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Parker Loves:

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Lucchesi Loves:

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Lucchesi Loves:

Cite It, Don't Fight It!
Case Law Strategy Update.

Presented by: David H. Parker & Megan Lucchesi
Attorneys at Law
Parker, Kern, Nard & Wenzel

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Cite It, Don't Fight It!
Case Law Strategy Update.

Moderated by: Sam Mann
Fresno County Risk Management

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S.I.P.P.

Set-up, Investigate, Prepare, Proceed.

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Set-Up.

The first question you should ask yourself is the simplest:

What legal defense will beat this case?

Can You Defend The Claim?

What is your legal defense:

1. Independent Contractor (Labor Code § 3600)
2. Intoxication (Labor Code § 3600)
3. Applicant's Serious and Willful Misconduct (Labor Code § 4551)
4. Disability aggravated by unreasonable conduct (Labor Code § 3600)
5. Employer prejudiced by failure to give notice of injury (Labor Code §5400 and 5404)
6. Intentional self-infliction of injury or death (Labor Code § 3600)
7. Initial aggressor/altercation (Labor Code § 3600)
8. Conviction and commission of a felony (Labor Code § 3600)
9. AOE/COE (Labor Code § 3600)
10. Apportionment (Labor Code §4663/4)
11. Volunteer(s) (Labor Code § 3600)

S.I.P.P.

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Investigate.

Do you have any case authority for your defense theories?

Cite It.

"Hard cases, it is said, make bad law."

-Lord John Campbell

To proceed or not to proceed, that is the question.

Cite It.

The answer as well as legal strategy ideally draws itself from legal authority.

Cite It.

"Tell your clients, judges and opposition what they need to hear, not what they want to hear."

-David H. Parker

Cite It.

A Simple Practical Outline:

1. I recommend we:
    1. Defend or
    2. Settle
2. Based on:
    1. Labor Code section
    2. Title 8 CCR section
    3. Case
    4. Tertiary source
3. And these case facts…

Case Law: AOE/COE.

Barbara Olden v. SCIF
(W.C.A.B. No. ADJ7454499)
2016 Cal. Wrk. Comp. P.D. LEXIS 3

Relevant Statutory References: Labor Code § 3208.3(h)

Relevant Case References:
Comp.Appeals Bd.

County of San Bernardino v. Workers (McCoy)
(2012)
77 CCC 219

Lockheed Martin vs. WCAB (McCullough)
(2002)
67 CCC 245

Case Holding:
"...defendant did not offer sufficient proof that applicant's hypertension solely resulted from her diagnosed psychiatric injury..applicant met her burden of proving that her hypertension was aggravated by work stress based on the opinion of the AME..."

Case Law: AOE/COE.

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Case Dicta of Interest:
"In short, stress is not a psychiatric injury. Stress can cause psychiatric injuries or physical injuries. Here, applicant did suffer a psychiatric injury, which was found to be not compensable, but defendant did not prove that applicant's hypertension was solely caused by her psychiatric injury..."

Take-Away:
“Stress” is not a psychiatric injury subject to Labor Code §3208.3 defenses, stress “is not a diagnosis, disease, or syndrome. It is a nonspecific set of emotions or physical symptoms that may or may not be associated with a disease or syndrome. Whether or not stress contributes to a disease or syndrome depends on the vulnerability of the individual, the intensity, duration, and meaning of the stress; and the nature and availability of modifying resources”, the WCAB citing American College of Occupational and Environmental Medicine (ACOEM) Practice Guidelines, 2nd Edition at p. 1055. There is injury as in “psychiatric injury” and injury as in “physical injury” such as that causing hypertension. The latter is not defensible pursuant to Labor Code 3208.3. Stressed yet?

Case Law: AOE/COE/ PSYCHE

Ferrell v. County of Riverside
81 Cal. Comp. Cases 943
(Panel Decision)

Relevant Statutory Reference(s): Labor Code §§ 3028.3(h), 3600

Relevant Case Reference(s): Larch v. Contra Costa County
(1998)
63 CCC 831

Schultz v. WCAB
(1998)
63 CCC 222

Case Law: AOE/COE/ PSYCHE

Case Holding:
"...whether an action constitutes a personnel action under section 3208.3 (h) does not depend simply on whether the action is of a direct supervisor of the applicant or is of one who is in the chain of command. All the participants' duties, whether management in fact ratified the action in question and/or whether the action in question was justified standing alone would be relevant factors. This determination is not solely related to whether the actions are taken by a superior or supervisor and it does not encompass just "any criticism" as claimed by applicant....It is unnecessary, moreover, that a personnel action has a direct or immediate effect on the employment status. Criticism or action authorized by management may be the initial step or a preliminary form of discipline intended to correct unacceptable, inappropriate conduct of an employee. The initial action may serve as the basis for subsequent or progressive discipline, and ultimately termination of the employment, if the inappropriate conduct is not corrected."

