

Apportionment

I21 - Jose's 1998 injury resulted in 45% permanent disability. He filed a petition to reopen after the adoption of SB 899 and the resulting amendments to Labor Code section 4664. He was found to have 66% permanent disability. In figuring out how much money Jose gets, the proper method is to:
Answer: C. Issue an award for the total percentage of PD and credit defendant for payments made. On a Petition to Reopen, apportionment pursuant to section 4664 and Brodie is not proper. Esparza v. City of Los Angeles (2008), 2008 Cal. Wrk. Comp. PD LEXIS 410 (noteworthy panel decision).

N39 - Joseph had an admitted shoulder injury, which resulted in 15% permanent disability. Defendant sought apportionment based upon an earlier PD award referred to in medical reports. Defendant can meet its burden of proof on apportionment by introducing into evidence:
Answer: Defendant has the burden of proof to show an actual prior PD award and evidence that there is overlap between the prior disability and the current disability. Mere mention of it by a medical report is not sufficient. E&J Gallo Winery v. WCAB (Rubio) (2008) 73 CCC 1206 (unpublished court of appeal decision).

N40 - At the time of Deborah's admitted injuries, she was 51 years old, weighed 340 pounds, had diabetes and peripheral neuropathy, as well as age-related severe degenerative disk disease. The AME found her 100% permanent disabled, but apportioned 90% to non-industrial factors. In assessing this apportionment, choose the best answer.
Answer: Apportionment will be allowed. Labor Code section 4663 allows for apportionment to pathology and asymptomatic prior conditions. To the extent 4663 and FEHA are inconsistent, the more recent legislative enactment prevails. Kos v. WCAB (2008), 73 CCC 529 (writ denied).

N44 - Randall had a 1992 injury which resulted in 27.5% permanent disability. His 2004 injury resulted in 31% permanent disability using the new rating schedule based on AMA Guides and Whole Person Impairment. As the judge in this case, to determine Randall's new level of disability, you:
Answer: C. Convert the factors of disability from the old injury so that both disabilities can be rated under the same schedule, then do the subtraction. A defendant who can prove overlap of disability is entitled to subtract prior disability, but the comparison must be between apples and apples and not apples and oranges. Minville v. County of Contra Costa (2008), 36 CWCR 199 (decision after reconsideration).

N45 - True or False: In 2008, Labor Code section 4663 was amended to provide that a physician reporting causation-based apportionment of permanent disability may no longer consider as a causative factor race, religious creed, color, national origin, age, gender, marital status, sex, or genetic predisposition.
Answer: False. While the legislature passed such a bill, the governor vetoed it, stating in his veto message, "While I support the intent of this measure, I do not believe it is necessary. Current law, as well as court rulings, adequately protects injured workers from inappropriate application of apportionment statutes"

G55 - Manuel had various injuries while working at Hertz. These injuries, combined with his inability to read and write English and lack of academic training, caused a workers' compensation judge to find him non-feasible for vocational rehabilitation and therefore permanently totally disabled. Defendant

wants apportionment to these non-industrial conditions. Answer: C. Even though Manuel is non-feasible, Hertz is entitled to apportionment for the non-industrial causes per SB 899. Hertz is liable only for the percentage of Manuel's permanent disability directly caused by his industrial injuries. His limited language skills and education affect his ability now, just as they affected his ability to compete in the open labor market prior to his injuries. Hertz Corporation v. WCAB (Aguilar) (2008) 73 CCC 1653.

G58 - Hilda, a police officer, developed heart trouble – a presumptively industrial condition. Defendant seeks apportionment because of her non-industrial obesity, smoking, and family history, which the AME concluded caused 50% of her permanent disability. Answer: A. Because Labor Code section 3212.5 prohibits attributing permanent disability to matters preceding the manifestation of heart trouble, no apportionment is allowed. In the absence of stated legislative intent to modify the anti-attribution clause of Labor Code section 3212.5, it is still valid. City of Los Angeles v. WCAB (Kendrick) (2008) 73 CCC 499 (writ denied). See also Labor Code section 4663(e) preventing apportionment, which has been held applicable to state corrections officers and found to be retroactive. Department of Corrections and Rehabilitation v. WCAB (Novak) (2008) 73 CCC 1443 (writ denied); Department of Corrections and Rehabilitation v. WCAB (Alexander) (2008) 2008 Cal. Lexis 13623, 73 CCC 1294.

