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Workers' Comp Bingo 2019

Presentation For

PARMA

Public Agency Risk Management Association
45TH Conference & Expo

Tuesday, February 12, 2019
Disneyland Hotel, Anaheim CA

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(Warning: Facts will vary outcomes, seek legal advise for your specific issue or dispute)

Discovery & Procedure, Attorney Fees, Liens

Stay on Lien of Criminally Charged Medical Practice Not Lifted for Payment of Criminal Defense Attorney Fees - Dr. Shady, was criminally charged for alleged illegal misconduct. This resulted in his practice, Shady Physicians, LLC, being automatically stayed pursuant to LC 4615. All liens from his practice were flagged, even those pertaining to services from other providers within the practice, and liens that were unrelated to the alleged illegal conduct. Dr. Shady was running out of money to pay for his criminal defense attorney, so he filed a petition to lift the LC 4615 stay, alleging his Sixth Amendment right to counsel was violated by his not being allowed to pursue collection on his liens. Does Dr. Shady's right to counsel "trump" the stay statute?
Answer: (B) No, Dr. Shady cannot get the stay on his liens lifted. Although the Supreme Court has held that the Government's pretrial restraint of legitimate, untainted assets needed to pay for assistance of counsel violates a charged party's Sixth Amendment rights, liens in workers' compensation cases are not vested until they are reduced to a final judgment. *Barri v. WCAB,* 28 Cal. App. 5th 428 (2018).

Amended Claims to add Body Part Are Not Subject to 90-DayPresumption Provisions of LC 5402(b) - LA Dodgers pitcher Clayton Chestnut was involved in an on-field brawl, and terminated for cause due to his actions. He filed an application for orthopedic injuries from the brawl, and 9 months later filed an amended application, adding psyche. There was disputed evidence as to whether Defendant denied the original orthopedic injuries within 90 days. The psyche application was never denied. Will Chestnut's argument that the psyche injury be presumed compensable under LC 5402(b) for failure to deny within 90 days prevail?
Answer: (B) Regardless of whether the amended psyche claim was timely denied within 90 days, *and* regardless of whether the original orthopedic injury was accepted, denied, or not acted upon within 90 days, the amended psyche claim should not be presumed compensable pursuant to LC5402(b), as an amended claim to add a new body part does not trigger a new 90-day period to reject a claim. *Val v. Southern California Edison*, (2017), 83 CCC 584

Injury AOE/COE, Presumptions

Cancer Presumption Does Not Control Allocation of Responsibility - Smokey the Bear worked as a firefighter for the City of San Francisco from 1973 to 2001 and for Forrest International Research Explorers ("FIRE") from 2002 to 2007. He was exposed to known carcinogens at both employers. Smokey developed cancer and filed a workers' compensation claim against FIRE invoking the presumption of section 3212.1. FIRE denied liability and joined the City, who settled the case and sought contribution from FIRE. The medical evidence showed that the last hazardous exposure occurred in 1996, and therefore the cancer was not causally linked to the employment with FIRE. The City argued that FIRE owes contribution because it did not rebut the cancer presumption of LC §3212.1, are they right?
Answer: (A) Because the Lab. Code § 3212.1 presumption that the applicant's cancer arose out of employment as a firefighter does not govern the allocation of responsibility, the subsequent employer does not have to rebut the presumption. The weight of the evidence established that the was no hazardous employment for the last 10 years of the firefighter's employment, and thus City gets no contribution from FIRE. *City of South San Francisco v. Workers' Comp. Appeals Bd.* (2018) 83 Cal. Comp. Cases 451

Worker is an Employee if under the control of the Employer - After a long career of fighting supernatural criminals, Iron Man decided to retreat to his mansion to focus on his next project. Iron Man then learned

of the evil plan of Thanos to destroy the world, and signed an agreement with The Avengers to save the world according to the "Avengers Code" in exchange for $1 million per hour based on a 40 hour work week. He ended up working 41 hours per week rather than 40 hours per week. There was a week during that year where Iron Man decided to build an enormous tree house for Groot. Iron Man sued the Avengers for the overtime since he believed he was entitled to overtime pay for the extra hour he worked each week. The Avengers argued that Iron Man was an independent contractor to whom overtime did not apply. Are they right?