Case Law: AOE/COE/ PSYCHE

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Take Away:

In determining whether psychiatric injury is substantially caused by lawful, nondiscriminatory, good faith personnel actions, distinction must be drawn between general stressful working conditions that cause psychiatric injury and "personnel action" specifically directed toward individual. Without such distinction the phrase "personnel action" would encompass everything in employment environment that stems from good faith management and would be an overbroad interpretation that would preclude from consideration almost all employment events. The elimination of one department due to budgetary concerns and transfer of several employees to a different department with all consequences of new probationary period and need to share limited resources were general working conditions and not "personnel actions."

Please note this panel decision is in direct contrast to the panel decision of Schultz v.WCAB, 63 Cal. Comp. Cases 222, (Cal. App. 2d Dist. 1998).

Case Law: AOE/COE/ PSYCHE

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VIOLENT ACTS

Larsen v. Securitas Sec. Servs.
81 Cal. Comp. Cases 770
(Panel Decision)

Relevant Statutory Reference(s): Labor Code §§ 4660.1, 3208.3

Relevant Case Reference(s): Lockheed Martin vs. WCAB (McCullough)

(2002) 96 Cal. App. 4th 1237

Case Law: AOE/COE/ PSYCHE

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Case Holding:
"Here, applicant was struck by a car in a parking lot where she was conducting a walking patrol as a security guard. Furthermore, the evidence establishes that applicant was hit from behind with enough force to cause her to fall, hit her head, and lose consciousness. Being hit by a car under these circumstances constitutes a violent act. Applicant was therefore a victim of a 'violent act' within the definition of section 3208.3(b). Thus, applicant is entitled to additional permanent disability for her psychological injury as an exception to section 4660.1(c)."

Take Away:
The WCAB has broadened the definition of violent act to include acts that are characterized by either strong physical force, extreme or intense force, or are vehemently or passionately threatening. Since applicant was hit from behind with enough force to cause her to fall, hit her head and lose consciousness, she was the victim of a violent act for psychiatric compensability purposes.

Case Law: AOE/COE/ PSYCHE

Take Away:
Distinction must be drawn between general stressful working conditions that cause psychiatric injury and personnel action specifically directed toward individual. The elimination of one department due to budgetary concerns and transfer of several employees to a different department with all consequences of new probationary period and need to share limited resources were general working conditions and not personnel actions.

Case Law: Death Benefits.

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Woolever v. City of Long Beach
2016 Cal. Wrk. Comp. P.D. LEXIS 605, (ADJ9440770, ADJ889760344) (Panel Decision)

Relevant Statutory Reference(s): Labor Code §§ 3503, 5903

Relevant Case Reference(s): Lloyd Corporation, LTD v. Industrial Acc. Com.
(1943)
61 Cal.App.2d 275

Case Law: Death Benefits.

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Case Holding:
"Petitioner relies heavily upon Lloyd Corp. v. Industrial Accident Com, 8 Cal Comp Cases 248 (Cal App 1943) in support of her position that an ex-wife can be awarded benefits as alleged. In that case, however, the court found "that if there had been a bona fide separation there had also been a reconciliation, from which it would follow that they were living together as husband and wife" (Id. at 250). That case is distinguishable from the case at issue herein, as there was no evidence presented to indicate that any of the support or affection provided by Lee Woolever to Penny Woolever progressed to the level of reconciliation."

Take Away:
When a divorce has been finalized, and the former spouses continue to live as separate households with no reconciliation, the former spouse of the decedent does not qualify as a dependent under Labor Code § 3503. Reconciliation requires living together as husband and wife, not mere financial support, affection, or even sexual relations.

Case Law: Depositions/ Med-legal Fees

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Chaides v. Kroger Co.
2016 Cal. Wrk. Comp. P.D. LEXIS 143 (ADJ8128486)
(Panel Decision)

Relevant Statutory Reference(s):

2016.010,

Labor Code § 5710
California Code of Civil Procedure §§

8 CCR §§ 35.5(f); 9795

Relevant Case Reference(s):

Rodas v. Travelers Cas. And Surety Co. (2007)
35 CWCR 156

Case Law: Depositions/ Med-legal Fees

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Case Holding:
"...the replacement of (a PQME)...solely for an improper deposition policy is not warranted under the circumstances of this particular case (and is not unless)...defendant has shown it will suffer significant prejudice or harm...If (a PQME's) policy and its terms are inconsistent with and contrary to statute or administrative rules, he (or she) may be subject to sanction, discipline, or other regulatory action by the Medical Director under Administrative Director Rules 60 and 65..."

Take-Away:
Panel replacements are not supported based on deposition policies alone absent a showing of significant prejudice or harm by a party, though Administrative sanction, discipline or other regulatory action may be depending on case circumstances.

Case Law: Employment.

County of Riverside v. Workers' Comp. Appeals Bd.
(Cal. App. 4th Dist. 2016)
81 Cal. Comp. Cases 911, 2016 Cal. Wrk. Comp. LEXIS 108

Relevant Statutory References: Labor Code §§ 3351, 3357, 5000, 5001; Penal Code § 4017

Relevant Case References: Arriaga v. County of Alameda (1995)
60 Cal. Comp. Cases 316

Case Law: Employment.

