PUBLICATION UPDATE

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California Workers' Compensation Law, 6th Ed.

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HIGHLIGHTS

2009 Legislation

- Legislative actions affecting workers' compensation have been added.

Administrative Regulations

- Changes made through Register 2009, No. 39 (9/25/09) have been added.

Case Law

- Recent important decisions have been added, including *Almaraz/Guzman II, Ogilvie II, Weiner*.

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CALIFORNIA STATUTES. Legislation affecting workers' compensation enacted during the 2009 legislative session, not included in previous releases, have been added, including the following:

State Compensation Insurance Fund; Sale of Assets. The legislature has enacted Insurance Code Secs. 11885–11886.2, authorizing the state Director of Finance to sell a portion of the State Compensation Insurance Fund's (SCIF's) assets and liabilities. [*See* Ch. 1, § 1.20, Important Note.]

Disaster Service Workers; Liability for Payment of Workers' Compensation. The legislature has amended Labor Code Sec. 4352 to provide that, when appropriated funds are temporarily unavailable for disbursement to injured disaster service workers, the State Compensation Insurance Fund may provide compensation to an eligible claimant whose injuries have previously either been accepted or been found to be compensable by the Appeals Board. [*See* Ch. 2, § 2.21.]

Compensable Injuries; Employee's Race, Etc. The legislature has amended Labor Code Sec. 3600 to provide that no personal relationship or personal connection will be deemed to exist between an employee and a third party based only on a

determination that the third party injured or killed the employee solely because of the third party's personal beliefs relating to his or her perception of the employee's race, religious creed, color, national origin, age, gender, disability, sex, or sexual orientation. [*See* Ch. 10, § 10.10[4].]

Rating Organizations; Internet Website. The legislature has enacted Insurance Code Sec. 11752.75 to provide for the creation of an internet website to enable persons to determine whether an employer was insured for workers' compensation on a given date. [*See* Ch. 3, § 3.10[3].]

Salary in Lieu of Temporary Disability Payments. The legislature has amended Labor Code Sec. 4850 to remove the requirement that public employees be members of previously specified public employees' retirement systems in order to qualify for benefits pursuant to Labor Code Sec. 4850. [*See* Ch. 6, § 6.23[3], [4].]

Personal Physician; Employee's Predesignation. The legislature has amended Labor Code Sec. 4600 to delete the December 31, 2009, repeal date for those provisions pertaining to an employee's predesignation of a personal physician. [*See* Ch. 4, § 4.18[1].]

Medical Treatment; Authorization. The legislature has enacted Labor Code Sec. 4610.3 to provide that an employer that authorizes medical treatment may not rescind or modify that authorization after the medical treatment has been provided for any reason, including, but not limited to, the employer's subsequent determination that the physician who provided the treatment was not eligible to treat that injured employee. [*See* Ch. 4, § 4.26[3][b][i].]

Failure to Secure Workers' Compensation; Penalty Assessments. The legislature has amended Labor Code Sec. 3722 to provide that an uninsured employer is subject to a penalty assessment by the Director of Industrial Relations consisting of the greater of (1) twice the amount the employer would have paid in workers' compensation premiums during the period the employer was uninsured (not amended), or (2) the sum of $1,500 per employee employed during the period the employer was uninsured (amended by raising the amount from $1,000). The amended provisions also specify that, with respect to the first of the two options, "the amount the employer would have paid in workers' compensation premiums" is to be calculated by referring to "the three-year period immediately prior to the date the penalty assessment is issued." [SB 313, 2009 Ch. 640, effective 1/1/2011] This provision will be covered in more detail in next year's updates for the Treatise.

CALIFORNIA REGULATIONS.

Qualified Medical Evaluators. In amending Admin. Dir. Rules 1-159, the Administrative Director has updated the regulations governing qualified medical evaluators. [*See* Ch. 1, § 1.13[3]–[8]; Ch. 16, § 16.54[1]–[16].]

Medical Treatment Utilization Schedule. Effective July 18, 2009, the Administrative Director has updated Admin. Dir. Rules 9792.20-9792.26, the regulations governing the medical treatment utilization schedule. [*See* Ch. 4, § 4.26[3][a].]

Rules of Court Administrator. In promulgating Ct. Admin. Rules 10210-10297, the Court Administrator has specified various procedures, including those for EAMS, the Electronic Adjudication Management System, being implemented by the Division of Workers' Compensation. [*See* Ch. 1, §§ 1.06[5][a]–[e], 1.24[1]–[7]; Ch. 6, § 6.24[6], Ch. 15, §§ 15.06A[1]–[7], 15.42[1]–[6]; Ch. 16, §§ 16.04[4]–[5],

16.05[2][b]–[c], 16.11[3], 16.13, 16.28[1]–[5].]

Disability Evaluation Unit Regulations. In promulgating new regulations and amending existing regulations, the Administrative Director has conformed the Disability Evaluation Unit regulations, Admin. Dir. Rules 10150-10168, to the requirements of document filing with the Electronic Adjudication Management System (EAMS). [*See* Ch. 7, § 7.43A[1]–[4].]

Retraining and Return to Work Regulations. In promulgating new regulations and amending existing regulations, the Administrative Director has conformed the retraining and return to work regulations, Admin. Dir. Rules 10116-10133.58, to the requirements of document filing with the Electronic Adjudication Management System (EAMS) and enabled the same definitions to apply to both the return to work and the supplemental job displacement regulations. [*See* Ch. 6, § 6.24[6]; Ch, 21, §§ 21.08[3], 21.16[2]–[5].]

Medical Treatment; DWC 12-Point Plan. Concerned about the rising costs of medical treatment of injured workers, the Division of Workers' Compensation has developed a plan to control payments to medical providers, with some of the plan's 12 points already implemented and others in various stages along the route to implementation. [*See* Ch. 4, § 4.01, Important Note.]

CALIFORNIA CASES.

Negligence; Duty of Care; Negligence Per Se; Moving or Operating Equipment Near Power Lines. The Supreme Court in *Ramirez v. Nelson* (2008) 44 Cal. 4th 908, has held that homeowners neither had nor breached any statutory duty of care owed to a deceased worker under Penal Code Sec. 385(b), which provides that "[a]ny person who either personally or through an employee or agent, or as an employee or agent of another, operates . . . or moves any tools . . . [or] equipment . . . within six feet of a high voltage overhead conductor is guilty of a misdemeanor." [*See* Ch. 2, § 2.26[3].]

Medical Treatment; Attorney's Fees. The Supreme Court in *Smith v. W.C.A.B.* (2009) 46 Cal. 4th 272, has held that, in light of unambiguous statutory language and legislative history, Labor Code Sec. 4607 authorizes an award of attorney's fees to only those employees who successfully resist efforts to terminate their award of medical treatment and does not permit an award of fees to employees who successfully challenge a denial of specific treatment requests. [*See* Ch. 17, § 17.16[5].]

Uninsured Employers Benefits Trust Fund; Sanctions. The court of appeal in *Duncan v. W.C.A.B. (Silva)* (2008) 166 Cal. App. 4th 294, has held that the limitation of liability specified by Labor Code Sec. 3716.2 precludes imposition of a sanction against the UEBTF pursuant to Labor Code Sec. 5813 for bad-faith actions or tactics that are frivolous or intended solely to cause unnecessary delay. [*See* Ch. 11, § 11.09[4].]

Temporary Disability; Two-Year Limitation on Temporary Disability Indemnity; Education Code Sec. 44043 Payments. The court of appeal in *Mt. Diablo Unified School District v. W.C.A.B. (Rollick)* (2008) 165 Cal. App. 4th 1154, has held that, for purposes of determining the two-year limitation period on temporary disability indemnity, temporary disability payments commenced when a school district paid its injured employee her normal wages under Education Code Sec. 44043. [*See* Ch. 6, § 6.12.]

Temporary Disability; Credits; Time to Claim. The court of appeal in *J.C.*

Penney Co. v. W.C.A.B. (Edwards) (2009) 175 Cal. App. 4th 818, has held that the employer's claim of credit against permanent disability payments was allowable only for temporary disability payments made after June 2006, which was the last date for which the employee's treating physician reported that he was temporarily disabled, so that any claim of credit for temporary disability payments made prior to that date was foreclosed by Labor Code Sec. 4062(a). [*See* Ch. 15, § 15.04[3][a].]

