PMA) as an office assistant and sustained injury to her left lower extremity and psyche when she slipped and fell on May 7, 1997. She filed an Application for Adjudication of Claim for this injury on December 16, 1997. Later, on January 16, 1998, applicant filed a separate claim for psychiatric injury from alleged sexual harassment by her supervisor, Ray Waters.

On September 15, 1998, Claxton filed a civil complaint against PMA and Waters for sexual harassment in violation of the Fair Employment and Housing Act. Defendants filed an answer to the civil complaint on November 6, 1998.

On February 25, 1999, applicant and PMA settled the workers' compensation claims by Compromise and Release for \$25,000.00. The settlement was on the pre-printed compromise and release form required by Rules of Practice and Procedure §10874. The form listed the two WCAB case numbers, and made no reference to the pending civil action against PMA and Waters. The pre-printed compromise and release form, at paragraph 3, provides in part that upon approval, the employee releases the employer and insurance carrier from all claims and causes of action now known or which may arise as a result of the injury. The Compromise and Release was approved on March 16, 1999.

Thereafter, defendants in the civil suit sought leave to file an amended answer to include a defense that the claim was extinguished by provisions in the Compromise and Release agreement. Claxton sought summary judgment on the affirmative defenses. In support of the motion for summary judgment, Claxton filed declarations. Her declaration stated that it has been her intent to compromise and release from further liability her employer as to workers' compensation and not civil liability. Her attorney in the workers' compensation case stated that it had been the intent to release the employer from workers' compensation liability only, not civil liability for harassment, that use of the form with the pre-printed language was mandatory, and no authority had been sought or given by Claxton to release the defendant's civil liability for harassment.

The trial court granted defendants' motion for summary judgment on the ground that the compromise and release in the workers' compensation case extinguished plaintiff's cause of action. The Court of Appeal reversed the trial court, holding that the standard language on the pre-printed compromise and release form releases only those claims which are within the scope of the workers' compensation system. Defendant petitioned the Supreme Court for review.

The Supreme Court noted that prior Court of Appeal decisions in *Lopez v. Sillema* (1991) 229 Cal. App. 3rd 31, and *Delaney v. Superior Fast Freight* (1993) 14 Cal. App. 4th 590, had declined to bar civil suits on the basis of the release provisions of the preprinted Compromise and Release form. Defendant contended that the holding in *Jefferson v. Department of Youth Authority* (2002) 28 Cal. 4th 299, required that in the absence of extraordinary circumstances, the release language in a preprinted compromise and release agreement releases claims that fall outside the workers' compensation system. The Court held that the holding in *Jefferson* was not based on the pre-printed language in the compromise and release form, but on language in an attachment expressing the parties intent that the release apply to the employee's civil actions for alleged sex discrimination.

The Supreme Court reviewed the basis for workers' compensation liability, the nature and need for approval of compromise and release agreements, and the preclusion from release of vocational rehabilitation benefits by compromise and release in the absence of specific findings. It concluded that the preprinted language in a compromise and release form should be narrowly construed to apply only to workers' compensation claims. It held that to apply the release to the injured worker's civil claims outside of the workers' compensation scheme, regardless of whether the civil action had been filed at the time of

execution of the Compromise and Release, would run counter to the public policy of protecting the injured worker against the unintentional loss of workers' rights.

The Court went on to hold that intended settlement of claims outside the workers' compensation system would have to be reflected in a separate document. The separate document would have to make clear in "clear and non-technical language" the intent to release causes of action outside the workers' compensation law, but need not identify precise claims. The Court indicated that prospectively, extrinsic evidence is not admissible to show intent that the language in a preprinted compromise and release was intended to release any action outside the workers' compensation system. Finally, the Court noted that in other respects, interpretation of a compromise and release requires consideration of all credible evidence.

XX. Findings and Awards and Orders

XXI. Reconsideration and Removal

XXII. Judicial Review

Gonzalez v. WCAB (2004) 69 CCC 13 (Not Certified For Publication).

Applicant injured her neck, back and left upper extremity on 9/11/96. In March 1998 a WCJ found a period of temporary disability, but no permanent disability, nor need for further medical treatment. The WCAB denied reconsideration.

Applicant, through counsel, petitioned to reopen for new and further disability. After a hearing, the WCJ found her medical evidence and testimony incredible, and thus concluded she failed to show good cause to reopen. Again the WCAB denied reconsideration.

Applicant, in pro per, wrote a letter to the court of appeal, requesting that the court reopen her case and reevaluate her claim, and asked that the court appoint an attorney to represent her. The court, by letter advised applicant that it lacked the funds or authority to appoint an attorney, and provided her with the procedures to petition for writ of review.

Applicant wrote a second letter requesting the court to reopen her case, or in the alternative for more time to find representation. The court accepted the letter as a timely petition for writ of review and granted 60 days to file supplemental pleading. She did not. The court denied the writ and indicated that it does not have authority to reweigh the evidence where the applicant failed to present the court with any legal argument.

XXIII. Reopening

Berry v. Workers' Compensation Appeals Board (2004) 69 CCC 1320, Court of Appeal, Second Appellate District, writ denied, not certified for publication.

On July 21, 1997, applicant sustained an injury to her neck and left shoulder that also caused headaches. In August 1997, she received a stipulated award for 47 percent permanent disability and further medical treatment. On March 31, 1999, within five years after the date of injury, she petitioned to reopen her award for new and further disability and on July 17, 2001 she amended the petition to include injury to the psyche as a compensable consequence of the orthopedic injury. A psychiatric AME, Dr. Gary Stanwyck, reported in 2003 that applicant had sustained injury to her psyche which caused temporary disability beginning July 24, 2003, just beyond five years from the date of injury.

After the case was tried on the temporary disability issue, the WCJ granted the petition to reopen, finding that applicant injured her psyche on July 21, 1997 and was in need of further medical treatment. However, held the judge, the WCAB has no jurisdiction to award temporary disability, since the new and further disability occurred more than five years from the date of injury. [*Beck (Hambrick v. WCAB* (2000) 65 CCC 845 (writ denied); *Fekkers v. WCAB* (2002) 67 CCC 92 (writ denied).] Applicant sought reconsideration, contending that she had preserved WCAB jurisdiction by filing her petition to reopen with the five-year statutory period. The WCJ reported that under *Beck* and *Fekkers*, both the petition for new and further disability and the new temporary disability period must commence within five years from the date of injury.

A WCAB panel granted reconsideration and, after studying the matter, affirmed the judge. Under *Beck*, *Fekkers* and *Hartsuiker v. WCAB* (1993) 58 CCC 19, the WCAB has no jurisdiction, even where the petition is filed timely, to award further temporary disability benefits unless the period of temporary disability begins within the five year period. The Court of Appeal denied review.

XXIV. Statute of Limitations

XXV. Contribution

XXVI. Subrogation, Third Party Actions

Langley v. AM-PM Door, Inc. (2004) 69 CCC 346, Court of Appeal,
Second Appellate District, not certified for publication

Langley was a courier for FedEx and was on the premises of AM-PM Door, Inc., to deliver a package. AM-PM installs new doors and retrieves and returns used doors to its premises for resale to scrap metal dealers. As Langley was walking across AM-PM's parking lot, two used doors fell and struck Langley, knocking him to the ground. He sustained injuries to his head, right shoulder, and knees.

