

CONSOLIDATIONS

&

CLASS ACTIONS

Presented By: Judge Michael Cole & Judge Darcy Kosta

CONSOLIDATIONS & CLASS ACTIONS

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CONSOLIDATIONS

I. AUTHORITY:

A. Cal. Reg. §10260. Assignment of Consolidated Cases.

- (a) Any request or petition to consolidate cases that are assigned to different workers' compensation administrative law judges in the same district office, or that have not been assigned but are venued at the same district office, shall be referred to the presiding workers' compensation administrative law judge of that office, whether the cases involve the same injured worker or multiple injured workers.
- (b) Any request or petition to consolidate cases involving the same injured worker that are assigned to workers' compensation administrative law judges at different district offices, or that have not been assigned but are venued at different district offices, shall first be referred to the presiding workers' compensation administrative law judges of the district offices to which the cases are assigned. If the presiding workers' compensation administrative law judges are unable to agree on where the cases will be assigned for hearing, the conflict shall be resolved by the court administrator upon referral by one of the presiding judges.
- (c) Any request or petition to consolidate cases involving multiple injured workers that are assigned to workers' compensation administrative law judges at different district offices, or that have not been assigned but are venued at different district offices, shall be referred to the court administrator.
- (d) In resolving any request or petition to consolidate cases that are assigned to workers' compensation administrative law judges at different district offices, or that have not been assigned but are venued at different district offices, the court administrator shall set the request or petition for a conference regarding the place of hearing. At or after the conference, the court administrator shall determine the place of hearing and may determine the workers' compensation administrative law judge to whom the cases will be assigned, giving consideration to the factors set forth in California Code of Regulations, title 8, section 10589. In reaching any determination, the court administrator may assign a workers' compensation administrative law judge to hear any discovery motions and disputes relevant to discovery in the action and to report their findings and recommendations to the court administrator.
- (e) Any party aggrieved by the determination of the court administrator may request proceedings pursuant to Labor Code section 5310, except that an assignment to a particular workers' compensation administrative law judge shall be challenged only in accordance with the provisions of California Code of Regulations, title 8, sections 10452 and 10453.

B. Cal. Reg. §10589. Consolidation of Cases.

- (a) Consolidation of two or more related cases, involving either the same injured employee or multiple injured employees, rests in the sound discretion of the Workers' Compensation Appeals Board. In exercising that discretion, the Workers' Compensation Appeals Board shall take into consideration any relevant factors, including but not limited to the following:
- (1) whether there are common issues of fact or law;
 - (2) the complexity of the issues involved;
 - (3) the potential prejudice to any party, including but not limited to whether granting consolidation would significantly delay the trial of any of the cases involved;
 - (4) the avoidance of duplicate or inconsistent orders; and
 - (5) The efficient utilization of judicial resources.

Consolidation may be ordered for limited purposes or for all purposes.

- (b) Consolidation may be ordered by the Workers' Compensation Appeals Board on its own motion, or may be ordered based upon a petition filed by one of the parties. A petition to consolidate shall:
- (1) List all named parties in each case;
 - (2) Contain the adjudication case numbers of all the cases sought to be consolidated, with the lowest numbered case shown first;
 - (3) Be filed in each case sought to be consolidated; and
 - (4) Be served on all attorneys or other representatives of record and on all non-represented parties in each case sought to be consolidated.
- (c) Any order regarding consolidation shall be filed in each case to which the order relates.
- (d) If consolidation is ordered, the Workers' Compensation Appeals Board, in its discretion, may designate one case as the master file for exhibits and pleadings. If a master file is designated, any subsequent exhibits and pleadings filed by the parties and lien claimants during the period of consolidation shall be filed only in the master case, however, all pleadings and exhibit cover sheets filed shall include the caption and case number of the master file case, followed by the case numbers of all of the other consolidated cases.
- (e) If a master file has been designated and the consolidated cases are tried, all relevant documentary evidence previously received in an individual case shall be deemed admitted in evidence in the consolidated proceedings under the master file and shall be deemed part of the record of each of the several consolidated cases. Evidence received subsequent to the designation of the master file shall be similarly received with like force and effect.