Discrimination; Labor Code Sec. 4850; Labor Code Sec. 132a. The court of appeal in *Los Angeles County Professional Peace Officers' Association v. County of Los Angeles* (2008) 165 Cal. App. 4th 63, has held that an employer's policy regarding "cash out" payments of excess accumulated vacation hours to sheriff's deputies who were not on Labor Code Sec. 4850 leave as a result of injuries AOE/COE, as opposed to its policy regarding such payments to deputies who were on such leave, discriminated against the latter group in violation of Labor Code Secs. 4850 and 132a. [*See* Ch. 6, § 6.23[7].]

Vocational Rehabilitation; Vocational Rehabilitation Maintenance Allowance; Credit. The court of appeal in *Medrano v. W.C.A.B.* (2008) 167 Cal. App. 4th 56, has held that VRMA is not a wage replacement benefit such as TD or VRTD, and that, therefore, no credit is allowed against VRMA payments for wages earned during the same period when the employee was receiving such payments. [*See* Ch. 21, § 21.04[3].]

Vocational Rehabilitation; Sunsetting. The court of appeal in *Beverly Hilton Hotel v. W.C.A.B. (Boganim)* (2009) 176 Cal. App. 4th 1597, has held that an October 2008 WCAB decision that affirmed the WCJ's January 2008 award of vocational rehabilitation benefits to an employee was not a "final" decision, so that the employee lost all rights to vocational rehabilitation benefits as of the January 1, 2009, repeal of Labor Code Sec. 139.5. [*See* Ch. 21, Special Alert.]

Third Party Actions; Settlement; Insurer's Credit Rights. The U.S. Court of Appeals, Ninth Circuit, in *Travelers Property Casualty Co. v. ConocoPhillips Co.* (2008) 546 F.3d 1142, has held that an insured employer's waiver of its right to credit against future workers' compensation benefits, granted by Labor Code Sec. 3600(b), as part of the settlement of employees' civil lawsuits against the employer, did not breach provisions of the policy between the employer and its workers' compensation insurer. [*See* Ch. 12, § 12.08[3].]

Employment Relationships; Independent Contractors. The court of appeal in *Chin v. Namvar* (2008) 166 Cal. App. 4th 994, has held that Labor Code Sec. 2750.5, which creates a rebuttable presumption that an unlicensed person who performs work requiring a license is an employee, not an independent contractor, was irrelevant because the statute's presumption of employee status may be rebutted only as to persons who hold a valid contractor's license, which plaintiff did not at the time of his injury. [*See* Ch. 2, § 2.26[3].]

Employment Relationships; Independent Contractors. The court of appeal in *Cristler v. Express Messenger Systems* (2009) 171 Cal. App. 4th 72, has held that the plaintiffs, representatives of a class of parcel and message drivers/deliverers, were independent contractors, not the defendant's employees, and that the trial court's jury instructions properly placed the burden on the defendant of rebutting the Labor Code Sec. 3357 presumption that the plain-

tiffs were the defendant's employees. [*See* Ch. 2, § 2.28[1].]

Employment Relationships; Unemployment Insurance. The court of appeal in *Messenger Courier Association of the Americas v. California Unemployment Insurance Appeals Board* (2009) 175 Cal. App. 4th 1074, has held that California courts and administrative agencies are all authorized to apply the comprehensive and overlapping tests regarding employment status stated in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* and that the reasoning of *Borello*, which arose in a workers' compensation context, applied equally to analysis of tax-related issues, such as employer contributions, requiring an employment determination. [*See* Ch. 2, § 2.26[1].]

Permanent Disability; Apportionment; Presumptions of Industrial Causation. The court of appeal in *Department of Corrections and Rehabilitation v. W.C.A.B. (Alexander)* (2008) 166 Cal. App. 4th 911, has held that Labor Code Sec. 4663, as enacted in 2004 by SB 899, did not repeal the non-attribution presumptions of Labor Code Secs. 3212–3213.2, and that the non-apportionability of permanent disability awards made pursuant to those statutes has been law since that 2004 enactment of Labor Code Sec. 4663, making non-apportionability applicable to the entirety of an employee's permanent disability compensation that he began to receive in 2006. [*See* Ch. 10, § 10.34.]

Permanent Disability; Rating; Application of 1997 Schedule for Rating Permanent Disabilities. The court of Appeal in *Lewis v. W.C.A.B.* (2008) 168 Cal. App. 4th 696, has held that a comprehensive medical-legal report or a treating physician's report need not state that the injured employee's condition has reached permanent and stationary status to indicate the existence of permanent disability within the meaning of Labor Code Sec. 4660(d). [*See* Ch. 7, § 7.001.]

Permanent Disability; Apportionment; *Wilkinson* Rule. The court of appeal in *Benson v. W.C.A.B.* (2009) 170 Cal. App. 4th 1535, has affirmed *Benson v. Permanente Medical Group* (2007) 72 Cal. Comp. Cases 1620 (Appeals Board en banc opinion) to hold that SB 899 abrogated the general applicability of the *Wilkinson* rule that allowed, in certain circumstances, a single combined award for two separate injuries. [*See* Ch. 7, § 7.46[2].]

Permanent Disability; Offers of Modified of Alternative Work. The court of appeal in *Bontempo v. W.C.A.B.* (2009) 173 Cal. App. 4th, has held that in the pretrial conference statement the parties stipulated that the permanent disability benefits that the employer was already paying to the employee included a 15-percent increase pursuant to Labor Code Sec. 4658(d), and that, by checking the boxes on the pretrial conference form labeled "Permanent Disability" and "Apportionment," the parties conveyed their intention that the WCJ calculate the award for permanent disability benefits under the applicable formula and the facts presented, including Labor Code Sec. 4658(d). [*See* Ch. 7, § 7.51.]

Classified School Employees; Paid Leaves. The court of appeal in *California School Employees Association v. Colton Joint Unified School District* (2009) 170 Cal. App. 4th 857, has held that Education Code Sec. 45196, which authorizes school districts to credit classified employees, each year, with at least 100 working days of paid sick leave and provides that the paid sick leave it authorizes "shall be exclusive of any other paid leave, holidays, vacation, or compensating time to which the employee

may be entitled," means that a school district could not combine vacation leave concurrently with Education Code Sec. 45196 leave, but rather that vacation leave and Education Code Sec. 45196 leave should be deducted separately or consecutively. [*See* Ch. 22, § 22.03[3].]

Workers' Compensation Insurance; Subrogation; Third Party Administrators. The court of appeal in *National Union Fire Insurance Co. v. Cambridge Integrated Services Group* (2009) 171 Cal. App. 4th 35, has held that the defendant, a third party administrator, had a duty of care to the plaintiff, the employer bank's excess insurer, that the plaintiff was a third party beneficiary of the contract between the employer and the defendant, and that the plaintiff was subrogated to the employer's rights against the defendant. [*See* Ch. 12, § 12.05[1].]

Bankruptcy; Workers' Compensation Claims. The Ninth Circuit in *California Self-Insurers' Security Fund v. Lorber Industries of California* (9th Cir. 2009) 564 F.3d 1098, has held that the Self-Insurers' Security Fund claim against an employer in bankruptcy for reimbursement was not an excise tax and, therefore, was not entitled to priority. [*See* Ch. 11, § 11.09[3].]

Civil Actions; Statute of Limitations; Tolling. The court of appeal in *Aguilera v. Heiman* (2009) 174 Cal. App. 4th 590, has held that the plaintiff's action was barred by the one-year statute of limitations under former Code of Civil Procedure Sec. 340(3) and that the equitable tolling doctrine did not apply to extend the plaintiff's time to file an action against the defendants. [*See* Ch. 12, § 12.03[2].]

Insurance; Policy Terms. The court of appeal in *Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal. App. 4th 64, has held that the word "occurrence" in two excess-insurance policies' phrase "loss arising out of any one occurrence" clearly, explicitly, and unambiguously refers to an accident or a cumulative injury that causes an employee to suffer damage and does not refer to the loss sustained by the employer in the form of a workers' compensation award or compromise and release. [*See* Ch. 3, § 3.19.]

Penalties; Unreasonable Delay in Payment of Benefits; Amount of Penalty. The Appeals Board en banc has held in *Ramirez v. Drive Financial Services* (2008) 73 Cal. Comp. Cases 1324 (Appeals Board en banc opinion) that the overriding consideration in determining what penalty amount to assess should be whether the penalty imposed would serve the purposes sought to be accomplished by Labor Code Sec. 5814, which are both penal and remedial. [*See* Ch. 11, § 11.11[2].]