Langley received workers' compensation benefits from FedEx totaling \$121,939.36. He also sued AM-PM for negligence. FedEx filed a complaint-in-intervention in the civil case. At the conclusion of the civil trial, the jury was instructed that plaintiff was entitled to a judgment for his damages without reduction for workers' compensation benefits obtained. (BAJI No. 15.10) At FedEx's request the jury was instructed to award Langley all of his damages and not to make deduction for workers' compensation benefits. The jury was also asked to complete a special verdict form specifying (1) whether AM-PM was negligent; (2) whether its negligence was the cause of Langley's injury; (3) the percentage of AM-PM fault; and (4) the amount of damages to be awarded to both Langley and FedEx. After two days of deliberations the jury reached a verdict and found AM-PM negligent, that its negligence was the proximate cause of Langley's injury; that AM-PM was 75% at fault, an unidentified "all other persons" was 25% at fault; and that Langley was entitled to recover \$234,000, but that Fed Ex was entitled to nothing. After remittitur, judgment entered in Langley's favor for \$222,500.00.

FedEx filed a motion for new trial seeking recovery of its compensation paid in the sum of \$121,939.36, alleging that there had been no finding of employer negligence; the award of damages to FedEx was therefore inadequate; that defendant's counsel had violated the collateral source rule; and that testimony of one witness not disclosed in discovery proceedings should have been excluded. AM-PM responded that FedEx should seek a lien against the judgment in lieu of a new trial. The motion for new trial was denied and FedEx appealed.

The Court noted that reimbursement of workers' compensation benefits can be obtained by three means: (1) by direct action against the third party tortfeasor; (2) to intervene in the employee's civil suit; or (3) to apply for a first lien against the amount of the employee's judgment, less litigation expenses and attorneys fees. Here, FedEx chose to seek recovery by intervention in the employee's suit. In such circumstances, the employee is entitled to have the jury determine his total tort damages, but is entitled to recover only a net judgment for the difference, if any, between the total damages and the workers' compensation benefits received. This may be accomplished by asking the jury to determine civil damages and advising it what compensation had been paid, then the court enters individual judgments, or plaintiff may ask for special verdict findings on the employee's damages aside from workers' compensation and a finding on the reasonable amount of benefits paid by the employer.

Here, by asking that the jury be instructed to award plaintiff a judgment for his damages without reduction for workers' compensation benefits obtained, and that law provides

another means to protect the rights of the person paying compensation benefits, FedEx had invited error. The Court found that by failing to fairly summarize the evidence in its appellate brief, including failure to mention the expert witness testimony of AM-PM's physician on causation of need for knee treatment, FedEx waived any argument that the damage award was inadequate. Langley's damages subsumed FedEx' claim for reimbursement, and it retains its right to assert and recover on its lien. The order denying motion for new trial was affirmed.

XXVII. Credit, Restitution, Fraud

County of Los Angeles v. Workers' Compensation Appeals Board (Hedwall) (2004) 69 CCC 456, Court of Appeal, Second Appellate District, not certified for publication

Applicant (Hedwall) sustained internal and psychiatric injuries while employed as a deputy sheriff by Los Angeles County (County). Hedwall claimed entitlement to Labor Code §4850 benefits and temporary disability for periods through October 18, 2002. During much of this time, he was working in a lighting business, which he owned with his wife. After the Mandatory Settlement Conference (MSC), the County served Hedwall with a notice to produce income documents (i.e., tax and accounting records for the lighting business), but the WCJ denied the request for production of documents because discovery had closed at the MSC. At trial, Hedwall testified regarding his work at the lighting business and the wages he received. The WCJ awarded temporary disability, less credit for days Hedwall worked in his lighting business, with jurisdiction reserved.

The Court held that the County failed to exercise due diligence in timely discovering income from Hedwall's lighting business and that the WCAB correctly denied County's notice to produce income documents at trial. The Court noted that various doctors had reported, before the MSC, that Hedwall was self-employed during the period of temporary disability.

The Court also concluded that the WCAB's allowance of credit for days Hedwall worked in the lighting business, with jurisdiction reserved, meant that further discovery was anticipated on the credit issue. The Court said, however, that the County could not engage in post-award discovery of Hedwall's net earnings from the lighting business, because to now allow discovery of those income documents would conflict with the WCAB's prior denial and with Labor Code §5502(d)(3) [now, (e)(3)]. But, the Court pointed out that the credit is based on the days Hedwall worked (and his daily earnings) in his lighting business, and not on his net income from the lighting business. Discovery of the days Hedwall worked and his daily earnings is not precluded because his trial testimony on these issues was unavailable or could not have been discovered with due diligence before the MSC. That is, prior to the MSC, Hedwall had told the reporting doctors that he did *not* receive any wages from the lighting business. Therefore, prior to the MSC, it was reasonable for the County to view the facts as more indicative of credit based on net income (profits) from a business. Also, the hours Hedwall worked and the

wages he earned in the business for time periods *after* the MSC could not have been discovered *before* the MSC.

Finally, the Court said that typographical errors regarding the correct temporary disability period could be corrected on remand. [*Toccalino v. WCAB*. (1982) 47 CCC 145, 154.]

Mason v. Lake Dolores Group (2004) 69 CCC 353, Court of Appeal,
Fourth Appellate District.

Mason was employed by Lake Dolores Group, L.L.C., as a pool tech whose duties involved cleaning filters and grates, checking chlorine levels, turning on pumps, and related activities at an amusement park's water rides. He normally worked from 6:00 a.m. to 2:00 p.m. On May 29, 1999, applicant arrived for work and was advised he would be moving chairs and tables to permit a jet ski competition to take place. He performed these tasks from 6:00 a.m. until noon. At noon he was told he could go home, but should report back at 6:00 p.m. to clean up after the jet ski competition. The park closed to the public at about 5:00 p.m.

Mason returned at 5:45 p.m. with another park employee, Michael Smith. Mason and Smith entered the park grounds but did not clock in. They were asked to take down a flag, which they did. That task took seven to nine minutes. Mason then went to the "Doo Wop Super Drop" water slide which had been off for about an hour and asked a park employee to start the ride. Mason shed his clothes at the bottom of the ride and asked Smith to meet him, with Mason's clothes, at the end of the slide. Mason then climbed 50 or 60 steps to the top of the slide and waited for water to fill the slide. When he believed there was sufficient water in the slide Mason went down the slide. There were no attendants at the slide, and no other person went down it with Mason. As Mason approached the bottom of the slide, he thought he was not stopping as quickly as he should. He lifted his head and neck to see where he was going, and hit the dam at the end of the slide. Smith testified that applicant's feet went over the dam, that plaintiff's tailbone smashed into the dam and he flew into the air, landing on his back. Mason was rendered a paraplegic by the impact. Mason testified that the "Doo Wop Super Drop" was his favorite, and he took the opportunity to ride it because it was the fastest, it was hot, and the slide was always crowded during park hours.