Case Holding:
"The purpose of Ordinance 766 is 'to require certain persons confined in County correctional facilities to perform labor pursuant to Penal Code Section 4017.' Under Ordinance 766, "prisoners" are required to perform labor on public works. As defined in Ordinance 766 (and as consistent with PC 4017), a prisoner is 'any person confined in the County Jail, Industrial Farm, Road Camp, or similar restrictive County facility under a final judgment of imprisonment rendered in a criminal action or proceeding or as a condition of probation after suspension of imposition of sentence or suspension of execution of a sentence.'"

Take Away:
Applicant was an employee at the time he was injured because his labor provided a service to the County, the County controlled Applicant's activities and Applicant was required to report to the County. The WCJ denied the applicability of Ordinance No. 766, noting that this ordinance applies only when an individual is "confined" to a correctional facility, and Applicant was not confined to any facility.

Case Law: Fraud.

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Hillary Schwartz v. Ease Entertainment, Starr Indemnity and Liability Company
(Cal. App. 2d Dist. 2016)
81 Cal. Comp. Cases 808

Relevant Statutory References: Insurance Code §§ 1871-1871.9
Labor Code §3600(a)(8)

Relevant Case References: People v. Laino
(2004)
32 Cal. 4th 878;
11 Cal. Rptr. 3d 723, 87 P.3d 27

Tensfeldt v. Workers' Comp. Appeals Bd.
(1998)
63 Cal. Comp. Cases 923

Case Law: Fraud.

Case Holding:

“Contrary to defendant's argument, the bar under section 3600(a)(8) only applies to a ‘commission of a felony’ that results in a conviction. The WCJ correctly concluded that applicant's claim for an industrial injury was not barred since under the laws of Georgia applicant has not been convicted of a felony.”

Take Away:

Applicants are innocent until proven guilty beyond a reasonable doubt in the United States. Innocent California injured workers are entitled to workers’ compensation benefits pursuant to “The Workmen's Compensation Insurance and Safety Act of 1917.” The affirmative defense in Labor Code section 3600(a)(8) should not be pursued absent a conviction or plea of guilty.

Case Law: IMR.

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State Comp. Ins. Fund v. WCAB (Margaris)
(Cal. App. 2d Dist. 2016)
81 Cal. Comp. Cases 561; 2016 Cal. App. LEXIS 491

Relevant Statutory References: Labor Code §§4610.6, 139.5
Gov. Code §19130

Relevant Case References: State Comp. Ins. Fund v. WCAB (Sandhagen)
(2008)
44 Cal.4th 230

Stevens v. WCAB
(2015)
241 Cal.App.4th 1074

Case Law: IMR.

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Case Holding:
"In a statute directing government action, 'shall' may be used in two different contexts: the mandatory-directory context, or the mandatory-permissive context ...Applying either of these general tests leads us to conclude that the Legislature intended the 30-day provision in section 4610.6, subdivision (d), to have a directory, rather than a mandatory, effect."

Take Away:
The Legislature intended to remove the authority to make decisions about medical necessity of proposed treatment for injured workers from the WCAB and place it in the hands of independent, unbiased medical professionals. The 30-day period is directory, rather than mandatory and jurisdictional. The Labor Code does not provide any consequence or penalty in the event the IMR organization fails to issue an IMR determination within the 30-day period. The Legislature provided limited grounds to seek an appeal of an IMR determination and untimeliness of the IMR determination is not one of the statutory grounds for appeal. The Legislature did not intend noncompliance with the time limits to effectively divest the Administrative Director of the Division of Workers' Compensation of jurisdiction to conduct IMR.

Case Law: Liens.

Julia Ozuna v. Kern County Superintendent of Schools, PSI,
2016
Cal. Wrk. Comp. P.D. LEXIS 98
(ADJ8092562 MF, ADJ82229 l l)

Relevant Citation(s):

Labor Code § 4620(a);
B&P Codes §§ 22450 and 22455;
8 CCR § 9981(a)

Relevant Case References:

U.S. Auto Stores v. Workmen's Comp. Appeals Bd. (Brenner)
(1971) 36 Cal.Comp.Cases 173;
Los Angeles Unified Sch. Dist. v. Workers' Comp. Appeals Bd. (Henry)
(2001)
66 Cal.Comp.Cases 1220 (writ denied)

Case Law: Liens.

Case Holding:
"Copy service fees incurred to obtain medical other records are medical-legal expenses under Labor Code section 4620(a), and they may be recovered by the filing of a lien claim...because the services were provided before the July 1, 2015 effective date of that fee schedule (Cal. Code Regs., tit. 8, § 9981(a).)...the value not established by a fee schedule...(thus) the lien claimant must present evidence of the reasonable value of those services in order to support recovery."

Case Dicta of Interest:
"...a fee schedule that is not controlling may be considered in evaluating whether the amount claimed by a lien claimant is unreasonable.."

Take-Away:
Copy service lien claimants can recover fees via liens for records not mentioned by parties' Agreed Medical Evaluators (AMEs), even without a finding of fact adopting conclusions contained in medical-legal reporting by an AME, and even if the AME report has no evidentiary value. A lien claimant is arguably to be paid simply for the acts/services of copying records.

Case Law: Liens.

