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Work Comp Bingo 2017
Case Law Updates

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Discovery & Procedure, Liens, Attorney Fees

C&R Rejected Where Consequences of Non-Submit MSA Not Explained

George settled his work injury claim by compromise and release with a net payment to George of $22,000 after deductions for attorneys' fees and PD advances. The C&R included an MSA of $24,000, which was not submitted to CMS for review. The C&R did not mention that the MSA would not be submitted to CMS for review, nor did it discuss the possible impact of this non-submission. As the assigned WCAB judge, should you approve this C&R?

Answer: (A) The C&R should not be approved because the amount is not adequate as the net recovery to George does not cover the MSA. The C&R should also not be approved because, while parties are not required to submit MSAs to CMS for review, their settlement documents must include a discussion of possible consequences when an MSA is not reviewed or approved by CMS. (*Alvarenga v. Scope Industries* (2016) 81 CCC 850.)
(Summary by: Victoria Green - Hanna Brophy Riverside)

No CA Jurisdiction over Football Player for CT with Few Games in CA

Rocco played 13 seasons of professional football for the Philadelphia Eagles, Miami Dolphins, New England Patriots, and New York Jets. During his career, he played 8 out of his 250 games in California. During those games in California, he was exposed to continuous physical trauma and had received medical treatment for various injuries while in California. Does the California WCAB have jurisdiction over Rocco's CT claim?

Answer: (B) No, the California WCAB does not have jurisdiction over Rocco's football injury CT claim because an overwhelming majority of his games were outside of California, and the extent to which any micro trauma occurred in California was "*de minimis*." (*Byars v. WCAB (NY Jets)* (2015) 81 CCC 64, writ denied.)
(Summary by: Kenneth Brown - Hanna Brophy Riverside)

90-Day Presumption Raised After WCAB Finding of No Injury Is Barred

Blair was a school psychologist who filed a claim for injury to his bilateral knees on the job. The claim was never accepted or denied by the school, and the matter proceeded to trial on injury AOE/COE. The presumption of compensability under Labor Code section 5402 was not raised before or at trial. The PQME report submitted at trial found no industrial causation for the right knee, and no evidence was presented at trial showing injury to the left knee. The WCJ issued a findings & award of no injury AOE/COE. Should Applicant's timely petition for reconsideration be granted based on the presumption of compensability under Labor Code section 5402 due to the defendant's failure to timely deny Blair's claim within 90 days?

Answer: (B) The presumption of compensability under Labor Code section 5402 is a rebuttable presumption and must be raised by the applicant as an issue before and at trial; otherwise, it will be deemed waived. (*Willis v. WCAB* (2016) 81 CCC 240, writ denied.)
(Summary by: Connor Shelton - Hanna Brophy Redding)

Only One Defense Attorney Allowed to Talk at WCAB Trial

F. Lee is a senior partner at a well-known defense law firm, and Sherman Peabody is a young associate at the same firm. Both appeared at a WCAB trial, and F. Lee informed the WCJ that Sherman would handle the trial and that F. Lee would only be observing. During the applicant's testimony, the WCJ instructed F. Lee that his concurrent conversation with Sherman was disruptive. After the applicant's attorney completed his examination of the applicant, the WCJ asked Sherman, "Are you going to impeach her?" F. Lee answered, "Yes," at which time the WCJ informed F. Lee that he was again being disruptive; the judge ordered F. Lee to leave the courtroom immediately. Was the WCJ's order proper?

Answer: (B) The WCJ's order for the senior attorney to leave the courtroom trial was appropriate and within his discretion under the California Code of Civil Procedure section 1209(a)(1), which provides, in part, "The following acts or omissions in respect to a court of justice are contempts of the authority of the court: (1) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding." (*Owens v. Department of Parks and Recreation* (2015) 2015 Cal. Wrk. Comp. LEXIS 767.)
(Summary by: Connor Shelton - Hanna Brophy Redding)

Order for Claims Examiner to Appear at Every WCAB Hearing is Overly Broad

Judge Crabby presided over a workers' compensation matter that involved years of contentious litigation. Frustrated with the idea that the claims examiner was part of the reason that the litigation did not resolve, the judge ordered him to personally appear at an upcoming appearance. The claims examiner failed to appear, having gone to the hospital for his own medical problems. Judge Crabby then issued an order requiring the claims examiner's personal appearance at all subsequent conferences and hearings. Was this order proper?