Mason sued Lake Dolores Group for negligence. Before trial defendant sought a summary judgment on the ground that workers' compensation was Mason's exclusive remedy. After plaintiff concluded presentation of his case, defendant moved for nonsuit on the same grounds. The park's general manager testified that usually employees did not ride the slides without upper management permission. No permission had been sought or obtained by Mason and the employee who turned on the slide at Mason's request was fired. The general manager also testified that employees were only permitted to use the slides if the employee was off duty and the slide open to the public. No one was authorized to use the slides after they were turned off for the day. After trial, a jury attributed 52% negligence to Lake Dolores Group, 38% to Mason, and 10% to

unidentified / unnamed “others.” The jury found that Mason was not acting in the course and scope of employment at the time of his injury. Judgment was entered in favor of Mason for \$4,397,850.00, after offsets.

Lake Dolores Group moved for judgment notwithstanding the verdict (JNOV) on the ground that applicant’s injury arose out of and occurred in the course of his employment and that workers’ compensation was applicant’s exclusive remedy. The trial court held that the injury was a compensable work injury under the personal comfort doctrine, granted the motion for JNOV and entered judgment in favor of defendant. Plaintiff appealed.

The Court of Appeal noted that the standard for review of a JNOV is that if substantial evidence supported the verdict, the JNOV should be reversed. Here there was evidence that Mason had not signed in for his six o’clock shift; his request to the co-employee to start the slide was made without authority and before the time he was scheduled to report, that the trial court had properly instructed the jury on course of employment and the personal comfort doctrine, that after entry upon the employer’s premises, the employee was rebuttably presumed to be acting in the course and scope of employment, and the jury had returned findings consistent with its determination that Mason was not acting in the course and scope of employment at the time of the injury. The Court found that the jury could reasonably have concluded from the evidence that Mason’s use of the water slide was not reasonably contemplated by nor causally related to his employment or employment duties, which for that shift was cleaning up after the jet ski competition. Because the conduct was not reasonably contemplated by the employment, it was not compensable under the personal comfort doctrine. The Court directed that the jury verdict be reinstated and awarded Mason costs on appeal.

People v. Chatman (2004) 69 CCC 367, Court of Appeal, First Appellate District, not certified for publication.

Raymond Chatman was a substitute custodian for the West Contra Costa Unified School District. On February 12, 1998 he was allegedly assaulted, hit over the head with a chair and thrown into tools in the corner of a room by a co-employee. The following day he was diagnosed as having sustained neck, back and right arm injuries. In March 1998, applicant changed treating physicians. Applicant sought workers’ compensation benefits and his claim was accepted. Temporary disability indemnity was paid through March 10, 1999.

During the employer’s investigation, the alleged assailant claimed he never touched or assaulted Chatman. Defendant hired an investigator who placed Chatman under surveillance. In April and May applicant was videotaped making brief trips to medical facilities and other locations near his home. In May 1998 Chatman was seen by a Qualified Medical Examiner (QME), Dr. Vatche Cabayan, at defendant’s request. Dr. Cabayan recommended a work hardening program. Applicant’s treating physician reported that Chatman was not taking prescribed medications and was not making progress toward maximum medical improvement. In January 1999, defendant objected to

Dr. Hood continuing as applicant's treating physician on the ground that his treatment was not beneficial. Thereafter, between February and July, 1999, seven additional days of *sub rosa* video were obtained. On February 1, after a conversation outside his house, Chatman was filmed driving to a gas station, lifting the hood of his vehicle and making several 90° bends (during which his upper body was parallel to the ground), lasting 25 to 30 seconds each, over a ten minute period. On February 2 applicant was video taped performing an hour of repair work to a window on his vehicle. During that time Chatman sometimes stood and bent over the window and at other times sat and leaned forward to work on the window.

On February 26, 1999, applicant was evaluated by Dr. Louis Dean, acting as a QME. Dr. Dean reported that applicant was permanent and stationary with subjective disability, loss of 50% of pre-injury work capacity, and medically eligible for vocational rehabilitation. The opinion later states that Dr. Dean recommended a limitation to light work. The restrictions, adjusted for age and occupation, rated 51%.

On May 7, 1999, police responded to a domestic violence call and received a complaint that Chatman had assaulted his girlfriend, Felicia Dixon. She obtained a temporary restraining order and moved out. Chatman was subsequently acquitted on assault charges arising from the incident. On May 18, 1999, Dixon advised defendant's adjuster that Chatman was working and getting paid "under the table." She later provided defendant's adjuster receipts for paint. Dixon testified that before May 7, 1999, Chatman was getting jobs to perform house painting. He would get a crew together and paint a caller's house. Chatman was paid \$500 to \$800 for the job, including materials. She testified that Chatman was unhappy that the alleged assailant in the February 12, 1998 incident had not been fired; that he did not intend to return to work unless granted a permanent position. Dixon testified that after the February 12, 1998 incident, applicant continued to operate a business called "Ray's Hauling," that he had been able to mow the lawn, care for three dogs, pitch a baseball to his son, and pick up his five year old daughter. Dixon testified that Chatman had cut five trees at her sister's home between January and May 1999. On July 7, 1999, Chatman and another man loaded boxes and furniture onto a flatbed truck and into a van. The loading process took two hours. The vehicles were then driven to another residence and unloaded. The investigator noted no restriction in Chatman's motions.

Chatman's father testified that Chatman did not operate the hauling business in 1998 and 1999, that he and his son and five others participated in moving Chatman belongings on July 7, 1999 and another date. He denied that he had observed his son performing any strenuous activities since February 1998, unless he had to.

Chatman's deposition was taken on July 22, 1999. In early 2000, Dr. Dean reviewed the deposition and video and reported that he had overestimated Chatman's disability. In light of the video, it was his opinion that applicant had lost 25% of pre-injury work activities and was not medically eligible for vocational rehabilitation. The treating physician, Dr. Hood, reviewed the video and concluded that applicant's injuries limited him to light work.

The Court states that the revised assessment by Dr. Dean would have reduced the permanent disability indemnity payable from \$46,622.50 to \$9,320.00 and not have supported payment of \$8,535.24 in vocational rehabilitation service costs \$4,466.60 in vocational rehabilitation maintenance allowance, \$9,434.14 in medical treatment costs, and \$450.00 in mileage allowance.

In April 2000, Dixon was interviewed by an investigator from the Department of Insurance. She told the investigator about Chatman's job painting for the Young family, but did not disclose a number of other activities she had described to the adjuster. Some of Dixon's allegations, including the allegation that Chatman had cut trees at Dixon's sister's house, were refuted by evidence at the trial.

Chatman was charged with and convicted of two counts of violation of Insurance Code §1871.4, the first count for representations made to an investigator on July 22, 1999 and the second for representations made during his July 22, 1999 deposition. Chatman appealed his conviction.

The Court noted that applicant's statement and deposition testimony included representations that his injury prevented him from working on his car, that he was unable to lift over 25 pounds, and that he had received no income while collecting workers' compensation benefits. Each of these statements was demonstrated to be false by evidence presented at the criminal trial. Chatman's deposition testimony was that he never lifted his 42 pound daughter; Dixon's trial testimony was that he picked her up on a number of occasions. Chatman contends the testimony should be disregarded because it does not specify how often, for how long, or in what manner he lifted his daughter. The Court found that the misrepresentations were knowingly false and that they were material in that they concerned subjects reasonably relevant to the insured's misrepresentation. The conviction was affirmed.

City of Santa Clara v. Workers' Compensation Appeals Board
(Henry) (2004) 69 CCC 386, writ denied.