Penalties; Unreasonable Delay in Payment of Benefits; Attorney's Fees. The Appeals Board en banc has held in *Ramirez v. Drive Financial Services* (2008) 73 Cal. Comp. Cases 1324 (Appeals Board en banc opinion) that, if an unreasonable delay in payment of the award of compensation occurs, Labor Code Sec. 5814.5 entitles an employee's attorney to receive fees for enforcing the award, and such fees are to be based on a reasonable number of hours expended and a reasonable hourly rate and are to be awarded in addition to the penalty awarded to the employee under Labor Code Sec. 5814(a), not as a percentage of that penalty. [*See* Ch. 11, § 11.11[2].]

Penalties; Unreasonable Delay in Payment of Benefits; Successive Penalty. The Appeals Board en banc has held in *Ramirez v. Drive Financial Services* (2008) 73 Cal. Comp. Cases 1324 (Appeals Board en banc opinion) that, although, under Labor Code Sec. 5814(a), a successive penalty may be

awarded for an unreasonable delay in making a prior penalty payment, it should not be awarded when the employer had genuine doubt as to its liability or when there has been no legally significant intervening event. [*See* Ch. 11, § 11.12[4].]

Medical Liens; Proof of Claim; Evidence. The Appeals Board en banc has held in *Tapia v. Skill Master Staffing* (2008) 73 Cal. Comp. Cases 1338 (Appeals Board en banc opinion) that, pursuant to *Kunz v. Patterson Floor Coverings, Inc.*, an outpatient surgery center lien claimant (or any medical lien claimant) has the burden of proving that its charges are reasonable, and that the outpatient surgery center lien claimant's billing, by itself, does not establish that the claimed fee is reasonable, so that, even in the absence of rebuttal evidence, a lien need not be allowed in full if unreasonable on its face. [*See* Ch. 4, § 4.26[5].]

Permanent Disability; AMA *Guides*; 2005 Permanent Disability Rating Schedule. The Appeals Board en banc in *Almaraz v. Environmental Recovery Services*; *Guzman v. Milpitas Unified School District* (2009) 74 Cal. Comp. Cases 201 (Appeals Board en banc opinion) has held that the AMA *Guides* portion of the 2005 Permanent Disability Rating Schedule is rebuttable, and that it is rebutted by showing that an impairment rating based on the *Guides* would result in a permanent disability award that would be inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability. Subsequently, the Board granted reconsideration in these joint cases. [*See* Ch. 7, § 7.001.]

Permanent Disability; AMA *Guides*; 2005 Permanent Disability Rating Schedule. The Appeals Board en banc in *Almaraz v. Environmental Recovery Services*; *Guzman v. Milpitas Unified School District* (2009) 74 Cal. Comp. Cases 1084 (Appeals Board en banc opinion) has specifically rejected the "inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability" standard set forth in its previous en banc opinion. [*See* Ch. 7, § 7.001.]

Permanent Disability; 2005 Permanent Disability Rating Schedule; Diminished Future Earning Capacity. The Appeals Board en banc in *Ogilvie v. City and County of San Francisco* (2009) 74 Cal. Comp. Cases 248 (Appeals Board en banc opinion) has held that the diminished future earning capacity portion of the 2005 Permanent Disability Rating Schedule is rebuttable, since Labor Code Sec. 4660(c) provides that the 2005 Schedule is merely "prima facie evidence of the percentage of permanent disability to be attributed to each injury." Subsequently, the Board granted reconsideration in this case. [*See* Ch. 7, § 7.001.]

Permanent Disability; 2005 Permanent Disability Rating Schedule; Diminished Future Earning Capacity. The Appeals Board en banc in *Ogilvie v. City and County of San Francisco* (2009) 74 Cal. Comp. Cases 1127 (Appeals Board en banc opinion), *pet. for writ of rev. filed* 10/7/2009, has held that any individualized diminished future earning capacity adjustment factor must be consistent with Labor Code Sec. 4660(b)(2), the RAND data to which it refers, and the numeric formula adopted by the Administrative Director in the 2005 Schedule. [*See* Ch. 7, § 7.001.]

Vocational Rehabilitation; Sunsetting. The Appeals Board en banc in *Weiner v. Ralphs Grocery* (2009) 74 Cal. Comp. Cases 736 (Appeals Board en banc opinion) has held that the repeal of Labor Code Sec. 139.5 terminated all rights to voca-

tional rehabilitation pursuant to orders or awards not final before January 1, 2009, and that, with specified exceptions, effective January 1, 2009, the WCAB has no power to issue orders or make awards regarding vocational rehabilitation. [*See* Ch. 21, Special Alert.]

Vocational Rehabilitation; Sunsetting. The Appeals Board en banc in *Weiner v. Ralphs Grocery* (2009) 74 Cal. Comp. Cases 958 (Appeals Board en banc opinion), *pet. for writ of rev. filed* 9/28/2009, has held that, even if the Board assumed that some vocational rehabilitation maintenance allowance was indisputably due to the employee prior to January 1, 2009, this does not mean that the employee's right to this vocational rehabilitation maintenance allowance had vested. [*See* Ch. 21, Special Alert.]

CAUTION: *The following court of appeal cases were not certified for publication. Practitioners should proceed with caution when citing to these unpublished cases and should also verify the subsequent history of these cases.*

Permanent Disability; Apportionment; Burden of Proof. The court of appeal in *E & J Gallo Winery v. W.C.A.B. (Rubio)* (2008) 73 Cal. Comp. Cases 1206 (court of appeal unpublished opinion) has held that the employer did not meet its burden of proving that the employee's permanent disability award should have been apportioned to a prior injury, since the employer bears the burden of proving the existence of a prior permanent disability award and the extent of overlap between the prior and the current disabilities, and there was no evidence in the record that the employee had received a prior permanent disability award. [*See* Ch. 7, § 7.46[3].]

Permanent Disability; Apportionment; Substantial Evidence. The court of appeal in *Continental Casualty v. W.C.A.B. (Goodin)* (2009) 74 Cal. Comp. Cases 435 (court of appeal unpublished opinion) has held that no evidence supported the Appeals Board's finding that the employee's 100-percent disability due to respiratory problems stemming from asthma was not subject to apportionment, when the only evidence on apportionment in the record was the opinions of the physician who apportioned disability 60 percent to nonindustrial factors and 40 percent to industrial factors. [*See* Ch. 7, § 7.44[2].]

Permanent Disability; Apportionment; Substantial Evidence. The court of appeal in *Allen v. W.C.A.B.* (2008) 73 Cal. Comp. Cases 1631 (court of appeal unpublished opinion) has held that substantial evidence supported the AME's opinion that 20 percent of an employee's disability was caused by pre-existing pathology in form of arthritis and stenosis. [*See* Ch. 7, § 7.44[2].]

Permanent Disability; Apportionment; Age-Based Discrimination. The court of appeal in *Allen v. W.C.A.B.* (2008) 73 Cal. Comp. Cases 1631 (court of appeal unpublished opinion) has held that the Appeals Board's apportionment of an employee's permanent disability did not constitute age-based discrimination in violation of Government Code Section 11135(a), when the AME's opinion, on which the Board relied, was based on the employee's medical health, not on her age. [*See* Ch. 7, § 7.44[2].]

Permanent Disability; Evidence; Vocational Rehabilitation Expert. The court of appeal in *Allen v. W.C.A.B.* (2008) 73 Cal. Comp. Cases 1631 (court of appeal unpublished opinion) has held that the Appeals Board correctly rated an employee's permanent disability by using the 2005 Permanent Disability Rating Schedule,

rather than accepting the employee's vocational rehabilitation expert's opinion that the employee's permanent disability was 100 percent, since this opinion was expressed in terms of the employee's inability to compete in the open labor market, which standard was repealed by SB 899 and replaced by the requirement that the Board and the courts consider an injured employee's diminished future earning capacity. [*See* Ch. 7, § 7.05.]

Permanent Disability; Rating; Application of 1997 Schedule for Rating Permanent Disabilities. The court of appeal in *Virginia Surety Co. v. W.C.A.B. (Echelard)* (2008) 73 Cal. Comp. Cases 1218 (court of appeal unpublished opinion) has, in addition to rejecting *Vera* and following *Genlyte* and *Zenith* to hold that a pre-2005 treating physician's report need not state that the employee has reached permanent and stationary status in order to indicate the existence of permanent disability, held that the treating physician's 2007 deposition's explanation of the words of his 2004 report could be considered in determining the meaning of the 2004 report. [*See* Ch. 7, § 7.001.]