Answer: (B) The judge's order requiring the claims adjuster's personal appearance at all conferences and hearings in the matter was overly broad. In light of the extreme prejudice and hardship to the defendants, the judge would need to show a compelling rationale as to why the claims examiner must be personally present. (Buford v. Cook Concrete Products (2015) 2016 Cal. Wrk. Comp. LEXIS 1, panel decision.)
(Summary by: Curtis Wheaton - Hanna Brophy Oakland)

Defendant Responsible to Pay Award, Even if Stipulations in Error, if No Petition to Set Aside or Hearing Requested

Defense attorney, Care Less, negotiated a settlement (stipulations with a request for award) at 34% PD, and the parties agreed that the employer was entitled to the "15% bump down" pursuant to Labor Code section 4658(d) such that the 34% PD would be paid at $188.40 per week, for a total of $25,670.97. Unfortunately, when Care Less drafted the stipulations, he included that $36,570 would be paid in PD, which was the 34% at the statutory maximum weekly rate of $240 per week. After the stipulations were approved, Care Less did not file a petition to set aside the award or request a hearing to provide evidence of good cause to lower the PD award to $25,670.97. Will the petition for reconsideration filed by Care Less be granted?

Answer: (A) Reconsideration will not be granted. A defendant will be stuck with the mistake in the settlement papers that its counsel drafts, signs, and gets approved, unless its counsel immediately

seeks (a) to set aside the award or (b) an evidentiary hearing to correct the award. (*Oxnard School Dist. v. WCAB (Garcia)* (2016) 81 CCC 69, writ denied.)
(Summary by: Curtis Wheaton - Hanna Brophy Oakland)

Claim to Disallow EDD Lien Based on PD Apportionment Rejected

Sylvia sustained an accepted work injury and was paid benefits by EDD. EDD paid benefits at the same time that Defendant did. The case-in-chief later settled (with the EDD lien left open) based upon an AME who found 15% apportionment to non-industrial factors. Defendant argued at a lien trial that the EDD lien should be disallowed because Labor Code section 4904(b)(1) only permits EDD's lien to be allowed when EDD benefits arose "solely from the same injury or illness" as the industrial injury at issue. In essence, Defendant argued that, since there was apportionment to non-industrial factors, at least part of EDD's benefits failed to arise "solely" from the industrial injury. Is Defendant correct (will EDD's lien be disallowed)?

Answer: (B) Defendant is wrong. Even though it paid benefits at the same time as EDD, EDD's lien is allowed because the industrial injury led to benefits that were owed. Further, in such a case, EDD should be awarded its full lien. Defendant confused causation of the *injury* (AOE/COE, which was admitted) to causation of the *disability* (apportionment). Note: Defendant should not have risked settling the case-in-chief while leaving EDD's lien open. (*Santa Clara Valley Transportation Authority v. WCAB (LaRue)* (2016) 81 CCC 382, writ denied.)
(Summary by: Edgar Quezada - Hanna Brophy Oakland)

Injury AOE/COE, Presumptions

Death Caused by Overuse of Alcohol Found Industrial

Firefighter Frank had an accepted back injury in 2006. Treatment included therapy by a psychologist with whom Frank had previously treated for "binge drinking" and other alcohol-related issues. Frank was found dead at home in 2008. The cause of death was determined to be acute ethanol intoxication. Frank's wife, Francine, filed a claim for death benefits, and the PQME, a toxicologist, listed the cause of death as "acute alcoholism." The employer denied death benefits, arguing that Frank had a long history of alcohol abuse for which he had sought treatment and for which he had been subject to on-the-job discipline. At trial, Francine submitted evidence that Frank's drinking increased due to his 2006 back injury. The employer argued that the "intoxication defense" pursuant to Labor Code section 3600(a)(4) barred recovery. Is Francine entitled to death benefits?