Applicant filed multiple claims alleging that he sustained industrial injuries while employed as a police captain by defendant. He sustained an injury to his right knee on August 14, 2000 when he hit his knee against a copy machine. Defendant advanced \$1,250.00 in permanent disability indemnity. He sustained a cumulative trauma injury to his neck and back from January 1982 through June 2, 2000. Defendant advanced \$2,100.00 in that case. Applicant sustained an injury to his neck on November 27, 1997 when he hit his head on an overhanging tree limb. There were no permanent disability advances. Defendant also filed a lien in the cumulative trauma case, claiming the reasonable value of applicant's living expenses as a result of the advances made in the August 14, 2000 injury.

After trial, the WCJ issued a joint Findings and Award, finding in part as follows: 1) in the August 14, 2000 injury, applicant sustained no additional PD after apportionment; 2)

in the cumulative trauma injury, applicant sustained 23% permanent disability, after apportionment; and 3) in the November 27, 1997 injury, applicant sustained no permanent disability.

The WCJ denied defendant's lien for permanent disability overpayment filed in the cumulative trauma claim for benefits paid in the August 14, 2000 case. Defendant filed for reconsideration for the denied credit. Defendant contended that the WCJ was required to allow the credit for overpayment in one injury to the second injury; and also claimed that denial of the lien would unjustly enrich applicant.

The WCJ recommended that the petition be denied. In his report, the WCJ noted that defendant claimed to be aggrieved only by the finding in the cumulative trauma claim that it was denied credit for permanent disability advances made in another injury. The WCJ pointed out there was no legal authority to support its claim. The WCJ also noted that Labor Code §4903 (c) allows a lien for the reasonable value of living expenses, but stated that this section has been strictly construed and would not cover permanent disability advances made in a completely different case. The WCAB denied reconsideration and adopted and incorporated the WCJ's report without further comment.

XXVIII. Special Benefits, Including Labor Code §132a and Serious and Willful Misconduct

Crown Appliance v. WCAB. (Wong) (2004) 69 CCC 55 (Certified for Publication).

Wong suffered an industrial injury to his left elbow and back in August of 2000 while employed as a delivery driver and appliance installer for Crown Appliance. Wong settled the underlying disability claim but left the L.C. §132a unresolved. At trial, Wong testified that he had a very good relationship with the owner of Crown, May Sanchez, before his injury, but the dynamics of their relationship changed dramatically following Wong's return to work on light duty. After Wong's return Sanchez constantly complained about Wong's performance, gave Wong the impression nothing he did was good enough and excluded Wong from monthly employee meetings. Sanchez did not modify this behavior toward Wong once he returned to his usual and customary job. In May 2001 Sanchez fired Wong at a time when Crown's business was very busy. She told Wong he was being fired for using inappropriate language in front of a customer and that a screw fell out of a dishwasher installation he had done a year earlier. Wong did not know about any customer complaints at the time of his termination. Sanchez testified that Wong was terminated due to customer complaints, although Wong's personnel file could not be located.

In May 2003 the WCJ found Crown had violated L.C. §132a by terminating Wong. Crown's petition for reconsideration was granted for the limited purpose of assessing attorney's fees. The Court of Appeal denied Crown's writ and took the unusual step of publishing their opinion denying the writ. Citing *Barnes v. WCAB* (1989) 54 CCC 433, if

an injured worker makes a prima facie showing of discrimination under L.C. §132a the burden shifts to the employer to demonstrate its conduct was necessary and directly linked to the realities of doing business, a burden that Defendant did not meet. Applicant was terminated and there was no reality of doing business defense that Defendant could prove to justify this termination. Although there had been some customer complaints, they were not documented at trial, though, at one time, documentation of them did exist and was presented to the UIAB. It could not be shown customer complaints occurred before or after Applicant's work injury, but it was proven that before Wong's injury he had never been reprimanded in any way. It was concluded that Wong was fired in retaliation for having filed a workers' compensation claim in violation of L.C. §132a.

Crown's petition for writ of review was deemed indisputably without merit and attorneys fees pursuant to L.C. §5801 were awarded.

Los Angeles County Professional Peace Officers' Association v. County of Los Angeles (2004) 115 Cal.App.4th 866, 69 CCC 79 (Certified for Publication)

Plaintiffs worked as investigators for the Los Angeles County District Attorney's Office. Both had been injured on the job and stayed off work on temporary disability leave, but retired after their disabilities became permanent. Under county ordinance, investigators may accumulate up to 320 hours in current and deferred vacation time. If an employee exceeds the 320 accumulated vacation hours, the balance must be reduced by the excess, with the employee paid for lost vacation hours at the rate of his or her salary. Vacation time cashed out under this provision is added into the employee salary figure used to calculate retirement benefits. If, however, the employee is disabled due to a work related injury, none of the provisions limiting the carryover of vacation time apply; the employee may accrue more than 320 hours of vacation time. In the case of industrial disability, the carryover buyout rules do not resume until the end of the first vacation anniversary year of the injured worker's return to duty.

When plaintiffs retired they were paid back for all accumulated vacation hours but the buyout occurred after their retirement so the money they were paid was not used to calculate pension benefits. Plaintiffs and their union sought mandate from the Superior Court contending their rights pursuant to L.C. §4850 had been abrogated. Specifically, they argued entitlement to the vacation buyout while on temporary disability and failure to allow this was a breach of their right to full compensation under L.C. §4850 resulting in a reduction of pension benefits. The trial court denied the petition and an appeal followed.

L.C. §4850 provides that recipients get a leave of absence in the case of an industrial injury, without loss of salary. After distinguishing leading cases in the area, the court concluded that the way in which Los Angeles County calculated benefits for these investigators was not a violation of L.C. §4850. A clear right to benefits during a disability period is distinguishable from indemnification for benefits an employee might receive as a condition of employment during the disability period. Depriving an injured employee of the former is a violation of L.C. §4850, whereas the latter is not. The

uncontroverted evidence was that the DA's office tried to encourage employees to take vacation time to avoid cash buy-outs of excessive vacation hours. Rarely would an investigator have the opportunity for a buy-out under normal circumstances, so there was only a possibility that a buy-out would occur, not an absolute right to one; the policy was more a limitation on the accrual of vacation time than a right to a buy-out. In support of this distinction the court relied on Mannetter v. County of Marin (1976) 41 CCC 1060.

This court also noted there was no illegal forfeiture of accrued vacation time in violation of L.C. §227.3, no violation of plaintiffs equal rights and no violation of L.C. §132a. No discriminatory conduct occurred, because to allow cash-out of accrued vacation while on disability would grant the disabled person greater pension rights than most non-disabled counterparts, since most people used their vacation time and did have a right to a buy-out.

Linam v. Workers' Compensation Appeals Board (2004) 69 CCC 332, Court of Appeal, Fifth Appellate District, writ denied, not certified for publication.

Applicants were employed as drywall hangers for Dennis Carey Drywall and were working on a wooden platform supported by steel scaffolding 20' to 22' above floor level when, on December 17, 1998, a hook broke and the three fell to a concrete floor. All sustained upper extremity injuries; one additionally suffered injuries to his hip, back, groin, leg, feet, and hearing, and the third suffered face lacerations. All filed petitions alleging their injuries were the result of the employer's serious and willful misconduct and violation of a safety order. The matters were consolidated for hearing.

