

SUMMARY OF  
2005 SIGNIFICANT CASE DECISIONS  
IN  
CALIFORNIA WORKERS' COMPENSATION LAW

- I Jurisdiction
- II Employment

**Farmer Brothers Coffee v. Workers' Compensation Appeals Board (Ruiz)**, (2005) 133 Cal. App. 4<sup>th</sup> 533, 70 Cal. Comp. Cases 1399. (Court of Appeal Second Appellate District) [Employment – illegal aliens.]

The circumstances of employment and injury and history of the litigation in the matter is not set forth in the opinion. Appeals were filed with respect to two matters, each alleging that 8 United States Code §1101, et. seq., enacted by the Immigration Reform and Control Act of 1986 (IRCA) preempts provisions of the California Labor Code extending the right to workers' compensation benefits to aliens, whether legally or illegally employed, and that immigration status is irrelevant to the issue of liability under California labor and employment laws. (Labor Code Sections 3351 and 1171.5, respectively.) Of the two matters appealed, the Ruiz matter alone is decided by this decision.

The IRCA makes it unlawful to hire or continue in employment any alien the employer knows to be an unauthorized alien, to-wit, one who is not lawfully admitted for permanent residence or authorized to be employed. The California Workers Compensation Act carries forth the mandate of the California Constitution to provide a complete system of workers' compensation "...to furnish expeditiously, and inexpensively, treatment and compensation for persons suffering workplace injury, irrespective of fault..." There is no provision in the California Workers Compensation Act imposing sanctions for employment of illegal aliens; therefore the act does not conflict with the IRCA's express preemption provision. The Court stated:

"To imply preemption, there must be 'such actual conflict between the two schemes of regulation that both cannot stand in the same area...' because the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (70 Cal. Comp. Cases 1399, at 1403-4.)

After examining effects of finding preemption on employment and on the Workers' Compensation Appeals Board's potential obligation to determine legality of employment and good faith compliance in each case, and considering the enactment of Labor Code Section 1171.5, the Court concluded that the Workers' Compensation Act is not in conflict with and is therefore preempted by the IRCA. The Court then found lacking petitioner's arguments that illegal aliens were intended to be excluded from the definition of employee found in Labor Code Section 3351(a). Finally, the Court found that use of fraudulent Social Security and green cards to obtain employment was not a violation of

Insurance Code §1871.4. Record of conviction of workers' compensation fraud is required to bar receipt or retention of benefits obtained as a direct result of the fraud. The Court noted that it was employment, not compensable injury, which the employee received as a direct result of use of the fraudulent documents. The Board's prior determination in the matter was affirmed.

***General Casualty Insurance v. Workers' Compensation Appeals Board (Miceli)***, (2005) 70 Cal. Comp. Cases 953. (Court of Appeal, Second Appellate District; opinion decertified for publication by the California Supreme Court, 10-12-05). [Employment general and special employers / Insurance coverage.]

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.

The Workers' Compensation Appeals Board held that Labor Code §3602(d) and Insurance Code §11663 do not extinguish the joint and several liability of 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 the Board found 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).

Remedy Temp, Jacuzzi, Assurance and Casualty sought review. They contended that their agreements satisfied the requirements of Insurance Code Section 11663, and Labor Code Section 3602, which extinguished joint and several liability. The agreement, they contended acts as an exclusion of coverage for special employees. The Board's finding that the coverage provided to Jacuzzi by Assurance was not intended to include special employees was supported by substantial evidence and should control.

The court noted that Insurance Code §11663 is limited in application to insurers, it does not apply to CIGA. The legislative effort in Labor Code Section 3602(d), to allow a special employer to avoid the obligation for duplicate insurance does not prohibit such insurance by the special employer. The court requested additional briefing on availability of an exclusion provision which would have excluded special employees from coverage under the general employer's policy, and whether the general employer's insurer could have charged premium for special employees paid by the special employer. The court initially affirmed the Appeals Board decision, and appellants requested rehearing.

On rehearing the Court accepted that WCIRB had rejected use of a "Form 11" endorsement to exclude coverage for special employees of another insured. However, after examining various provisions of the Assurance policy, the positions of the Department of Insurance and WCIRB, reflected in the briefs, and intent of the employers. The policy, which is boilerplate, and incorporates or provides for circumstances where Labor Code Section 3602(d) may apply shows intent not to cover special employees. Therefore the Assurance policy was not "other available insurance" within the meaning of Insurance Code Section 1063.1 (c) (9). Dismissal of CIGA was reversed, and the matter ordered remanded.

**Hestehauge v. Charkins**, (2005) 70 Cal. Comp. Cases 1294. (Workers' Compensation Appeals Board significant panel decision.) [Employment.]

Paul Hestehauge was employed by Wayne and Laurie Charkins as a painter in their residence on November 15, 2005. Mr. Hestehauge fell fifteen feet from a scaffold injuring his brain, head, left wrist and body. The work Mr. Hestehauge was performing for the Charkins required a contractor's license, but Hestehauge was unlicensed. Mr. Hestehauge sought workers' compensation benefits for his injury. At the time of his injury, Mr. Hestehauge had not worked a sufficient number of hours to be covered as a residential employee under Labor Code Sections 3351(d) and 3352(h) (the latter section excluding any residential employee with less than 52 hours worked and \$100 earned in the ninety days prior to the injury). Notwithstanding the Labor Code Section 3352(h) exclusion, applicant was found to qualify for workers' compensation benefits under Labor Code Section 3715(b). The Workers' Compensation Judge found that applicant was excluded from benefits by the employment exclusion in Labor Code Section 3352(h), but entitled to benefits under Labor Code Section 3715(b). Section 3715(b)

affords coverage under the workers' compensation act to household domestic servants working for one employer over 52 hours per week, gardeners working for an individual over 44 hours per month, or casual employees on projects contemplated to last over 10 days and include labor costs of over \$100.00. Section 3715(b) states in pertinent part that such employees are entitled:

“...[I]n addition to proceeding against his or her employer by civil action...to file his or her application with the appeals board for compensation. The appeals board shall hear and determine ...[the case] in like manner as in other claims, and shall make the award to the claimant as he or she would be entitled to receive if the employer had secured the payment of compensation....”

The Charkins were insured as to residential employment by California State Automobile Association Inter-insurance Bureau. Defendant sought reconsideration, contending that Labor Code Section 3715 provides remedies for those employed by uninsured employers. Defendant also contended that the record did not establish that applicant's work for the Charkins would take more than 10 days to complete.

The Board granted reconsideration and found that the exclusion under Labor Code Section 3352(h) applied. It also found that Labor Code Section 3715(b) expressly provides that it was intended to “make no change in the law as it applies to those types of employees covered by this subdivision prior to the effective date of Chapter 1263 of the [Statutes] of the 1975 Regular Session.” The Board noted that Mr. Charkins is a California licensed glazing contractor. The Charkins met Mr. Hestehauge through Mr. Emmery, a California licensed painting contractor. The engagement under which Hestehauge was to paint for the Charkins was not written, and there was no agreement as to compensation for the job or by the hour. There was no inquiry as to whether Hestehauge had a contractor's license. Mr. Hestehauge's injury was incurred in the third hour of his work on the project. After Mr. Hestehauge's injury, the Charkins used a number of others to complete their painting project; the total number of work days of the others was three to five from Mr. Emmery, five work days for the dining room, and two work days for two people for the living room and family room. This project took twelve to fifteen work days to complete. Prior to January 1, 1977, residential workers whose employment was casual and not on the course of trade, business, profession, or occupation of the employer was excluded from coverage under the workers' compensation act by former Labor Code Section 3352(a). There was an exception in former section 3354 limiting “casual “ as used on Section 3352(a) to work of more than ten days duration or having a labor cost in excess of \$100.00. Other exceptions to the prior Section 3352(a) exclusion existed for child care and gardening. This exclusion and the exemptions applied for all employers until the effective date of AB469, which expressly provided that the change in Labor Code Section 3715(b) was intended to make no change in the law prior to the effective date of Chapter 1263 of the [statutes] of the 1975 Regular Session. That legislation also mandated that comprehensive liability homeowner's insurance cover residential employees. In response to the broadened definition of employee and potential liability for insured resident's insurers and uninsured residents (particularly renters), AB 133 was passed as urgency legislation, taking effect

March 25, 1977, as Chapter 17 of the Statutes of 1977. AB133 placed the 52 hours worked or \$100.00 paid within ninety days before injury as a limitation in Labor Code Section 3352. After considering the legislative history and the mandate of liberal construction in Labor Code Section 3202, the Board found that the coverage afforded by Labor Code Section 3715(b) applies to both insured and uninsured residential employers. This is the September 23, 2005, Significant Panel Decision reported at 70 Cal. Comp. Cases 1294.

Prior to the date on which the Board's decision after reconsideration issued, defendant filed a petition for writ of review or mandate with the court of appeal. On September 27, 2005, the Court of Appeal denied review. (70 Cal. Comp. Cases 1547.) In December 2005, a writ of review was granted by the First Appellate District, Division Four, in the case to review the Board's determination of employment.

### III Insurance Coverage / California Insurance Guarantee Association

#### A. CIGA Exclusions from Covered Claims

**California Insurance Guarantee Association v. Workers' Compensation Appeals Board (Hooten)**, (2005) 128 Cal. App. 4<sup>th</sup> 569, 70 Cal. Comp. Cases 551. (Court of Appeal Second Appellate District) [Insurance, CIGA, Covered Claims]

Rodney Hooten sustained a succession of specific and alleged cumulative injuries while employed by one employer. The first was a left shoulder injury sustained on December 8, 1994 when the employer was insured as to workers' compensation liability by Superior Pacific Casualty Company. The second was a neck and shoulders injury sustained on August 27, 1997 when the employer was insured by Argonaut Insurance. The third was an alleged cumulative neck, shoulders, arms, and back injury sustained from 1967 through 1997; Argonaut was the insurer for the last three months of the cumulative injury period. The fourth was an alleged cumulative injury to the neck, shoulders, arms and back sustained from September 8, 1998 through March 17, 1999; Wausau Insurance was the workers' compensation carrier during this period.

In June 2000, all insurers entered into a Compromise and Release agreement with applicant resolving all claims. Under terms of the agreement Argonaut reserved a right of contribution or reimbursement from Superior Pacific Casualty. On September 26, 2000, Superior Pacific Casualty was placed in liquidation, and California Insurance Guarantee Association (CIGA) became liable for its "covered claims."

On September 23, 2003, Argonaut filed a petition for reimbursement seeking 90% of \$102,193.36 in indemnity and medical benefits paid to Hooten on the 1994 and 1997 specific injuries. Argonaut relied on the Workers' Compensation Appeals Board en banc decision in Gomez v. Casa Sandoval, (2003) 68 Cal. Comp. Cases 753, which held in part that in cases of successive injuries, a determination of apportionment must be made and that "other insurance" does not cover the liability on the apportioned liability on a

specific injury or cumulative injury falling solely within the insolvent insurer's period of coverage where the insurer has been placed in liquidation and its obligations pass to CIGA. It also relied on the opinion of a physician who apportioned 90% of the disability to the 1994 injury and 10% to the 1997 injury.

The WCJ found that liability under the Order Approving Compromise and Release was not joint and several for the successive injuries, and allowed Argonaut reimbursement. CIGA sought reconsideration contending Argonaut was "other insurance" and that it was not liable for contribution or reimbursement under Insurance Code Section 1063.1(c)(5). The WCJ, in his Report and Recommendation noted that the liability of Argonaut and CIGA was not joint and several in this successive injury scenario. He saw a distinction between a claim for contribution, indemnity or subrogation by a solvent carrier against CIGA on a single claim and assignment of liability upon carriers and CIGA on successive separate claims. The Workers' Compensation Appeals Board denied reconsideration adopting the WCJ's Report and Recommendation as the basis for its determination. CIGA sought review.

The Court of Appeal granted review. It found that CIGA was not liable to make reimbursement to Argonaut because of the provisions of Insurance Code Section 1063.1 subdivisions (c)(5) and (c)(9)(ii). The former subdivision exculpates CIGA from liability to insurers (et. al.) for contribution. The latter subdivision exculpates CIGA from liability to any person who is an assignee of the original claimant. Application of the exculpatory provisions of Insurance Code Section 1063.1 do not require there to be joint and several liability of another insurer with CIGA. Argonaut's claim is for payment of an obligation to an insurer, and is barred by the exculpatory provisions of the Insurance Code. The court vacated the order of reimbursement and remanded with direction to issue an order denying Argonaut's petition for reimbursement.

**California Insurance Guarantee Association v. Workers' Compensation Appeals Board (Weitzman)**, (2005) 128 Cal. App. 4<sup>th</sup> 307, 70 Cal. Comp. Cases 556. (Court of Appeal Second Appellate District) [Insurance, CIGA, Covered Claims]

Timothy Weitzman suffered a specific low back injury arising out of and occurring in the course of employment by Capstar Hotels (Capstar) on February 12, 1997. He entered stipulations with American Motorists Insurance Company (AMIC), Capstar's compensation carrier at the time of injury, settling his claim on January 30, 1998. On September 26, 2001, applicant filed a timely Petition to Reopen his February 1997 injury claim, and concurrently filed claims for a new specific injury on February 10, 1998 and a cumulative injury during the period September 7, 1999 through March 30, 2001. At the times of the newer injuries he had been employed by Cal Poly Foundation insured in 1998 by California Compensation Insurance (Cal Comp), and in the year ending March 30 2001 by Legion Insurance (Legion).

In 2000 Cal Comp became insolvent and liability for its "covered claims" passed to California Insurance Guarantee Association (CIGA). In 2003 Legion became insolvent

and liability for its “covered claims” passed to CIGA. AMIC filed a lien against CIGA for \$133,800.00 for medical expenses and temporary disability indemnity paid allegedly for the latter two of Mr. Weitzman’s injuries.

In October 2003, the matters came to trial and were consolidated for hearing. The WCJ found good cause to reopen the 1997 injury case, and awarded 55% permanent disability and further medical treatment. On the 1998 injury and cumulative injury the WCJ also awarded 55% permanent disability and future medical treatment. The petition for reimbursement was allowed, but AMIC was ordered to administer the future medical award. In his opinion the WCJ indicated that all three injuries had contributed to the latter periods of temporary disability, need of medical treatment, and a 55% permanent disability.

CIGA sought reconsideration, but the Board denied it relying on the WCJ’s report and recommendation. CIGA filed a Petition for Writ of Review. The Court of Appeal initially denied the writ, but the Supreme Court granted and remanded with directions. The court noted that outside the workers’ compensation field, CIGA’s immunity from claims of other insurers had been clearly and consistently established by appellate decision from the early 1980’s. It had been applied in workers’ compensation subrogation cases involving a third party tortfeasor’s insolvent insurer from 1991. (*CIGA v. Argonaut Ins. Co.*, (1991) 227 Cal. App. 3<sup>rd</sup> 624, 56 Cal. Comp. Cases 104.) The Court held:

“The plain language of section 1063.1, subdivisions (c)(5) and (c)(9)(ii) bars AIMC’s reimbursement claim because the claim is an ‘obligation to an insurer,’ AIMC is not the ‘original claimant under the insurance policy,’ and the two subsections expressly exclude ‘claims for contribution, indemnity, or subrogation, equitable or otherwise.’”

The Board’s en banc decision in *Gomez v. Casa Sandoval*, (2003) 68 Cal. Comp. Cases 753 (*Gomez*), had relied on the anti merger statute, Labor Code Section 3208.2, and separate or one cause of action statute, Labor Code Section 5303, in finding a requirement for apportionment and findings as to each injury. As to medical treatment, the liability of each insurer responsible for any injury contributing to the need is joint and several. In these cases the WCJs findings were that all injuries contributed to the temporary disability and permanent disability, so the liability of each responsible insurer is also joint and several. CIGA is not liable for any of the benefits because each of the carriers is jointly and severally liable for all benefits, and AMIC is a solvent insurer providing coverage for the losses. Where there is joint and several liability among insurers and CIGA, CIGA has no obligation to pay, contribute, or make reimbursement. To the extent *Gomez* is inconsistent with this determination it is overruled. As to CIGA’s possible liability, provisions of Insurance Code 1063.1 control, notwithstanding Labor Code Sections 3208.2 and 5313. CIGA’s petition was granted, the Board’s decision annulled, and the matter remanded with directions to deny AMIC’s lien claim.