Answer: (B) Francine is entitled to death benefits because there was a causal relationship between the stress of the back injury and the increase in alcohol intake. (*City of Stockton v. WCAB* (2016) 81 CCC 212, writ denied.)
(Summary by: Glenn Miller - Hanna Brophy Santa Rosa)

Death Industrial Because of Special Risk Doctrine

Rudy was a "gaffer" for a film production company, working on a film being made in an operational mining area on unpaved roads with large, earth-moving equipment and a constantly changing landscape. He left the set at 3 p.m. and was not seen again until he was found dead in his car in the neighboring quarry at 5 a.m. the following morning. The PQME concluded that Rudy's psychiatric

illness predisposed him to erratic, manic behavior and that it was medically probable that Rudy drove into the quarry by mistake and panicked, which triggered a fatal heart arrhythmia. Was Rudy's death industrial?

Answer: (C) Rudy's death is industrial due to the "special risk" exception to the "going and coming" rule because the unpaved roads in the operational mining area exposed Rudy to a greater risk than that of the general public. (*New CAPS, LLC v. WCAB* (2016) 81 CCC 229, writ denied.)
(Summary by: Glenn Miller - Hanna Brophy Santa Rosa)

Injury/Death Not Barred by Going & Coming Rule

Homer worked on a farm and used his personal van to pick up co-workers. Homer and his co-workers were temporary employees, and many of Homer's co-workers did not have drivers' licenses or any means of transportation to the fields. The employer did not ask Homer to drive his co-workers to or from work, and the employer did not reimburse Homer for this. In fact, Homer charged his co-workers to transport them to and from work. One day, while driving some co-workers to work, a doughnut truck dumped glazed doughnuts on the freeway, causing Homer to crash. Homer sustained injuries and filed a workers' compensation claim, which his employer denied based on the "going and coming " rule. Homer fought the denial and presented evidence that he used his van to perform tasks that benefitted the employer, such as recruiting and managing farm laborers, transporting laborers to and from the field, carrying work documents and tools, and passing out paychecks. Is Homer entitled to workers' compensation benefits?

Answer: (A) Homer is entitled to workers' compensation benefits. His claim is not barred by the "going and coming" rule because his use of his van benefitted the employer. (*MV Contracting v. WCAB (Cabrera)* (2016) 81CCC 223, writ denied.)
(Summary by: Edgar Quezada - Hanna Brophy Oakland)

Injury at Off-Duty Education Program Not Compensable Where Employer Did Not Pay for or Have Knowledge of Class

Dr. Smartz attended a CLE class to keep his license active. He found the class on his own, and he registered and paid for it without informing his employer. He bought a hot dog in the lobby next to the conference room, but the dog slipped out of the bun and fell to the floor. When Dr. Smartz bent down to pick it up, he sustained a back injury. Is Dr. Smartz entitled to workers' compensation benefits for this injury?

Answer: (B) Dr. Smartz does not get workers' compensation benefits for his back injury while attending the seminar because his employer did not know about the specific seminar in advance, was not given an opportunity to approve or disapprove the seminar, and did not encourage or require attendance at this specific seminar. There needs to be both a subjective belief by the employee that attendance at this specific seminar was approved, and this subjective belief must be objectively reasonable. (*Hollie v. WCAB* (2016) 81 CCC 368, writ denied.)
(Summary by: Greg Choate - Hanna Brophy San Diego)

Temporary Disability & LC § 4850

Defendant Cannot Take TD Credit for TD Period Occurring During Paid Administrative Leave; the Leave Does Not Count Against the 104-Week TD Limitation

Officer Wage was hurt in the line of duty but continued to work. Unrelated to the injury, he was charged with misconduct and placed on paid administrative leave; he was later terminated. He was subsequently seen by an AME for the work injury, who found that Officer Wage had become TTD while on paid administrative leave but prior to his termination. The City retroactively converted the administrative leave pay to credit towards the 104 weeks of TTD benefits and then stopped benefits after 104 weeks of TTD was paid out. Officer Wage argued that the City was not entitled to take credit towards TTD benefits for the period that he was on administrative leave. Is he right?