At trial evidence was introduced that petitioners were not provided hard hats, safety belts, or safety training by the employer. There was disputed evidence that extra scaffolding, "x-braces", were available for use as a guard railing; the employees testified that Carey instructed them not to use the "x-braces" because they were needed for another job. The WCJ found that the employer had engaged in serious and willful misconduct and that he had violated Safety Order §1670 by failing to provide safety restraints.

The employer sought reconsideration and the WCJ commented in his report and recommendation that "Carey was presumed to know the law and regardless, the necessity for providing the safety equipment... was obvious to any casual observer." The Appeals Board granted reconsideration and in a split decision set aside the finding of serious and willful misconduct on the ground that applicant's had not met the burden of proving that the employer had knowledge of the safety order, or that the condition making the safety order applicable was obvious.

The employees sought reconsideration which the Appeals Board granted and a panel of Commissioners then unanimously affirmed the initial Decision after Reconsideration.

Applicant's filed a Petition for Writ of Review. The Court of Appeal denied the writ and issued an opinion noting that the evidence indicated that the employer was aware of the

dangerous condition, that the safety order requiring side railings or safety belts was not known or obvious to the employer and that the failure to comply with the safety order requiring side railings or safety belts was not a proximate cause of the injury which had resulted from the failure of a hook in the support scaffolding.

**Daimler Chrysler Corp. v. Workers' Compensation Appeals Board
Freeman**). 69 CCC 1327, Court of Appeal, Second Appellate District, writ denied.

Applicant sustained an injury to his head and neck for which he received an award of 22 percent permanent disability in mid-1997, after apportionment to a prior disability. In October 2000 his treating doctor, Dr. Rahmati, placed light duty work restrictions on him, which his supervisors told him could not be accommodated. He was sent home and was told he could not return to work until he was given a full release. He was advised in November that he must report to the workplace with proper documentation, or his seniority would be terminated, and on December 18, 2000, he presented documents showing he could return to work without restriction. The documents were questioned, and applicant was told to present the original documents from his doctor by January 12, 2001, or be terminated. On that day he presented the documents in his possession, which were "pink copies." He was not told at the time that they were inadequate, but he was terminated for being absent without proper documentation.

Applicant filed a petition under Labor Code §132a for discrimination. At the trial, a coworker testified that he heard comments by supervisors derogatory to applicant and expressing pleasure that they "got him." A supervisor testified that applicant gave him proper documentation; if it was not proper, it was his custom to so inform the worker. The human resources supervisor testified that although applicant turned in proper documents, she felt they had been tampered with by applicant. She questioned whether the doctor had actually signed them. The WCJ found that applicant had been terminated in violation of §132a.

Defendant sought reconsideration, arguing that the decision was not supported by substantial evidence, and that the Board did not consider that applicant had 107 work violations prior to his termination. In his recommendation on reconsideration, the judge noted that under *Department of Rehabilitation v. WCAB (Lauher)* (2003) 68 CCC 831, applicant must show that he suffered an adverse result caused by the employer's action triggered by the industrial injury, and that he had a legal right to retain the deprived benefit. Here, although applicant had 107 violations, defendant never connected them to his termination. The latter was based only on the belief that applicant had tampered with the doctor's signature, but that opinion was not substantiated. The HR supervisor did not inform applicant that she could not verify the note, and did not follow up with the doctor. Applicant did everything he was supposed to do, yet was fired on an unsupported view of the HR supervisor, in violation of §132a. The WCAB denied reconsideration, adopting

the WCJ's report, and the Court of Appeal denied review. The Court also denied applicant's request for fees and costs for a frivolous writ.

Savage v. Circuit City (2004) 32 CWCR 101, Appeals Board Panel Decision.

The employer, Circuit City, had a uniform policy of terminating employees who had been off work for six months, regardless of whether the cause was industrial or non-industrial. David Savage was employed by Circuit City as a home delivery person on March 18, 2001, when he injured his right ankle. After being off work for six months due to this accepted industrial injury, the employer reviewed the work restrictions imposed by Mr. Savage's treating physician and determined that Mr. Savage would not be able to return to his former position with those work restrictions. He was then terminated in accordance with the company policy.

Applicant filed a Labor Code §132a Petition for increased compensation. He alleged that he had been fired because of his industrial injury in violation of §132a. At trial, the employer explained the business purpose for terminating employees who continued to be disabled for more than six months. Essentially, it was not cost effective to hire temporary help to fill in for disabled employees who were on extended disability leaves and who did not appear to be making the necessary progress which would enable them to return to their former positions. The employer testified that this policy was a business necessity and was applied uniformly to all employees who were off work for more than six months, due to either industrial and non-industrial disability. The WCJ held in favor of the employer.

Applicant filed a Petition for Reconsideration claiming that the termination was discriminatory within the meaning of §132a; and that the employer had not established an adequate business necessity for their termination policy.

The Appeals Board affirmed the WCJ's decision, stating that applicant had not met its burden of proof and was required to show more than a mere "adverse consequence" to prevail on a §132a claim.

In the Supreme Court case of *Judson Steel v. WCAB (Maese)* (1978) 43 CCC 1205, Justice Tobriner set forth the parameters of the type of discriminatory conduct that is prohibited by §132a. Although the employee in *Judson Steel* had not been fired, he lost his seniority when he was off work for over a year due to an industrial injury. This "penalty" or "detriment" was considered sufficient to invoke §132a. Later, the Court in *Barnes v. WCAB*, (1989) 54 CCC 433, referred to the *Judson Steel* case and stated, "We held that a worker proves a violation of Section 132a by showing that as the result of an industrial injury, the employer engaged in conduct *detrimental* to the worker."

In the Supreme Court case, *Department of Rehabilitation v. WCAB, (Lauher)*, (2003) 68 CCC 831, the injured worker claimed the employer had violated Labor Code §132a because he was forced to use his sick leave and vacation time to attend medical appointments to treat his industrial injury. The *Lauher* Court revisited *Judson Steel* and

the definition of actions prohibited by §132a. The Court acknowledged that the “test of ‘detriment’ to the employee was accepted as the applicable standard...” (*Lauher, supra*, at page 843) However, the *Lauher* Court declined to apply this standard and focused more on whether the act of the employer could be considered discriminatory. The *Lauher* Court found no violation of §132a since “nothing suggests (the) employer *singled (the employee) out for disadvantageous treatment because of the industrial nature of his injury.*” (*Lauher, supra*, at page 845) The *Lauher* Court strictly construed the language of §132a to mean not just that the employee has suffered a “detriment,” but that the employer must also engage in discriminatory conduct in order to violate §132a.

The Appeals Board in the *Savage* case quoted several passages from the *Lauher* case and reached the same conclusion, using the same rationale. The Appeals Board felt that since the employer applied their termination policy equally to all disabled workers, they had not engaged in discriminatory conduct in violation of §132a. Therefore the decision of the trial judge, who had reached that same determination, was upheld.

Silgan Containers Corp. v. Workers’ Compensation Appeals Board (Shelton) (2004) 69 CCC 473, Court of Appeal, Fifth Appellate District, not certified for publication.

Applicant sustained a December 15, 1999 right knee injury while employed by Silgan Containers. About nine months before his injury, Shelton had been promoted to the trainee level of “can plant inspector.” A can plant inspector is supposed to rotate among three inspector positions: press line inspector; can line inspector; and gauge inspector. The press and can line inspector positions are physically arduous, but the gauge inspector position allows the worker to sit most of the time.