Olivia Palacios v. County of Fresno, PSI, Administered By RISCO
2016
Cal. Wrk. Comp. P.D. LEXIS 4
(DJ6466823, ADJ6465939, ADJ784456 l)

Relevant Labor Code/Regulatory Citation(s): Labor Code § 5900;
8 Cal. Code Reg. § 10301(dd)

Relevant Case References: Kunz v. Patterson Floor Coverings
(2002)
67 CCC 1588

Case Holding:
"Because there is a final determination that applicant did not sustain an injury to her psyche, lien claimant cannot recover (its) lien for psyche treatment."

Case Law: Liens.

Case Dicta of Interest:
"In this case, the...Findings and Award...found that applicant did not sustain an industrial injury to her psyche, was served on lien claimant and lien claimant did not seek reconsideration of that finding. A lien claimant becomes a party to a case when the underlying case is resolved...Furthermore... '[a]ny person aggrieved directly or indirectly by any final order, decision, or award' may file a petition for reconsideration."

Take-Away:
Lien claimants cannot recover on their liens after WCJs issue Findings and Orders of "take nothings." Lien claimants are parties to cases when served with "take nothing" Orders post-trial. Lien claimants have to file timely petitions for reconsideration. Failing to do so results in final orders precluding recovery for treatment and/or services rendered to applicants and they cannot re-litigate same issues. Make sure "estoppel" and "res judicata" are raised as issues in Pre-Trial Conference Statements (DWC CA Form 10253.1).

Case Law: Medical-Legals.

Kischa Loving v. SCIF
2016
Cal. Wrk. Comp. P.D. LEXIS 238
(ADJ692183 1, ADJ9093989)

Relevant Citation(s): Labor Code § 4062.3;
8 CCR §10842

Relevant Case References: Alvarez v. Workers' Comp. Appeals Bd.
75 Cal. Comp. Cases 397

Case Holding:
"[Citing REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION]...Labor Code section § 4062.3 does not contain an exception for criminal investigations. Defendant's ex-parte oral and written communications (providing documents for the AME to review) were not so insignificant and inconsequential that any resulting repercussion would be unreasonable... Defendant violated Labor Code § 4062.3..."

Case Law: Medical-Legals.

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Case Dicta of Interest:
"...Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration...."

Take-Away:
Ex-parte communication prohibitions are applicable to AMEs and PQMEs even if related to pending criminal investigations. Also note the Report and Recommendation included the following language “Defendant did not comply with Rule 10842 (a) by fairly stating all the material evidence...” which was adopted and incorporated by the Board in its decision.

Case Law: Medical-Legals.

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Beatriz Hernandez v. Ramco Enterprises, PSI
2016 Cal. Wrk. Comp. P.D. LEXIS 486, (ADJ9836001, ADJ9836002, ADJ9836004, ADJ9836542, ADJ10301695)
(Panel Decision)

Relevant Statutory Reference(s):	Labor Code § 4062.2
Relevant Case Reference(s):	Navarro v. City of Montebello (2014) 79 CCC 418

Case Law: Medical-Legals.

Case Holding:
"Defendant suggests that applicant intentionally delayed in filing the Claim Form of the September 25, 2015 injury until after the initial evaluation with PQME Miller in order to obtain another panel QME. Although we do not condone actions that are intended to controvert the law, we cannot ascribe such a motive to applicant on the evidentiary record in this case. Applicant testified that she was not given a Claim Form by her supervisor when she reported the September 25, 2015 injury...She also denied that a Claim Form was sent to her on November 18, 2015...Defendant did not present any evidence to contradict applicant's testimony. Further, applicant's Answer points out that the September 25, 2015 injury was initially treated as requiring only first aid until the January 27, 2016 office visit when applicant was given restrictions...The Application and Claim Form in case number ADJ10301695 were filed shortly after this report issued...Thus, the claimed injury was reported subsequent to the initial PQME with Dr. Miller and, therefore, our decision in Navarro applies and applicant is entitled to a new PQME with regard to this injury."

Case Law: Medical-Legals.

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Take Away:
While Navarro requires the PQME address all medical issues arising from all injuries reported on one or more claim forms and injured worker return to the same PQME when a new medical issue arises relating to the previously reported claim, if the new injury which is reported after the other claims were filed and subsequent to initial evaluation, they do not need to be evaluated by the same PQME.

Case Law: Medical-Legals.

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Concepcion Vasquez v. Providence Saint Joseph Medical Center,
2016 Cal. Wrk. Comp. P.D. LEXIS 576 (ADJ8641731)
(Panel Decision)

Relevant Statutory Reference(s):	8 CCR § 38(i) Labor Code § 4062.5
Relevant Case Reference(s):	Corrado v. Aquafine Corp. (2016) 2016 Cal. Work Comp. P.D. LEXIS 318

Case Law: Medical-Legals.