Answer: (B) Yes, Officer Wage is entitled to additional TTD benefits. The City should not have retroactively taken credit for any TTD period that occurred while Officer Wage was on administrative leave because TTD is supposed to act as a substitute for wages lost and because administrative leave is equivalent to earning wages. (*Ortega v. City of Guadalupe* (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 163, panel decision.)
(Summary by: Heather Marks - Hanna Brophy San Diego)

Permanent Disability & Rating

Almaraz/Guzman Rating Denied Where AME Speculates as to Loss-of-Use Percentage

Hercules sustained an admitted bilateral carpal tunnel injury. The AME, Dr. Atlas, provided 19% WPI for each arm under a strict AMA Guides application. On an Almaraz/Guzman theory, however, the AME reasoned that Hercules had lost 50% of his use of each arm. Because the total loss of use of an arm under the AMA Guides is given 60% WPI, the AME multiplied the 60% WPI by the 50% loss-of-use estimate, which led to a rating of each arm at 30% WPI. Should the WCJ give 19% WPI for each arm or 30% WPI for each arm?

Answer: (B) The proper WPI is 19% per arm under the AMA Guides. The Almaraz/Guzman provision by Dr. Atlas was flawed because the AMA Guides does not allow a doctor to multiply an impairment level by the patient's percentage of loss of use of the arm. To give a valid Almaraz/Guzman provision, a doctor must stay within the four corners of the AMA Guides. (Weaver v. Los Angeles USD (2015) 2015 Cal. Wrk. Comp. LEXIS P.D. 766.)
(Summary by: Greg Choate - Hanna Brophy San Diego)

Employer Should Take Safety Officer Back to Work Once Retirement Medical Board Reverses Industrial Disability Retirement

Officer Iwannawork received a CalPERS industrial disability retirement from City of Acme for an industrial spinal injury. Nine months later, she applied to CalPERS for reinstatement. CalPERS found that she was eligible for reinstatement. Acme offered to employ her on the condition that she complete medical and psychological evaluations. Officer Iwannawork argued that she was entitled to unconditional reinstatement based upon the CalPERS decision. Is Acme correct to require proof that Officer Iwannawork still meets the minimum standards for peace officers prior to reinstating

her?

Answer: (A) Acme is not correct. It must first reinstate the officer based on the CalPERS findings, and then it may pursue a fitness-for-duty evaluation under its usual procedures. Placing conditions on an officer prior to reinstatement would be contrary to the mandatory reinstatement provisions of Government Code section 21193. (*CA Dept. of Justice v. CalPERS (Resendez)* (2015) 81 CCC 1.)
(Summary by: Heather Marks - Hanna Brophy San Diego)

Adding of Ratings Rather Than Using the CVC Rejected

Annabelle has accepted injuries to her back and psyche, both with high levels of permanent disability. Both the orthopedic and psyche AMEs provided that Annabelle's ortho and psyche disabilities are "synergistic," which Annabelle's attorney used to argue that the two PD ratings should be *added* together as opposed to *combined*. The judge disagreed and instructed the rater to combine the two disabilities despite the AMEs' conclusions that the disabilities were "synergistic." When can a judge properly instruct a rater to add the disabilities (as opposed to using the combined values chart)?