Answer: (A) Iron Man is an employee and can collect the overtime pay because he was under the direction and control of The Avengers and the "Avengers Code". The California Supreme Court held that a worker is considered an independent contractor only if the worker is free from control and direction of the hirer, the worker performs work that is outside the usual course of the hirer's business, and the worker is customarily engaged in the type of work performed for the hiring entity. *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal. 5th 903

Worker is an Independent Contractor if he Uses His Own Tools and Maintains Contractor's License - CostInc, a warehouse-style supermarket, hired Tom Toolman, a freelance handyman, to construct a walk-in refrigeration space within its warehouse. They agreed Tom would do the work only during CostInc's business hours, and he would wear a CostInc uniform. Tom wore a hat with his personal business logo, maintained a contractors license, and supplied his own tools and transportation. Tom Toolman hurt his back during construction and filed a workers' compensation claim against CostInc. The claim was denied on CostInc's contention that Tom was an independent contractor. Who prevails?

Answer: (B) Tom Toolman is an independent contractor based on several factors that are considered, as outlined in the seminal case for determining employee vs independent contractor of *S.G. Borello & Sons, Inc. v. DIR (Borello)* 54 CCC 80, 85, including that Tom had a distinct business, used his own tools, and CostInc was not in the business of building refrigeration space. *Garcia v. Border Transportation Group, LLC* (2018) 83 CCC 1775

Hirer of Independent Contractor Not Responsible for Injury to Contractor's Employee - Mother Goose owned a well that had not been well maintained. She did not know how truly dilapidated it was. She hired J&J Maintenance to fix the well. Jack, an employee of J&J was trying to fix the well when it exploded, and he was severely injured. Is Mother Goose liable for Jack's injuries?

Answer: (B) Mother Goose is not liable to Jack, she is considered the hirer of an independent contractor, J&J Maintenance. Jack's sole remedy is his workers' compensation claim against J&J Maintenance. Mother Goose may have civil liability if: (1) she retained control over the work and exercised that control negligently, (2) her inaction was subject to a nondelegable statutory or regulatory duty, or (3) she knew or should have known of a concealed hazardous condition. *Verdugo v. California Resources Elk Hills* (2018) 83 Cal. Comp. Cases 1545 (appellate court, ordered unpublished).

Injury When Using the Restroom is Compensable - These are the facts: Ron needed to use the bathroom which he did. After buttoning up, he turned towards the sink intending to wash his hands. As he turned from the urinal he felt strong pain in his back. His claim is: **Answer: (C)** The claim is compensable under the "personal comfort" doctrine, the course of employment is not broken when an employee goes to the bathroom.

Allied Signal, Inc. v. WCAB (Briggs) (2001) 66CCC1333 (writ denied).

Permanent Disability & Rating

No Credit for PD Paid on Unfiled Injury Claim - Chef Ramsay completed a DWC-1 for a hypertension injury 11/16/2009. Permanent disability was advanced based on a PQME report of Dr. Elliott to the tune of $54,000, but an Application for Adjudication was never filed and the matter was never resolved. Less than a year later, Chef Ramsay retained counsel who filed a cumulative trauma for various injuries including hypertension. Applicant received a 77% Award in that claim. Should the Judge allow Defendant to take a

$54,000 credit from the 77% Award in light of the first injury?
Answer: (B) Defendant gets no credit. While the allowance of a credit is a matter of judicial discretion, the WCAB has no jurisdiction to determine the allowance of a credit when an Application for Adjudication (or other case opening document) has not been filed. *Di Genova v. City of Manhattan Beach* (2018) Cal. Wrk. Comp. LEXIS 147 (panel decision).

Claimant Does Not Get Both Grip Loss and Range of Motion Rating - Cory was organizing the supply room when reams of paper fell onto her left wrist causing an accepted injury. After treating for 3 years, her PTP finally issued a P&S report providing 12% WPI for grip loss and 8% WPI for loss of motion. The defense objected stating the 8% loss of motion rating adequately represented Cory's impairment therefore, and that per the AMA Guides, there is no basis for also allowing a grip loss rating. Does Cory get both ratings for her wrist?
Answer: (A) Cory does not get both ratings. The grip loss rating is inappropriate based on Section 16.8 of the AMA Guides. When the injured worked has both loss of motion and documented wrist pain, the loss of motion rating adequately represents the applicant's impairment, unless there is evidence that the grip loss is due to an unrelated etiological or patho-mechanical cause. *Gutierrez v. WCAB* (2018) 83 Cal Comp Cases 1578