- (f) When cases are consolidated, joint minutes of hearing, summaries of evidence, opinions, decisions, orders, findings, or awards may be used, however, copies shall be filed in the record of proceedings of each case.

II. ISSUES TO BE DECIDED ON THE PETITION FOR CONSOLIDATION:

- A. Should the Petition for Consolidation be granted for discovery and/or trial?
- B. Pursuant to rule 10260 and rule 10589 are there common issues of law and fact?
- C. Do the complexity of the issues involved warrant consolidation?
- D. Is there any potential prejudice to any party, including but not limited to whether granting consolidation would significantly delay the trial of any of the cases involved?
- E. Will consolidation lead to the avoidance of duplicate or inconsistent orders?
- F. Will consolidation allow for the efficient utilization of judicial resources?

III. CONSOLIDATION PROCEDURES:

A. LISTING OF CONSOLIDATED CASES:

- (1) When petitions for consolidations are filed, the party filing the petition for consolidation is required to list all case numbers in the petition that they wish to have consolidated.
- (2) Many times the parties do not know all the cases and case numbers that they want subject to an order of consolidation. This problem usually arises in lien cases. To solve this problem the order of consolidation will relate to all liens/cases described by a specific set of parameters, i.e. "all liens between defendant A and lien claimant B with dates of service between January 1, 2001 and January 1, 2005."

B. CONSOLIDATION FOR DISCOVERY PURPOSES ONLY:

- (1) In order to decide the issues in II above you must frame issues on the cases to be consolidated. Many times the parties cannot frame issues until discovery is complete. If that is the case, often cases are initially only consolidated for discovery purposes. Consolidation for discovery is granted if it will lead to the avoidance of duplicate or inconsistent decisions and will allow for a more efficient use of judicial resources by avoiding multiple hearings and decisions on the same discovery disputes.

- (2) Often times, particularly with liens, completion of discovery results in large global settlements between defendant carrier(s) and one or more lien claimants.
- (3) Once discovery is completed, the parties will either stipulate to an order of consolidation, or to an order denying consolidation, or they will disagree on whether consolidation is appropriate in which case a decision will be made on the petition after framing the issues (see Section D, below) and written/oral argument.

C. STAY OF PROCEEDINGS:

- (1) When a consolidation is granted and the matter set for trial a stay order issues on all the cases that are part of the consolidation. This stay order is issued to prevent an individual case proceeding to trial before another WCJ.
- (2) A stay order can issue any time after the filing of the petition for consolidation and a petition for stay may be either a separate petition or part of the petition to consolidate.
- (3) Granting a stay before the matter is consolidated and set for trial is a balancing of the prejudice to the parties whose actions are stayed versus the harm and complications of cases proceeding individually to trial while a decision on the petition for consolidation is in progress.
- (4) When consolidation for discovery only is granted, a stay order may or may not issue. Again it is a balancing of the prejudice to the party whose cases are stayed versus whether consolidation for trial will eventually be granted and potential problems that may be caused by individual cases proceeding to trial during the discovery process.

D. FRAMING ISSUES FOR CONSOLIDATION TRIALS:

- (1) Framing issues in consolidations can be difficult as the issues are often unique or involve complicated lien issues. A single issue presented by the parties may in fact require multiple issues. For example, the parties may claim the only issue is the reasonable valuation of a treatment service. However, to adequately address that issue, it may be necessary to break down reasonableness into its lowest components such as which billing code was used and what defendants claim is the proper code for each item in dispute. The issue could be bundling and the item should not have been separately billed. Each issue must be set out with specificity.