Answer: (A) A judge may instruct a rater to add together different PD ratings without using the combined values chart when the "synergy" of two or more disabilities is adequately explained. More specifically, physicians should explain how the separate disabilities are acting in a synergistic fashion and why adding the disabilities is a more accurate reflection of an applicant's disability. Simply using the word "synergistic" does not suffice. (*Johnson v. Wayman Ranches* (2016) 2016 Cal.Wrk.Comp P.D. Lexis 235.)
(Summary by: Jacob Gillick - Hanna Brophy San Diego)

100% Permanent Disability Rating Based on Use of Medications

Andy suffered a back injury in 2012 at work, and the orthopedic AME, Dr. Reasonable, issued a report. After trial, the DEU rated the report at 16% under the 2005 PDRS. Andy's attorney objected, pointing out that Andy takes heavy amounts of medications for his injuries; therefore, the AA argued that Andy's disability rating should be 100% "in accordance with the fact" pursuant to Labor Code section 4662. The WCJ ordered that the parties further develop the record. In depositions and supplemental reports, some of the doctors and vocational experts provided that Andy's use of medications related to his orthopedic injury and caused extreme fatigue, which took away job opportunities for Andy. Can the need for heavy medications lead to a 100% case, even when the injury itself is relatively minor?

Answer: (A) Applicant can get the 100% PD rating. The WCAB found that medical evidence and vocational reporting, along with the applicant's corroborating testimony, constituted substantial evidence under Ogilvie to rebut the 16% scheduled rating because the applicant's need for pain medication was causally related to the industrial orthopedic injury, even though the orthopedic injury was comparatively minor. (Sutter Medical Foundation v. WCAB (Moulthrop) (2014) 79 CCC 1570, writ denied.)
(Summary by: Preetesh Ranchhod - *Hanna Brophy Los Angeles)*

Orthopedic AME Cannot Determine Psychiatric PD

Inez White (IW) suffered industrial orthopedic and psyche injuries. The ortho AME, Dr. Backache, provided 30% WPI for the orthopedic problems. He further stated that,

orthopedically, IW can return to work, but, when combining orthopedic and psyche problems, IW is completely precluded from returning to any kind of work at all. Dr. Backache did find, however, that there is 25% non-industrial apportionment. The psyche AME, Dr. Emotional, provided that the predominate cause of IW's psyche injury was non-industrial. The trial judge awarded 75% permanent disability. Will this award be upheld on appeal?

Answer: (B) The 75% award will be reversed because the ortho AME is not qualified to comment on psyche med-legal issues, and the psyche AME found that the psyche injury did not meet the threshold of predominant causation for compensability. (*Unsworth v. Grandview Real Estate* (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 193.)
(Summary by: Austin Sung - Hanna Brophy Riverside)

Medical/Legal Evaluations, AMEs, Panel QMEs

Defendant Entitled to QME Exam, Even if Co-Defendant Already Had QME Exam

Baloo alleged a cumulative injury while harvesting honey. Insurance companies, Shere Khan (SK) and King Louie (KL), share coverage for the cumulative trauma claim. Baloo and SK obtained a QME panel. KL then attempted to obtain its own QME panel, but Baloo objected, arguing that KL is an active party in the single litigated claim and that it is, therefore, not entitled to a separate QME panel. Does KL get its own QME panel?

Answer: (A) When an applicant declines to elect against one insurance company under Labor Code section 5500.5, the second insurance company is an active party and entitled to its own QME panel pursuant to Labor Code section 4062.2. (*Chanchavac v. WCAB* (2016) 81 CCC 101, writ denied.)
(Summary by: Jeanette Herrera - Hanna Brophy Sacramento)

New QME Panel Granted Where There is Evidence of Bias By the PQME

Pam Beesly, an *in pro per* applicant, alleged a psyche injury and selected Dr. Michael Scott as a PQME. Dr. Scott evaluated Pam on two occasions in his office and a third time in his home. During the third visit, Dr. Scott failed to advise Pam of her right to terminate the evaluation, and she had to walk around dirty laundry to use the restroom. Dr. Scott also failed to serve Pam with his report. Pam retained an attorney, Rainn Schrute, who petitioned for a new panel. Is Pam entitled to a new QME panel?