Case Holding:

"In this case, defendant could have attempted to remedy Dr. Pretsky's failure to issue a supplemental report in response to its request shortly after expiration of the 60-day time period in Administrative Director Rule 38(i). Defendant did not do so. Further, while defendant did send a letter to Dr. Pretsky on May 11, 2015, that letter does not mention the January 27, 2015 request for a supplemental report or inquire as to the report's status. We also observe that on June 24, 2015, defendant sent sub rosa film to Dr. Pretsky and requested that he review the film and issue a supplemental report. That letter also fails to inquire as to the status of defendant's January 27, 2015 request for a supplemental report. In addition, it was not until August 4, 2015, over six months after defendant made its January 27, 2015 request for a supplemental report, that it objected to the untimeliness of Dr. Pretsky's reporting and requested a supplemental QME panel. Under these circumstances, a strong argument can be made that defendant waived its objection. Moreover, Dr. Pretsky has served as the psychiatric QME in this case since 2014. Replacement of Dr. Pretsky at this late date, especially in view of the fact that defendant could have but failed to take any steps to remedy the matter, is contrary to our Constitutional mandate to accomplish substantial justice in all cases in the most expeditious, inexpensive and unencumbered manner possible."

Case Law: Medical-Legals.

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Take Away:
Labor Code § 4062.5 only mandates the replacement of a QME where the initial medical-legal report is untimely, not where the supplemental medical report is untimely. Absent a showing of substantial prejudice, the QME cannot be replaced for untimely supplemental reports, especially where the Defendant makes no effort to remedy the untimeliness and the particular QME has been part of the case for a substantial period of time.

Case Law: MPNs.

Joel Rodriguez Luna v. The Home Depot
2016 Cal. Wrk. Comp. P.D. LEXIS 405, (ADJ9052223**)**
(Panel Decision)

Relevant Statutory Reference(s):	8 Cal. Code Reg. § 9767.5(a)(1) Labor Code § 4616.3(d)
Relevant Case Reference(s)	Soto v. Sambrailo Packaging 2016 Cal. Wrk. Comp. P.D. LEXIS 26

Case Law: MPNs.

Case Holding:
"Here, the facts stipulated to by the parties do not establish, as asserted by applicant, that defendant's MPN is in violation of the applicable access standards. The parties stipulated that the MPN has only one orthopedic surgeon within the 15 mile/30 minute radius. There is no evidence regarding whether the MPN has at least three physicians willing to act as applicant's primary treating physician within a 15 mile/30 minute radius of applicant's residence or the employer's zip code, the access standard that applies to the selection of a primary treating physician. Defendant's MPN will meet the access standards if there are at least three physicians identified as primary treating physicians within that radius who are willing to treat applicant's industrial injury. Additionally, the parties' stipulation that the MPN has seventeen orthopedic surgeons within 30 miles of the applicant's residence and the employer's zip code, does not establish their availability to provide applicant's care as primary treating physicians, as specialists may agree to act as secondary physicians and only take patients on referral from a primary treating physician."

Case Law: MPNs.

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Take-Away:
Employees must demonstrate that there are no primary treating physicians within the required range in order to demonstrate that the MPN does not meet the access standards. If the employee seeks to use a specialist as a primary treating physician, the larger access standards apply and it does not negate the MPN.

Case Law: PD/Voc Experts.

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Branham v. Arroyo Grande Glass,
81 Cal. Comp. Cases 652
(Panel Decision)

Relevant Statutory Reference(s): Labor Code § 4660

Relevant Case Reference(s): Telles Transport. v.WCAB
(2001)
92 Cal. App. 4th 1159

LeBoeuf v. WCAB
(1983)
34 Cal. 3d 234

Holding:
"...it is inappropriate for a vocational expert to consider the cognitive effects of industrially-prescribed medications on an applicant's ability to compete in the open labor market. In fact, such an opinion from a vocational expert may be sufficient, in conjunction with the opinion of medical expert(s), to support a finding of permanent and total disability.

Case Law: PD/Voc Experts.

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Take-Away:
A vocational expert alone on PD is insufficient if the expert's opinions are based on medical conclusions. A vocational expert's opinions in conjunction with a medical expert's opinions may be required to prove a LeBoeuf permanent disability impairment assuming both vocational expert and medical expert opinions cross-over. Discovery on both cognitive and medical effects on work restrictions and ability to compete in the open labor market may be required discovery.

Case Law: PD/Re-opening.

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Andrew Weitnauer v. Sacramento County Sherif.f's Department
2016 Cal. Wrk. Comp. P.D. LEXIS 171, (ADJ6716371)
(Panel Decision)

Relevant Statutory Reference(s):

Labor Code § 5804
8 CCR §10859

Relevant Case Reference(s):

Selden v. WCAB
(1986)
176 Cal. App.3d 877

A.C. Transit District v.WCAB
(1992)
57 CCC114

Korff v. WCAB
(1997)
63 CCC 88

Case Law: PD/Re-opening.

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Case Holding:
"...(where) defendant's Petition to Reduce was not filed until April 10, 2014, well after the five years from applicant's date of injury expired on August 19, 2013...where the issue is jurisdiction, it cannot be waived by a failure to raise it...we conclude that the WCAB lacks jurisdiction to reduce applicant's permanent disability award..."

Take-Away:
A Petition to Reduce PD requires the same deadlines as a Petition to Reopen. Failure to timely Petition to Reduce PD will be barred by lack of jurisdiction.