## B. Duty to Defend

*Allied Mutual Insurance Co. v. Workers' Compensation Appeals Board (Tarbell)*, (2005) 70 Cal. Comp. Cases 1. (Fifth Appellate District, not published.)

On a case on arbitration, the arbitrator directed Allied Mutual Insurance Company to appear and defend the interest of an alleged employer, John Beery. Injured employee Tarbell had been employed or otherwise in service as a ranch hand for Beery on one day during the ninety days prior to his accident.

Allied appealed the order to appear and defend. The Workers' Compensation Appeals Board found that Allied submitted no evidence or argument that there was no possibility for Beery to have been covered by Allied for applicant's workers' compensation claim. It affirmed the arbitrator's order.

The Court of Appeal granted defendant Allied's petition for writ of review. It noted that an insured's duty to appear and defend arises from the existence of a potential for coverage and ceases when such potential is ruled out or absent. Here, there was no evidence that Tarbell's injury was potentially covered by Allied's policy. The arbitrator and Board did not discuss their impressions of the credibility of evidence. In the absence of the Board providing a basis for finding Allied liable, there was no basis for review by the court. The Board's failure to state the evidence relied upon renders its decision fatally defective under Labor Code Section 5908.5. The defect cannot be cured by further briefing. The Opinion and Decision after Reconsideration were annulled and the matter remanded for the Board to set forth in detail its reasons for ordering Allied to defend Beery.

*Stephenson v. Argonaut Insurance Company*, (2004) 125 Cap. App. 4<sup>th</sup> 962, 70 Cal. Comp. Cases 435. (Court of Appeal, Fourth Appellate District) [Insurance, duty to defend]

Fred Stephenson was trustee of Commercial Conservancy No. 1, which conducted business as Enniss Enterprises (Enniss). Enniss decided to outsource employee needs, and contracted with Builders Staff Corporation (BSC) to furnish employees and to provide workers' compensation coverage for the furnished employees. Jimmy Guardado was furnished by BSC to Enniss to work as a sand washer, and sustained injuries on Enniss premises. Guardado sued Enniss and Clarendon America Insurance Company (Clarendon), Enniss general liability insurance carrier, for civil damages. Guardado alleged he was the special employee of Enniss, and was subject exclusively to Enniss direction and control in performing the duties of his work. Clarendon initially defended the case, but within a year of commencement of the litigation, it withdrew its defense on the ground that the policy excluded coverage of leased worker claims. Stephenson then tendered defense to BSC's workers' compensation insurer, Argonaut. Argonaut did not defend the matter, and Stephenson spent over \$300,000 in attorney's fees and costs. Further, Guardado obtained a \$1,750,000 default judgment against Stephenson due to

Stephenson's failure to comply with discovery orders. Stephenson sued Argonaut, and the trial court sustained Argonaut's demurrer, and dismissed the action as to Argonaut without leave to amend. Stephenson appealed.

BSC through a broker had obtained a workers' compensation and employer's liability policy from Argonaut covering employees of BSC furnished to Enniss. The policy showed plaintiff [Stephenson or Enniss] as a named insured. Argonaut contended that if plaintiff was an insured and plaintiff had employed Guardado, it had no duty to defend or indemnify in the civil suit because the workers' compensation exclusion applies.

The Court of Appeal noted that in reviewing appeal from a summary judgment it would reverse if plaintiff showed either that the Guardado action created a potential for coverage under defendant's policy or that the pleading could be amended to show a potential for coverage. Under part one of the Argonaut policy, coverage and defense of claims under the workers' compensation law was afforded. Under part two, coverage for bodily injury by accident or disease arising out of and in the course of employment of an employee was afforded. However, part two coverage excluded any obligation imposed by a workers' compensation, occupational disease, unemployment compensation, or disability benefits law. Part two coverage was construed in La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co., (1994) 9 Cal. 4<sup>th</sup> 27, 59 Cal. Comp. Cases 1002 to afford coverage against lawsuits by employees injured in the course of employment, but whose injuries are not compensable under workers' compensation laws. Coverage under parts one and two is mutually exclusive.

Argonaut contends that even if Guardado was plaintiff's employee, Guardado sustained a compensable workers' compensation injury for which Argonaut provided a defense and benefits in the workers' compensation claim.

Case law has consistently held that where there is a clear exclusion in part two of the policy for claims by employees entitled to workers' compensation benefits, the insurer has no duty to provide a defense of a civil action brought by the employee for the injury. The Court reviews several of the cases on this point at length.

Plaintiff argued on appeal that Guardado's injury was outside the course and scope of his employment because he was injured lubricating a sand washer, a risk not reasonably contemplated by his employment as an unskilled laborer. However, Guardado received workers' compensation benefits, and plaintiff had admitted that Guardado's injury was "clearly within the scope of the workers' compensation law." The court construed this as an admission. It found that the trial court held defendant's policy unambiguously eliminated any potential of coverage for Guardado's civil action. The summary dismissal was affirmed.

C. Uninsured Employers Benefits Trust Fund – Duty to cooperate in discovery

**Rea v. Workers' Compensation Appeals Board (Boostan) [f.k.a. Milbauer v. Boostan]**, (2005) 127 Cal. App. 4<sup>th</sup> 625; 70 Cal. Comp. Cases 312. (Court of Appeal, Second Appellate District, 3/15/05)

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*) (hereinafter *Milbauer I*). Additionally the Appeals Board chastised the Uninsured Employers' Benefits Trust 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.

Applicant, Daniel Milbauer, had sustained injuries in a traffic accident on October 17, 1994. In August 1995 his counsel served Erez Boostan as an individual and substantial shareholder of American Runner Attorney Service and Courier [Inc.?] with a copy of the Application for Adjudication of Claim and Special Notice of Lawsuit. On October 17, 1996, counsel for UEF obtained an order amending the employer's name to American Runner Messenger Service, Inc., a corporation, formerly known as American Runner Attorney Service and Courier Network, Inc. Erez Boostan was also named as a substantial shareholder and/or beneficial owner of the corporation. Milbauer's counsel amended the application and prepared a new Special Notice of Lawsuit and served the documents on Erez Boostan. On April 30, 1997, UEF was ordered joined as a party defendant. On January 28, 1998, Milbauer obtained exclusion order from a bankruptcy stay. On July 2, 1999, applicant's condition was found to be medically permanent and stationary. On February 15, 2000, the workers' compensation case was tried, and applicant testified as to employment, injury, treatment and nature and extent of disability. As to employment he testified he worked for American Runner, Inc., which might have been American Courier, Inc., and that he had pay stubs and a badge at home which might indicate a different name for the employer. The WCJ, in light of pay stubs filed after trial, found that the correct employer was American Runner Attorney Service, and that there was no jurisdiction over American Runner Messenger Service, Inc. Milbauer sought reconsideration contending that the UEF had stipulated to employment and provided substantial benefits, including surgery. Applicant's counsel subsequently sought to effect service by publication on Erez Boostan doing business as American Runner Attorney Service. There was no record of a fictitious business filing for American Runner Attorney Service. There had been a business, incorporated on April 7, 1992, and suspended January 4, 1999 (i.e. in effect at the time of the October 17, 1994

injury) known as American Runner Attorney Service, Inc. The WCJ ordered service by publication which was completed on March 28, 2002.

The matter proceeded to trial and was submitted on February 25, 2003. The WCJ issued a supplemental Findings and Award determining that applicant was injured while employed by Erez Boostan, and individual and doing business as American Runner Attorney Service. Benefits including temporary disability indemnity, 64:1% permanent disability indemnity, and further medical treatment were awarded. The opinion on decision indicated that the finding as to identity of the employer was based on applicant's testimony, paycheck stubs, exhibits to the Petition for Service by Publication, and medical evidence. UEF untimely sought reconsideration contending that American Runner Attorney Service, Inc. is the correct illegally uninsured employer, and that jurisdiction over said employer has not been established. The Board granted reconsideration on its own motion under Labor Code Section 5900(b), and issued its initial en banc decision, *Milbauer I*.

The Board found the paystubs substantial evidence that the employer had been correctly named in the Findings and Award. It went on to note the UEF's lack of assistance in identifying the employer. The Board went on to "adopt" and "announce" procedures to promote early and active participation of the UEF in identifying and correctly naming illegally uninsured employers.

From the original *en banc* opinion, *Milbauer I*, 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 second Petition for Reconsideration (*Milbauer v. Boostan*, (2004) 69 Cal. Comp. Cases 246 (WCAB en banc) (*Milbauer II*)), 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 procedural changes, the Board contended are prospective, and that the new procedures, if applied improperly, could be challenged in the future cases where the improper application(s) occur.

UEF Filed a Petition for Writ of Review from the decision in *Milbauer II*, contending that because WCJs are bound by the Board's determinations in an En Banc decision, the newly directed procedures do aggrieve the UEF because WCJs are applying the new procedures statewide. The UEF contended also that the new procedures change jurisdictional requirements under Labor Code Sections 3716(d) and 5502(f), and that those changes potentially interfere with the ability of UEF to seek reimbursement from uninsured employers. UEF further contended that the decision constitutes improper rule making under the Administrative Procedures Act (APA).

The Court of Appeal granted the UEF Petition for Writ of Review. The Court determined that the Appeals Board "overstepped its authority" in its first en banc decision in the matter. The Appeals Board had directed that the Uninsured Employers Benefits Trust Fund (UEF) might be ordered to appear at priority conferences, be ordered to assist with discovery of the proper employer, and to be subject to sanctions for dilatory conduct. The Court found the new procedures involve substantial rights and liabilities that change the jurisdictional and liability requirements under Labor Code Sections 3716 and 5502. Thus the decision is a final appealable order. UEF was not advised that its course of conduct under Labor Code §3716, subdivisions (b) and (d)(4) were in issue until the decision in *Milbauer I* issued. Because there was no notice of the changed requirements until the initial en banc decision issued in *Milbauer I*, UEF was denied due process and initially aggrieved and the second Petition for Reconsideration was appropriate. Therefore the Petition for Writ of Review from the decision in *Milbauer II* is timely.

The procedures announced in *Milbauer I* require premature joinder of UEF when the statutes (Labor Code Sections 3716, 5502, 5307, and the APA. Under present statutes, the UEF may not be joined in any proceeding until a legal person or entity has been identified as the illegally uninsured employer, and said employer has been served with the Application for Adjudication of Claim and Special Notice of Lawsuit in the manner provided for service of a summons in the Code of Civil Procedure [or the employer has made a general appearance]. The Court noted that the Code of Civil Procedure provides for service and default even where the true identity of the defendant is unknown. The Court considered the contention of the Appeals Board that the policies announced in *Milbauer I* were proper legal precedent rather than regulations, citing *Tidewater Marine Western, Inc. v. Bradshaw*, (1996) 14 Cal. 4<sup>th</sup> 557, and Government Code §11425.60. It concluded that the new procedures are more like regulations than precedent in that they contain general legal or policy determinations likely to recur. They are –

“...much more extensive than general legal conclusions or policies produced after interpretation of applicable statutes or law in the context of a specific case. *Milbauer I* adopted and announced a whole body of entirely new procedures, after

the WCAB in bank concluded that the Fund breached its duties under section 3716, subdivisions (b) and (d).”

The Court went on to note that the Board’s finding of a pattern of conduct not supporting timely correct identification of uninsured employers is supported by substantial evidence in other cases and by the record in this case. Specifically, the UEF provided an incorrect identity which the WCJ and applicant relied upon in amending and serving the alleged employer. The UEF then did not challenge that designation until attempting to do so in an untimely petition for reconsideration. However, the statutory scheme and *Yant v. Snyder & Dickinson*, (1982) 47 Cal. Comp. Cases 254, provide legal means by which injured workers in Milbauer’s situation can gain proper and early jurisdiction over the illegally uninsured employer and UEF. Where an applicant is genuinely ignorant of the identity of the illegally uninsured employer the legal person or entity can include a fictitiously named party or Doe sufficient for entry of a default or default judgment. (Where as here the employee had in his possession pay stubs and an employer furnished identification badge, and where all of various alleged names of the employer were allegedly controlled by Erez Boostan, the delay in moving forward to name and serve one or more as “also known as” employer entities is difficult to understand.) The Court notes that Milbauer was aware at the time of injury that Boostan was operating under various business entities; he could have added a fictitious defendant or DOE defendant to the application and special notice in the manner provided for service of summons under the Code of Civil Procedure. This, the Court states, would have provided jurisdiction over the illegally uninsured employer and the UEF.

The new procedures (requirements for UEF assistance in identifying the employer’s correct name and form of business enterprise) under the decision in *Milbauer I* and the decision in *Milbauer II* are annulled. The Findings and Award against defendants herein, as found by the WCJ was not annulled.

#### IV Injury AOE-COE

***State of California, Employment Development Department v. Workers’ Compensation Appeals Board (Kral)***, (2005) 70 Cal. Comp. Cases 161. (Court of Appeal, Second Appellate District, unpublished).

Ms. Kral sustained cumulative orthopedic, psychiatric, and internal injuries arising out of and occurring in the course of her work as an employment program specialist from March 1992 to November 23, 1999. Applicant’s medical legal examiner, Dr. Bernstein, opined that applicant suffered from diabetes which had been aggravated and accelerated by work stress. Defendant’s medical legal evaluator, Dr. Jay, opined that applicant’s work had not caused or aggravated her diabetes. In August 2002, the WCJ issued Findings and Award including a finding of injury to the internal system of diabetes, and awarding 58% permanent disability. Defendant sought reconsideration.

The Board granted reconsideration and found the opinions of both parties medical legal consultant's deficient in explaining the causation of applicant's diabetes. The matter was remanded for development of the record. Dr. Burnstein issued a supplemental report and was deposed. Dr. Jay issued a supplemental report attributing applicant's diabetes to obesity. The matter was resubmitted, and on April 19, 2004, the WCJ issued a Findings and Award, again finding injury including diabetes, and awarding 81% permanent disability without apportionment. Defendant sought reconsideration, contending that Dr. Bernstein's report was not substantial evidence, in part as to permanent disability because it failed to discuss apportionment by causation, as required by new Labor Code Section 4663 (effective April 19, 2004.) The WCJ reported the Dr. Bernstein had discussed the factors causing the applicant's diabetes, and noting that Dr. Jay had ignored the progression of diabetes after applicant received cortisone injections for work injuries. The Board denied reconsideration. Defendant filed a petition for writ of review.

The Court of Appeal granted review. It found that the changes in apportionment and reporting requirements effected by SB 899 were both procedural and substantive. However, the language of the statute provides that it applies to all pending cases, regardless of date of injury. Because the new apportionment statutes, Labor Code Sections 4663 and 4664, took effect before the expiration of time for appeal of the decision, the new law is applicable to the determination. Both physicians' indicated that applicant's diabetes may have been caused by a combination of factors, and the issue of causation must be addressed under current standards. The court noted that the Board's decision on reconsideration did not address the change in apportionment standards, and was therefore deficient under Labor Code Section 5908.5. The matter was remanded to obtain supplemental medical reports addressing apportionment under new Labor Code Sections 4663 and 4664.

**Reyes v. Hart Plastering, Fremont Compensation Insurance Company, in liquidation, California Insurance Guarantee Association**, (2005) 70 Cal. Comp. Cases 223. (WCAB significant panel decision) [Injury AOE-COE.]