Answer: (A) The QME violated Administrative Regulations section 40(b) by failing to advise Ms. Beesly that she could terminate her evaluation, and, when combined with Ms. Beesly having to walk around dirty laundry plus the failure to provide the report, it was unprofessional and created the appearance of bias. This entitles her to a new QME panel. (*Crane v. State of California, High Desert State Prison* (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 179.)
(Summary by: Jeannette Herrera - Hanna Brophy Sacramento)

Same PQME Must Evaluate All Injuries Claimed in Applications Filed Prior to the Initial Evaluation

Mercedes filed applications for 3 separate orthopedic injury claims, all with the same employer. The defense attorney, Don, obtained a QME panel on the first of the 3 claims filed and asked the PQME to address all 3 injuries. The applicant's attorney, Annie, told the PQME that he was only

to address the first injury claim because Mercedes was entitled to separate QME panels for the other two claims. As the judge, how should you rule?

Answer: (A) The PQME should address the medical issues on all 3 claims because all 3 claims were filed prior to the initial PQME evaluation. If the applicant files new injury claims after the date of the initial PQME evaluation, then the Applicant is entitled to a new QME panel on the subsequent claims, even if the body parts or QME specialty remains the same. (*Parker v. DSC Logistics* (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 402.)
(Summary by: Preetesh Ranchhod - Hanna Brophy Los Angeles)

Medical Treatment, Utilization Review, & IMR Issues

Lien for More than 24 Visits with a Licensed Chiropractor Allowed

Chiropractor Donald Duck sought payment for 48 office visits on an accepted case. The defendant paid for 24 office visits and argued that it owed nothing more because chiropractic care was limited to 24 office visits pursuant to Labor Code section 4604.5(c)(1). Donald argued that he was entitled to additional payment because the applicant's visits included a 50/50 mix of chiropractic and physical therapy services. He also testified that, at the time that the services were rendered, he was licensed to provide both types of services. Does Donald get payment for 48 visits?

Answer: (B) Donald will get payment for all 48 visits because (1) at the time of treatment, he was licensed to provide both physical therapy and chiropractic manipulation and (2) there were 24 visits for each type of service. (Molina Romero v. California Pizza Kitchen (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 20.)
(Summary by: Katie Nowak - Hanna Brophy Orange County)

Treatment Outside MPN Allowed Because No Written Authorization Given

Darth Vadar suffered an industrial injury after being struck by a light saber. The orthopedic medical group, "The Dark Side," is in the employer's MPN, and Darth's attorney requested in writing that this group be authorized as Darth's primary treating physician. At the expedited hearing, the claims examiner testified that she called The Dark Side to authorize treatment, but she admitted that she did not send authorization to The Dark Side in writing. Darth's attorney argued that Darth can now treat outside of the MPN due to the adjuster's failure to provide written authorization. Will Darth prevail?

Answer: (A) Darth can treat outside of the MPN because the failure to give written authorization for treatment amounted to a refusal or neglect to provide medical treatment such that the applicant was entitled to treat outside of the MPN. (*Pomona Unified Sch. Dist. v. WCAB* (2015) 81 CCC 81, writ denied.)
(Summary by: Katie Nowak - Hanna Brophy Orange County)

Requests for Authorization Submitted by Secondary Physician Must Be Timely Sent to UR

Police Officer Matt has an admitted back injury, and his primary treating physician referred him to Dr. Consult, a secondary treating physician, who submitted a request for authorization (RFA) requesting disk replacement surgery. Defendant does not send this request to UR and ignores Dr. Consult's RFA because only the primary treating physician gets to direct medical treatment. At the expedited hearing, can the WCAB award the treatment?

Answer: (B) The WCAB has jurisdiction to award the treatment. Although the RFA came from a secondary physician, it still constitutes a treatment recommendation. Thus, this triggered UR, and, since there was no timely UR decision, the Board had jurisdiction to award the surgery. (Lopez v. City and County of San Francisco (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 206.)
(Summary by: Mark Thorndal - Hanna Brophy Oakland)

Timely RFA Sent to Defense Attorney Requires UR review

Defense attorney, Elaine, received a DOR for an expedited hearing, claiming that there was no UR decision on an RFA from a secondary treating physician, Dr. Costanza. Elaine objects to the DOR, explaining that Defendant never received the RFA in question. One week before the expedited hearing, the AA, Newman, faxed the RFA to Elaine, who did not forward it to the claims examiner for submission to UR. Newman argued that the WCAB has jurisdiction to decide the medical treatment dispute because there was no timely UR decision. Elaine argued that UR was not triggered because the AA had only served her with the RFA instead of the claims examiner. Does the WCAB have jurisdiction over this treatment dispute?