Case Law: Procedure.

Dorothy Claiborne v. Precious Home Companion, California Insurance Guarantee Association, FirstComp Insurance Services
2016
Cal. Wrk. Comp. P.D. LEXIS 343
(ADJ9805381, ADJ7750980)

Relevant Statutory Reference(s): 8 Cal. Code Reg. § 10589
Labor Code §§ 4062.2, 4060, 4064(d)

Case Law: Procedure.

Case Holding:
"[Defendant] does not dispute that medical evaluation by AME Dr. Pang was properly obtained by agreement…in [another case] pursuant to section 4062.2, just that it did not agree to use Dr. Pang in [a second case] (Lab, Code, § 4060(c).)…Consequently given [the] evaluation was properly obtained, [the Agreed Upon Medical Evaluator] reports and deposition are admissible."

"We also note [Defendant] was able to conduct discovery regarding [AME's opinions and reports]…[the] reports were provided to the [other] Panel Qualified Medical Examiner [in the second case]...In addition, [Defendant] was able to depose [the Agreed Upon Medical Evaluator] as to both the alleged specific and cumulative injuries to applicant's left knee...Accordingly, we concur with the WCJ that consolidation was appropriate under WCAB Rule 10589 (Cal. Code Regs., tit. 8, § 10589) and deny reconsideration as to that issue…"

Take Away:
In cases consolidated under 8 Cal. Code Reg. § 10589, AME evaluations from one of the consolidated cases are admissible in any proceeding except as providing by Labor Code §§ 4060, 4061, 4062.1 or 4602.2.

Case Law: Presumptions.

Cal. Dep't of Corr. & Rehabilitation v. Workers' Comp. Appeals Bd.
(Cal. App. 5th Dist. 2016)
81 Cal. Comp. Cases 608, 2016 Cal. Wrk. Comp. LEXIS 73

Relevant Statutory Reference(s): Labor Code § 3212.2

Relevant Case Reference(s): Reeves v. WCAB
(2000)
80 Cal. App. 4th 22

Case Law: Presumptions.

Case Holding:
"...Defendant's argument that custodial duties are not precisely defined and must have some nexus to punishment...is misplaced. Defendant fails to consider that all of the training provided by Applicant for these Level 3 and 4 inmates is without other employees present including correctional officers. Applicant becomes the substitute for correctional officers dealing with this large number of inmates who are the worst in the system and require constant vigilance by Applicant to prevent prohibited activities, all because these inmates are serving sentences after convictions and being punished for their earlier activities...Applicant's duties are related to the punishment that has been imposed by the Courts and Defendant's argument is not persuasive."

Case Law: Presumptions.

Take Away:
It's the job duties, not the job title which matters. The presumption applies to employees who have any duties that are custodial in nature. As a vocational instructor, applicant worked with inmates without the presence of other correctional officers. As such, applicant becomes the substitute for correctional officers dealing with the inmates which requires constant vigilance to prevent prohibited activities. It's the work that counts, not the job title. The presumption applies to employees who have any duties that are custodial in nature. As a vocational instructor, applicant worked with inmates without the presence of other correctional officers. As such, applicant becomes the substitute for correctional officers dealing with the inmates which requires constant vigilance to prevent prohibited activities.

Case Law: Retirement.

Cameron v. Sacramento County Employees' Retirement System
(Cal. App. 3d Dist. 2016)
4 Cal. App. 5th 1266; 2016 Cal. App. LEXIS 941

Relevant Statutory References: Gov. Code, §§ 31722, 31641

Relevant Case References: Weissman v. Los Angeles County Employees Retirement Assn.
(1989)
211 Cal.App.3d 40; 1989 Cal. App. LEXIS 587

Driscoll v. City of Los Angeles
(1967) 67 Cal.2d 297; 1967 Cal. LEXIS 220

Case Holding:
"The evidence established that plaintiff ceased to work for a salary from which deductions were made when he received his last check on May 15, 2008. Consequently, that is the date of "discontinuance of service" within the meaning of section 31722...Dr. [DOE] opined that plaintiff was continuously disabled…a month after the date of 'discontinuance of service…' Accordingly, the section 31722 alternative does not apply here to make plaintiff's application timely."

Case Law: Retirement.

Case Dicta of Interest:

"If the Legislature wanted to define "'service'" as the period during which a person is a county employee, it could easily have done so. Instead, the Legislature defined "service" differently. As noted, section 31641, subdivision (a), defines "[s]ervice" as 'uninterrupted employment of any person appointed or elected for that period of time:(a) For which deductions are made from his earnable compensation from the county or district for such service while he is a member of the retirement association.'...employment is just one component of the definition of "service" as it applies here."

Take Away:

The legislature means what it writes. An application for service-connected disability retirement is timely under if made while, from the date of discontinuance of service to the time of the application, the employee is continuously physically or mentally incapacitated to perform his or her duties. The employee did not establish he was physically incapacitated between when he received his last check and the beginning of his continuous disability. Therefore, he did not establish he was continuously disabled and his application thus was not timely made.

Case Law: SJDBs.