Following Shelton’s December 15, 1999 injury, Silgan placed him in its “transitional duty program” and permitted him to work solely as a gauge inspector.

In November 2000, Shelton was declared permanent and stationary with disability that precluded him from working all of the can plant inspector duties, except gauge inspector. Thereafter, because Shelton could not perform all of the can plant inspector duties, Silgan terminated him and offered vocational rehabilitation.

Shelton filed a Labor Code §132a petition, and the WCJ ultimately found: (1) that he had shown a *prima facie* case of discrimination because he was terminated due to his work restrictions; and (2) that Silgan did not carry its “business necessities” defense because the collective bargaining agreement did not specifically prevent it from providing Shelton with limited can plant inspector duties (i.e., the gauge inspector duties).

On writ, Silgan did not dispute that applicant made a *prima facie* showing of discrimination, given that it dismissed him as a result of his industrially caused work restrictions. Thus, the only question was whether Silgan established that the termination was necessary or directly linked to the realities of doing business.

The Court said that Labor Code §132a does not compel an employer to ignore the realities of doing business by reemploying unqualified employees and that the “key to understanding” Labor Code §132a is to examine whether “the employee was, despite his injury, *competent to perform his job and that his former job was open upon his return.*” (*Emphasis in opinion.*)

As to this issue, the Court stated:

In finding Silgan discriminated against Shelton, the WCAB relied on Silgan’s apparent ability under the collective bargaining agreement to continue to employ Shelton on light duty. Regardless of Silgan’s contractual ability under the agreement to place Shelton permanently in a light duty position, however, Silgan demonstrated sufficient business reasons to rebut the prima facie showing of employer discrimination. According to supervisor Hatfield, Silgan mandated that the can plant inspectors rotate and be proficient in each of the three primary inspection duties and had never allowed a can plant inspector to perform exclusively the less physically demanding gauge inspection work. Hatfield explained that Silgan required the rotating shifts to ensure competence in each area so that the inspectors can work any shift as the workload required. Human resources manager Ashley confirmed that no full time gauge inspector position existed. They both added ...that placing Shelton in a gauge inspector position permanently would likely create problems with the union by not awarding that highly coveted position based on seniority, which Shelton lacked.

The Court also said that, before the WCAB, Shelton never offered any legal authority suggesting that Silgan was required to change his former job duties to accommodate his disability after he became permanent and stationary. To the contrary, the WCAB has held an employer has no duty to provide modified or light work to an employee who is no longer able to perform the usual and customary pre-injury job duties. (*Gilbert v. WCAB* (1996) 61 CCC 703 (writ denied); *Cook v. WCAB* (1990) 55 CCC 94 (writ denied); *Dutil v. WCAB* (1988) 53 CCC 136 (writ denied).

In a footnote, the Court observed that, after it granted review, Shelton argued for the first time that Silgan did not attempt to reasonably accommodate his disability under the Fair Employment and Housing Act (FEHA). (Gov. Code, §12940; Cal. Code of Regs., tit. 2, §7293.9.) The Court said that Shelton had waived the issue by not raising it before the WCAB. (Labor Code §5904.) It also said, “[w]hile we draw no conclusion on the issue, we have not found any authority applying the FEHA to an industrial injury.”

Pate v. Workers’ Compensation Appeals Board, (2004) 69 CCC 1339, Court of Appeal, Fourth Appellate District, writ denied.

Applicant suffered an industrial injury to his abdomen on June 27, 2001 and was released to modified work on the following day. Applicant called in sick on July 24 and 25, 2001 and on July 26, 2001, he went to see Dr. Jennings who prescribed medication and returned him to work with limitations.

On July 27, 2001, applicant returned to work, but was told that “unless he brought a medical excuse” for missing the past 3 days of work, he would be fired. Since he did not produce a “medical note” excusing him from work, he was terminated in accordance with the terms of his collective bargaining agreement (“CBA.”) The applicant claimed this action violated Labor Code Section 132a.

At trial, the WCJ held that the applicant was absent from work due to his industrial injury. Since he was fired because of this absence, the WCJ found that he had sustained his burden of proof as to detriment under Labor Code Section 132a. Further, the WCJ found that the defendant “failed to sustain the burden necessary to establish the business necessity defense.”

The defendant filed a Petition for Reconsideration and the Appeals Board overturned the WCJ and held that Labor Code Section 132a had not been violated. Essentially, the Appeals Board found that the applicant was fired because he violated the CBA’s requirement that he produce medical substantiation for his absence (regardless of whether the absence was for industrial or non-industrial medical reasons.) Applicant had not established a link between the detriment and his industrial injury. “Consequently, the necessary element of causation under section 132a, between the injury and the termination, is not present in this case.”

XXIX. Penalties, Sanctions, Contempt and Costs

***In re Raul V. Aguilar and Allen J. Kent on Contempt, (Aguilar v. Lerner, underlying case)* (2004) 34 Cal.4th 386, Supreme Court**

Raul V. Aguilar and Allen J. Kent were attorneys for Aguilar in the case of *Aguilar v. Lerner*. Aguilar was a partner in the firm of Aguilar & Sebastinelli, and Kent was an associate in the firm. On January 14, 2004, notice issued to parties and counsel that oral argument was set before the California Supreme Court at 2:00 p.m. on February 10, 2004, in the matter of *Aguilar v. Lerner*. On January 29, 2004, Allen Kent advised the Court that he would be present and present oral argument at the February 10, 2004, proceeding. On February 10, 2004 no member of Aguilar & Sebastinelli appeared for the oral argument.

The Supreme Court initiated contempt proceedings, and issued an Order to Show Cause. Raul V. Aguilar and Allen J. Kent responded by March 17, 2004, whereupon the Supreme Court referred the matter to the State Bar Court for investigation. The Supreme Court had posed specific questions to the State Bar Court concerning the honesty of Aguilar and Kent, whether their conduct violated professional or ethical obligations, and whether Aguilar actually was personally aware of the oral argument before February 10, 2004. The State Bar Court heard two days of hearing and submitted a report to the

Supreme Court. The Supreme Court also received oral presentations and supplemental briefs from Aguilar and Kent.

The Supreme Court concluded that both Aguilar and Kent were in contempt and fined Aguilar \$1,000.00 and Kent \$250.00 for failure to appear at the oral argument on February 10, 2004. The Court found that a notice of oral argument in a case before the California Supreme Court is an order requiring the parties' attorneys in the case to appear.

The Supreme Court found that Kent, who had personally advised the court that he would appear on February 10, 2004, was in contempt for failing to appear or advise the court that he would not appear. The conduct was found to violate Code of Civil Procedure §1209(a) (3), prohibiting willful neglect or violation of duty by an attorney. Although Kent was not personally the attorney of record, and another member of the firm could have appeared, here Kent had advised the Court that he would be appearing. Kent's employment by Aguilar and Sebastinelli ended on February 5, 2004, five days before the date set for oral argument. Aguilar was the legal manager and calendar assignment attorney for the law firm. The record indicated that Kent had mentioned the upcoming oral argument to two associates in the firm, but not to Aguilar, within days of his leaving employment by the firm. Kent was aware that the matter had not been assigned to one of the two associates, but did not speak about the assignment with the other. The Court found that it would not have been improper for Kent to have advised the Court that he would not appear due to his separation from employment by the firm.