Answer: (B) The WCAB has jurisdiction. This case involves a narrow holding. If a defense attorney is aware of a dispute regarding an RFA that he/she alleges was never received, and then, if the defense attorney receives that RFA, then he/she has a duty to provide the RFA to the claims administrator "within a reasonable time" so that UR can be performed. Failure of defense counsel to do so can result in an untimely UR decision, which gives the WCAB jurisdiction over the treatment issue. Policy: Don't sit on your rights. (Czech v. Bank of America (2016) 81 CCC 856.)
(Summary by: Jacob Gillick - Hanna Brophy San Diego)

Penalty, LC § 132a, S&W, Rehab Voucher

Okay to Settle SJDB on Post 1/1/13 Injury if AOE/COE Dispute

Sammy Supple claimed a work-related back injury in 2015 that was denied based upon a post-termination defense. The parties agreed to settle via a compromise and release for $10,000, which included resolution of the Supplemental Job Displacement Benefit (SJDB/"voucher"). The judge, without the parties' agreement, included language in the settlement and order approving that the voucher could not be settled pursuant to Labor Code section 4658.7(g) (which precludes settlement of SJDB vouchers for dates of injury on/after 1/1/2013). Upon Defendant's petition for reconsideration, will the original C&R language that resolves the SJDB voucher be approved?

Answer: (B) An injured worker generally may not settle out his/her right to the SJDB on an accepted injury for SB 863 injuries. However, the voucher may be resolved where there is at least one good-faith dispute as to injury AOE/COE and/or liability for injury to one or more body parts, which could, if resolved against the injured worker, defeat all of the his/her rights to recover benefits. (*Beltran v. Structural Steel Fabricators* (2016) Cal. Wrk. Comp. P.D. LEXIS [citation pending].) *(Summary by: Keith Epstein - Hanna Brophy Oakland)*

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No Penalty When Claim Remains Denied, Even After PQME Finds Injury AOE/COE

Mitch worked hard digging ditches for Defiant Dredging Company, and he came down with a bad case of Valley Fever. The PQME found the Valley Fever to be industrial, and Defiant took the PQME's deposition. After the deposition, and after several PQME reports issued, the PQME still found the injury industrial. Defiant continued to deny liability despite having no evidence to oppose the PQME's opinions. The trial judge awarded penalties against Defiant for an unreasonable refusal to pay benefits. How does Defiant do on appeal?

Answer: (B) Defiant does not owe penalties (note: this was a split panel decision). Defendants are allowed to claim that the PQME's opinions did not constitute substantial medical evidence. If the med-legal opinion had been rendered by an AME, the result may have been different. (*ASR Construction v. WCAB (Davis)* (2016) 81 CCC 201, split panel decision.)
(Summary by: Mark Thorndal - Hanna Brophy Oakland)

Penalty for Unreasonable Delay of Advance Pension Payments

Police Officer Paul collected a year of full-salary benefits pursuant to Labor Code section 4850 and then applied for an Industrial Disability Retirement (IDR). He asked for advance disability pension benefits pending approval of his IDR pursuant to Labor Code section 4850.4. The advance pension payments did not start until a month later, and peeved Paul filed a penalty petition pursuant to Labor Code section 5814 for unreasonable delay. Is Paul entitled to penalties?