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Beltran v. Structural Steel Fabricators
(2016) Cal. Wrk. Comp. P.D. LEXIS - (cite pending)

Relevant Labor Code citation(s): Labor Code §§ 4658.7, 5001

Relevant Case References: Thomas v. Sports Chalet, Inc. (1977) 42 Cal. Comp. Cases 625

Case Law: SJDBs.

Case Holding:
“Our review of the record demonstrates the existence of such a good faith dispute over applicant's entitlement to the Supplemental Job Displacement Benefit voucher, such that the parties' settlement of that benefit should be approved. Accordingly, we will grant defendant's Petition for Reconsideration and issue an Order approving the parties' Compromise and Release Agreement as presented.”

Take Away:
Supplemental Job Displacement Benefits may be resolved in a Compromise and Release. Parties must make a sufficient offer-of-proof demonstrating a legal basis analogous to that in the Thomas v. Sports Chalet case, i.e., sufficient evidence would be presented at trial which, if relied upon by the trier-of-fact, would result in a decision the threshold right to SJDBs and/or all benefits would not be met, thus applicant would take-nothing.

Case Law: SOL's.

Antouri v. Workers' Comp. Appeals Bd.
(Cal. App. 2d Dist. 2016)
81 Cal. Comp. Cases 604

Relevant Statutory References: Labor Code §§ 5410, 5803

Relevant Case References: Benavides v. WCAB
(2014)
227 Cal. App. 4th 1496

Case Law: SOL's.

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Case Holding:
"[W]e adopt and incorporate our prior decision of February 19, 2015, which sets forth the relevant procedural and legal history in this matter and which constitutes the law of this case. On page four of that decision, we stated that "here there has been an adjudication of the issue of psychiatric disability after the petition to reopen, and the WCJ determined that [applicant] had not sustained new and further disability in the form of injury to the psyche. Because of that second determination, applicant is now barred from pursuing the issue further because the time limits for filing another petition to reopen have passed'."

Take Away:
Even if a misdiagnosis of a psychiatric injury is grounds for reopening a case for new and further disability, such claim is barred if the time limits for filing a petition to reopen have passed. Applicant is entitled to psychiatric treatment to the extent that such treatment is necessary to cure or relieve her from the effects of her industrial injury.

Case Law: SOL's.

Ostini v. Workers' Comp. Appeals Bd.
81 Cal. Comp. Cases 752, (Cal. App. 2d Dist. 2016)

Relevant Statutory Reference(s): Labor Code §§ 5405, 5411, 5401

Relevant Case Reference(s): Honeywell v. WCAB (Wagner) (2005)
35 Cal. 4th 24

Case Law: SOL's.

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Case Holding:
"Here, the WCAB pointed out, the statute of limitations began running on Applicant's date of injury pursuant to Labor Code § 5405(a), since Applicant was never provided with disability indemnity or medical treatment so as to start the statute running at a later date under Labor Code § 5405(b) or (c). The WCAB also concluded that Applicant did not establish that the statute was tolled based on a breach by Defendant of its duty to provide Applicant with notice of her potential right to workers' compensation benefits pursuant to Labor Code § 5401, when there was no evidence that Defendant knew about Applicant's injury....The duty arises when the employer knows of an injury or claim, not when it should have known …"

Take Away:
In specific injury cases when no benefits have been provided, unless there is basis for tolling, the statute of limitations runs from date of injury's occurrence, not date applicant obtained knowledge of her potential right to workers' compensation benefits. The statute was not tolled because there was no duty to provide Applicant with notice of her potential right to workers' compensation benefits when there was no evidence that Defendant knew about Applicant's injury.

Case Law: SOL's.

Erwin v. Gulfstream Aero.
81 Cal. Comp. Cases 932
(Panel Decision)

Relevant Statutory Reference(s): Labor Code §§ 5401, 5405, 4600

Relevant Case Reference(s): Kaiser Found. Hosps. v. WCAB (Martin)
(1985)
39 Cal. 3d 57

CIGA. v. WCAB (Carls)
(2008)
163 Cal. App. 4th 853

Case Law: SOL's.

Case Holding:
"The letter and claim form...do not contain the notifications and information required by section 5401(b)(1)-(9)...The Supreme Court has held that,… the remedy for breach of an employer's duty to notify is a tolling of the statute of limitation if the employee, without that tolling, is prejudiced by that breach...An employee would be prejudiced without the tolling if he has no knowledge that his injury might be covered by workers' compensation before he receives notice from the employer...Actual knowledge of the…potential eligibility for a particular injury...cannot be proven by showing an injured worker's...general awareness of the existence of the workers' compensation system...or...past experience with workers' compensation …"

Case Law: SOL's.

Take Away:

The employer has the burden to prove either written notice was provided or establish that the applicant had actual knowledge of his workers' compensation rights. The employer had actual knowledge of applicant's injury and sent applicant a letter and claim form. However, defendant's letter and claim form do not contain the notifications and information required for proper notification, the supervisor never explained the scope or extent of workers' compensation benefits and there was no evidence that anyone explained the necessary procedures to be used to commence proceedings for the collection of compensation. Furthermore the employer did provide applicant with health insurance as a benefit of his employment, and that applicant received medical treatment for the claimed ankle injury through that health insurance coverage which constituted benefits thus tolling the statute of limitations for so long as treatment was afforded under the plan.