Jose Reyes was employed as a plasterer by Hart Plastering when he suffered a seizure and fell from a third floor scaffolding approximately 53 feet. After trial, the WCJ found the medical record required development and appointed a "regular physician," Dr. Kounang, under Labor Code Section 5701. After examination, Dr. Kounang reported that Mr. Reyes fall was caused by seizure activity. Based on that medical opinion and a report of Dr. Ronald Kent, the WCJ concluded that applicant's injury had not arisen out of and occurred in the course of employment. Applicant sought reconsideration.

The Workers' Compensation Appeal Board granted reconsideration. It noted that the standard for determining whether an injury arises out of employment is not one of sole causation, but whether employment is a contributory cause of the injury. It noted that SB899 had altered the legal standards for apportionment of permanent disability, but that those changes did not impact the standard or prior case law concerning the standard of

proximate cause of injury. The Board held that compensability of an injury resulting from idiopathic seizure is settled in the case of Employers Mutual Liability Insurance Company of Wisconsin v. Industrial Accident Commission (Gideon), (1953) 41 Cal. 2<sup>nd</sup> 676, 18 Cal. Comp. Cases 286. The applicant's fall was caused by the non-industrial seizure disorder, and does not thereby become compensable in and of itself. However, the fact that applicant's employment placed him on a scaffolding at third floor level is a contributory factor arising out of employment making the injuries suffered in striking the wall, scaffolding, possibly a landing, and ultimately the ground. The injuries resulting from the fall did arise out of and occur in the course of applicant's employment and are compensable. The Board ordered the Findings and Order rescinded and a finding of injury substituted. All other issues were remanded to the trial level.

**Fleetwood Enterprises, Inc. v. Workers' Compensation Appeals Board (Moody)**, (2005) \_\_\_ Cal. App. 4th \_\_\_, 70 Cal. Comp. Cases \_\_\_. (Court of Appeal, 4<sup>th</sup> Appellate District, E037314 (W.C.A.B. No. RIV47035), December 19, 2005) [Injury AOE-COE – Commercial Traveler.]

Applicant was a design manager for Fleetwood. In Fall 1999 he was assigned to a team of three employees to attend a major RV show in Düsseldorf, Germany. After the show he was to visit a German RV manufacturer, and then visit a fiberglass supplier in Ferrara, Italy. He picked up a rental car furnished by his employer at Düsseldorf; the rental agreement provided that the car was to be returned to Düsseldorf. Applicant's wife was to meet him in Geneva after the RV show and accompany applicant to the RV manufacturer and fiberglass supplier. After the plant visit in Ferrara, applicant's co-employees were taken to Milan for flights back to the United States. Mr. and Mrs. Moody traveled to Florence, and Rome, then headed back toward Düsseldorf to return the rented car. When they left Rome, they had three days prior to their departure flight. Aside from taking pictures of unusual motor homes and RVs, the post Ferrara travel involved no specific job duties. Applicant charged expenses on a company account American Express card in his name. The afternoon the Moody's left Rome, at about 3:00 p.m., they were involved in a head on collision with a vehicle which crossed the centerline of the roadway. Fleetwood arranged applicant's medical treatment and chartered an air ambulance for his return to the United States; the expenses were submitted to the group health insurer. Applicant returned to work about 6 months after the hearing, and was laid off thirty months later. After being laid off, applicant filed a DWC Form 1 (Claim form) in May 2002. Defendant denied workers' compensation liability for the injury on August 1, 2002.

Initially it was held that because Fleetwood had knowledge of the injury from the outset and failed to furnish a claim form, the August 1, 2002 denial was not made within 90 days and the presumption of compensability under Labor Code 5402 applied. Before litigation became final, that determination was invalidated by the decision in Honeywell v. Workers' Compensation Appeals Board (Wagner), 35 Cal 4<sup>th</sup> 24 (2005). Honeywell holds that absent estoppel, the time for denial of a claim under Labor Code 5402 runs from the actual time of service of the DWC Form 1 (Claim form) on the employer.

“The Supreme Court stated that if the employer is aware of an industrial injury, and either refuses to provide a claim form or leads the employee to believe no claim is necessary, the 90-day period may begin before the claim is actually filed *if* the employee ‘suffered some loss of benefits or setback as to the claim.’” (*Honeywell, supra*, 35 Cal.4th 24, at p. 37.)

Applicant attempted to establish estoppel, but the Supreme Court found that the record was not sufficiently developed to support the contention. The Workers’ Compensation Judge and Workers’ Compensation Appeals Board found that even absent the presumption of compensability, the injury was compensable. The Court disagreed, concluding “the evidence is susceptible *only* of the conclusion, fatal to applicant, that there was no continuing or resumed business purpose at the time of the accident.” The Court distinguished the situation as to liability from the result had the accident occurred between Düsseldorf and Ferrara, when the commercial traveler doctrine would have applied. The court also found that the “special mission” exception to the going and coming rule did not apply in this situation. In the court’s view applicant’s business trip ended after the plant visit in Ferrara. The Court noted that the strongest argument in favor of compensability was that applicant had to return the car to Düsseldorf. However, it noted that the arrangements were made prior to the trip, that alternative and easier arrangements could have been made for air travel from Germany to Italy. It appeared that the arrangements were primarily for the Moodys’ convenience, and not for a business purpose of Fleetwood’s.

“The fact that Fleetwood was aware of his plans and facilitated his travel arrangements is immaterial in the absence of evidence that it did so because it expected applicant to function as an employee during that portion of his trip or that it exercised any control over his route.

“The fact than an employee performs ‘some tidbit of work’ during a personal trip will not transform the journey into part of the ‘course of employment.’”

Defendant was allowed costs. The matter was remanded to allow development of the record on the issue of estoppel, only.

## V Presumptions

### A. Ninety day presumption of compensability for untimely denial (Lab. C. 5402)

***Honeywell v. Workers’ Compensation Appeals Board (Wagner)***, (2005) 35 Cal 4<sup>th</sup> 24, 70 Cal. Comp Cases 97. (Supreme Court of California) [Presumption of compensability – Claim form must be served on employer.]

Applicant was a sheet metal specialist who sustained injury to his psyche and other parts cumulatively through October 16, 1998. The company was in possession of a

medical record dated July 20, 1998, indicating that applicant was being prescribed medications to cope with work stress. On October 16, 1998, applicant was admitted to a psychiatric facility for treatment of a nervous breakdown. Applicant's wife advised Honeywell's disability coordinator by phone of the fact and her opinion that Wagner's "work supervisor and others had pushed her husband over the edge with their 'head games.'" A physician's note prescribing disability was received by the employer on October 20, 1998. On January 11, 1999, after receipt of a leave request indicating the disability was work related, Honeywell forwarded a DWC Form 1 (Claim form) and letter, and pamphlet explaining workers' compensation. On January 15, 1999, Wagner served the completed claim form on Honeywell. On March 31, 1999, Honeywell denied the claim.

Applicant obtained a psychiatrist's report opining that applicant's disability was work related; defendant obtained a psychologist's report opinion that the disability was due to non-work related and good faith personnel action causes. At hearing, the presumption of compensability and evidentiary exclusion provisions of Labor Code Section 5402 were raised. The Workers' Compensation Judge found that the employer had knowledge of the claim of work injury on October 16, 1998, and breached its duty to timely furnish a claim form. That the presumption applied when no denial issued within ninety days of the breach of duty, here, on January 15, 1999. Therefore, the Labor Code Section 5402 presumption applied. Defendant appealed.

In an en banc decision in 2001, the Board held that the duty to furnish a claim form arises when the employer is "reasonably certain" of an industrial injury of claim. The matter was ordered remanded for development of the record under that standard. On remand the Honeywell disability coordinator admitted she was reasonably certain that Ms. Wagner was claiming that an industrial injury had occurred in October 1998. The WCJ found Labor Code Section 5402 applied in October 1998, under the Board's reasonably certain standard. Defendant's petition for reconsideration was denied. Honeywell sought review.

The Court of Appeal granted review and found that the "reasonably certain" standard was inconsistent with the statutory standard. The time under Labor Code Section 5402 runs from the employer's receipt of the completed claim form in the absence of egregious conduct designed to frustrate the employee's pursuit of compensation. The Court of Appeal ordered remand to determine whether Honeywell's conduct was egregious or merely negligent. The Workers' Compensation Appeals Board sought review.

The Supreme Court granted review and held that the Board's "reasonably certain" standard impermissibly reduced the statutory four step process to two steps. The statute creates a duty triggered on the date the claim form is filed with the employer. Only after the employee decides to complete and serve on the employer the completed claim form does the duty to investigate and timely deny the claim or face a presumption of compensability arise.

The only exception to the requirement that the claim form be filed with the employer is where three elements are met: (1) the employer with knowledge of the injury or claim

of injury refuses to provide the claim form, or misrepresents the availability or need to file a claim form; (2) the employee is in fact misled into believing that no claim form is available or needed, and fails to file one for that reason, and (3) the employee suffered some loss of benefits or set back as to the claim as a result of the reliance. [The Court substitutes actual reliance and detriment as a condition for the estoppel in place of the Court of Appeal element of egregious failure to provide.] The case was ordered remanded to determine whether there was estoppel.

D. Presumption of Correctness of Treating Physician's Opinions.

**Martinez v. California Building Systems, CIGA for Fremont Indemnity Co., in liquidation, et. al.**, (2005) 70 Cal. Comp. Cases 202. (Workers' Compensation Appeals Board, En Banc) [Presumption of Correctness of PTP.]

Martinez was injured October 19, 2000 when he fell from a roof. Applicant obtained medical treatment from Dr. Wilson. In 2003, the matter was tried, and among issues submitted for decision was that of presumption of correctness of the primary treating physician. Discovery had closed on May 15, 2003. On April 19, 2004, SB 899 was enacted repealing Labor Code Section 4062.9. On July 7, 2004 Findings and Award issued, and an Amended Findings and Award correcting clerical errors issued on July 19, 2004. The WCJ indicated in his opinion on decision that he had relied on Dr. Wilson's opinion as presumptively correct in determining duration of temporary disability and extent of permanent disability. Defendant sought reconsideration.

The Board granted reconsideration. It found that section 46 of SB 899 makes the repeal of Labor Code Section 4062.9 applicable to all cases regardless of the date of injury, but does not constitute good cause to reopen, rescind, alter or amend any existing order, decision, or award. The Board distinguished its 2004 en banc decision in Scheftner v. Rio Linda School District (now reversed), which had determined that any existing order included interim interlocutory orders, such as discovery closure orders. Here, unlike Scheftner, application of the repeal of the presumption to all cases where decisions have not become final by April 19, 2004, does not require further discovery. The repeal of Labor Code Section 4062.9 applies to all cases where a final decision had not issued and appellate rights been exhausted prior to April 19, 2004.

**Garcia v. Workers' Compensation Appeals Board**, (2004) 70 Cal. Comp. Cases 60. (Court of Appeal, Second Appellate District, writ denied) [Presumption of correctness of PTP.]

Applicant sustained a low back injury on December 10, 2002. Applicant's treating physician, Dr. Larson found applicant's condition permanent and stationary with a limitation from heavy work on August 20, 2003. Dr. Larson did not discuss apportionment in his report.

Defendant obtained a QME report from Dr. Posfisl, who recommended that applicant be restricted from repetitive very heavy lifting based on a 3 mm disc bulge. Defendant subsequently discovered a cumulative back injury claim through February 1991, in which an x-ray and CT scan showed a 4 mm disc bulge at the same level. The 1991 claim had been resolved by Compromise and Release without rating. There had also been a non-industrial slip and fall injury in April 2001. After review of the medical records from the prior injuries, Dr. Posfisl opined that applicant had not sustained ratable disability from the 2002 injury.

The matter proceeded into litigation. Shortly before trial, applicant requested Dr. Larson review Dr. Posfisl's reports and write a supplemental report addressing apportionment under Labor Code Section 4663, as amended April 19, 2004. Dr. Larson's supplemental report was not available at time of trial. At trial applicant's testimony concerning the history provided the physicians was evasive and contradictory, but he admitted he had not disclosed the 2001 slip and fall injury to Dr. Larson. The WCJ found that Dr. Larson's August 2003 report was inadmissible on the issue of permanent disability for failure to discuss causation of permanent disability as required by Labor Code Section 4663. On August 4, 2004, the WCJ issued Findings and Award and Order determining, in part, that applicant had not sustained permanent disability as a result of the 2002 injury.

Applicant sought reconsideration urging that Dr. Larson's report was entitled to reliance under former Labor Code Section 4062.9, that application of the SB 899 repeal of Labor Code Section 4062.9 was unconstitutional if applied retroactively, and that the WCJ should have ordered development of the record to permit Dr. Larson's supplemental report on the issue of apportionment to be received and be considered. The WCJ reported that the repeal of Labor Code Section 4062.9 was not retroactive, but became inoperative as to all dates of injury for which determinations were not final by April 19, 2004. Further reliance could not have been placed on the opinions of Dr. Larson because he had not been made aware of applicant's cumulative injury through February 1991 and of the April 2001 non-industrial slip and fall injury. The WCJ noted that applicant had not requested additional time to obtain Dr. Larson's supplemental report at the time of trial.

The Appeals Board denied reconsideration, in part adopting the WCJ's report and recommendation, and adding that even had 4062.9 been applicable, it was rebutted under *Minnear v. Mt. San Antonio College*, (1996) 61 Cal. Comp. Cases 1055, and Rule 10606 due to the inaccurate history provided the treating physician.

Applicant filed a Petition for Writ of Review contending that it was error not to apply Labor Code Section 4062.9, that it was error not to direct further development of the record, and that it was error to fail, without prior notice and opportunity to be heard, to consider Dr. Larson's opinion on permanent disability after the report had been admitted in evidence. Defendant answered contending that the appeals board had a sufficient record upon which to determine permanent disability. The Court of Appeal denied the Petition for Writ of Review.

## E. Labor Code Section 3212 et. seq.

***City of Long Beach v. Workers' Compensation Appeals Board (Garcia)***, (2005) 126 Cal. App. 4<sup>th</sup> 298, 70 Cal. Comp. Cases 109. (Court of Appeal Second Appellate District) [Presumptions – Cancer.]

David Garcia was employed as a police officer by the City of Long Beach beginning in February 1991. He was a patrol officer throughout his career. In performance of his duties he was exposed to asbestos at an old police station, exposed to vehicle exhaust, combustion gasses from vehicular and other fires, and noxious substances at chemical spills and drug labs. He had to pump gas into his patrol car almost daily. On January 20, 2002, applicant was diagnosed with kidney cancer. He sought workers' compensation benefits for his cancer illness.

At hearing, medical evidence from Dr. Frank Villalobos, and Dr. Edward O'Neill was received. Dr. Villalobos opined that applicant's kidney cancer was probably not related to any asbestos exposure, because he had not contracted asbestosis. He did enclose an extract citing an inconclusive study suggesting that exposure to petroleum products could be associated with kidney cancer. Further study was recommended. Dr. O'Neill opined that there was no clear relationship between any work exposure claimed by applicant and development of kidney cancer. He noted lead exposure in pistol firing, exposure to anti-freeze, and petroleum products. The petroleum products contained benzene. Dr. O'Neill agreed that asbestos exposure was probably not a causative factor in development of the kidney cancer. Dr. O'Neill testified in deposition that kidney cancer is rare and less well studied than more common cancers. There was insufficient research to suggest what might or might not have contributed to development of the cancer. He could not state it was medically probable that benzene exposure had not caused the kidney cancer.

After submission, the WCH found that applicant had shown exposure in the course of his work to a known carcinogen, benzene, and had contracted the cancer during his employment. This was sufficient to apply the presumption in Labor Code Section 3212.1, and his kidney cancer was found to be a work injury. Defendant sought reconsideration contending the evidence did not support the finding of fact.