Answer: (B) The WCAB has jurisdiction to award penalties for the delay of advance pension payments because these payments are mandated by Labor Code section 4850.4, and the payments qualify as compensation under Labor Code section 3207. (*Gage v. WCAB* (2016) 81 CCC 1127.)
(Summary by: Victoria Green - Hanna Brophy Riverside)

Psychiatric Claims

Good-Faith Personnel Action Not a Defense to Hypertension Caused by Psyche Factors

Sally was stressed out by the poor performance reviews she got from her supervisor. She filed a workers' compensation psyche injury claim, which was denied based on the good-faith personnel action defense pursuant to Labor Code section 3208.3(h). Sally also filed a hypertension injury claim from being overworked. If the WCJ dismisses the psyche claim based on the good-faith personnel action defense, must the judge also dismiss the hypertension claim since it, too, was caused by stress?

Answer: (B) Sally can still pursue the hypertension claim because the stress and hypertension from being overworked was different from the stress and psyche injury that resulted from the good-faith personnel action. (*Olden v. State of California, Department Of Corrections* (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 3, panel decision.)
(Summary by: Matthew Seeley - Hanna Brophy Sacramento)

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Sudden and Extraordinary Exception to 6-Month Rule Barring Psyche Injuries Is Not Met by Trip-and-Fall Injury

Labor Code section 3208.3 bars psyche injuries of employees who have been with their employers for fewer than 6 months, unless the injury resulted from a "sudden and extraordinary" event. Tripper worked for Cap Construction for only 5 months when he slipped and fell while walking over a smooth concrete walkway that was slippery because it had been raining. He had walked over this walkway many times, but he had not expected it to be so slippery when wet. May Tripper properly pursue his psyche injury claim?

Answer: (B) Tripper may not pursue his psyche injury claim because the slip and fall conditions were not so uncommon, unusual, or totally unexpected to warrant the "sudden and extraordinary" exception to 6-month rule. (Travelers Casualty & Surety Co. v. WCAB (Dreher) (2016) 246 Cal. App. 4th 1101, 81 CCC 402.)
(Summary by: Matthew Seeley - Hanna Brophy Sacramento)

DFEH, FEHA, Civil Litigation, and Subrogation

Intervention Denied After Complaint Dismissed

While on the job, Claudia Clumsy slipped and fell near the beverage machine. She received workers' compensation benefits through her employer's insurance company, PayAlot. PayAlot filed a civil lawsuit for subrogation against the manufacturer of the beverage machine on the last day to file within the applicable statute of limitations. Claudia filed an *ex parte* application for leave to file a complaint in intervention, but, within days of that filing, PayAlot filed a request for dismissal because it had just reached settlement with the beverage machine manufacturer. The civil court granted the request for dismissal and then took the *ex parte* application off calendar. Is Claudia out of luck against the beverage machine manufacturer?

Answer: (B) Claudia cannot maintain her civil lawsuit against the beverage machine manufacturer because she did not become a party prior to the complaint being dismissed. The filing of the *ex parte* application for leave to intervene does not protect a non-party's claim to the civil lawsuit until the *ex parte* application is granted and the complaint in intervention is filed. (*Zenith Ins. Co. v. Bunn-O-Matic* (2016) 81 CCC 192.)
(Summary by: Patricia Robbins - Hanna Brophy Redding)

No Credit for Discrimination Payment Against Employer's Liability for Compensation Benefits

Joe was a mechanic at an automotive lot, and, over a period of five months, he was verbally, physically, and sexually harassed by his co-workers. The harassment culminated in a sexual attack. Joe filed a civil suit against his employer for (1) sexual harassment, (2) negligent hiring, supervision and retention, (3) assault, and (4) battery. The civil suit settled, and Joe then filed a workers' compensation claim for the specific injury from the sexual attack. Based on Joe's recovery in the civil suit, the employer sought credit against its obligation to provide workers' compensation benefits. Is the employer entitled to credit from the civil recovery?

Answer: (B) The employer does not get credit for Joe's civil settlement. The basis for the lawsuit and settlement was outside of the employer's statutory right to credit for the employee's first-party settlement, and the civil suit resolved only non-workers' compensation issues, including failure to prevent a hostile work environment. (*Hartzheim Dodge, Inc. v. WCAB* (2016) 81 CCC 362.)
(Summary by: Patricia Robbins - Hanna Brophy Redding)