Permanent Disability; Rating; Application of 1997 Schedule for Rating Permanent Disabilities. The court of appeal in *City of Fresno v. W.C.A.B.* (Wilson) 73 Cal. Comp. Cases 1401 (court of appeal unpublished opinion) has held that a treating physician's 2004 report constituted substantial evidence of permanent disability by stating that the employee "will probably have a disability precluding heavy lifting and repetitive bending and stooping. I do not think she will be able to return to her usual job and vocational retraining should be considered." [*See* Ch. 7, § 7.001.]

Permanent Disability; Rating; Application of 1997 Schedule for Rating Permanent Disabilities. The court of appeal in *Service Rock Products v. W.C.A.B. (Marquis)* (2008) 73 Cal. Comp. Cases 1307 (court of appeal unpublished opinion) has held that the 1997 Schedule for Rating Permanent Disabilities applied when an employee received temporary disability benefits from April 2004, in September 2004 the employer discontinued paying temporary disability benefits and issued a Labor Code Sec. 4061 notice based on the employee's release to return to work, and the employee worked a few weeks until placed back on temporary disability and received additional temporary disability benefits from November 2004 through at least January 2005. [*See* Ch. 7, § 7.001.]

Permanent Disability; Applicability of 1997 Schedule for Rating Permanent Disabilities. The court of appeal in *Muraoka v. W.C.A.B.* (2009) 74 Cal. Comp. Cases 440 (court of appeal unpublished opinion) has held that consideration of the entire medical record prior to 2005 mandated a finding that substantial medical evidence supported application of 1997 Schedule for Rating Permanent Disabilities. [*See* Ch. 7, § 7.001.]

Permanent Disability; Rating; Substantial Evidence. The court of appeal in *Rivera-Sanchez v. W.C.A.B.* (2009) 74 Cal. Comp. Cases 20 (court of appeal unpublished opinion) has affirmed the WCAB's decision that, based on the range of evidence, the employee either had an unusually low pain threshold or had exaggerated his symptoms, and that the employee's injury caused 28-percent permanent disability, not a higher percentage that would have been based on the employee's subjective complaints. [*See* Ch. 7, § 7.06.]

Permanent Disability; Apportionment; *Wilkinson* Rule. The court of appeal

in *Forzetting v. W.C.A.B.* (2009) 74 Cal. Comp. Cases 689 (court of appeal unpublished opinion) has followed *Benson v. Permanente Medical Group* to hold that the rule established by *Wilkinson* is no longer generally applicable because inconsistent with the post-SB 899 requirement that apportionment be based on causation. [*See* Ch. 7, § 7.46[2].]

Presumption of Industrial Causation; Heart Trouble; Peace Officers. The court of appeal in *California Department of Corrections and Rehabilitation v. W.C.A.B. (Garza)* (2009) 74 C.C.C. 134 (court of appeal unpublished opinion), following *Department of Corrections and Rehabilitation v. W.C.A.B. (Alexander)* (2008) 166 Cal. App. 4th 911, held that Labor Code Sec. 4663(e), plus the statement of legislative intent accompanying its enactment, meant that apportionment could not be applied to the employee's injury, even though the relevant statute, Labor Code Sec. 3212.2, granting a presumption of industrial causation of heart trouble, contains no non-attribution language prohibiting apportionment to prior diseases. [*See* Ch. 10, § 10.34.]

Employment Relationships; Partnership. The court of appeal in *Ramirez v. W.C.A.B.* (2008) 73 Cal. Comp. Cases 1302 (court of appeal unpublished opinion) has held that a widow's deceased husband was not an employee at the time of the injury that resulted in his death, but was rather a working member of a partnership, so that the widow was not eligible for workers' compensation decedent benefits. [*See* Ch. 2, § 2.12[2].]

California Insurance Guarantee Association; Other Insurance; Evidence. The court of appeal in *California Insurance Guarantee Association v. W.C.A.B. (Thomas*) (2008) 73 Cal. Comp. Cases 1519 (court of appeal unpublished opinion) has held that a State Compensation Insurance Fund (SCIF) policy constituted "other insurance" under Insurance Code Section 1063.1(c)(9), making SCIF, the general employer's insurer, not the California Insurance Guarantee Association (CIGA), handling claims against the special employer's insolvent insurer, liable for the employee's cumulative trauma industrial injuries. [*See* Ch. 3, § 3.34[3].]

Medical-Legal Expenses; Costs. The court of appeal in *California Nurse Life Care Planning, Inc. v. W.C.A.B. (Escobedo)* (2008) 73 Cal. Comp. Cases 1529 (court of appeal unpublished opinion) has held that no evidence or legal support existed for the proposition that a life care plan prepared by the lien claimant for the purpose of obtaining settlement in a workers' compensation proceeding was required or necessary, so that the Appeals Board reasonably denied the lien within its discretionary powers. [*See* Ch. 17, § 17.27[2].]

Petitions to Reopen; Good Cause. The court of appeal in *Dykes v. W.C.A.B.* (2008) 73 Cal. Comp. Cases 1535 (court of appeal unpublished opinion) has held that the Appeals Board acted within its powers in reducing an employee's permanent disability award in light of the Supreme Court's decision in *Brodie v. W.C.A.B.*, when the employer timely petitioned the Board to reopen within five years from the date of injury. [*See* Ch. 14, § 14.08[1].]

Presumption of Industrial Causation; Cancer; Peace Officers. The court of appeal in *Fain v. W.C.A.B.* (2008) 73 Cal. Comp. Cases 1543 (court of appeal unpublished opinion) has held that, because there was no evidence that a police officer who developed a brain tumor was ever exposed to any known *carcinogen* on the job, and because there was no medical evidence

otherwise suggesting a causal relationship between the officer's employment and his brain tumor, the officer never met the threshold requirements of establishing the applicability of the Labor Code Sec. 3212.1 presumption. [*See* Ch. 10, § 10.33[5].]

Compromise and Release; Permanent Disability Advances. The court of appeal in *Huhtamaki Americas, Inc. v. W.C.A.B. (Madhaw)* (2008) 73 Cal. Comp. Cases 1549 (court of appeal unpublished opinion) has held that the language of a compromise and release agreement explicitly provided that the employer was entitled to credit for future permanent disability advances in the amount of $5,278 made to the employee after the date specified in the agreement. [*See* Ch. 18, § 18.01[2].]

WCAB Jurisdiction; Petitions to Reopen for Good Cause. The court of appeal in *Priest v. W.C.A.B.* (2008) 73 Cal. Comp. Cases 1556 (court of appeal unpublished opinion) has held that substantial evidence supported the Appeals Board's decision that jurisdiction to reopen the case for good cause had lapsed. [*See* Ch. 14, § 14.06[3].]

Statute of Limitations; Notice to Employees of Benefits. The court of appeal in *Pugh v. W.C.A.B.* (2008) 73 Cal. Comp. Cases 1561 (court of appeal unpublished opinion) has held that, when the employer failed to post the notice of employees' workers' compensation rights required by Labor Code Sec. 3550 and the employee was otherwise unaware of her rights, the statute of limitations governing the filing of a workers' compensation claim was tolled until the employee gained actual knowledge of her potential entitlement to benefits. [*See* Ch. 3, § 3.05[2].]

Attorney's Fees; Restitution. The court of appeal in *Sutter Memorial Hospital v. W.C.A.B. (Green & Azevedo)* (2008) 73 Cal. Comp. Cases 1569 (court of appeal unpublished opinion) has held that the Appeals Board did not exceed its powers or rule unjustly in denying an employer's request for restitution of attorney's fees previously granted by the Board and that the factual record supported the Board order, when, three and one-half years after its initial award to the employee, the Board reduced the employee's permanent disability from 100 percent to 41 percent and ordered the employee to pay the employer restitution, based on a report of the AME, who had reviewed sub rosa films taken of the employee and concluded that she "had over-represented her level of pain and disability while simultaneously underrepresenting her physical abilities and capacities." [*See* Ch. 17, § 17.01[2].]

Injury AOE/COE; Substantial Evidence. The court of appeal in *A. Teichert & Son v. W.C.A.B. (Barron)* (2008) 73 Cal. Comp. Cases 1621 (court of appeal unpublished opinion) has held that there was no substantial evidence that decedent's death arose out of his employment, when the court found that decedent died at his workplace of a ruptured cerebral aneurysm following an argument with his supervisor. [*See* Ch. 10, § 10.26.]