- (2) Issues may have to be framed several times. The first time could be to decide if the cases should be consolidated. If the parties agree to consolidate for discovery, or the consolidation was granted for discovery only, issues may need to be framed to help clarify and resolve discovery disputes. After discovery is completed the stipulations and issues will have to be framed for a decision on whether consolidation should be granted and if granted, separate stipulations and issues may be required prior to setting the consolidated issues for trial.
- (3) If some issues are common and some issues are not, bifurcation may be in the best interest of judicial economy and avoiding duplicate decisions. Sometimes the parties will waive the issues that are not common to avoid the consolidation being denied if bifurcation will not work. .

E. ALTERNATIVE CONSIDERATIONS:

- (1) Arbitration: One way to proceed, especially with anticipated long, multi-day trials, is to use the arbitration process. It can often be less expensive and burdensome for the parties as they can litigate on straight days and obtain a final decision in a much quicker fashion.
- (2) Divide Up Proposed Consolidations: Many times individual settlement conferences can be set, especially in lien consolidations, to see if individual global settlements can be reached either between individual defendants and lien claimants, or between a specific lien claimant and defendants. The use of bifurcated settlement conferences can also be effective to attempt to reduce the number of cases and parties before considering ruling on the petition for consolidation.
- (3) Multiple Limited Trials: On rare occasions, a special trial procedure can be used even though the cases are not common as to the facts. The matters sometimes can be set before a judge for a short cause trial with many being set in a day. This can be done when the law is common, the facts are limited and time for each hearing is short or can be submitted on the record.
- (4) Creative Consolidations (Lockheed case): Rarely, creative consolidations can work as a solution. In the Lockheed cases 1800 hundred applicants filed individual cases. All the applicants filed at least one case that contained alleged CT chemical exposure. The same experts were going to testify for both sides on the chemical exposure issues. Originally, the same attorney represented all the applicants and the same attorney represented the defendant on all the cases. The cases were consolidated by having the first twenty applicants who only had a chemical exposure case testifying, then all the experts testified and following that

the WCJ was to issue twenty different decisions. All the evidence was admissible and part of all 1800 cases. The first twenty cases took 72 days of trial and each case after that has been 20 minutes to a ½ day trial depending on the other applications filed.

- (5) Consolidating Multiple Consolidations: Many times multiple petitions for consolidation will be filed on the same issue with some or all the parties being different. This often happens in lien consolidations when many different defendants will file petitions to consolidate against different lien claimants, although the legal issue may be the same in all of the proposed consolidations.

F. ASSIGNMENT TO A TRIAL JUDGE AND VENUE SELECTION:

- (1) First, venue must be decided. In consolidations involving multiple cases at multiple district offices venue could often be proper at more than one location. Often the parties will agree on a venue location. If they cannot agree, then the assigned consolidation WCJ, as designee of the chief judge, will select a venue taking into consideration the consolidation issues and facts, the convenience of the parties and witnesses, as well as the argument of the parties.
- (2) A consolidation trial judge needs to be assigned.

G. SETTLEMENTS & GLOBAL SETTLEMENTS:

- (1) Global settlements are the big advantage of consolidated settlements. The parties can settle all the cases between them, often times without even knowing how many cases they have with each other, i.e. by settling all liens between defendants “a” and lien claimant “b” for a designated period of time whether listed, known or unknown at the time of the settlement.
- (2) Many times the global settlement is the basis for the petition for consolidation. The parties reach a global settlement and now want it approved. Generally the parties are asked to file a petition to consolidate with the common issue of law and fact being settlement.

CLASS ACTIONS

I. AUTHORITY:

In Addington v. Cavey (1970) 35 Cal.Comp.Cases 39, the Appeals Board in an en banc decision held that "...class actions are cognizable before this tribunal".

"First, we find nothing in the statutes dealing with our proceedings, nor in the judicial authorities interpreting them, to preclude this Board from entertaining litigation in the nature of a class suit, similar to that authorized by California Code of Civil Procedure, section 382. Labor Code section 5300 gives this Board jurisdiction to hear and determine all matters pertaining to workmen's compensation liability. In this regard, section 5300 is rather broadly phrased (emphasis added):

"All the following proceedings shall be instituted before the appeals board and not elsewhere, except as otherwise provided in Division 4.