The Court further found that the termination of employment with the firm was not justification for failure subsequently to advise that he would not appear. The non-appearance was without justification and was contemptuous.

The Court found that on January 15, 2004, Kent advised Aguilar by phone that the case was set for oral argument on February 10, 2004, and that it would be necessary to seek continuance of another matter set before the Court of Appeal in order for Kent to appear at the Supreme Court. There was also documentation that Aguilar had reviewed a copy of the Supreme Court's February oral argument calendar, and made a note thereon that Kent was appearing at the oral argument. It found that Aguilar had repeatedly lied in written documents filed with and oral statements made to the Supreme Court. The pressures of the law firm's economic distress and press of business were not found to mitigate Aguilar's alleged failure to be aware of the oral argument, or his failure to review records and determine that he had been informed on January 15, 2004 by Kent, on February 5, 2004, by an associate of the firm, William Henley, and at the time he noted Kent's assignment on the oral argument calendar. Aguilar misrepresented that he had no knowledge of the oral argument in his February 11, 2004 letter to the Court, in his February 27, 2004 response to the Order to Show Cause, and in his oral presentation on March 9, 2004. The conduct violated Business and Professions Code §6068(d).

Aguilar's conduct was also contemptuous in that he failed to assign an attorney to appear for the firm at the oral argument set on February 10, 2004. That conduct violated Code of Civil Procedure §6086.7(a) and (c).

Frisella v. Workers' Compensation Appeals Board (2004) 69 CCC 401, Court of Appeal, First Appellate District, writ denied.

Applicant sought multiple Labor Code §5814 penalties for defendant's alleged unreasonable delay in paying various benefits. The WCJ issued a Findings and Award, finding in pertinent part that defendant was liable for four compounded penalties. Defendant filed a Petition for Reconsideration contending that since there was no initial penalty assessment by the WCAB, multiple penalties could not be assessed.

The WCJ recommended that reconsideration be denied on the basis that temporary disability had been delayed in connection with three instances of unreasonable conduct, and that a fourth penalty was warranted by defendant's failure to self-assess a penalty under Labor Code § 4650(d). The WCJ further reasoned that since a penalty under Labor Code §5814 is properly characterized as part of the original compensation award, any subsequent penalties should be assessed not only on the original amount of compensation, but also on the penalties already assessed.

After first granting reconsideration for further study, the Appeals Board concluded that applicant was entitled to two Labor Code §5814 penalties and disallowed the compounding of the successive penalties. The Appeals Board cited *Christian v. WCAB* (1997) 62 CCC 576 for the proposition that multiple Labor Code §5814 penalties could be approved only when the refusal or delay in payment of benefits involved "separate and distinct acts" by the employer or insurance carrier. The Appeals Board indicated that the legally significant event or act must be a stipulation of the parties or some other formal agreement that unequivocally establishes the liability for the benefits in question.

With respect to the delays in payment of temporary disability, the Appeals Board found a single course of conduct justifying a single penalty. An additional penalty was justified by the failure to pay the Labor Code §4650 increase. Regarding the WCJ's decision to compound the Labor Code § 5814 and 4650(d) penalties, the Appeals Board stated in relevant part:

"We hold that compounding of penalties only occurs where an unreasonable delay penalty has been imposed followed by a subsequent unreasonable delay of the same benefit. Where multiple penalties are imposed in a single award, those penalties may not be compounded, but rather each is applied to the basic indemnity rate two, three or four times depending on how many penalties are imposed. However, unlike here, when there is a finding of a subsequent unreasonable delay in the payment of that class of benefit after a prior imposed penalty, the section 5814 penalty would apply to the increased indemnity rate including the prior imposed penalty amounts. This holding is consistent with the decision in *Anderson v. Workers' Comp. Appeals Bd.* (1981) 116 Cal. App. 3d 954 [172 Cal. Rptr. 398, 46 Cal. Comp. Cases 342]."

The Appeals Board further stated:

“In applying this principle to the instant case, the two section 5814 penalties to be imposed above will not be compounded. Instead, the TD rate will be increased by two times since there has been no prior award of a section 5814 penalty against TD.”

Applicant’s Petition for Writ of Review was denied.

Martinez v. Jack Neal & Son, Inc., Fremont Compensation Insurance Co., in liquidation, California Insurance Guarantee Association,
(2004) 69 CCC 775, Appeals Board *en banc*.

Jose Martinez sustained injury to his back and psyche on August 13, 1999. Injury to the back was admitted by defendants. On October 4, 2000, applicant’s primary treating physician, Gary P. McCarthy, M. D., reviewed a September 29, 2000 MRI report and recommended applicant undergo L4-5 and L5-S1 spinal surgery. Dr. McCarthy sent requests for authorization for surgery to Fremont Compensation Insurance Co. (Fremont) on October 4, October 12, and October 17, 2000. On November 14, 2000, defendant’s QME, Donald Trauner, M. D., issued a report agreeing that spinal surgery was warranted. Applicant’s counsel requested that Fremont authorize the surgery on December 6, 2000. On January 5, 2001, Fremont authorized the surgery. On July 2, 2003, Fremont Compensation Insurance was placed in liquidation, and its covered claims became obligations of the California Insurance Guarantee Association. On January 1, 2004, California Insurance Code §1063.1(c) (8) was amended to provide, in pertinent part, that “‘covered claims’ does not include any amount awarded... by the Workers’ Compensation Appeals Board pursuant to §5814 or §5814.5 because payment of compensation was unreasonably delayed or refused by the insolvent insurer.”

On March 24, 2004 the WCJ found that the employer’s workers’ compensation insurer, Fremont unreasonably delayed provision of medical treatment benefits and imposed a 10% penalty to be paid by CIGA on all medical benefits.

In an *en banc* decision the WCAB held that the 2004 amendment to California Insurance Code §1063.1(c) (8) precludes an award of penalty against CIGA for unreasonable delay by the insolvent insurer. The Appeals Board issued amended findings of fact and award in which the fact of unreasonable delay of medical treatment by Fremont was found and a finding added that CIGA is not liable for the penalty for unreasonable delay in providing medical treatment by Fremont. There was no provision in the Appeals Board’s award for the penalty.

Abney v. Aera Energy; Liberty Mutual Insurance Company, (2004) 69 CCC 1552, Appeals Board *en banc*.

On March 26, 2004, applicant filed a Labor Code §5814 penalty petition for defendant’s unreasonable delay in the payment of temporary disability. After a hearing, the WCJ

issued a Findings and Award on August 5, 2004, awarding the penalty and applying the new version of §5814, rather than the pre-Senate Bill 899 version. Therefore the penalty amount awarded was 25 percent of the amount delayed less the amount already paid pursuant to Labor Code §4650. The applicant sought reconsideration of the decision, contending that the WCJ should have applied the version of Labor Code §5814 that was in effect on the date of the unreasonable delay; *not* the version in effect on the date of the hearing.