The Workers' Compensation Appeals Board denied reconsideration. It noted that the requisites for qualification for application of the presumption in Labor Code Section 3212.1 had been outlined in the en banc decision in *Faust v. City of San Diego*, (2003) 668 Cal. Comp. Cases 1822 (*Faust*). *Faust* holds that a *prima facie* showing of entitlement to the presumption is made where a safety member demonstrates exposure to a known carcinogen, and development of cancer during or within a limited time period after employment in the safety class. Under the statute after 1999 amendments, it is not necessary that the employee show evidence linking the carcinogen with the disabling cancer. Under current law, once the exposure and development of the disease are established, the burden of rebutting the presumption falls on defendant. The statute expressly provides that the presumption may be rebutted by showing that the exposure is

not reasonably linked to the disabling cancer. The defendant sought review reiterating its contentions on reconsideration.

The Court of Appeal granted review, and after review sustained the Board's decision. It noted that Labor Code Section 3212.1 is one of a series of presumption statutes altering the burden of establishing proximate causation of specified injuries or illness for safety members engaged in "vital and hazardous services" The requirements of Labor Code Section 3212.1 with respect to qualification and rebuttal were reiterated. Its legislative history was reviewed. The Court found that the Board correctly construed the statute. It rejected the City's contention that it was impossible to prove a negative, which it contended was required to rebut the presumption. The court pointed out that in this matter the question of the kidney cancer's relationship to asbestos had been ruled out by both physicians. Here, Garcia had established that he was exposed to benzene, a known carcinogen. He developed kidney cancer during his employment. There was no medical evidence indicating that benzene was not linked to development of the kidney cancer. It rejected defendant's contentions that exposure to benzene in pumping gas had not been shown, or that applicant's testimony that he filled his patrol car with gas was uncorroborated. Applicant met the requirements for a finding of injury based on Labor Code Section 3212.1.

***Jackson v. Workers' Compensation Appeals Board***, (2005) 133 Cal. App. 4<sup>th</sup> 965, 70 Cal. Comp. Cases 1413. (Court of Appeal, Third Appellate District, on rehearing.) [Presumption of Heart injury in Correctional Officer – Burden met]

Barry Davis, Sr. was a correctional officer at Deuel Vocational Institute, Tracy, California from 1986 until 1999. At Thanksgiving 1999 Mr. Davis developed a respiratory tract infection and bronchitis. The infection spread to his heart, causing viral myocarditis. On December 15, 1999, Mr. Davis suffered a fatal heart attack at home. Cynthia Jackson as guardian ad litem for Barry Davis, Jr., filed an Application for Adjudication of Claim alleging that the heart attack presumptively arose out of and occurred in the course of employment. Applicant's medical legal consultant, Dr. Robert Blau, opined that the heart attack occurred as a consequence of the respiratory infection, but that under Labor Code Section 2122.2, it was presumed to have arisen out of employment. Defendant's medical legal consultant, Dr. Eugene Ogrod, opined that the heart attack was a consequence of the respiratory infection, and that the respiratory infection could be contracted in a variety of daily activities. In his opinion there was nothing about the viral infection or secondary viral myocarditis suggesting it was occupationally related. In his opinion there was no medical basis justifying linking the heart problem to employment, absent the application of the presumption. The WCJ found that Dr. Ogrod's opinion rebutted the presumption and that the heart attack did not arise out of and occur in the course of employment. The Workers' Compensation Appeals Board on reconsideration upheld the WCJ's determination. Jackson sought review.

The Court of Appeal granted review. In an initially unpublished opinion at 70 Cal. Comp. Cases 1085, it annulled the Workers' Compensation Appeals Board decision that the presumption in Labor Code Section 3212.2 had been rebutted. On rehearing, the same result was reached, but the opinion was ordered published. The Court noted that the presumptions in Labor Code Sections 3212 et. seq. were adopted as a response to two competing schools of medical thought. While the presumption is rebuttable, the burden of proof is on the employer to prove that the heart trouble did not arise out of and in the course of employment. Here Dr. Ogrod did not establish a non-work related cause; he merely said the cause could have been either work or non-work related. Pointing out that there is nothing specifically tying the infection to the work place, but this does not establish that any nonwork-related event was the sole cause of this heart attack. Therefore, the presumption under Labor Code Section 3212.2 is applicable and the Board's decision must be annulled. The matter was remanded for further proceedings.

## VI Res Judicata and Collateral Estoppel

**Diggle v. Sierra Sands Unified School District**, (2005) 70 Cal. Comp. Cases 1480. (WCAB Significant Panel Decision) [Precedential value of *en banc* decisions]

Applicant had sustained a low back injury in 1993, and obtained a 12% permanent partial disability award. She sustained further injury to her spine on October 4, 2000, and now had a 70% disability after adjustment but before apportionment. The parties submitted the issue of how the apportionment and indemnity was to be calculated under Labor Code Section 4664.

The WCJ on August 26, 2005, issued an award finding 58% permanent partial disability after apportionment and awarding the indemnity for the number of weeks provided by Labor Code Section 4658 at the compensation rate applicable to applicant's earnings and date of injury for a 58% disability. This was the method approved by Fuentes v. Workers' Compensation Appeals Board, (1976) 16 Cal. 3<sup>rd</sup> 1, 41 Cal. Comp. Cases 42 (Fuentes), for an award for a successive injury under former Labor Code Section 4750, and approved for computing compensation for a successive rated injury under Nabors v. Piedmont Lumber and Mill Co., (2005) 70 Cal. Comp. Cases 856 (Workers' Compensation Appeals Board en banc) (Nabors) issued June 9, 2005. Applicant sought reconsideration contending that it was improper to apply the Fuentes method because a Petition for Writ of Review had been filed in Nabors, and the proper method was to rate the overall disability and give defendant credit for the permanent disability indemnity previously paid.

In a Significant Panel Decision issued October 7, 2005, the Board denied applicant's petition for reconsideration and discussed the impact and longevity of an en banc decision. En banc decisions are binding precedent on the Appeals Board, its panels, and on Workers' Compensation Judges. (Rules of Practice and Procedure §10341.) The Board noted that Labor Code Section 5956 provides that a petition for or pendency of a writ of review does not stay or suspend the operation of any order, rule, decision or award

unless the reviewing court expressly orders such stay or suspension. The Board noted that in addition to the filing of the petition for writ in *Nabors*, a writ had been granted on a similar issue in *E&J Gallo Winery v. Workers' Compensation Appeals Board (Dykes)*, (2005) STK 188538 (*Dykes*). (The Petition for Writ of Review in *Nabors* was granted on October 7, 2005.) Neither the filing of a timely petition for writ of review from an en banc decision in *Nabors*, nor the grant of review on a similar issue in *Dykes* changes the legal effect of the en banc decision until the court suspends or overrules the en banc decision. The Board considered statements in court decisions indicating that the persuasive weight of the en banc decision in *Scheftner v. Rio Linda Union School District*, (2004) 69 Cal. Comp. Cases 1281 (Workers' Compensation Appeals Board en banc) had been diminished after a petition for writ of review was granted in that case. However, the Board found such discussion to be dictum which failed to address the impact of Labor Code Section 5956. Only if the court expressly orders a stay or suspension of the en banc decision or issues a decision expressly or implicitly overruling the en banc decision does that en banc decision lose its authority. The Board noted that it did not reach the issue of conflict between an en banc decision and a subsequent inconsistent unpublished court opinion on the same issue in a different case. *Nabors* was controlling at the time of the WCJ's decision, and the extent and indemnity for the disability were correctly determined under the en banc decision in *Nabors*.

VII Conditions of Compensation

VIII Earnings; Indemnity Rate Determination

IX Temporary Disability, Industrial Disability Leave, 4850 pay

***City of Long Beach v. Workers' Compensation Appeals Board (Edwards)***, (2004) 70 Cal. Comp. Cases 44. (Court of Appeal, Second Appellate District, Writ Denied)

Applicant was employed as a firefighter by City of Long Beach from 1973 through March 2002. Applicant sustained cumulative injuries to his lungs, knees, and hearing throughout his employment, and specific injuries: (1) to his left arm and shoulder on May 1, 1994; (2) to his right knee on November 3, 1998, and to his right arm and bilateral shoulders on August 18, 2001. Applicant received 4850 pay in lieu of temporary disability indemnity from November 4, 1998 to January 8, 1999, and from November 17, 2001 through October 4, 2002. Applicant received permanent disability indemnity, but no 4850 benefits for the cumulative injury.

On September 23, 2002 applicant requested a disability retirement. Applicant was medically evaluated, found to be unable to perform his usual and customary duties, and the disability retirement was granted effective October 4, 2002. Applicant withdrew his request for retirement on October 6, 2002.

On October 21, 2002 applicant underwent knee surgery. He thereafter requested reinstatement of 4850 benefits. Defendant denied the request. Labor Code Section 4850 provides in part that a local safety member is entitled to:

“...a leave of absence while so [temporarily or permanently] disabled without loss of salary in lieu of temporary disability payments or maintenance allowance payments under Section 139.5, if any, which would be payable under this chapter, for the period of the disability, but **not exceeding one year, or until that earlier date as he or she is retired on permanent disability pension, and is actually receiving disability pension payments** or advanced disability pension payments...” [Emphasis added.]

After hearing applicant was granted Labor Code Section 4850 benefits after the effective date of applicant’s disability retirement. Defendant sought reconsideration.

On June 25, 2003, the Appeal Board granted reconsideration and remanded for determination by the WCJ which injury or injuries the 4850 benefits were payable under. It also found that applicant’s disability retirement date, in itself, could not be the basis for termination of the obligation for 4850 benefits if applicant did not consent to the retirement.

After further proceedings, the WCJ found that applicant’s retirement was involuntary, and that applicant was entitled to 4850 benefits from October 21, 2002 to October 5, 2003. Defendant again sought reconsideration contending that the award of 4850 benefits was in error, that the determination that applicant’s retirement was involuntary was in error, that if 4850 benefits were due it was only for the period October 5, 2002 through October 17, 2002, and that reliance on *Martinez v. W.C.A.B.*, (2000) 65 Cal. Comp. Cases 1368 (*Martinez*), was in error. (In *Martinez*, applicant worked light duty until June 16, 1995; her condition was permanent and stationary rendering her medically eligible for vocational rehabilitation on May 1, 1995. The city then placed involuntarily retired applicant relying on the 1989 Greene Margolin Workers’ Compensation Reform Act which allowed permanent and stationary status prior to completion of vocational rehabilitation. The *Martinez* decision holds that for a retirement to cut liability for 4850 benefits applicant must consent to the retirement under Government Code Section 21164.) The WCJ recommended that reconsideration be denied because the nature of the retirement had been determined in 2003, and not overturned; that applicant was entitled to the balance unpaid of a year of 4850 benefits; defendant had paid 9-3/4 weeks of 4850 benefits on the 1998 right knee injury; applicant has been feasible for vocational rehabilitation on November 25, 2002, and entered a plan to be completed in November 2003; applicant’s are entitled to separate periods of 4850 benefits for each separate injury (citing *Montclair v. WCAB*, (2001) 66 Cal. Comp. Cases 899 (writ denied).) The Appeals Board denied reconsideration adopting the WCJ’s report and recommendation, except that the Board held its June 25, 2003 ruling had remanded for development of the record on whether applicant’s retirement was voluntary. After opportunity to develop the record, there was no finding on new evidence, but the Board believed the determination that the retirement was involuntary was correct. Defendant sought review. The Court of

Appeal denied the Writ, but awarded applicant's request for attorney's fees pursuant to Labor Code Section 5801 was granted.

X Medical Treatment

XI Medical Legal, QME Process

***Sandhagen v. Cox and Cox Construction***, (2005) 70 Cal. Comp. Cases 208. (Workers' Compensation Appeals Board en banc) ("*Sandhagen II*")

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 initial decision en banc, and affirmed the WCJ's findings. In *Sandhagen I*, (at 69 Cal. Comp. Cases 1452), the Board found that Labor Code 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 treating physician’s request.

The Appeals Board noted in its initial decision 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.”

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.

The Board rescinded the WCJ’s Findings and Award and remanded the matter to allow defendant an opportunity to initiate the AME/QME process. Applicant filed a Petition for Reconsideration of the Board’s en banc decision. Applicant contended that utilization review was mandatory and if a defendant failed to timely initiate and complete utilization review it should be barred from declaring a dispute and proceeding under Labor Code Section 4062.

The Workers Compensation Appeals Board in this decision, *Sandhagen II*, found that where the Board grants reconsideration, rescinds a WCJ’s decision, and returns the matter for further no final order has generally entered, even if the decision makes procedural or evidentiary rulings. Under such circumstances no substantive right or liability has been determined, and the determination is not a final award or order from which reconsideration can be sought.

After determining that the Petition for Reconsideration should be dismissed, the Board reviewed the language of Labor Code Sections 4610 and 4062. Utilization review is not a pre-requisite to declaring a dispute and proceeding under Labor Code Section 4062 when – (1) it is the applicant who disputes the recommendation of the treating physician, and (2) where defendant never or not timely used the utilization review process in Labor Code Section 4610.

A Petition for Writ of Review was granted on July 18, 2005. No decision or order setting aside the en banc decisions has issued to date.

**Simmons v. State of California, Dept. of Mental Health**, (2005) 70 Cal. Comp. Cases 866. (Workers' Compensation Appeals Board en banc) [Medical legal, utilization review.]

Lisa Simmons sustained injury to her right shoulder and bilateral wrists arising out of and occurring in the course of her employment as a janitor on August 20, 2002. Applicant's treating physician recommended that applicant undergo right shoulder surgery. The recommendation was reviewed under defendant's utilization review process by Patricia Pegram, M. D. Dr. Pegram did not treat or examine applicant, but opined that the treatment was reasonable based on an MRI but was not required to cure or relieve an industrial injury because industrial causation of injury to the shoulder was not established. The treating physician, Dr. Sperling, had responded that the work injury had caused an impingement syndrome which had progressed with normal daily activity to a rotator cuff tear. Defendant offered Dr. Pegram's report in evidence at the expedited hearing on April 28, 2004. The WCJ refused to admit Dr. Pegram's report in evidence because it was not the report of a treating or examining physician. On May 6, 2004, the WCJ issued Findings and Award determining that applicant was in need of the right shoulder surgery based on the opinion of Dr. Sperling. Defendant sought reconsideration contending that Labor Code Section 4610 was intended to provide an expedited efficient method of determining necessity of proposed treatment without resort to qualified or agreed medical evaluation. Under the utilization review process established by Labor Code Section 4610, Dr. Pegram's report should have been admitted and should be presumed correct because applicant did not offer evidence establishing a variance from ACOEM was required.

The Workers' Compensation Appeals Board granted reconsideration, and assigned the case for an *en banc* decision. The Board held that where utilization review is invoked, if a utilization review physician finds the proposed treatment reasonable and necessary but questions whether it is industrially related, the report is admissible for the limited purposes of establishing that utilization review was undertaken, and dates shown; that the treatment was found to be reasonable and medically necessary; and that the review resulted in a dispute as to whether the industrial injury caused or contributed to the need for a particular treatment. The utilization review report may not be considered and is not admissible for the purpose of determining whether the industrial injury caused or contributed to the need for a particular treatment. If the utilization review physician

opines that a proposed treatment is reasonable and necessary but questions whether the need is a result of the industrial injury, the employer must either authorize treatment or timely deny authorization, timely communicate the denial to the treating physician and applicant, and timely initiate the AME/QME process. The Board noted that the ACOEM guidelines are presumptively correct as to extent and scope of medical treatment, but have no presumption on the issue of whether a need for medical treatment is causally related to the industrial injury.

Ordinarily when a defendant objects to an opinion or recommendation of the treating physician not subject to utilization review, it has 20 days (for represented injureds) or 30 days (for unrepresented injureds) to object and initiate medical legal investigation. Defendant is not required to use utilization review in every case, and the foregoing procedure is applicable if utilization review would be appropriate, but is not utilized.