Permanent Total Disability Must Be Determined Under LC 4660 - Stella sustained an injury to her lumbar spine and psyche. The orthopedic QME report rated to 95% PD, and the psyche QME report rated to 70% PD. The combined value was 99% PD. The orthopedic QME report noted Stella was permanently totally disabled on the lumbar spine alone. The Workers' Compensation Judge relied on the orthopedic QME report and Stella's testimony in finding permanent total disability per LC 4662(b)'s language of disability "in accordance with the fact." The Judge made no mention of the combined values chart, Ogilvie or any other method to rebut the rating schedule. Will the Judge's 100% Award hold up on appeal?
Answer: (B) The 100% Award will not stand, because LC 4662(b) does not provide an independent path to permanent total disability. The Judge must determine Permanent Disability under LC 4660, though other avenues under LC 4660 still can be used to determine a higher level of permanent disability (i.e. Ogilvie/Dahl), as supported by LC 4662(b) language, "in accordance with the fact." *Dept. of Corrections and Rehabilitation v. WCAB (Fitzpatrick)* (2018), 27 Cal. App. 5th 607, 83 Cal. Comp. Cases 1680.

Medical/Legal Evaluations, AME, Panel QMEs

Objection Must Be Within a Reasonable Time for Ex-Parte Communication - For an upcoming PQME evaluation, Defense counsel inadvertently sent over medical records they had not previously served on AA. AA learned of this ex-parte communication 7 days prior to the evaluation but did not object until 3 days after the evaluation and requested a new PQME. Defense counsel contends that the objection was not made within a reasonable time and therefore is an invalid objection. AA contends that they objected within 10 days and therefore their objection is valid. Does AA get a new QME Panel?
Answer: (B) AA does not get a new QME Panel, as there is no specific time frame within which to object to ex-parte communication, and in this case, the WCAB denied the request for a new QME Panel, stating that "if an aggrieved party elects to terminate the evaluation and seek a new evaluation due to an ex parte communication, the aggrieved party must do so within a reasonable time following discovery of the prohibited communication." *Suon v. California Dairies* (2018) (En Banc decision after removal) ADJ9013590; ADJ9014316; ADJ9489408

Applicant May Record PQME Exam - Olive Oyl was scheduled for a PQME exam with Dr. Bluto. Ms. Oyl was wary of Dr. Bluto and showed up to the exam ready to video record the entire thing on her cell phone. Dr. Bluto refused to do the exam. Ms. Oyl's attorney, Popeye, requested a new Panel, citing Ms. Oyl's right to record the exam. Defense attorney Wimpy objected, arguing that cell phone recording isn't authorized, and an exam with Dr. Bluto should go forward. Does Ms. Oyl get a new QME?
Answer: (C) Olive Oyl can get a new QME Panel, as CCP 2032.510 authorizes the recording of a physical exam "stenographically or by audio." Olive Oyl can also have her attorney or court reporter attend. Responsibility

for the cost varies from case to case. *Guzman Rodriguez v. Waste Management Collection and Recycling/Ace American Ins.* (2018) 46 CWCR 211 (panel
decision).

AME Cover Letter May Not Include "Information" Over Opponent's Objection - Defendant's AME cover letter included the following statements: (1) "discuss the periods that you determine Applicant was TTD, if the injuries are intertwined as you suggest, then we would expect the periods of TTD to run concurrently", and (2) "review the enclosed WCAB Judge's findings and award relative to Applicant's claimed TTD status". The cover letter is impermissible if Applicant's attorney objects because: **Answer: (B) -** Statement (2) contains medical information and is impermissible over opposing council's objection. Under LC 4062.3 parties can include "communication" to an AME over the opponent's objection, but cannot include "information" to an AME if an objection is made. Here, the statement about intertwined injuries and TTD is legal argument and constitutes a permissible "communication" to the AME. Providing the AME a findings and award over opposing council's objection is not permitted, because the findings and award contained reference to medical reports which are "information" and cannot be provided to an AME over opposing council's objection. Maxham v. California Dept. of Corrections and Rehabilitation (2017) 82 Cal. Comp. Cases 136 (En Banc)

Medical Treatment, Utilization Review & IMR Issues

No Duty to Disclose the Name of IMR Reviewers - Phyllis Vance sustained an accepted left shoulder injury in 2007. In 2013, after years of treatment, the claims administrator submitted her prescription regimen of five medications for utilization review. UR approved one medication and denied the remaining four. Phyllis' attorney–Bob Vance, filed an IMR appeal, and IMR approved one of the four previously denied medications. Bob appealed the IMR decision, and the WCJ reversed the IMR decision, and remanded to Maximus for a review by a different reviewer. While the second IMR was pending, Bob filed a petition that Maximus disclose the identity of the IMR reviewers, because he needed to verify whether the second IMR was reviewed by a different reviewer, as required under LC 4610.6(I). Should the WCJ order disclosure of the IMR reviewer's identity? **Answer**: (A) No, the confidentiality provision of LC 4610.6(f) is mandatory, the legislative history reiterates the importance of keeping IMR "independent," and other adequate safeguards allow Phyllis to challenge the procedures behind IMR determinations, including being able to obtain information about IMR's selection and recruiting of reviewers. *Zuniga v. WCAB* (2018), 19 Cal. App. 5th 981, 83 CCC 1.