Injury AOE/COE. The court of appeal in *Lopez v. W.C.A.B.* (2008) 73 Cal. Comp. Cases 1673 (court of appeal unpublished opinion) has held that substantial evidence supported the Appeals Board's decision that the employee did not sustain a specific industrial injury to his right knee, when the court found that no presumption of industrial injury applied because the employer timely denied the employee's claim. [*See* Ch. 10, § 10.01[2].]

Injury AOE/COE. The court of appeal in *Costco Wholesale v. W.C.A.B. (Slayton)* (2009) 74 Cal. Comp. Cases 319 (court of appeal unpublished opinion) has held that

an employee, who worked in her employer's deli and bakery departments, sustained an injury AOE/COE to her right knee when she slipped and fell while retrieving a cake for her sister from the bakery department. [*See* Ch. 10, § 10.20[2].]

Injury AOE/COE; Aggravation of Preexisting Condition; Substantial Evidence. The court of appeal in *Grimaldo v. W.C.A.B.* (2009) 74 Cal. Comp. Cases 324 (court of appeal unpublished opinion) has held that the Appeals Board did not rely on substantial medical evidence to support its finding that an employee's diabetes was not lit up or aggravated by an industrial injury. [*See* Ch. 7, § 7.45[2].]

Vocational Rehabilitation; Vocational Rehabilitation Maintenance Allowance. The court of appeal in *Galvao v. W.C.A.B.* (2008) 73 Cal. Comp. Cases 1639 (court of appeal unpublished opinion) has held that a vocational rehabilitation maintenance allowance is not a wage replacement benefit such as temporary disability or vocational rehabilitation temporary disability, and that, therefore, no credit is allowed against vocational rehabilitation maintenance allowance payments for wages earned during the same period when the employee was receiving such payments. [*See* Ch. 21, § 21.04[3].]

New and Further Disability; Petitions to Reopen; Statute of Limitations. The court of appeal in *City of Los Angeles v. W.C.A.B. (Johnson)* (2009) 74 Cal. Comp. Cases 1 (court of appeal unpublished opinion) has held that an employee's petition to reopen for new and further disability filed more than five years after the date of injury was not barred by Labor Code Sec. 5410, because the five-year limitations period set forth in that statute is not jurisdictional but is an affirmative defense that is waived if not raised at trial. [*See* Ch. 14, §§ 14.04, 14.16.]

New and Further Disability; Permanent Disability; Apportionment. The court of appeal in *City of Los Angeles v. W.C.A.B. (Johnson)* (2009) 74 Cal. Comp. Cases 1 (court of appeal unpublished opinion) has held that an employer should be afforded an opportunity to demonstrate whether the AME could provide substantial evidence of increased knee disability caused by degenerative disease of the knees after a 2001 joint findings and award. [*See* Ch. 7, § 7.44[1].]

Stipulated Awards; Medical Treatment; Substantial Evidence. The court of appeal in *Criswell v. W.C.A.B.* (2009) 74 Cal. Comp. Cases 144 (court of appeal unpublished opinion) has held that the employee failed to meet her burden of proving industrial causation of her left ankle injury with reasonable probability, and that, accordingly, the Appeals Board's decision not to issue an order to perform surgery on her left ankle was supported by substantial evidence. [*See* Ch. 4, § 4.023[1].]

Judicial Review; Discrimination; Labor Code Section 132a. The court of appeal in *Cantrell v. W.C.A.B.* (2009) 74 Cal. Comp. Cases 819 (court of appeal unpublished opinion) has held that it was unable to conduct an adequate review of the Appeals Board's decision as to whether an employer had discriminated against an employee in violation of Labor Code Sec. 132a, when the Appeals Board on reconsideration made no finding as to whether the employer's policy of requiring employees to submit to drug testing if involved in an accident or injury at work discriminated against the employee for sustaining an industrial injury. [*See* Ch. 11, § 11.27[6]; Ch. 20, § 20.06[1].]

Medical Treatment; Utilization Review; Objections to Medical Determina-

tion. The court of appeal in *State Compensation Insurance Fund v. W.C.A.B. (Sandhagen); Sandhagen v. W.C.A.B.* (2009) 74 Cal. Comp. Cases 835 (court of appeal unpublished opinion) has held that the utilization review process pursuant to Labor Code Sec. 4610 is required for every medical treatment request, that the employer's failure to comply with the deadlines set forth in Labor Code Sec. 4610(g)(1) precluded it from using the utilization review process or utilization review medical reports to deny the employee's medical treatment request, and that Labor Code Sec. 4062 precludes employers from using its provisions to object to employees' treatment requests but permits employees to use its provisions to object to employers' decisions regarding treatment requests. [*See* Ch. 4, § 4.26[3][c][iii].]

Petitions for Writ of Review; Final Orders. The court of appeal in *State Compensation Insurance Fund v. W.C.A.B. (Sandhagen); Sandhagen v. W.C.A.B.* (2009) 74 Cal. Comp. Cases 835 (court of appeal unpublished opinion) has held that the Appeals Board's en banc decision, holding that the employer's failure to comply with the deadlines set forth in Labor Code Sec. 4610(g)(1) precluded it from using the utilization review process and rendered untimely utilization review medical reports inadmissible, was a final order for purposes of appellate review because it settled an issue critical to the employee's claim. [*See* Ch. 20, § 20.01[2].]

CAUTION: *The following entries are "writ denied" cases. Practitioners should proceed with caution when citing to these cases and should also verify the subsequent history of these cases.*

Permanent Disability; Application of 1997 Schedule for Rating Permanent Disabilities. The Appeals Board in *City of Daly City v. W.C.A.B. (Baldwin)* (2008) 73 Cal. Comp. Cases 1078 (writ denied) has held that Labor Code Sec. 4850 salary continuation benefits were the equivalent of temporary disability indemnity for the purpose of Labor Code Sec. 4061 notice requirements, so that the employer was required to give the employee notice regarding permanent disability benefits when it stopped paying Labor Code Sec. 4850 benefits in 2004, thereby triggering, pursuant to Labor Code Sec. 4660(d), use of the 1997 Schedule for Rating Permanent Disabilities. [*See* Ch. 7, § 7.001.]

Permanent Disability; AMA *Guides*; Rebuttal Evidence. The Appeals Board in *Rosendin Electric, Inc. v. W.C.A.B. (Bojorquez)* (2008) 73 Cal. Comp. Cases 1123 (writ denied) has rescinded the WCJ's award of 27-percent permanent disability that was based on the testimony of two vocational experts regarding the employee's diminished future earning capacity, which the WCJ had found sufficient to rebut a 13-percent rating obtained under the 2005 Permanent Disability Rating Schedule and the AMA *Guides*. [*See* Ch. 7, § 7.001.]

Permanent Disability; Application of 2005 Permanent Disability Rating Schedule. The Appeals Board in *Kramer v. W.C.A.B.* (2008) 73 Cal. Comp. Cases 1457 (writ denied) has held that a WCJ's finding based solely on MRI scans indicating that an employee's injury resulted in whole person impairment under the AMA Guides, without a medical opinion, were not a sufficient basis to find an indication of permanent disability under Labor Code Sec. 4660(d). [*See* Ch. 7, § 7.001.]

Permanent Disability; Rating; Application of 2005 Permanent Disability Rating Schedule. The Appeals Board in *Ponce v. W.C.A.B.* (2008) 73 Cal. Comp. Cases

1470 (writ denied), following *Boughner v. Comp. USA*, has held that an employee's permanent disability was properly rated under the 2005 Schedule, when it found that the employee failed to rebut the presumptive validity of that schedule. [*See* Ch. 7, § 7.001.]

Permanent Disability; Apportionment; Substantial Evidence. The Appeals Board in *Pascale v. W.C.A.B.* (2008) 73 Cal. Comp. Cases 1368 (writ denied) has held that the opinions of AMEs in rheumatology and psychiatry constituted substantial evidence to support a finding that 20 percent of the employee's permanent total disability, stemming from various cumulative orthopedic injuries, psychiatric injury, and fibromyalgia, was apportionable under Labor Code Sec. 4663 to pre-existing histrionic and hypochondriacal personality traits described by the psychiatric AME. [*See* Ch. 7, § 7.44[2].]