Case Law: UR.

Esperanza Sanchez v. Dunlap Manufacturing Inc., Travelers Property Casualty Company
(Board Panel Decision 2016)
2016 Cal. Wrk. Comp. P.D. LEXIS 407
(ADJ9913496)

Relevant Statutory Reference(s):

8 Cal. Code Reg. § 9792.9.1(e)(3)
Labor Code §§ 4610(g)(1), (g)(3)(A)

Relevant Case Reference(s):

Hamilton v. Lockheed Corporation (Hamilton)
(2001)
66 Cal.Comp.Cases 47

McClune v. WCAB
(1998)
63 Cal.Comp.Cases 261

Case Law: UR.

Case Holding:
"…the RFA is a medical report and should have been served upon counsel (Cal. Code Regs., tit. 8, § 10608), the only evidence in the record in this case is a copy of defendant's UR. No other evidence was submitted at trial and no testimony was taken. There is no medical evidence in the record to support the reasonableness and necessity of applicant's request for treatment. There is also no evidence to establish that defendant's failure to serve the RFA or produce a copy of the RFA at trial constituted a willful suppression of evidence. The fact that the RFA was not voluntarily produced by defendant as an exhibit does not constitute the willful suppression of the RFA."

"Without any evidence to indicate whether defendant willfully suppressed the production of evidence and without any evidence establishing whether the requested medical treatment is reasonable and necessary, the proper procedure is to return this matter to the trial level for further proceedings."

Take Away:
Even if a Defendant does not timely complete UR, an injured employee still has to prove their medical treatment was necessary and reasonable. If there is insufficient evidence in that regard, further proceedings at the trial level will be necessary.

Case Law: UR.

Tyni v. Workers' Comp. Appeals Bd.
81 Cal. Comp. Cases 1050, (Cal. App. 2d Dist. 2016)

Relevant Statutory Reference(s): Labor Code §§ 4600, 4610.6, 4610.5, 4610

Relevant Case Reference(s): Stevens v. WCAB (2015)
241 Cal. App. 4th 1074

Arredondo v. Workers' Compensation Appeals Board(2015)
80 CCC 1050

SCIF v. WCAB. (Margaris) (2016)
248 Cal. App. 4th 349

Case Law: UR.

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Case Holding:
"The WCAB added that the WCJ's finding that the IMR determination did not issue within the time period described in Labor Code § 4610.6(d) was correct. The WCAB repeated, however, that such a determination did not affect the validity of the IMR determination since the time periods were directory, not mandatory.... In light of the expressed legislative intent and statutory design of IMR, the section 4610.6(d) time frames are properly considered to be directory and the IMR determinations in this case are valid even if they did not issue within those time frames.'"

Take Away:
The legislature intended to take out of the hands of the WCAB the issue of the appropriateness of medical treatment, provided the parties follow the requisite review procedure. The IMR determination is valid. IMR is governmental action and the time frames set forth the labor code are directory and not mandatory. No grounds for appeal of the IMR determination were established at trial and thus the IMR determination is final and binding.

S.I.P.P.

Set-up, Investigate, Prepare, Proceed.

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Prepare and Proceed.

Cite the case authority for your defense theories.

Commit To Your Legal Theories And Defenses

What are your legal defenses based on your discovery results:

1. Independent Contractor (LC § 3600)
2. Intoxication (LC § 3600)
3. Applicant's Serious and Willful Misconduct (LC § 4551)
4. Disability aggravated by unreasonable conduct (LC § 3600)
5. Employer prejudiced by failure to give notice of injury (LC § 5400 and 5404)
6. Intentional self-infliction of injury or death (LC § 3600)
7. Initial aggressor/altercation (LC § 3600)
8. Conviction and commission of a felony (LC § 3600)
9. AOE/COE (LC § 3600)
10. Apportionment (LC §4663/4)
11. Volunteer(s) (LC § 3600)

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Document:

Documentation:

1. List defenses

2. List documents

3. List witnesses

4. Match witness(es)/document(s) to defense(s)

Preparation Chart:

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DEFENSE

- Statute of Limitations
- LC § 5405(a)-(c)
- LC § 5404
- Antouri v. Workers' Comp. Appeals Bd., (Cal. App. 2d Dist. 2016) 81 CCC 604

WITNESSES/DOCUMENTS

- Witnesses
  - Knowledge
  - Date of Claim Form
  - Last Treatment
  - Last Benefit
  - Receipt of Notice
- Claim Form
  - Date of Filing
- Application
  - Date of Filing
- Etc…

Cite It, Don't Fight It!
Case Law Strategy Update.

Presented by: David H. Parker & Megan Lucchesi
Attorneys at Law
Parker, Kern, Nard & Wenzel

pknwlaw.com
dp@pknwlaw.com
ml@pknwlaw.com
559-449-2558

Law Offices Of
PARKER KERN & NARD WENZEL
Professional Corporation