The Appeals Board affirmed the WCJ's finding and held that in order to give effect to the plain meaning of the statutory language and to harmonize it with the entire legislative scheme of SB 899, the current version of Labor Code §5814 should apply to all delays, regardless of whether they occurred before or after June 1, 2004, the operative date of the statute. The Appeals Board determined that retroactive application of Labor Code §5814 was consistent with "Section 49 requiring that the act take effect 'immediately' and provide relief 'at the earliest possible time.'"

The Board also found this interpretation to be consistent with existing case law regarding the nature of the workers' compensation system and changes in its remedies. Citing (*Graczyk v. WCAB*, (1986) 51 CCC 408), it noted that the workers' compensation system is based entirely on statute, rather than on common law, and "because the right to workers' compensation benefits is wholly statutory, a party does not have a vested right in any remedy or cause of action not reduced to a final judgment." Therefore the application of new Labor Code §5814 to all cases decided on or after June 1, 2004 was deemed to be consistent with the stated intent and purpose of Senate Bill 899 and the statutory nature of the workers' compensation system.

The Appeals Board further explained that there was a distinction between procedural statutes (which may be applied retroactively) and substantive statutes, and that that new Labor Code §5814 "does not alter an injured worker's' existing right to seek penalties, but simply changes the remedy available..." Thus, it is a procedural statute and may be applied retroactively.

[Editorial Note: In this case, defendant raised at trial, the issue of whether the new or the old Labor Code §5814 should apply. Therefore defendant preserved its right to raise the issue throughout the entire litigation process. It would seem that failure to raise this issue at trial would most likely be deemed a waiver and defendant would be barred from raising it for the first time in a Petition for Reconsideration or a Petition for Writ of Review.]

The Appeals Board tacked on two additional holdings which are binding, though not related to the facts in this case.

(1) Labor Code §5814(c) provides that accrued penalty claims are conclusively presumed to have been resolved "[u]pon the approval of a compromise and release, findings and awards, or stipulations and orders by the appeals board," or "[u]pon the submission of any issue for determination at a regular trial hearing," unless the penalty issues have been

specifically excluded. The Appeals Board held that the “triggers” for the conclusive presumption include the “approval or submission conditions” listed in the statute. Since these “triggers” did not become operative until June 1, 2004, the presumption only applies to “triggers” which occur on or after June 1, 2004.

(2) Labor Code §5814(g) provides that penalty petitions must be brought within two years from the date the payment of compensation was due. The Appeals Board explained that statutes of limitations, such as this one, were permissibly applicable to pending proceedings as long as “the affected parties are allowed a reasonable time to pursue their remedy before the statute takes effect.” Since the legislature enacted a “grace period” from April 19, 2004 to June 1, 2004, this was deemed by the Appeals Board, to be a reasonable period of time for parties to file their penalty petitions prior to the operative date of the new statute of limitations. Therefore, the two year statute of limitations applies to all penalty petitions filed on or after June 1, 2004.

A Petition for Writ of review has been filed in this case.

XXX. Attorneys Fees

Lett v. L.A.C.M.T.A. (2004) 69 CCC 250 (Board Significant Panel Decision).

Defendant took Applicant’s deposition and refused to pay L.C. §5710 fees since Applicant refused to sign the deposition transcript. The WCJ issued a conditional order allowing attorneys fees to which Defendant timely objected, arguing allowance of the fees would be an unreasonable exercise of discretion since the deposition could not be completed until it was signed by the deponent. Defendant also argued public policy; that L.C. §5710 must be read consistent with the anti-fraud provisions of Insurance Code §1871.4 since L.C. §5710 fees are a benefit to the injured worker and it is logical to provide that benefit only after the deposition had been completed with the deponent’s signature. After a hearing the WCJ determined that there was no legal requirement that Applicant sign the deposition as a condition precedent to an award of L.C. §5710 fees. Defendant filed a petition for reconsideration and the Appeals Board granted reconsideration for further study.

The Appeals Board, in agreeing with the WCJ, found that the occurrence of the deposition was the only requirement that must be met for L.C. §5710 fees to be awarded; there being no statutory requirement of the signature of the deponent as a condition precedent to the award of reasonable attorneys fees. Assuming the substantive provisions of the Code of Civil Procedure applies to workers’ compensation proceedings, §2025 (q) (1) provides the deponent “may either approve the transcript of the deposition by signing it, or refuse to approve the transcript by not signing it.” If the deponent fails to sign the transcript within an allotted period, the deposition is given the same effect as though it had been approved. Hence, whether the deponent signs the deposition has no bearing on payment of the L.C. §5710 fee payment.

Defendant also made a public policy argument based on *People v. Post* (2001) CCC 1503 where an injured worker who made misrepresentations in her deposition could not be prosecuted for perjury because she had not signed her deposition. Instead, the court concluded that she could be prosecuted for attempted perjury. Since defendant did not assert that there were any material misrepresentations in Applicant's deposition with respect to workers' compensation fraud, Defendant was engaging in speculation, not the promotion of sound public policy. Defendant also did not demonstrate how prejudice occurred as a result of Applicant failing to sign the deposition.

Christopher Michael Salon & Spa v. Workers' Compensation Appeals Board (Mitchell) (2004) 69 CCC 877, Court of Appeal, Fifth Appellate District, writ denied, not certified for publication

In short, the Court affirmed the Appeals Board's reliance on its significant panel decision in *Lett v. Workers' Compensation Appeals Board*. (2004) 69 CCC 250, quoting at length from that opinion, that the discretionary allowance of attorney's fees under Labor Code section 5710 was *not* contingent on whether an applicant signed his or her deposition. The Court found no reasonable basis for the petition and awarded attorney's fees under Labor Code section 5801.

The Court stated:

"Petitioners admit that section 5710, subdivision (b)(4), 'gives the Appeals Board the express authority to authorize when attorney's fees shall be paid and shall be discretionary as well[,] yet continue to argue the WCAB's exercise of that discretion here is contrary to legislative intent and public policy. As the WCAB explained, however, nothing in section 5710, Code of Civil Procedure section 2025, or *People v. Post, supra*, 94 Cal.App. 4th at page 467 mandates that a deponent must ever sign and execute her deposition testimony.

"Petitioners do not point to any legal authority to refute the WCAB's reasoning. Petitioners also suggest the WCAB committed prejudicial error by not requiring Mitchell to sign and execute her deposition, which precluded them from litigating and obtaining a conviction for perjury. The issue of perjury, however, was not before the WCAB and is therefore not before this court. If Petitioners possess evidence of Mitchell's inconsistent statements, they may -- and should -- provide such evidence to the WCAB before it weighs the ultimate disability issues. We find no prejudice, however, by Petitioners' inability to seek a criminal conviction for perjury, particularly when a less than truthful deponent who refuses to sign a deposition nevertheless remains at risk for attempted perjury (Pen. Code, §§118, 664) and workers' compensation insurance fraud (Ins. Code, §1871.4). (*People v. Post, supra*, 94 Cal.App.4th at pp. 475-483.)

"Petitioners claim they should not reimburse Musso for the costs associated with representing Mitchell at her deposition is particularly meritless considering the parties' stipulation, offered by their counsel, that 'a certified copy will be used in lieu of an original for all purposes' should an original deposition be unavailable or unsigned within

30 days from the date of transmittal. Because the parties agreed the deposition would be self-executing upon Mitchell's failure to sign the transcription document, we find no reasonable basis for their refusal to reimburse its associated costs and for this petition for writ of review. (§5801.)”