Permanent Disability; Apportionment. The Appeals Board in *Gunter v. W.C.A.B.* (2008) 73 Cal. Comp. Cases 1699 (writ denied) has held that there was an adequate basis to apportion permanent disability stemming from an employee's bilateral knee injury to non-industrial factors, since the employee had undergone bilateral knee replacement surgery, when the medical evidence established that the combination of industrial and non-industrial factors, including the pathology removed by the surgery, caused the employee's need for the surgery and the resultant permanent disability, thereby requiring apportionment of his disability. [*See* Ch. 7, § 7.44[2].]

Permanent Disability; Apportionment; Substantial Evidence. The Appeals Board in *Malcolm v. W.C.A.B.* (2008) 73 Cal. Comp. Cases 1710 (writ denied) has held that the AME's opinion constituted substantial evidence under *Escobedo* and Labor Code Sec. 4663, to support a 25-percent apportionment of an employee's permanent disability following an industrial shoulder and hip injury to pre-existing osteonecrosis in her shoulder and hip, when the Board found that the employee's hip replacement surgery did not preclude apportionment, since the need for hip replacement was caused by non-industrial osteonecrosis. [*See* Ch. 7, § 7.44[2].]

Permanent Disability; Apportionment. The Appeals Board in *Williams v. W.C.A.B.* (2008) 74 Cal. Comp. Cases 88 (writ denied) has held that an AME's opinion constituted substantial evidence that 50 percent of an employee's new and further permanent disability was apportionable to pre-existing arthritis under Labor Code Sec. 4663, notwithstanding the fact that the pre-existing arthritis was removed by the employee's total knee replacement surgery, when the AME properly apportioned disability based on causation, as required by Labor Code Sec. 4663, and removal of the pre-existing arthritis by the knee replacement did not preclude apportionment because the need for the knee replacement was caused by the arthritis. [*See* Ch. 7, § 7.44[2].]

Permanent Disability; Apportionment. The Appeals Board in *Lewis Tile Co. v. W.C.A.B. (McCalip)* (2008) 74 Cal. Comp. Cases 53 (writ denied) has relied on the opinion of the employee's evaluating neuropsychologist, and rejected the opinion of the defense psychiatrist, to find that the employee's industrial head injury resulted in 100-percent permanent disability, without any basis for apportionment to the employee's use of marijuana. [*See* Ch. 7, § 7.44[2].]

Permanent Disability; Apportionment. The Appeals Board in *Jennings-Pawlik v. W.C.A.B.* (2009) 74 Cal. Comp. Cases 543

(writ denied) has held that the AME's opinion constituted substantial evidence under the standards set forth in *Escobedo v. Marshalls* and *E. L. Yeager Construction v. W.C.A.B. (Gatten)* to support 40-percent apportionment of the employee's permanent disability to pre-existing factors, when the AME properly apportioned to causation, based on accepted diagnostic tools and his medical expertise. [*See* Ch. 7, § 7.001.]

Permanent Disability; Presumption of Industrial Causation; Apportionment. The Appeals Board in *Nooner v. W.C.A.B.* (2009) 74 Cal. Comp. Cases 300 (writ denied) has held that the anti-attribution clause in Labor Code Sec. 4663(e), with respect to Labor Code Sec. 3212.1, did not preclude apportionment of an employee/fire captain's psychiatric injury. [*See* Ch. 10, § 10.33[5].]

California Insurance Guarantee Association; Covered Claims; Other Insurance. The Appeals Board in *Fireman's Fund Insurance Co. v. W.C.A.B. (Giles)* (2008) 73 Cal. Comp. Cases 1084 (writ denied) has held that the court of appeal's decision in *General Casualty Insurance v. W.C.A.B. (Miceli)* did not collaterally estop CIGA from contending that a special employer's insurance constituted "other insurance," under Insurance Code Sec. 1063.1(c)(9), available to an injured employee. [*See* Ch. 3, § 3.34[3].]

California Insurance Guarantee Association; Covered Claims; State Entities. The Appeals Board in *California Insurance Guarantee Association v. W.C.A.B. (Carter)* (2009) 74 Cal. Comp. Cases 510 (writ denied) has held that CIGA was obligated to pay a lien claimant, UC Davis Medical Center, for medical treatment rendered to an employee with an industrial hand injury, pursuant to a "hold harmless" provision in a compromise and release under which CIGA agreed to hold the employee harmless from UC Davis Medical Center bills and to provide medical coverage for the employee's injury for two years following the date of the agreement. [*See* Ch. 3, § 3.34[3].]

California Insurance Guarantee Association; Other Insurance; Contribution and Reimbursement. The Appeals Board in *Swift Transportation v. W.C.A.B. (Kvenbo)* (2008) 73 Cal. Comp. Cases 1482 (writ denied) has held that CIGA was entitled to reimbursement from a solvent carrier for benefits paid to an employee with cumulative injuries and was not barred by the statute of limitations in Labor Code Sec. 5500.5(e) from seeking contribution or reimbursement, even though the claim was made more than one year after approval of a compromise and release agreement under which the solvent carrier agreed to pay settlement funds and which notified the solvent carrier of benefits previously paid by CIGA. [*See* Ch. 3, § 3.34[3].]

California Insurance Guarantee Association; Claims for Credit. The Appeals Board in *California Insurance Guarantee Association v. W.C.A.B. (Labua)* (2009) 74 Cal. Comp. Cases 292 (writ denied) has held that CIGA was not entitled to credit for state disability benefits paid to an injured employee by EDD against benefits owed to the employee pursuant to an award of temporary disability stemming from lumbar spine injuries. [*See* Ch. 3, § 3.34[3].]

Compromise and Release; Approval After Applicant's Death; Medicare Set-Aside. The Appeals Board in *Insurance Company of the State of Pennsylvania v. W.C.A.B. (Rodriguez)* (2008) 73 Cal. Comp. Cases 1089 (writ denied) has held that a compromise and release resolving an employee's claims for right knee and

psyche injuries that was executed by all parties but approved after the employee's death was enforceable notwithstanding the fact that the Center for Medicare and Medicaid Services had not approved the Medicare set-aside amount contained in the compromise and release prior to its approval. [*See* Ch. 18, § 18.10[4].]

Compromise and Release. The Appeals Board in *Bejarano v. W.C.A.B.* (2008) 73 Cal. Comp. Cases 1244 (writ denied) has held that there was no final agreement and no properly executed compromise and release agreement when the agreement was signed by the employee, her attorney, and one of the three involved insurers, after which one of the other insurers unilaterally attempted to modify the agreement by adding an addendum, which the employee never agreed to before dying. [*See* Ch. 18, § 18.01[1].]

Compromise and Release; Execution. The Appeals Board in *Lizarraga v. W.C.A.B.* (2008) 73 Cal. Comp. Cases 1463 (writ denied) has held that a compromise and release was not binding on the employer even though the employee executed and returned the agreement prior to his death, when the Board found that the agreement had not been concluded before the employee's death because a Medicare set-aside was not completed and the employer did not sign the agreement. [*See* Ch. 18, § 18.01[2].]

Compromise and Release; Cumulative Injuries. The Appeals Board in *St. Louis Cardinals Baseball Club v. W.C.A.B. (Guerrero)* (2008) 74 Cal. Comp. Cases 77 (writ denied) has held that Labor Code Sec. 5005 did not apply to reduce the liability of the St. Louis Cardinals baseball club for cumulative injuries suffered by an employee/player from 1973 to 1992, even though the employee had settled his claim against another team for which he had played by way of compromise and release. [*See* Ch. 18, § 18.23.]

Petitions to Reopen; New and Further Temporary Disability; Five-Year Statute of Limitations. The Appeals Board in *Kelly Staff Leasing, Inc. v. W.C.A.B. (Druebert)* (2008) 73 Cal. Comp. Cases 1097 (writ denied) has held that it had jurisdiction, more than five years after an employee's injury, to award retroactive temporary disability, when the employee's need for surgery arose within five years of her date of injury, her treating physicians recommended surgery within the five-year period, and the employee's petition to reopen for new and further temporary disability was filed within five years of her date of injury. [*See* Ch. 14, § 14.06[3].]

Serious and Willful Misconduct by Employer. The Appeals Board in *Little Caesar Enterprises v. W.C.A.B. (Saldana)* (2008) 73 Cal. Comp. Cases 1102 (writ denied) has held that the employee met her burden of proving that the employer's serious and willful misconduct resulted in the employee's injury, when the Board found that the employee was injured while plugging or unplugging a machine into or from an electrical outlet, causing an electrical shock to her right upper extremity. [*See* Ch. 11, § 11.14[2].]