If utilization review is used and the physician's report raises for the first time a question as to whether the work injury caused or contributed to the need for treatment, the time for objection should run from the date of receipt of the utilization review physician's report.

If a determination has been made as to the body parts injured in a work injury, and the treating physician recommends treatment to another and disputed body part, utilization review cannot be used to obtain evidence as to whether or not there was industrial injury to the disputed body part. Instead defendant should timely notify the physician and applicant of the dispute and initiate the medical legal (AME/QME) process.

Here defendant did not initiate the AME/QME procedure of Labor Code Section 4062(a) after receiving Dr. Pegram's report. Because this is a case of first impression, the WCJ was directed to allow defendant reasonable time to initiate the AME/QME process. The Findings and Award of May 6, 2004 were rescinded, the reports of Dr. Pegram admitted in evidence for the limited purpose of showing timeliness of UR, and Dr. Pegram's opinion that surgery was warranted based on the MRI. One commissioner dissented and would not have allowed defendant to initiate the AME/QME process belatedly.

*Simi v. Sav-Max*, (2005) 70 Cal. Comp. Cases 217. (Workers' Compensation Appeals Board en banc) [Medical legal evaluation of represented injured workers.]

Applicant reported an alleged right foot injury on December 10, 2002. Defendant denied liability but after obtaining a medical legal evaluation pursuant to Labor Code Section 4060, defendant accepted liability for the injury. On August 22, 2003, applicant underwent surgery performed by Dr. Barry Weiner, D. P. M. On September 23, 2003, applicant filed an Application for Adjudication of Claim alleging cumulative injury to her right foot and ankle. In March 2004, Dr. Weiner requested authorization for a referral of applicant for treatment of a "Baker's cyst" on her left knee, on an industrial basis. Defendant objected to the request for referral and sought agreement with applicant's

counsel for use of an Agreed Medical Examiner (AME). When no agreement was reached, defendant scheduled an appointment with Dr. Pfeffinger as a Qualified Medical Examiner (QME). Applicant's counsel wrote and advised that his client would not attend Dr. Pfeffinger's evaluation, and contended that defendant had no right to use any evaluator other than the initial 4060 physician, Dr. Uro. When applicant failed to attend, defendant filed a Petition to Compel Attendance and Suspend Benefits. Applicant's counsel filed an objection and Declaration of Readiness to Proceed contesting defendant's right to use any evaluator other than Dr. Uro.

On July 27, 2004, a WCJ issued the Order Compelling Attendance... and giving notice that benefits might be ordered suspended if applicant failed to attend the evaluation. Applicant's counsel filed a Petition for Reconsideration / Removal, contending that SB899 (Chapter 34 of the Statutes of 2004) had repealed provisions in Labor Code Sections 4061 and 4062 authorizing QME evaluation for represented injured workers with dates of injury prior to January 1, 2005. The Board dismissed the Petition for Reconsideration and granted removal.

It noted that the Qualified Medical Examiner process had been enacted effective in 1991 and had been substantially amended by SB 899, effective April 19, 2004. Under Labor Code Sections 4061 and 4062 as they existed from 1991 to April 19, 2004, defendant in this case had a right to obtain a Qualified Medical Evaluation to rebut the treating physician's recommendation for treatment on an industrial basis of the Bakers' cyst.

Effective January 1, 2004, the QME process was amended to provide for utilization review and expedited evaluation and review of disputed spine surgery. Through April 18, 2004, however, the basis rule for qualified medical examination for injured workers remained. On April 19, 2004, SB899 (Chapter 34 of the Statutes of 2004) took effect. This legislation provided that for represented injured workers, if an Agreed Medical Examiner were not selected, the parties were required to utilize a QME selected by elimination from a panel of three. However, the new procedure expressly applied only to injuries incurred on or after January 1, 2005. The legislation made no provision for evaluation of represented injured workers with injuries incurred on or before December 31, 2004.

In a similar situation involving vocational rehabilitation, the Board had ruled in *Godinez v. Buffets, Inc.*, (2004) 69 Cal. Comp. Cases 1311, that where legislative amendment left no operative law for a situation, the prior law would be applied. The same situation applied in the present case – there is no operative law for medical legal evaluation of represented injured workers with injuries incurred prior to January 1, 2005. Therefore, the Board held that prior Labor Code Section 4062 is applicable. Defendant was not required to continue to use Dr. Uro, because the issues being presented appeared to be outside of his area of training and expertise. Thus, defendant had a right to refer applicant to Dr. Pfeffinger as a defense QME. The Board ordered the title of the Order amended to “Order Compelling Attendance at Defense QME,” and ordered the language giving notice of possible suspension of benefits stricken.

- XII Liens and Lien Claimants
- XIII Vocational Rehabilitation
- XIV Permanent Disability
- XV Apportionment (including retroactive application of new statutes; “causation” apportionment; apportionment to prior rated disabilities.)

A. Labor Code Section 4663:

**Kleeman v. Workers' Compensation Appeals Board**, (2005) 127 Cal. App. 4<sup>th</sup> 274, 70 Cal. Comp. Cases 133. (Court of Appeal, Second Appellate District)

Gregory Kleeman while employed by the California Department of Justice as a special agent sustained cardiovascular and two right knee injuries in 2000, 1999, and 2001. He had previously been awarded 16½% disability for a back and right knee injury sustained in 1986. The 1999 knee injury was closed by stipulations and timely reopened in 2002 on allegations of new and further disability. In 2003 applicant obtained a medical legal report from Dr. Dennis Ainbinder, opinion that applicant had ratable knee disability, and apportioning 60% of that disability to the 2001 injury; 40% to the 1999 knee injury, and nothing to the “fully resolved” 1986 injury. Applicant’s cardiologist recommended that applicant be precluded from heavy work and undue stress. The matters were tried on March 24, 2004. After enactment of SB899, the Workers’ Compensation Judge vacated submission and set the matters for status conference. The Order vacating submission indicated that further development of the medical record was required. Applicant filed a Petition for Removal.

The WCJ reported that in accordance with Section 47 of SB899, the provisions of new Labor Code Sections 4663 and 4664 became applicable to the case because no award had become final in the case by the effective date of the legislation, April 19, 2004. The Workers’ Compensation Appeals Board denied removal, relying on the WCJ’s report and recommendation. It found that there was neither substantial harm nor irreparable prejudice in requiring applicant to wait and seek reconsideration if aggrieved by the final decision on the issues of permanent disability and apportionment

Applicant filed a Petition for Writ of Review contending that application of the new apportionment standards was an impermissible retroactive application of law; that such application would lead to litigation, costs and delays contrary to the Constitutional mandate, and that apportionment in this case is precluded by the presumption in Labor Code Section 3212. The Court of Appeal granted review. It found that SB899 amendments to the Labor Code make both procedural and substantive changes. The changes in Labor Code Section 4663 are mainly procedural, except subdivision (a). Changes in Labor Code Section 4663(a) and in new Section 4664 are substantive.

“With respect to substantive changes, new legislation is generally applied prospectively, unless it is clear from statutory language or extrinsic sources that the Legislature intended retroactive application.” (70 Cal. Comp. Cases 133, at 141.)

Section 47 of SB899 provides clear statutory language that unless otherwise specified, the changes made by the amendments were to apply from their effective date, regardless of the date of injury. Section 47 precludes reopening, rescinding, altering or amending any existing order, decision or award. The court concluded that that limitation be applied only to final existing orders, decisions or awards – that is those from which right of appeal had been exhausted or had expired. The language was intended to preclude reopening of a final award under Labor Code 5410 or Labor Code Sections 5803-4. There was no award of permanent disability as to which right or time for appeal had expired, subject to under Labor Code 5410 or Labor Code Sections 5803-4 in this case. The court questioned and directed the Board to determine if Labor Code Section 3212 (creating a presumption with respect to hernias, heart trouble, and pneumonia, applied to applicant’s right knee disability.

The Court found that the Board should have ruled on the merits of the Petition for Removal; it annulled the denial of removal, and remanded the matter for decision on the merits.

**Rio Linda Union School District v. Workers’ Compensation Appeals Board (Scheftner)**, (2005) 131 Cal. App. 4<sup>th</sup> 517, 70 Cal. Comp. Cases 999. (Court of Appeal, Third Appellate District) [Apportionment – Retroactive application of SB 899]

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, SB899, 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 found that it must look to the entire statutory scheme to construe the meaning of the term “existing order.” An existing order, the Board found, is not the same as a final order, but is more inclusive. The Appeals Board decision held 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, the Board found that 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 Board held, those 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. Defendant filed a Petition for Writ of Review.

The Court of Appeal granted review. After examining Section 47 of SB899, and the stated purpose of the legislation, the Court held that the repeal of former Labor Code Section 4663 was effective on April 19, 2004, and that the new standard of discussion and basis for apportionment is applicable to all cases, regardless of date of injury, which were not finally decided and subject only to continuing jurisdiction under Labor Code Sections 5803 and 5804. The Board's decision that existing order applied to discovery closure or submission orders was annulled, and the matter remanded for further proceedings.

**Escobedo v. Marshalls**, (2005) 70 Cal Comp. Cases 604. (Workers' Compensation Appeals Board en banc) [Apportionment, causation for 4663 apportionment.]

Marlene Escobedo fell suffered an injury to her left knee arising out of and occurring in the course of her employment as a sales associate by Marshalls on October 28, 2002. She later developed right knee problems as a compensable consequence of the initial injury. Applicant's treating physician, Dr. Woods performed arthroscopic surgery to repair applicant's left knee medial meniscus, and on June 5, 2003, he declared applicant's condition to be permanent and stationary. He opined that applicant had bi-lateral knee disability limiting her to semi-sedentary work. Applicant had been diagnosed with arthritis ten years earlier, but no restriction had been imposed. Dr. Woods concluded that applicant's disability was a result of the October 28, 2002 work injury.

Defendant's Qualified Medical Examiner (QME), Dr. Ovadia, evaluated applicant and reported on March 15, 2004, that applicant was limited to four hours of weight bearing in an eight hour shift; had lost 25% of pre-injury work capacity; should avoid more than occasional kneeling, squatting, or walking on uneven ground; was precluded from running or jumping, and should avoid stair, incline, or ladder climbing. He opined that applicant's arthritis would have become disabling and produced half of her present disability in the absence of the "trivial" October 28, 2002 injury.

After hearing, on June 29, 2004, the Workers' Compensation Judge (WCJ) found that applicant had an overall disability of 53%, based on factors described by Dr. Ovadia, and that defendant was entitled to apportionment of 50% of her disability to non-industrial causation under Labor Code Section 4663. Although both medical reports discussed disability and apportionment in pre-SB899 terms, the WCJ found that Dr. Ovadia's apportionment met the criteria of apportionment to causation required by Labor Code Section 4663 enacted effective April 19, 2004. Applicant sought reconsideration contending that new Labor Code Section 4663 should not be applied to pre-April 19, 2004 injuries, that apportionment to pathology was not authorized by new Section 4663, and that Dr. Ovadia's opinion was inadequate to constitute substantial evidence on the issue of apportionment to arthritis.

The Board granted reconsideration and assigned the case for an en banc determination. It found, pursuant to the decision in *Kleeman v. Workers' Compensation Appeals Board*, (2005) 127 Cal. App. 4<sup>th</sup> 274, 70 Cal. Comp. Cases 133, that SB899 expressly required application to all cases pending at its effective date regardless of date of injury. With respect to the substantive change in the apportionment standard, the Board held that new Labor Code Section 4663 requires apportionment of permanent disability based on causation of disability, not causation of injury. It requires that both the reporting physician and the WCAB determine what percentage of the disability was directly caused by the injury, and what percentage was caused by other factors. In reaching these determinations, the applicant has the burden of proving percentage of disability caused by the industrial injury, and the defendant has the burden of proving the percentage of disability caused by other factors. The Board found that it was the intent of the legislature in repealing the prior apportionment statutes and enacting new Labor Code Section 4663, to significantly change and expand the scope of permissible apportionment. Under the new standard, factors which may support apportionment of causation include not only disability which could be apportioned under prior Labor Code Sections 4663, 4750, and 4750.5, but also causation arising either before or after the work injury based on pathology, conditions which are congenital, developmental, pathological, or traumatic, or for retroactively recommended prophylactic work restrictions. To apply there must be substantial medical evidence establishing that these causes were factors in causing the permanent disability.

In this case, even though Dr. Ovadia's opinion was that it was "medically reasonable" as opposed to "medically probable" that the arthritis caused the disability, the physician cited factors supporting his opinion on causation. The report met the standards of new Labor Code Section 4663. The Findings and Award of June 29, 2004 were affirmed.

Applicant file a Petition for Writ of Review from the en banc decision, and the Court of Appeal denied review. The denial is noted at Escobedo v. Workers' Compensation Appeals Board, (2005) 70 Cal. Comp. Cases 1506.

B. Labor Code Section 4664:

Sanchez v. County of Los Angeles, (2005) 70 Cal. Comp. Cases 1440. (Workers' Compensation Appeals Board, en banc) [Apportionment / overlap.]

Virginia Sanchez, a Deputy Sheriff, injured her left foot on December 18, 2002. At hearing the parties entered into stipulations, including a stipulation that the 2002 injury had resulted in 7% permanent partial disability based on subjective complaints, before apportionment, which was consistent with a medical evaluation by Dr. Jon Greenfield, M. D., the parties agreed medical examiner (AME). In 1997, applicant had sustained a bilateral knee injury which had also been resolved by stipulations. The 1997 injury had resulted ton a 35% loss of pre-injury capacity for kneeling, squatting, climbing, heavy lifting, pushing and pulling, based on recommendations of an AME, Dr. Alexander Angerman. They had stipulated to a rating formula of 14.5-15-490I-21-22%. The 2002 injury case was submitted on the issue of apportionment, specifically, application of Labor Code Section 4664. The WCJ found that applicant was entitled to a 7% unapportioned award. Defendant sought reconsideration.

The Workers' Compensation Appeals Board granted reconsideration for study and assigned the case for an en banc decision. It noted that provision for apportionment of permanent disability where there had been a prior disabling injury had been provided by the workers' compensation law since 1917. In 1937, the provision was codified in Labor Code Section 4750. In applying the prior statute, it was necessary to determine what if any factors of the prior disability overlapped the overall disability from both injuries. Mercier v. Workers' Compensation Appeals Board, (1976) 16 Cal. 3<sup>rd</sup> 711, 41 Cal. Comp. Cases 205, and State Compensation Insurance Fund v. Industrial Accident Commission (Hutchinson), (1963) 59 Cal. 2<sup>nd</sup> 45, 28 Cal. Comp. Cases 20, were among the leading cases interpreting Labor Code Section 4650. It was the factors of disability, not parts injured in the successive injuries which controlled the determination of overlap. Where the successive injuries produced separate disabilities, no apportionment was allowed.

Upon passage of SB899, Labor Code Section 4750 was repealed and replaced by Labor Code 4664. The new section provided a presumption that prior rated disability exists at the time of any subsequent industrial injury. The presumption is referred to as both a conclusive presumption and one affecting the burden of proof. Section 4664 also divides the body into seven regions, and provides that the maximum accumulation of all permanent disability awards for one region shall not exceed 100% over the employee's lifetime absent a conclusively presumptive totally disabling injury. The new section also limits the rating for any one injury from exceeding 100%.

The Board found that consideration of overlap of disabilities is still required under new Section 4664. To establish apportionment under Labor Code Section 4664, the defendant has the burden of proving that applicant had a prior permanent disability award relating to the same region of the body. The preferred method for establishing the existence of the prior award is to produce a copy or request the Board to take judicial notice of the prior award. Where that is not possible, secondary evidence sufficiently reliable to establish the substance of the prior award may be used.