Applicant Entitled to a New PTP Within the MPN When Released From Treatment - Molly was treating with a MPN physician when he released her from care. In the same medical report, the PTP recommended over-the-counter medication and home physical therapy. Molly disagreed, feeling she needed additional treatment. She sought treatment from another MPN doctor, which was denied. At the Expedited Hearing, Defendant argued that, if Molly wanted additional treatment, that was an issue in dispute, which needed to be resolved through the Panel QME process. Molly responded that she was entitled to a second PTP opinion within the MPN, without first going though the PQME proces. Does Molly get a new MPN doctor? **Answer: (A)** Molly is entitled to select a new MPN doctor, she is not required to go through the PQME process to obtain medical treatment when the MPN primary treating physician releases her from care. *Verduzco v. Milanesio Farms/Ins. Co. of the West* (2018) 46 CWCR 219.

Oral Prescription for Home Health Care in AME's Deposition Valid - Sad Sally was found 100% permanently totally disabled by the AME and the parties entered into a Stipulated Award at 100% with future medical care. The Stipulations provided that home health care was deferred to the AME. Two years later Sally's attorney set the AME's deposition. The defense attorney did not show up but was called, and

he agreed the AME's deposition could go forward without him. The AME testified that home health care was needed every day 24/7. Sally's attorney served the AME's deposition transcript on Defendants and insisted that the 24/7 home healthcare be authorized. Defendants timely objected to the demand. **Answer: (B)** Sally gets the 24/7 home health care because the AME's deposition testimony was equivalent to an oral prescription for home health care, and pursuant to LC 4600(h) home health care shall be provided if prescribed and reasonably required to cure and relieve an industrial injury. The due process rights of the Defendant were not violated as they had notice of the deposition and waived their appearance. Pacas v. The Mailing House, SCIF (2018) 83 Cal. Comp. Cases 769 (Panel Decision).

Penalty, LC 132a, S&W

No Voucher Due even if LC 132a Violation - Employer has an absentee-employee policy which requires all leaves and vacation requests to be approved by management in advance. Laura is an employee with an accepted WC claim, and after a period of TD, she was released to full duty, and the employer took her back to work. Soon after, Laura violated employer's absentee-employee policy, for which her pay was docked. Laura resigned and promptly filed a LC 132a petition, alleging she was forced to resign due to mistreatment when her pay was docked. Is Laura entitled to the supplemental job displacement voucher, based on her resignation and the alleged LC 132a violation? **Answer: (B)** No voucher is due, even if a LC 132a violation is found, because the employer properly made Laura an offer of work pursuant LC §4658(b). *Siller v. WCAB*, (2018) 83 Cal. Comp. Cases 557, 2018 Cal. Wrk. Comp. LEXIS 14, (writ denied).

Psychiatric Claims, Death Benefits

SOL Death Claim - The Wicked Witch of the West had an injury in 2010 when a house was dropped on her. She passed away in 2017and her dependents filed a death claim. Is the claim barred by the 5-year statute of limitations? **Answer: (B)** The WCAB held that when the employee's death occurred more than five years after the date of injury that the claim for death benefits is barred even though all other issues including injury AOE/COE and the nature and extent of injury had not yet been resolved as of the date of death. *Morales (dec'd) v. The Kroger Co. dba Ralphs Grocery Co.* (2017) 49 CWCR 5 (panel decision)

Burden of Provide For Suicide to be Industrial - Toby Lawyer is defending a case where the employee committed suicide in 2017. Toby knows that suicide is not a psychiatric injury, but rather a symptom or consequence of an underlying psyche injury. But in this case the applicant (the employee's surviving spouse who filed a timely WC claim) is alleging just that: the employee had an industrial psyche injury which contributed to his suicide. The psyche PQME report found that decedent-employee had a diagnosed psyche injury pursuant LC §3208.3(a), and that 30% of that injury was caused by events of employment. There was no evidence that the psyche injury was caused by a violent act. Assuming this is all the evidence applicant has, will they prevail? **Answer: (C)** No, because the applicant has the burden of showing the events of employment were predominant to all causes combined (51%) of the psyche injury, and that the industrial psyche injury contributed to the employee's death. Here, the decedent was diagnosed with a psyche injury, so applicant could proceed to the next step of proving industrial causation, which, based on this PQME report, applicant cannot do. Even if they could, they still need to show the psyche injury contributed to the death. *Rockefeller v. State*, (2017) Cal. Wrk. Comp. P.D. LEXIS 246, *1-2, 82 Cal. Comp. Cases 1430, 1431-1432 (board panel decision).