Serious and Willful Misconduct by Employer. The Appeals Board in *Dunagan Construction Co. v. W.C.A.B. (Gautreaux)* (2009) 74 Cal. Comp. Cases 370 (writ denied) has held that an employer engaged in serious and willful misconduct under Labor Code Secs. 4553 and 4553.1, when an employee iron worker sustained an industrial injury from a 21-foot fall from an I-beam, resulting in permanent total disability. [*See* Ch. 11, § 11.18[1].]

Psychiatric Injuries; Actual Events of

Employment. The Appeals Board in *Merced City School District v. W.C.A.B. (Delgado)* (2008) 73 Cal. Comp. Cases 1115 (writ denied) has held that a teacher who alleged that she sustained psychiatric injury, resulting from her participation in school fund-raising activities, a subsequent grand jury investigation of those activities, press coverage of the grand jury investigation, and a defamatory e-mail sent to all school district employees by another teacher, met her burden under Labor Code Sec. 3208.3(b)(1) of demonstrating by a preponderance of the evidence that actual events of employment were predominant as to all causes of her psychiatric injuries. [*See* Ch. 10, § 10.24[3].]

WCAB Powers; Exclusive Jurisdiction Over Workers' Compensation Claims. The Appeals Board in *Venegas v. W.C.A.B.* (2008) 73 Cal. Comp. Cases 1126 (writ denied) has ordered a WCJ to strike the phrase "Division of Workers' Compensation" from the title/heading of his decision and to substitute the phrase "Workers' Compensation Appeals Board." [*See* Ch. 1, § 1.07[2].]

Evidence; Newly Discovered Evidence. The Appeals Board in *Scott v. W.C.A.B.* (2008) 73 Cal. Comp. Cases 1261 (writ denied) has ordered admission of surveillance videos, when the employer requested reopening of the record after trial but before submission of the matter, based on newly discovered evidence in the form of the videos, with the Board noting that the employer made substantial efforts to obtain a surveillance video of the employee before the mandatory settlement conference and trial, in the form of at least four attempts, but that the employee could not be seen at her residence on those occasions. [*See* Ch. 14, § 14.08[4].]

Employment Relationships; Employees. The Appeals Board in *Tri-Counties Regional Center v. W.C.A.B. (Hope)* (2008) 73 Cal. Comp. Cases 1266 (writ denied) has held that a physician was an employee at the time of her injury, despite the contract between the physician and her employer, which stated that the physician was an independent contractor. [*See* Ch. 2, § 2.26[1].]

Return to Work; Offers of Work; Notices. The Appeals Board in *City of Los Angeles v. W.C.A.B. (Nguyen)* (2008) 73 Cal. Comp. Cases 1348 (writ denied) has held that, when an employer sent a notice offering an injured employee *regular* work (form DWC-AD 10003), but should have sent a notice offering *modified* work (form DWC-AD 10133.53), sending the incorrect form was not substantial compliance with the statute, so that the employer was ordered to pay a 15-percent increase in permanent disability payments pursuant to Labor Code Sec. 4658(d)(2). [*See* Ch. 6, § 6.24[6].]

Reconsideration on WCAB's Own Motion. The Appeals Board in *K-Mart v. W.C.A.B. (Chism)* (2008) 73 Cal. Comp. Cases 1362 (writ denied) has held that it had jurisdiction on February 25, 2008, to grant reconsideration on its own motion of the WCJ's January 31, 2008, order vacating a December 26, 2007, order approving compromise and release, even though the employee's January 18, 2008, petition for reconsideration/petition to set aside compromise and release was untimely filed. [*See* Ch. 19, § 19.04.]

Attorney's Fees; Commutation of Award. The Appeals Board in *Wilton Fire Protection District v. W.C.A.B. (Schneider)* (2008) 73 Cal. Comp. Cases 1380 (writ denied) has held that a 15-percent attorney's fee awarded to the attorney for an employee with 100-percent permanent dis-

ability was properly commuted equally from each of the employee's lifetime indemnity payments based on the published DEU life expectancy tables, not on the employee's actual life expectancy. [*See* Ch. 17, § 17.17[1].]

Attorney's Fees; Application Filed by Employer; Unrepresented Applicants. The Appeals Board in *Bimbo Bakeries USA v. W.C.A.B. (Shriver)* (2009) 74 Cal. Comp. Cases 766 (writ denied) has held that an employer who filed an application for adjudication of claim in connection with an employee's cumulative injury, allegedly for discovery purposes, was liable, pursuant to Labor Code Sec. 4064(c), for $10,211 in attorney's fees incurred by the employee after the application was filed, including fees incurred through the filing of a stipulated award. [*See* Ch. 15, § 15.04[3][a].]

Sanctions. The Appeals Board in *Blake v. W.C.A.B. (Gonzalez)* (2008) 73 Cal. Comp. Cases 1439 (writ denied) has upheld a WCJ's award of attorney's fees in the amount of $2,800 to the employer's counsel and imposition of $2,500 in sanctions on an unrepresented lien claimant/physician pursuant to Labor Code Sec. 5813 and 8 Cal. Code Reg. § 10561 for the lien claimant's multiple failures to appear. [*See* Ch. 16, § 16.35[2].]

Discrimination; Labor Code Section 132a; **Business Necessity.** The Appeals Board in *Pomona Unified School District v. W.C.A.B. (Munoz)* (2008) 73 Cal. Comp. Cases 1598 (writ denied) has held that an employer terminated an employee/teacher in violation of Labor Code Sec. 132, when the employee made a prima facie case that the employer violated Labor Code Sec. 132a by discharging her due to her industrial injuries, and the employer failed to carry its burden of proving that any work restriction prevented the employee from safely performing her job, which failure prevented the employer from showing business necessity. [*See* Ch. 11, § 11.27[7].]

Third-Party Actions; Credit; Employer Negligence. The Appeals Board in *Moya v. W.C.A.B.* (2008) 73 Cal. Comp. Cases 1717 (writ denied) has awarded an employer a $20,000 credit under Labor Code Sec. 3861 against workers' compensation benefits owed to an employee for injuries sustained in an industrially-related automobile accident, when the Board found that the employee's net recovery for the purpose of awarding a credit was $20,000, despite the fact that the net sum came from different sources, including sources other than the third-party defendant. [*See* Ch. 12, § 12.08[4].]

Medical Provider Networks; Notice Requirements. The Appeals Board in *Barrett Business Services, Inc. v. W.C.A.B. (Desiderio)* (2008) 74 Cal. Comp. Cases 49 (writ denied) has noted that, even though an employer provided a complete list of MPN doctors on its website, an employee was entitled to a written list of MPN doctors within the employee's geographic area. [*See* Ch. 4, § 4.18[8][c].]

Medical Provider Networks; Notice Requirements. The Appeals Board in *Santa Ana Unified School District v. W.C.A.B. (Johnson)* (2008) 74 Cal. Comp. Cases 68 (writ denied) has held that an employer was liable for self-procured medical treatment obtained by an injured employee through a treating physician outside the employer's MPN, when the employer failed to give the employee proper notice regarding its MPN at the time of her injury. [*See* Ch. 4, § 4.18[8][c].]

Medical Provider Networks; Notice Requirements. The Appeals Board in *Barrett Business Services, Inc. v. W.C.A.B.*

(Desiderio) (2008) 74 Cal. Comp. Cases 49 (writ denied) has held that an injured employee properly designated a treating physician outside his employer's MPN when the employer did not comply with the notice requirements addressing transfer of the employee's ongoing care, once liability for the employee's claim was accepted. [*See* Ch. 4, § 4.18[8][c].]

Liens; Medical Treatment; Reporting Requirements. The Appeals Board in *Optima Health Institute v. W.C.A.B. (Shang Won Ym)* (2008) 74 Cal. Comp. Cases 64 (writ denied) has held that the lien claimant did not comply with the reporting requirements of Labor Code Sec. 4061.5 and 8 Cal. Code Reg. § 9785(e)(3), (4), when it found that the lien claimant provided treatment as a secondary treating physician on referral from the employee's primary treating physician, that the primary treating physician did not mention referral or review or incorporate or adopt the secondary treating physician's reports, and that there were no reports from the lien claimant in evidence. [*See* Ch. 4, § 4.18[2]; Ch. 17, § 17.22[1].]