The Board further held that once the prior award is established, Labor Code Section 4664 provides that such disability is conclusively presumed to still exist. Evidence of medical rehabilitation is not permitted to rebut the presumptive disability.

The Board reconciled the apparently conflicting language about the nature of the presumption in Labor Code Section 4664(b) by holding that once the prior disability is established, the percentage of that prior disability is to be subtracted from the rating of the overall disability unless the applicant disproves overlap. This presumption of overlap is the presumption affecting the burden of proof, and if the applicant demonstrates that the prior and present permanent disabilities affect different abilities to compete and earn (i.e. disproves overlap) in whole or in part, the non-overlapping disability is not subtracted from the overall disability.

In this case the subjective 7% foot disability did not overlap the prior rated work restriction, and applicant was entitled to an award of the 7% without apportionment. The prior Findings and Award was affirmed.

**Strong v. City and County of San Francisco**, (2005) 70 Cal. Comp. Cases 1460. (Workers' Compensation Appeals Board, en banc) [Apportionment, §4664; presumptions]

Jack Strong sustained a series of injuries while employed as a stationary engineer by the City and County of San Francisco (San Francisco). The initial injury occurred on November 27, 1995, and resulted in a stipulated award of 34½% permanent partial disability for the left knee. The award was based on a limitation from heavy lifting. On February 12, 1999, applicant injured his left shoulder, and a stipulated award of 42% issued on March 28, 2003, based on applicant's limitation to light work. On May 8, 2002 applicant sustained injury to his back. Mr. Strong received treatment for each injury from Dr. Peter von Rogov, M. D. Dr. Von Rogov's reports were the only medical reports received in evidence in the cases. Dr. Von Rogov's present assessment is that applicant is limited to semi-sedentary work, and that the increase from restriction to light work to his present level of disability is due to his back injury. Dr. Von Rogov also reported some objective and subjective factors of disability due to the back injury.

After trial the parties stipulate that applicant's overall disability after adjustment for age and occupation was 70%; the issue of apportionment under Labor Code Section 4664

was submitted for decision. The Workers' Compensation Judge (WCJ) issued rating instructions directing that the disability evaluation specialist (rater) consider that applicant's present disability was 70% based on limitation to semi-sedentary work, and that the applicant had prior disabilities to the left shoulder, left knee, left ankle, and right wrist which had limited applicant to light work. The rater recommended a final rating of 10% after apportionment. On May 31, 2005, the WCJ issued Findings and Award determining that applicant was entitled to an award of 10% permanent disability after apportionment as a result of his back injury. Applicant sought reconsideration contending that Labor Code Section 4664 did not allow apportionment from disability in one region of the body to a prior rated disability in another part or parts of the body, and that if apportionment were allowed, it should be by crediting the indemnity paid on the prior award(s) from the indemnity payable for the overall disability before apportionment.

The Workers' Compensation Appeals Board granted reconsideration and assigned the matter for an en banc decision. It held that Labor Code Section 4664 requires that prior rated disability be presumed to continue, and that regardless of the region or regions of the body in which the present and prior disabilities exist, apportionment of the overall disability must be made if the factors of disability in the pre-existing disability or disabilities overlap the factors of disability in the overall disability. If the successive injuries produced separate and independent disabilities, not affecting the same ability to compete and earn in the open labor market, the successive disabilities do not overlap, and the former disabilities are not apportionable from the overall or current disability. The standard for determining overlap is the same whether the disability is in one or more than one of the regions of the body enumerated in Labor Code Section 4664(c)(1). As found in *Sanchez v. County of Los Angeles*, (2005) 70 Cal. Comp. Cases 1440 (*Sanchez*), the defendant has the burden of proving the prior disability or disabilities, including any disability or disabilities in other regions of the body. As determined in *Sanchez*, once the prior permanent disability is established, the burden of proof is on applicant to establish that the disabilities do not overlap. In the absence of such proof, the prior disability is subtracted from the present overall disability. If it is proven that there is not overlap, in full or in part, only those factors of disability which do overlap the overall disability are subtracted.

Here defendant established that applicant had received successive prior awards for 34½% left knee disability based on preclusion from heavy lifting and 42% left knee, left ankle, and right wrist disability based on limitation to light work. The prior disabilities of 34½% and 42% only partially overlap the current disability, because the earlier restriction is subsumed on the light work restriction, and the physician found and the WCJ awarded applicant the disability for the increase from a light work limitation to a limitation to semi-sedentary work. The method for computing the apportionment and indemnity payable after an apportioned finding of permanent disability is as prescribed in *Nabors v. Piedmont Lumber and Mill Co.*, (2005) 70 Cal. Comp. Cases 856 (Workers' Compensation Appeals Board en banc) (*Nabors*), and that determination will not be revisited here. (Note: A writ of review has been granted in *Nabors*, and the appellate process is continuing in a determination to the contrary as to computation of an

apportioned award following successive injuries in one employment in *E&J Gallo Winery v. Workers' Compensation Appeals Board (Dykes)*, (2005) \_\_\_ Cal. App. 4<sup>th</sup> \_\_\_, 70 Cal Comp. Cases \_\_\_\_.) The Findings and Award of May 31, 2005 was affirmed.

*E & J Gallo Winery v. Workers' Compensation Appeals Board (Dykes)*, (2005) F47246, filed 12/20/05, STK 188538 (Court of Appeal, Fifth Appellate District) [Apportionment – Method of determining apportionment for employees with successive injuries in one employment.]

David Dykes injured his back in September 1996 in the course of work as a winery employee for E & J Gallo Winery (Gallo). A stipulated award of 20½% permanent partial disability resulted in payment to him of \$11,680 in indemnity. In January 2002, Mr. Dykes' condition had improved and he testified that the restrictions previously imposed for his back injury were lifted.

In October 2002, Mr. Dykes again injured his back. He was found to have an overall spinal disability rating 73% before apportionment. If entitled to an unapportioned award, applicant would have received \$230 per week for 453.5 weeks [and thereafter a life pension of 19.5% of \$257.69, but the court opinion does not mention the life pension until late in the decision.] The indemnity for 453.5 weeks at \$230 per week is \$104,305.00. The WCJ awarded that sum allowing credit for the \$11,680.00 pain on the prior award. Defendant sought reconsideration contending that pursuant to Labor Code Section 4664 the prior award of 20½% disability should have been subtracted from the overall 73% disability and indemnity awarded based on 53% disability after apportionment. The WCJ submitted a Report and Recommendation reiterating her calculation without addressing the calculation issue. On January 5, 2005, prior to issuance of the Board's en banc decision in *Nabors, v. Piedmont Lumber & Mill Co.*, (2005) 70 Cal. Comp. Cases 856 (*Nabors*), the Board denied reconsideration, incorporating the report and recommendation as the basis for its decision. Defendant filed a Petition for Writ of Review.

The Court of Appeal granted review. It noted in its opinion that it was determining the appropriate method of apportioning liability between injuries as “conjured” by the Legislature. It noted that SB899 was enacted and became effective on April 19, 2004, as a comprehensive plan to reform the workers' compensation system. The reforms included provisions to amend the standards of apportionment. Under pre-SB899 law, apportionment was concerned with pre-existing or independently progressing disability. Under SB899, apportionment was concerned with cause or pathology. (Citing *Marsh v. Workers' Compensation Appeal Board*, (2005) 130 Cal. App. 4<sup>th</sup> 906, 70 Cal. Comp. Cases 787. (*Marsh*)) Under prior law, an employer could be liable to the full extent an industrial injury accelerated, aggravated, or lighted up a nondisabling preexisting disease, condition or physical impairment. Former Labor Code Section 4750 prevented an industrially injured employee suffering from a previous permanent disability or physical impairment from receiving a workers' compensation award greater than he or she would

otherwise receive for the later injury alone. The prior law limited the employer's liability to only "that portion due to the later injury as though no prior disability or impairment had existed." Under post SB899 law, apportionment is "based on causation and the employer shall only be liable for the **percentage** of the permanent disability directly caused by the injury arising out of and occurring in the course of employment." (Slip decision page 4, Labor Code Sections 4663(a) and 4664(a).) The court discusses the duty imposed by Labor Code Section 4663 for physicians to discuss causation of disability to be considered complete on the issue of permanent disability.

Turning to the question at issue, apportionment between successive work injuries, the Court noted that Labor Code Section 4664 added a new conclusive presumption effecting the burden of proof that a prior permanent disability exists whenever an employee has received a prior permanent disability award. Apportionment may be based either on non-industrial factors of causation sufficiently described by the medical evidence (Labor Code Section 4663(c)) or disability previously awarded to the employee under a prior workers' compensation claim (Labor Code Section 4664(b)). The SB899 changes in apportionment standards apply to all cases not final on April 19, 2004, regardless of date of injury. (Citing *Marsh* and *Rio Linda Union School District v. Workers' Compensation Appeals Board (Scheftner)*, (2005) 131 Cal. App. 4<sup>th</sup> 517, 70 Cal. Comp. Cases 999. (*Scheftner*))

The parties agree that Labor Code Section 4664 requires apportionment to Mr. Dykes' prior back disability award. Gallo contends that the clear language of Labor Code Section 4664 requires that the percentage of prior disability must be deducted to arrive at the percentage of permanent disability directly caused by the new injury. The Court noted that in construing application of legislation to undisputed facts it should: (1) "give great weight to the construction of the WCAB except where an interpretation contravenes the Legislature's intent as evidenced by clear and unambiguous statutory language; (2) view a particular provision [of law] in the context of the entire statutory scheme...and harmonize it with the statutory framework as a whole;" (3) "consider the consequences that will flow from a particular statutory interpretation which, when applied, will result in wise policy rather than mischief or absurdity," and (4) liberally construe workers' compensation statutes in favor of the injured worker.

The law with respect to apportionment between successive work injuries which became permanent and stationary at different times under pre-SB899 law was controlled by *Fuentes v. Workers' Compensation Appeals Board*, (1976) 16 Cal. 3<sup>rd</sup> 1, 41 Cal. Comp. Cases 42 (*Fuentes*). *Fuentes* dealt with the then new exponentially progressive workers' compensation disability schedule for permanent partial disabilities. The California Supreme Court in that case considered three potential methods for computing indemnity for awards of permanent disability after apportionment. Method A, which the court adopted, provided that the percentage of disability to be apportioned be subtracted from the percentage of disability before apportionment, and that indemnity payable for the percentage of disability that was the difference be awarded. In *Dykes*, applying Method A would result in 20½% being subtracted from 73% leaving 52.5% [except that under the 1997 schedule, all disabilities are rounded to a whole percentage]. The award

for 52.5% would be \$48,662.50. *Fuentes* proposed Method B would determine the number of weeks of indemnity payable for the disability before apportionment, and multiplies that number by the percentage of the overall disability that was industrially related. In *Dykes* that would be  $([73-20 \frac{1}{2}] / 72) = 0.72$ . 72% of 453.5 weeks, or 326.25 weeks payable at \$170 per week resulting in an award of \$55,462.50. *Fuentes* proposed Method C would compute the monetary value of the overall disability and subtract the monetary value of percentage of disability to be apportioned out. The *Fuentes* decision rejected proposed Methods B and C, stating Method A was “required by the express and unequivocal language of Section 4750.” *Dykes* contends that the repeal of Labor Code Section 4750 can only be construed to show intent that injured workers be compensated in an amount more closely related to the full extent of their disability without considering the former overriding policy of encouraging the hiring of disabled workers. The *Fuentes* decision “found formulas B and C too closely aligned with the amount of compensation the employee would receive without apportioning the award.” Under prior Labor Code Section 4750 compensation for a subsequent disability was to be computed “as though no prior disability or impairment had existed.” New Labor Code Section 4664 turns the mandate to compute compensation “as though no prior disability or impairment had existed” on its head by conclusively presuming that any previously awarded permanent disability continues.

While this case was pending review, the Workers’ Compensation Appeals Board examined the appropriate method of calculating apportionment in *Nabors*. A majority of the commissioners concluded that because both Labor Code Sections 4663 and 4664 provide for apportionment “as a ‘percentage’ of permanent disability,” the policy considerations that led the Supreme Court in *Fuentes* to adopt Method A still apply. The Board found “no evidence that the Legislature intended to change the formula endorsed by the Supreme Court in *Fuentes*.” In *Nabors*, two commissioners dissented, one concluding that new sections 4663 and 4664 require application of Method B, and one Method C.

The Court in *Dykes* found that in repealing former Labor Code Section 4750, the basis for the finding in *Fuentes* had been eliminated and it was no longer controlling. The new mandates that causation of disability be considered and prior awarded disability be presumed to continue provides employers incentive to hire the disabled. Further, in the interval since adoption of Labor Code Section 4750, because discrimination against the disabled has been expressly outlawed by other statutory schemes, and employers can avoid costly job displacement benefit liability by retaining disabled workers. The Court concluded that the Legislature “contemplated a variation in determining apportionment by repealing section 4750. In the limited circumstances where an injured employee received a prior disability award while **“working for the same self-insured employer”** section 4664 contemplated accumulating successive multiple disability awards rather than subtracting percentage levels of disability. Since *Fuentes* was decided not only has the exponentially greater number of weeks of indemnity for higher percentages of disability continued, but in addition the maximum compensation rates for each week of indemnity increases at specific levels. A question not considered by the *Fuentes* court is whether the compensation rate should be determined by the percentage of disability

before or after apportionment. This change results in a greater difference between the *Fuentes* Methods B and C formulas. There are now five variables possible ranging from *Fuentes* Method A and an award for the unapportioned disability with credit for the prior award. For an overall disability in excess of 70% consideration must be given to the life pension provided by Labor Code Section 4659. "Section 4659 is silent with respect to whether the 70-percent-level-of-permanent-disability trigger applies before or after apportionment. The life pension for a 73% award in Dykes situation (date of last injury and earnings) would produce a \$50.25 per week life pension. Considering that the employer is only to be held for the percentage of disability directly caused by its work injury and the mandate of liberal construction, the Court found that only Method C ensures that an employee is adequately compensated and that the employer is directly liable for the percentage of disability directly caused by the work injury. All other formulas move the applicant down the progressive disability tables, "shortchanging him or her as though no prior injury or disability existed. This was mandated by former Section 4750, but is not permitted when the prior disability must be recognized and is presumed to have continued. Any algebraic formulation other than awarding indemnity for the overall disability less credit for prior payment creates a windfall to the employer and places an unreasonable burden on the employee who must compete in the labor market with a permanent disability. The Court noted that on the record in this case, under prior Labor Code Section 4750 no apportionment would have been allowed because of evidence of medical rehabilitation from the prior work injury. Applicant would have received the \$104,350 indemnity plus life pension with no offset for the prior award. New Labor Code Section Applicant is also entitled as a matter of law to the life pension for a 73% permanent disability, even though no life pension was awarded by the WCJ or Board. The Board's decision denying reconsideration is affirmed.

#### XVI Death Benefits

#### XVII Hearings, Discovery Closure

**Grupe Company v. Workers' Compensation Appeals Board (Ridgeway)**, (2005) 132 Cal. App. 4<sup>th</sup> 977, 70 Cal. Comp. Cases 1232. (Court of Appeal, Third Appellate District, partially published) [Discovery closure, development of expert witness testimony after.]

Ruby Ridgeway injured her upper extremities and neck working for Grupe Company in March 1987. Applicant was awarded continuing temporary disability which defendant unsuccessfully sought to terminate in May 1999, and successfully petitioned to terminate in May 2000. In an objection to a Declaration of Readiness, applicant acknowledged receipt of a settlement offer, but declined to settle until vocational rehabilitation was complete. Applicant also indicated that she intended to pursue a *Le Boeuf* theory to establish permanent total disability. At Mandatory Settlement Conference, applicant listed as a witness Dan Sidhu. No information concerning Mr. Sidhu's anticipated testimony other than that it pertained to the *Le Boeuf* theory was disclosed.