Psyche Injury Not Compensable as it is Not Sudden - Jack Ofall Trades was new on the job, and on his 3rd day of work, was operating a jack hammer when it hit a rock, flew up into the air, and landed on Jack causing severe orthopedic and psyche injuries. The WCJ found the psyche injury was compensable, despite Jack being employed less than 6 months, as it was caused by a "sudden and extraordinary" employment condition. Is the WCJ correct?**Answer: (B)** Jack's psyche injury is not compensable. Labor Code section 3208.3 excludes psychiatric injuries resulting from routine physical injuries during the first six months of employment. To be within the "sudden and extraordinary" exception of LC 3208.3, the employment condition must be "uncommon, unusual and unexpected." Jack hammers bounce around, this condition of employment was not "extraordinary," even though it may have been "sudden." *State Comp. Ins. Fund v. WCAB (Guzman)* (2018) 83 Cal. Comp. Cases 185.

Defendant Has The Burden of Proof to Establish Good Faith Personnel Action Defense - Homer sustained a direct psychiatric injury. The QME determined the cause of the psyche injury to be: 50% to personnel and non-personnel actions with Mr. Burns, 10% to personnel actions with supervisor Krusty, 5% to negative performance evaluations, 10% to interactions with two subordinates Lisa and Bart, and 25% to Homer's own maladaptive traits. Is Homer's psychiatric injury compensable? **Answer: (A)** The psyche injury is compensable. Labor Code § 3208.3(h) places the burden on Defendant to prove Applicant's psychiatric injury was substantially caused (35%) by good faith personnel actions. Defendant should have developed the record to determine how much of the 50% interactions with Mr. Burns related to personnel action, to see if that combined with the other personnel action reached the 35% causation required to establish the good-faith personnel action defense. *Contra Costa Water Dist. v. Workers' Comp. Appeals Bd. (Kirby)* (2018) 83 Cal. Comp. Cases 366.

DFEH, FEHA, Civil Litigation and Subrogation

Employer's Subrogation Recovery Attaches to Entire Judgment - Jeff, acting in the course and scope of his employment with Terayon, Inc., fell and broke his leg at a Target store. He opened a WC claim with employer, who paid benefits, including TD indemnity for lost wages. Jeff also filed a personal injury claim against Target. His Complaint against Target asked for pain and suffering, lost wages, and past/future medical. However, when Target was found 100% liable for Jeff's injuries, his recovery did not include any amounts for lost wages, as he did not seek them at trial. Now employer wants to file a lien against Jeff's recovery. Can it get reimbursed for the amount in benefits paid for Jeff's lost wages, or is it barred because Jeff made no attempt to recover those lost wages from Target? **Answer: (B)** Employer will be reimbursed in light of the plain language of LAB §3856(b), which grants a first lien for the amount of **all expenditures made** to provide employee w/WC benefits. This lien **attaches to the entire amount of judgment** employee recovers, after litigation expenses, whether or not that judgment includes all damages employee could have recovered. *Duncan v. Wal-Mart Stores, Inc.*, (2017) 18 Cal. App. 5th 460.

Employee Can Pursue Both Civil and Workers' Comp Remedies When Conduct Beyond What is Normally Expected in the Workplace - Chandler was a data analyst at FRIENDS. In 2011, Chandler told his supervisor Doug that he wanted to add his partner as a beneficiary on his health insurance. A few days later, Chandler overheard Doug discussing with other employees the private details of Chandler's personnel file. This made Chandler sick, he went on medical leave and filed a complaint. Doug was terminated. Chandler filed a civil complaint against FRIENDS and Doug for harassment, and intentional and negligent infliction of emotional distress. Is Chandler's civil suit barred by the workers' compensation exclusive remedy rule under Labor Code 3602(a)?

Answer: **B** - Chandler can pursue both civil and workers' compensation claims if he can show that Doug's conduct is not what would normally occur when doing work as a data analyst, or if he can show that Doug's conduct would not be expected as a normal part of the employment relationship. *Hurley v. Department of Parks and Recreation* (2018) 83 CCC 631.