Injury AOE/COE; Sleep Deprivation; Substantial Evidence. The Appeals Board in *Barrett Business Services, Inc. v. W.C.A.B. (Bereta)* (2009) 74 Cal. Comp. Cases 287 (writ denied) has held that the AME's opinion that the decedent's employment-related chronic sleep deprivation contributed to the acceleration and development of coronary artery disease and his death from cardiac arrest, constituted substantial evidence to support a finding that the decedent's death arose out of and in the course of employment for purposes of the widow's death benefit claim. [*See* Ch. 9, § 9.04[2].]

Insurance Coverage; Officers and Directors. The Appeals Board in *Pic-A-Bagel, Inc. v. W.C.A.B. (Hercz)* (2009) 74 Cal. Comp. Cases 307 (writ denied) has held that an employee, a bagel dough maker, who had been properly elected as "Senior Vice President of Dough Making," was improperly excluded from workers' compensation coverage under the employer's workers' compensation policy on the basis that he was a corporate "officer." [*See* Ch. 2, § 2.14.]

Insurance Coverage; Residential Employees. The Appeals Board in *Wilson v. W.C.A.B. (Levine)* (2009) 74 Cal. Comp. Cases 891 (writ denied) has held that a worker injured while performing carpentry work in a house owned by another was not an "employee" under Labor Code Sec. 3351(d) for purposes of workers' compensation coverage pursuant to Insurance Code Sec. 11590, when the house was undergoing major renovations, leaving it without electricity, plumbing, bathroom facilities, heat, and air conditioning. [*See* Ch. 2, § 2.16[4].]

Insurance Fraud. The Appeals Board in *Blick v. W.C.A.B.* (2009) 74 Cal. Comp. Cases 491 (writ denied) has held that an employee could pursue claims for permanent disability and vocational rehabilitation benefits stemming from her 1994 and 1996 right knee injuries that accrued through March 6, 2001, but that her claims for benefits accruing on or after March 7, 2001, the last date of sub rosa footage taken of her and the date of her last medical appointment with her treating physician, were barred by her civil fraud, notwithstanding that she was ultimately acquitted of criminal fraud under Penal Code Sec. 550. [*See* Ch. 11, § 11.30[2].]

Insurance Fraud; Restitution. The Appeals Board in *Blick v. W.C.A.B.* (2009) 74 Cal. Comp. Cases 491 (writ denied) has held that the employer was entitled to

restitution for the portion of the employee's benefits related to her 1996 knee injury that accrued on or after March 7, 2001, based on a finding that the employee engaged in civil fraud to obtain benefits as of that date, even though the employee's benefits continued to accrue from the time of the original award in November 2000 until the benefits were reduced under an August 2004 award. [*See* Ch. 11, § 11.30[3].]

Statute of Limitations; Employer's Failure to Notify Applicant of Right to Benefits. The Appeals Board in *Pic-A-Bagel, Inc. v. W.C.A.B. (Hercz)* (2009) 74 Cal. Comp. Cases 307 (writ denied) has held that an employee, a bagel dough maker, was not barred by the Labor Code Sec. 5405 statute of limitations from recovering workers' compensation benefits, although his Application for Adjudication of Claim was filed two years after his injury, since the employer's unilateral determination that the employee was excluded from coverage under its workers' compensation policy on the basis that he was an "officer" of the corporation did not excuse it from its obligation to provide him with the requisite notice. [*See* Ch. 14, § 14.15[1].]

Statute of Limitations; Tolling. The Appeals Board in *Stephens v. W.C.A.B.* (2009) 74 Cal. Comp. Cases 885 (writ denied) has held that the Labor Code Sec. 5405(c) one-year statute of limitations barred an employee's attempt to receive further medical treatment for his 1998 hernia injury pursuant to his 2004 Application for Adjudication of Claim, since there was insufficient evidence to show that the employer had paid for medical treatment related to the employee's hernia injury within one year preceding the filing of the Application. [*See* Ch. 14, § 14.03[2].]

Statute of Limitations; Tolling. The Appeals Board in *Stephens v. W.C.A.B.* (2009) 74 Cal. Comp. Cases 885 (writ denied) has held that the statute of limitations for the filing of an application for adjudication of claim was not tolled, since the employee received all legally required notices from his employer after his hernia injury, and the employer was not required to notify the employee that his hernia claim would be barred if he did not file an application or to provide any notices to the employee beyond those required by law. [*See* Ch. 14, § 14.01[5].]

Average Weekly Earnings; Board and Lodging. The Appeals Board in *Burke v. W.C.A.B.* (2009) 74 Cal. Comp. Cases 359 (writ denied) has held that reimbursed expenses for lodging, gas, and food should be included when calculating an employee's earnings only when these expenses are part of the employee's remuneration but not when they are "special expenses." [*See* Ch. 5, § 5.05[1].]

Penalties; Delay in Payment of Compensation. The Appeals Board in *Los Angeles Department of Water & Power v. W.C.A.B. (Manriquez)* (2009) 74 Cal. Comp. Cases 374 (writ denied) has held that an employer was liable for Labor Code Secs. 4650 and 5814 penalties to an employee, as well as Labor Code Sec. 5814.5 attorney's fees, for failure to pay monies due under a Stipulated Award. [*See* Ch. 11, § 11.11[3].]

Temporary Disability; Two-Year Limitation on Temporary Disability Indemnity. The Appeals Board in *Morris v. W.C.A.B.* (2009) 74 Cal. Comp. Cases 794 (writ denied) has held that an employer's January 2006 payment of temporary disability indemnity to an injured employee for one day of total temporary disability in December 2005 precluded the employee, by virtue of Labor Code Sec. 4656(c)(1), from collecting further temporary disability

indemnity benefits for a claim of post-surgery temporary total disability arising more than two years after that payment. [*See* Ch. 6, § 6.12.]

Temporary Disability; Two-Year Limitation on Temporary Disability Indemnity; Amputation Exceptions. The Appeals Board in *Murray v. W.C.A.B.* (2009) 74 Cal. Comp. Cases 379 (writ denied) has held that partial removal of the medial malleolus is not "amputation" within the meaning of Labor Code Sec. 4656(c)(3) because it does not entail "removal of a limb, part of a limb, or other body appendage." [*See* Ch. 6, § 6.12.]

Temporary Disability; 104-Week Limitation; Exceptions. The Appeals Board in *POM6 XYZZX v. W.C.A.B.* (2009) 74 Cal. Comp. Cases 663 (writ denied) has held that the Labor Code Sec 4656(c)(3)(E), human immunodeficiency virus (HIV), exception did not apply to extend the 104-week limitation on an employee's entitlement to temporary disability indemnity for a low back and left shoulder injury, when the employee did not show that his HIV condition was an industrial injury. [*See* Ch. 6, § 6.12.]

Temporary Disability; 104-Week Limitation; Exceptions. The Appeals Board in *AA Gonzalez, Inc. v. W.C.A.B. (Morfin)* (2009) 74 Cal. Comp. Cases 760 (writ denied) has held that an employee, who suffered an industrial injury when a hose pumping stucco exploded with great force into his eyes, sustained a "high velocity eye injury" and was entitled to 240 compensable weeks of temporary disability within five years from the date of his injury pursuant to the high velocity eye injury exception to the 104-week limit on temporary disability indemnity. [*See* Ch. 6, § 6.12.]

Credit; Third-Party Recovery; Death Benefits. The Appeals Board in *Colusa Trailer v. W.C.A.B. (Hickey)* (2009) 74 Cal. Comp. Cases 641 (writ denied) has held that, when an injured worker received a third-party settlement and subsequently died as the result of his industrial injury, a credit for the third-party recovery was not allowed against workers' compensation death benefits. [*See* Ch. 12, § 12.08[3].]

Evidence; Expert Opinions. The Appeals Board in *Bresler v. W.C.A.B.* (2009) 74 Cal. Comp. Cases 637 (writ denied) has held that it was appropriate for the WCJ to rely on the testimony of a claims adjuster, testifying as an expert witness for the employer, to determine the correct coding for a lien claimant's treatment charges. [*See* Ch. 16, § 16.48[3].]

Death Benefits; Time to File Claims. The Appeals Board in *Leverton v. W.C.A.B.* (2009) 74 Cal. Comp. Cases 874 (writ denied) has held that the phrase "date of injury" as used in Labor Code Sec. 5406 refers to the decedent's date of injury for purposes of commencing the 240-week period for filing a claim, rather than to the date of injury that dependents suffered by virtue of loss of support, and that the 240-week period is not a statute of limitations subject to being tolled until the surviving dependent discovers that death was industrially related. [*See* Ch. 9, § 9.21.]

* * * * *

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