The case was tried beginning August 27, 2001 and ending September 6, 2001. Mr. Sidhu testified as to his medical record review, interviews with Ridgeway, vocational testing, and analysis. It was his opinion that she was not feasible for the vocational plans which had been developed. On cross examination Mr. Sidhu testified that his opinion that applicant was unable to compete in the open labor market had been formed after August 17, 2001. Defendant presented testimony of another vocational rehabilitation counselor in rebuttal.

After submission, the WCJ issued Findings and Award and Orders in which the opinion on decision indicated that applicant's testimony was incredible and inconsistent with medical histories; applicant's treating physician's opinions were unfounded and speculative, and that Mr. Sidhu's testimony was to be stricken because his evaluation and formulation of opinion took place after the discovery closure order of July 10, 2001. The WCJ went on to indicate that he had reviewed the testimony and exhibits produced by Mr. Sidhu, and if considered those would not change the result. Applicant sought reconsideration contending that it was error to strike Mr. Sidhu's testimony, that Mr. Sidhu's testimony and reports were substantial evidence, and that Dr. Weitz opinion was not substantial evidence. The Appeals Board granted reconsideration. It found that disclosure of Mr. Sidhu as a witness in the pre-trial statement met the requirements of Labor Code Section 5502, even though the witness did not meet with applicant or formulate his opinion until after the Mandatory Settlement Conference. The Board also found that because Dr. Weitz' opinion was essentially unchanged from his initial permanent and stationary report in 1998, and that opinion had been found stale and unpersuasive at the time of the denial or the initial petition to terminate liability for temporary disability, it was deficient and could not sustain the present award. The Board directed that Mr. Sidhu's testimony and other evidence be re-admitted and considered, and that the medical record as to extent of permanent disability be updated. Defendant sought review.

In the unpublished part of the Courts opinion, it found that the Board's decision after reconsideration was a final and appealable decision on a threshold issue affecting a substantial right – admissibility of Mr. Sidhu's testimony and evidence.

In the published portion of the opinion, the Court sustained the Board's order directing admission and consideration of Mr. Sidhu's testimony and evidence. Here, the Court notes, applicant obtained Mr. Sidhu as a witness and disclosed his identity at the Mandatory Settlement Conference. There is nothing in Labor Code Section 5502 precluding a witness from formulating or further developing his testimony after his disclosure in a pre-trial statement. The court denied the Petition for Writ of Review and found there was no reasonable basis for the writ. Costs on appeal and attorney's fees, to be fixed by the Board, were awarded applicant.

## XVIII Compromise and Release

## XIX Findings and Awards and Orders

## XX Reconsideration

## XXI Reopening

**Marsh v. California v. Workers' Compensation Appeals Board**, (2005) 130 Cal. App. 4<sup>th</sup> 787; 70 Cal. Comp. Cases 787. (Court of Appeal, Fifth Appellate District)

Marsh, a welder, sustained injury to his back AOE-COE on August 12, 1999. He was referred to an agreed medical examiner, Dr. Arthur Holmboe. The parties stipulated to a 46% award in September 2000. In November 2001 applicant filed a Petition to Reopen, and re-evaluation by Dr. Holmboe resulted in a rating of 70% before apportionment. The issue of validity of apportionment of the increase in disability, 50% to increased disability from the work injury, 50% to osteopena was tried, and on April 9, 2004, the Workers' Compensation Judge issued Findings and Award determining that the apportionment was not legal under Labor Code Sections 4663, 4750, and 4750.5 then in effect. Defendant sought reconsideration based on the change in apportionment standards which went into effect on April 19, 2004, as a result of SB899. The Board granted reconsideration and remanded to determine whether SB899 should apply. Applicant filed a Petition for Writ of Review, contending that, under Scheftner v. Rio Linda School District, the new standards could not be applied where there had been an existing order, decision or award.

The Court of Appeal granted the Petition for Writ of Review and found (1) that the reopening in this case had not been instigated to obtain more favorable apportionment under new Labor Code Sections 4663 and 4664, and (2) under Kleeman v. Workers' Compensation Appeals Board, SB 899 too effect before the Findings and Award of April 9, 2004 became final, therefore under provisions of SB899 the new apportionment statutes are applicable. The order remanding the matter to determine apportionment under the new statutory standards in new Labor Code Sections 4663 and 4664 was appropriate.

## XXII Miscellaneous Supplemental Proceedings

**Nolan v. City of Anaheim**, (2004) 33 Cal. 4<sup>th</sup> 335; 70 Cal. Comp. Cases 9. (Supreme Court of California)

Steven Nolan was a police officer for the City of Anaheim. He has been hired in 1984, and completed the sheriff's academy first in his class. His early performance appraisals were outstanding. He had transferred to the gang unit in 1991, and subsequently had become critical of what he believed to be use of excessive force by his fellow officers. He returned to patrol duties in 1992. His fellow gang unit officers were cleared of charges of use of excessive force, and Nolan was then brought up on charges of violation of departmental rules, misuse of sick time, unbecoming and unsatisfactory performance, and mishandling of evidence. He was discharged. On appeal he was reinstated with a five day suspension. After reinstatement Nolan received threatening phone calls. He ultimately resigned, filed a "whistleblower lawsuit" and filed for

disability retirement. He was awarded \$243,000 after remittitur in the whistleblower lawsuit.

He alleged that he was harassed and threatened by co-employees resulting in physical or mental incapacity rendering him incapable of performance of his duties. A petition for permanent disability retirement benefits was filed under Government Code §21156, which allows such retirement where an employee is “incapacitated physically or mentally for the performance of his ... duties inn the state service.”

In his request for disability retirement, an administrative law judge found that Mr. Nolan suffered no mental incapacity, and recommended denial of retirement. Nolan filed a writ of mandamus. The Superior Court found that Nolan was permanently incapacitated from performance of his duties as a police officer for the City of Anaheim.

Nolan contended that “state service,” as used in the statute, meant service to his last employer, i.e. that the test was whether he could perform the duties of a patrol officer for the City of Anaheim. The City contended that the requisite showing was broader, that applicant had to show he was precluded from performing duties of a patrol officer for work as a patrol officer with California law employment agencies with comparable positions, pay, benefits, and promotional opportunities. The Court of Appeal reversed the Superior Court determination and remanded for determination by the Court whether Nolan was “mentally incapacitated for state service, i.e., to perform police services throughout the state.” Nolan appealed. CalPERS filed an *amicus curiae* brief supporting Nolan, and contending that to require a showing as to ability to perform duties of a last assignment in other jurisdictions would be unadministerable.

The Supreme Court reversed. The majority opinion held that the term “state service” in the statute had broader meaning than “last employing department.” Rather is means all forms of public agency service. Here such service includes employment as a patrol officer for other cities covered by the Public Employees’ Retirement Law (PERL). The Court rejected that CalPERS argument noting that every civil service employer is required to describe the usual duties of every position. The applicant for retirement must show that he is disabled from performing the usual requirements of the duties in his position of last assignment, not only with his specific employer, but for the usual requirements his position of comparable employers who are members of PERS. If the employee meets this burden, then the burden shifts to the employer to demonstrate that the employee is capable of performing the usual requirements of the assignment and that there are similar positions in other California law enforcement agencies available to him. One justice concurred, but would not require the employer to show actual positions available to the employee once the employee made a prima facie case. Two justices dissented and would have reversed the Court of Appeal and reinstated the Superior Court determination that Nolan had not shown an actual incapacity.

## XXIII Contribution

**Graphic Arts Mutual Insurance Co. v. Time Travel International, Inc.**, (2005) 126 Cal. App. 4<sup>th</sup> 405, 70 Cal. Comp. Cases 184. (Court of Appeal, Second Appellate District) [Exclusive Remedy, Workers' Compensation Insurer's action for contribution against illegally uninsured employer.]

In 2000, Joe Garcia filed a cumulative injury claim against Time Travel International, Inc. (Time Travel) and Graphic Arts Mutual Insurance Co. (Graphic Arts), for injuries allegedly sustained arising out of and occurring in the course of employment from 1988 through June 24, 1997. Time Travel was insured as to workers' compensation liability from September 15, 1993 through September 15, 1994, and Time Travel was illegally uninsured thereafter. Pursuant to Labor Code Section 5500.5, Graphic Arts, as the last insurer of the employer was found liable for payment of benefits amounting to approximately \$80,000.00. More than a year after the initial award, but within a year after the award was sustained on appeal; Graphic Arts filed a civil action against Time Travel for reimbursement. Time Travel filed a demurrer alleging that the Workers' Compensation Appeals Board had exclusive jurisdiction, and that Graphic Arts had not sought contribution before the Workers' Compensation Appeals Board within the one year period of the award allowed by Labor Code Section 5500.5. The trial court sustained the demurrer without leave to amend. Graphic Arts appealed.

The Court noted that Labor Code Section 5500.5 initially codified an employee's right to elect against an employer or insurer when pursuing a cumulative injury claim, and that the employer or insurer elected against can petition for apportionment of liability (or contribution for benefits furnished) from the other employers or insurers who had injurious employment. In 1973, Labor Code Section 5500.5 was amended to limit the liability period in cases of multiple employment to five years from the last injurious exposure. In 1977, the limitation was applied to single employments and over a period of years, the liability period shortened to one year. The third paragraph of Labor Code Section 5500.5(a) gives an employer held liable for benefits as a result of another employer's failure to secure payment right to seek reimbursement from the uninsured employer(s) under Article 1 of Chapter 4 of Part 1 of Division 4 of the Labor Code. That article, commencing with Labor Code Section 3700, allows either proceedings before the Workers' Compensation Appeal Board or civilly under Labor Code Section 3706. Graphic Arts is entitled to seek reimbursement under the third paragraph of Labor Code Section 5500.5(a). Under the applicable article, it is entitled to select to use the remedy provided in Labor Code Section 3706, civil suit against the uninsured employer. The court further held that this was an action for reimbursement, not contribution, and therefore the one year limitation on contribution proceedings under Labor Code Section 5500.5(e) does not apply. The judgment of dismissal was reversed, with costs allowed to Graphic Arts on appeal.

**Knight Transportation v. Workers' Compensation Appeals Board**, (2005) 70 Cal. Comp. Cases 1036. (writ denied) [Standing of first employer to file applications for subsequent alleged injures; Wilkinson application.]

Rodney Boyd was employed as a truck driver by Hartson Kennedy Cabinets (Hartson) when he sustained injury AOE-COE on October 7, 1997 to his right ankle. Mr. Boyd subsequently became employed by Knight Transportation (Knight). After evaluation by an Agreed Medical Examiner (AME) and deposition of the AME, Hartson's compensation carrier, Fireman's Fund, filed a cumulative injury application for adjudication against Knight. Mr. Boyd opposed the proceeding against Knight, and stipulated that he did not claim injury during employment by Knight. After hearing the WCJ found that applicant had sustained cumulative injury while employed by Knight and apportioned 50% of a 10% permanent disability to the CT.

Knight sought reconsideration, alleging various typographical errors and contesting the determination of cumulative injury and standing of Fireman's Fund to file the cumulative injury claim. The WCJ reported that when Fireman's Fund obtained medical opinion evidence of the AME that applicant had sustained cumulative trauma, Hartson and Fireman's Fund became interested parties with standing to assert the cumulative injury claim against Knight. While Knight's medical legal report found no cumulative injury, the opinion of applicant's and Fireman's Fund's AME was more persuasive, and the 50% apportionment was supported by the AME. The Board granted reconsideration and corrected the clerical errors, but sustained the findings of injury and apportionment against Knight. Knight's petition for writ of review was denied.

#### XXIV Subrogation,

#### XXV Credit, Restitution, and Fraud

##### A. Fraud.

**Leegin Creative Leather Products v Diaz**, (2005) 131 Cal. App. 4<sup>th</sup> 1517, 70 Cal. Comp Cases 1108. (Court of Appeal Second Appellate District) [Workers' compensation fraud – complaint subject to dismissal where no probable cause for either element of fraud.]

Carolina Diaz was employed by Leegin Creative Leather Products, Inc. (Leegin), on December 2, 2002. On January 3, 2003, she reported that she had sustained an injury on December 2<sup>nd</sup>. Ms. Diaz was assigned light duty until April 9, 2003. On April 11, 2003, Ms. Diaz filed Applications for Adjudication of Claim alleging injuries on December 2, 2002, and cumulatively thereafter. Applicant's physician found her condition temporarily disabling from April 10, 2003. In May 2003, Leegin obtained videotape allegedly showing applicant engaged in strenuous activities and other acts inconsistent with a temporarily disabling bilateral upper extremity injury. Leegin concluded that applicant was falsely claiming injury and filed a civil fraud lawsuit against her.

Applicant filed a motion to strike the civil complaint under Code of Civil Procedure §425.16, the “anti-SLAPP statute.” Applicant alleged that Leegin’s workers’ compensation insurer, State Compensation Insurance Fund (SCIF), had accepted the injury or injuries and was providing medical treatment and temporary disability; SCIF had not raised fraud as a defense in the compensation cases, and Leegin’s action would have a chilling effect on her ability to seek redress for injuries through the compensation system. The trial court requested additional briefings. After those were filed, a hearing was held at which the court concluded that Leegin’s remedy was not a civil fraud action, but defense of the workers’ compensation claim. The trial court granted Diaz’ motion to strike. Leegin appealed.

Leegin contended on appeal that fraud was encompassed under the exclusive remedy doctrine. It had contended that costs incurred by its insurer in providing benefits to applicant would result in higher premium rates, damages. The court, however, found that the real issue on a CCP§425.16 motion to strike was whether Leegin had demonstrated a probability it would prevail (elsewhere in the opinion stated to be prima facie evidence which would support a finding in its favor) on the merits of its complaint.

“Under California law, a cause of action for fraud requires the plaintiff to prove (a) a knowingly false misrepresentation by the defendant, (b) made with the intent to deceive or to induce reliance by the plaintiff, (c) justifiable reliance by the plaintiff, and (d) resulting damages. [Citation omitted] .... In this case, Leegin cannot establish the elements either of justifiable reliance or resulting damage.”

Leegin was obliged by its insurance policy to forward applicant’s claim of injury whether true or false; such action could not constitute detrimental reliance on any false misrepresentation by applicant. Because Diaz’ claim was not yet adjudicated, and because Leegin had the duty to provide information material to any defenses to SCIF, there was no evidence Diaz’ claims would result in higher premium costs. Therefore the damage element was unsustainable. The trial court order striking the complaint was sustained. Each side was to bear their respective costs and attorneys fees on appeal.

## XXVI Special Benefits

### A. FEHA Liability

**Claudio v. Regents of the University of California**, (2005) \_\_\_ Cal. App. 4<sup>th</sup> \_\_\_, 33 C.W.C.R. 133. (Court of Appeal, Third Appellate District) [Good faith in effecting reasonable accommodation.]

Claudio was an animal health technician who contracted leptospirosis disabling him from work in areas exposing him to infections. He filed a claim for workers’ compensation benefits and relocated to Florida. He was told he was fired. His attorney contacted him about discussing return to modified or alternative employment. His employer’s “employment specialist” contacted him about the possibility, and applicant

requested that the specialist discuss the matter with his law firm (workers' compensation counsel). When the specialist determined that applicant's law firm specialized in workers' compensation, no effort to contact the firm or worker was made. The employment specialist concluded that no positions were available within applicant's knowledge, skills, training and interests, and "effected" his termination.

Claudio filed a civil (FEHA) suit alleging discrimination, wrongful termination, retaliation and intentional infliction of emotional distress suit. The employer sought dismissal of the case on various grounds, and the causes of action based on FEHA on the ground that it was attempting to engage in a timely, good faith, interactive process to fashion effective accommodations. The law contemplates that usually, this will involve direct communications between the employer and employee. Generally, the employee has no right to withdraw himself from the process because the information to be elicited in effecting a modification or accommodation is personal to the employee. The trial court dismissed complaint on all counts. Claudio appealed.