"(a) For the recovery of compensation, or *concerning any right or liability arising out of or incidental thereto*.

"(b) For the enforcement against the employer or an insurer of any liability for compensation imposed upon him by this division in favor of the injured employee, his dependents, or any third person. . .

"The Board's jurisdiction under the quoted statute likewise has been broadly defined by the courts. For example, it has been held that the Board, and the Commission before it, has the power to determine the validity of insurance contracts (see *General Accident Fire & Life Assur. Corp. v. I.A.C. (Lilenquist)* [1926] 196 Cal. 179, 13 I.A.C. 152 [237 Pac. 33]), and, to reform insurance contracts, a form of equity jurisdiction (see *Bankers Indem. Ins. Co. v. I.A.C. (Merzoian)* [1935] 4 Cal. 2d 89, 20 I.A.C. 357 [47 P.2d 719]). Thus, in an appropriate case we hold that a class suit would be cognizable before this tribunal.

"Just such relief was sought and obtained by claimants in *Hartford Acc. and Indem. Co. v. I.A.C. (Ansley, et al.)* [1932] 216 Cal. 40, 18 I.A.C. 219 [13 P.2d 699]. In that case the receiver, appointed for the self-insured employer in bankruptcy proceedings, stopped the payment of all workmen's compensation awards theretofore issued against the employer. All the beneficiaries of such awards, together with those who had claims pending against the employer, were joined in a single proceeding seeking recovery against the surety on a bond which had been filed by the employer in order to obtain consent to self-insure. The award in favor of claimants provided for a pro-rata recovery against the surety, since the total liability of the employer under the outstanding awards was greater than the amount of the bond. Petitioner's challenge of the Board's

jurisdiction over such a claim was overruled by the Supreme Court. The case thus illustrates that a representative-type proceeding is not foreign to this tribunal and may be entertained in an appropriate situation such as in the *Ansley* case.”

II. ANALYSIS TO CERTIFY A CLASS ACTION:

The California Supreme Court recently discussed the requirements for class certification in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021-1022, which is quoted at length:

“Originally creatures of equity, class actions have been statutorily embraced by the Legislature whenever ‘the question [in a case] is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court’ (Code Civ. Proc., § 382; see *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1078; *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 458.) Drawing on the language of Code of Civil Procedure section 382 and federal precedent, we have articulated clear requirements for the certification of a class. The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. (Code Civ. Proc., § 382; *Fireside Bank*, at p. 1089; *Linder v. Thrifty Oil Co.*, *supra*,] 23 Cal.4th [at p.] 435; *City of San Jose*, at p. 459.) ‘In turn, the “community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.”’ (*Fireside Bank*, at p. 1089, quoting *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.)

“Here, only a single element of class suitability, and a single aspect of the trial court’s certification decision, is in dispute: whether individual questions or questions of common or general interest predominate. The ‘ultimate question’ the element of predominance presents is whether ‘the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.’ (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238; accord, *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) The answer hinges on ‘whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.’ (*Sav-On*, at p. 327.) A court must examine the allegations of the complaint and supporting declarations (*ibid.*) and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible. [Fn. omitted.] ‘As a general rule if the defendant’s liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.’ (*Hicks v. Kaufman &*

Broad Home Corp. (2001) 89 Cal.App.4th 908, 916; accord, *Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941.)

“On review of a class certification order, an appellate court’s inquiry is narrowly circumscribed. ‘The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: ‘Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification.’ [Citation.] A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions. [Citations.]’ (*Fireside Bank v. Superior Court, supra*, 40 Cal.4th at p. 1089; see also *Hamwi v. Citinational-Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462, 472 [‘So long as [the trial] court applies proper criteria and its action is founded on a rational basis, its ruling must be upheld.’].)”