On review, the Court of Appeal found that Claudio had been advised on at least four occasions that he was fired. In those circumstances, his request that the employer communicate with his counsel was reasonable; his obligation to deal directly with the employer was excused. Whether the employer's action in making a determination that no accommodation was available without input from the employee or his counsel was a violation of FEHA is a triable issue of fact, the court found. The court also rejected the employer's contention that applicant was totally disabled and could only engage in non-working paid leave. It found that prior extensions of leave were not reasonable exhaustion of reasonable accommodation. The course sustained dismissal of the retaliation, wrongful termination, and intentional infliction of emotional distress causes of action.

***Green v. State of California Department of Corrections***, (2005) 132 Cal. App. 4<sup>th</sup> 97, 70 Cal. Comp. Cases 1254. (Court of Appeal, Fourth Appellate District, published in part.) [FEHA Liability]

Green had worked as a stationary engineer at a correctional facility for twelve years. His duties as a stationary engineer involved maintenance and repair of boilers, air conditioners, refrigerators, and other equipment and mechanical systems. He supervised a crew of inmates, and conducted inmate searches in assisted prison guards. Green learned he had Hepatitis C in 1990. It was surmised that he had contracted the disease by being exposed to sewage while working on sewage pipes and systems at California Institute for Men. After learning of his diagnosis, Green continued to work as a stationary engineer, and received letters of commendation in 1994 and 1997. In 1997, applicant commenced Interferon treatments with resulting side effects of fatigues, aches, and agitation. Applicant's physician recommended light duty for several months in 1997. Accommodation was made, and applicant was able to perform his work duties. In 1999 Green sustained two specific back injuries; he was placed on light duty for four months. In November 1999, after the second back injury, he was placed on disability leave. In

April 2000, Green commenced a second course of Interferon treatments. In July 2000, applicant was released to full duty by his back doctor. A 1997 report from Dr. Alvin Markovitz recommended applicant be limited to light duty due to his hepatitis condition.

On July 17, 2000, applicant reported to the return to work coordinator with complaints of fatigue. The employer then advised that, absent a full release to work authorization from Dr. Markovitz, Green would not be allowed to return to work as a stationary engineer. Green was offered disability retirement, vocational rehabilitation, or medical leave; he did not respond. When the issue was not resolved, the employer filed an application for Green's disability retirement in November 2000.

Green filed suit for discrimination based on disability and failure to make accommodation under the FEHA. At trial, neither Dr. Markovitz' testimony nor reports were admitted. A jury awarded \$597,088 in economic and \$2,000,000 in non-economic damages. The court ordered a remittitur of the non-economic damages to \$1,800,000 or, if not agreed, ruled that defendant's motion for new trial would be granted. Applicant accepted the remittitur. Defendant appealed from the court's judgment, and plaintiff from the conditional order allowing new trial or remittitur.

The appellate court noted that the elements for establishing disability discrimination have relied upon Americans with Disabilities Act standards as set forth in *Brundage v. Hahn*, (1997) 57 Cal. App. 4<sup>th</sup> 228. There has remained confusion, the court notes, whether it is the plaintiff's burden to show he can perform the essential job functions, or the employer's burden to show plaintiff cannot perform those functions. The court noted that California regulations remove the burden of establishing capability to perform from the plaintiff's prima facie case. If the plaintiff shows (1) a disability or medical condition, (2) an adverse employment decision by defendant, (3) because of that disability or condition – plaintiff has established a prima facie case. The burden then shifts to defendant to provide a legitimate, non-discriminatory reason for the decision.

The court noted therefore that it was defendant's obligation to show applicant could not perform essential functions to defend, not applicant's obligation to establish performance capability to establish a prima facie case.

To establish a cause of action for failure of accommodation under FEHA, the employee must show a disability and that the employer failed to make accommodation for the known disability.

Defendant's contention that business necessities supported its action is misplaced, the court notes. Under ADA / FEHA law, "business necessities" is a defense in only in disparate impact cases. Here, where prophylactic work restrictions recommended in 1997 were inconsistent with plaintiff's actual performance in 1997, 1998, and 1999, the employer cannot hide behind restrictions inconsistent with actual performance. The court found that the employer had not met the bona fide occupational qualification test, because that test would require a showing that all or substantially all disabled persons are unable to perform the job duties of a stationary engineer safely and efficiently. Here, employer failed to establish that applicant was unable to perform his duties. The record

demonstrated that applicant had in fact been capable of performing the duties of a stationary engineer with hepatitis C since 1990; he had received commendations, and never had an assessment of less than satisfactory performance through 1999.

In the unpublished portion of the decision the appellate court held that the Workers' Compensation Appeal Board finding in 2003, that the employer did not violate Labor Code Section 132a was not entitled to collateral estoppel because disability is defined differently for workers' compensation than FEHA or ADA claims. (*City of Moorpark v. Superior Court*, (1997) 18 Cal. 4<sup>th</sup> 1143, 63 Cal. Comp. Cases 944.) The Court agreed. The court further found that exclusion of Dr. Markovitz testimony and reports was proper where the workers' compensation law applied a different standard for determining disability than FEHA or ADA.

The appellate court ordered the remittitur stricken and the \$2,000,000 verdict for non-economic damages reinstated; it sustained the trial court's award of \$184,800 versus \$498,300 in attorney's fees, awarded plaintiff costs on appeal, and otherwise affirmed the trial court's judgment.

## XXVII Penalties, Sanctions & Contempt

### A. Penalties under Labor Code Section 132a

**County of San Luis Obispo v. Workers Compensation Appeals Board (Martinez)**, (2005) 133 Cal. App. 4<sup>th</sup> 641, 70 Cal. Comp. Cases 1247. (Court of Appeal Second Appellate District) [132a – Business Necessity]

Art Martinez suffered injury to his neck, spine, shoulder and wrist arising out of and occurring in the course of his employment as a mental health therapist on February 24, 2000. In September 2001, applicant underwent back surgery, and nine months later his physician recommended that he be precluded from having to restrain patients. Three months later, the physician found applicant permanent and stationary, with a no very heavy work limitation. The recommendation to avoid restraining patients was not maintained. Based on the P&S report, in February 2003, applicant was allowed to return to work. His prior assignment was unavailable, and applicant was assigned to a school for emotionally disturbed adolescents.

Applicant requested a qualified medical examination, and the examiner, Dr. Hutchinson, recommended in May 2003 that applicant avoid heavy work or exposure to physical altercations. Applicant selected a new primary treating physician who agreed fully with Dr. Hutchinson's limitations. In September 2003, a job analysis indicated that applicant's current assignment exposed him to risk of altercations with disturbed teenagers weighing up to 300 pounds. There was a history of outbursts in which the students had thrown furniture or used sharp objects in assaulting staff or other students.

After hearing, applicant was found in October 2003 to have sustained 39% permanent disability as a result of his February 2000 injury. On September 26, 2003, applicant was placed on leave pending assessment of his duties and disability. On October 1, 2003 a "general job description" indicated that those in applicant's job might be required to restrain youth weighing up to 150 pounds. On October 7, 2003, applicant filed a petition for benefits under Labor Code Section 132a. On October 9, 2003, the County responded indicating that investigation was ongoing, and if after assessment it was determined that applicant's job was physically inappropriate; a determination would be made whether there was accommodation or other position for which applicant was qualified.

In November 2003, the County's department director issued a memorandum stating in substance that containment or restraint of combative students was of special importance to performance of the duties of a Mental Health Therapist II, and because of the unplanned and sporadic nature of these events it was not feasible to assign other staff to manage these events or altercations. Timely interventions were essential to avoid serious escalation and injury to students and staff.

A hearing on applicant's 132a Petition was held on February 2, 2004. Applicant testified that he could perform all required job duties. He admitted that some of the students weighed 300 pounds, but asserted there was no risk of assault. The County's risk manager testified that applicant had been returned to work essentially without restrictions. When Dr. Hutchinson and the new PTP's recommendations came to light, she believed there was risk of liability for injury to students or staff if applicant were precluded from effective restraint of an assaultive or combative student. Martinez had not been taken off work because of the permanent disability award, but because of the work restrictions imposed on him. A number of county employees at the school indicated that students weighed up to 365 pounds; there were altercations on a daily basis. Applicant's supervisor and a co-worker testified that they had had to restrain combative students, and that violence could occur at any time with any of the students.

The WCJ found that the County had violated Labor Code Section 132a in placing Mr. Martinez on leave. He ordered reinstatement, payment of lost wages, and \$10,000 penalty. The County sought reconsideration. The Board granted reconsideration for study and then affirmed the WCJ in a 2 to 1 decision. The County filed a Petition for Writ of Review.

The court noted that prior to 2003, under *Barnes v. Workers' Compensation Appeals Board*, (1989) 216 Cal. App. 3<sup>rd</sup> 524, 54 Cal. Comp. Cases 433 (*Barnes*), a prima facie case of 132a discrimination was met by showing that after a work injury or other qualifying event, the employer engaged in conduct detrimental to applicant. Once the showing was made, the burden shifted to the employer to establish business necessity for the conduct. In 2003, the employee's burden was made heavier by the Supreme Court's decision in *Department of Rehabilitation v. Workers' Compensation Appeals Board (Lauher)*, (2003) 30 Cal. 4<sup>th</sup> 1281, 68 Cal. Comp. Cases 831. Under the new standard, the employee must demonstrate not only detrimental conduct, but that he was singled out for disadvantageous treatment because of his injury. The parties, said the Court, argued

and the Board decided this case on the pre-2003 *Barnes* standard. The Court further stated that the Board's conclusion that the County's action did not show reasonable business necessity was based on several errors of fact and law. The decisions below had indicated a misperception that when applicant was returned to work he was under a restriction from subduing combative students. It is the employer's knowledge at the time of the detrimental act, not some prior time which determines whether a violation of Labor Code Section 132a has occurred. Finally, the Court thought the finding that the County manipulated the job analysis in changing the weight of students who had to be restrained from 150 to 300 pounds. The change was not prejudicial where there was uncontroverted evidence that the students weighed up to 365 pounds. The correction of the job analysis was to reflect actual conditions, not as a pretext for discrimination. The Court found that the County had established reasonable business necessity for its action. The award was annulled.

B. Penalties under Labor Code Section 5814

**Abney v. Workers' Compensation Appeals Board**, (2005) 70 Cal. Comp. Cases 460. (writ denied.) [Application of amended Labor Code Section 5814 to pre-6/1/04 delays.]

In *Abney v. Area Energy*, (2004) 69 Cal. Comp. Cases 1552, the Workers' Compensation Appeals Board held in an en banc decision that where defendant unreasonably delayed payment of temporary disability at the increased rate payable two years after the date of injury pursuant to Labor Code Section 4661.5, and applicant filed a petition for penalty for the delay on March 26, 2004, but a decision awarding penalty issued on August 5, 2004, the penalty was properly computed under Labor Code Section 5814, as amended by SB899, expressly effective June 1, 2004. The WCJ had imposed a penalty of 25% of the compensation unreasonably delayed, less credit for defendant's payment of Labor Code Section 4650(d) benefits. The Board upheld the WCJ's decision. Applicant filed a petition for writ of review. Applicant contended that the provision in new Labor Code Section 5814 of a June 1, 2004 effective date meant that the new section should not be applied to unreasonable delays before that date. The Court of Appeal denied the Petition for Writ of Review.

C. Penalties under Labor Code Section 4650(d)

**Leinon v. Workers' Compensation Appeals Board**, (2005) 70 Cal. Comp. Cases 496. (writ denied) [When 4650(d) penalty attached to previously disputed payments.]

Defendant denied injury and liability for temporary disability. After Findings and Award issued determining that defendant was liable for temporary disability, defendant paid the awarded compensation within 14 days. Thereafter a Workers' Compensation Judge awarded a Labor Code Section 4650(d) penalty on the temporary disability which had accrued and was payable, in the absence of dispute, prior to the award. Defendant sought reconsideration contending that it had no duty to pay on a contested claim until

the award issued, and that it had paid timely after issuance of the award. The Workers' Compensation Appeals Board in an en banc decision issued in August 2004, held that where injury, disability or indemnity rate is disputed, no section 4650(d) penalty arises if the disputed disability indemnity payments are made within 14 days of a final order, decision or award imposing liability for those benefits or within 14 days of a defendant's acceptance of liability for the injury and disability benefits. The Board also held that an order, decision or award becomes final for purposes of section 4650(d) when a defendant has exhausted all of its appellate rights or has not pursued them. Applicant sought reconsideration which was denied en banc in November 2004. Applicant then filed a Petition for Writ of Review. Defendant contended that the appeals board was correct on the merits and that the applicant's Petition for Writ of Review was not timely with respect to the August 2004 decision. Applicant's Petition for Writ of Review was denied without opinion.

D. Penalties for failure to secure payment of compensation

**Starving Students, Inc. v. Department of Industrial Relations**, (2005) 125 Cal. App. 4<sup>th</sup> 1357; 70 Cal. Comp. Cases 30. (Court of Appeal, Second Appellate District)

Starving Students, Inc., hired Human Dynamics Corporation to obtain its insurance needs and administer other employee benefits. Human Dynamics Corporation (HDC) obtained workers' compensation insurance through Insurance Company of the Americas (ICA). ICA charged a monthly premium of \$75,000 for the workers' compensation policy beginning on January 1, 2003. ICA was not authorized to write workers' compensation insurance in California. On March 12, 2003 a deputy labor commissioner visited employer's office and after verifying that ICA was not an authorized insurer, issued a "Stop Order – Penalty Assessment." Because Starving Students, Inc., had approximately 300 employees, the penalty assessment was \$100,000.00.

Starving Students contacted HDC, and was shortly advised that HDC had secured insurance through a policy issued by Kemper, a California authorized insurer, on another employee leasing company, Omni Staffing. At a hearing on March 17, 2003, Starving Students presented evidence of its attempts to obtain valid coverage, and a letter from HDC indicating that Omni had agreed to bind coverage through Kemper effective March 12, 2003. DLSE presented evidence that Kemper had not agreed to cover Starving Students through its policy for Omni Staffing. The stop order and penalty assessment were affirmed; the stop order to remain in effect until a valid policy was submitted to DLSE.

Starving Students continued operations notwithstanding the stop order. On March 19, 2003, a deputy labor commissioner visited Starving Students and cited it for violation of the stop order. On March 19, 2003, Starving Students obtained insurance through Zenith Insurance for a monthly premium of \$175,000.00. A copy of the Zenith policy was furnished to DLSE and the stop order lifted. On April 7, 2003, a hearing officer affirmed the \$100,000 penalty assessment. Starving Students filed a petition for writ of mandate

to order DLSE to set the penalty assessment. At hearing on October 23, 2003, the trial court ruled that the penalty assessment was mandatory, that Labor Code Section 3727.1 (authorizing withdrawal of a penalty assessment where proof of insurance at time of the citation is shown) did not apply, and that the assessment statute (Labor Code Section 3722) was not unconstitutional. The writ of mandate was denied and judgment entered on November 6, 2003 for \$100,000 plus interest. Starving Students appealed.

Starving Students contended that it was insured at the time of the initial citation, and that no employee was deprived of any workers' compensation benefit. Therefore, it argued, DLSE had discretion to withdraw the penalty assessment. The Court concluded that the stop order and penalty assessment had issued under Labor Code Section 3710.1, and that the relief afforded by Labor Code Section 3727.1 was unavailable. The employer had not secured payment as required by Labor Code Section 3700, its insurer was not authorized to write workers' compensation insurance in California. No evidence of actual harm to an employee is required to sustain the penalty assessment. The Court noted that the employer had saved over \$200,000 in premiums by use of an unauthorized carrier for a few months. The use of an unauthorized insurer placed Starving Students at a competitive advantage with respect to moving companies who were properly insured. The assessment was affirmed and DLSE awarded costs on appeal.

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