Discovery and Procedure, Settlements, Attorney Fees

I23 - Tami's lawyer attended the deposition of an agreed medical evaluator scheduled by defendant. He wants to be paid for his services in connection with the deposition. Applicant attorney's request for fees will be: Answer: D. Denied. While Labor Code sections 4620 and 5811 allow for costs, and section 5710 provides a fee when the applicant is deposed, there is no such authority for doctor depositions. Carter v. AIG Insurance Co. (2008), 36 CWCR 142.

I25 - Jose and his employer agreed to a Compromise and Release (C&R) including a Medicare set-aside trust, which Jose signed. Before the MSA was approved, and before defendant signed the C&R, Jose died. His estate wants the C&R approved and its funds paid. As the judge in this case, how do you rule? Answer: B. You rule for the employer. Until all parties sign, a C&R is not duly executed and may not be approved. Lizarraga v. WCAB (2008), 73 CCC 1463 (writ denied). Note: In a similar case in which the parties were awaiting MSA approval, but where the defendant had signed the C&R, the WCAB did approve the settlement, concluding that all parties had signed the settlement and there was no proof that approval of the MSA was a condition precedent to approval. Insurance Co. of the State of Pennsylvania v. WCAB (Rodriguez) (2008), 73 CCC 1089 (writ denied).

N35 - Maria and her employer settled a case by compromise and release. Due to a mistake by her attorney who used the address of a different client with the same name, the C&R had an incorrect address for Maria. Defendant sent the award to the Maria whose address was on the C&R, and she cashed the check. Who pays? Answer: D. The error was caused by Maria's attorney, who is liable. He may seek restitution from his former client. Gonzalez v. WCAB (2008), 72 CCC 1669 (writ denied).

N36 - Brewer obtained an award of 100% permanent disability. His attorney was awarded a 20% fee, which reduced his weekly benefit by 20%. Defendant objected to this fee. What's the ruling? **Answer:** Defendant has no standing to object, as it does not affect its overall liability to pay benefits. Brewer v. Capitol Reprographics 2007 Cal. Wrk. Comp. P.D. LEXIS 195.

G49 - Albertsons is permissibly self-insured. Its excess carrier, concerned about its potential liability to Schafer because of his numerous injuries, asks to be joined as a party defendant so as to better protect its interests. As the judge, in responding to the request for joinder, you: **Answer:** Deny the joinder. An excess carrier lacks standing to participate in the trial, as it was not aggrieved by the WCJ's decision. Schafer v. Albertsons, Inc. 2007 Cal. Wrk. Comp. P.D. LEXIS 231.

G51 - Applicant attorney made inappropriate remarks and accusations against the defendant and defense counsel in a petition for reconsideration. When admonished for the tone and character of his comments by the WCAB, the attorney sent a letter to three WCAB commissioners, claiming they failed miserably to discharge their duties, corrupted the proceedings, and told them they owed him and his client an apology for their judicial malfeasance. He further suggested the commissioners were either imbeciles or crooked. On these facts, what did the court do. **Answer:** D. Applicant attorney's comments were indisputably without merit, he was sanctioned \$2,500. Ezra v. WCAB (2008), 73 CCC 391 (writ denied).

Industrial Disability Retirement, Vocational Rehabilitation

B10 - With respect to vocational rehabilitation, as of 1/1/09: A. The Rehabilitation Unit of the DWC will no longer have jurisdiction over injuries irrespective of the date of injury. B.Rehabilitation appeals filed before 1/1/09 may be adjudicated by the WCAB. C.The Rehabilitation Unit staff will be transitioned into the Retraining and Return to Work Unit (RRTW). **Answer:** All of the above. Rehabilitation under Labor Code section 139.5 is sunsetted as of 1/1/09. The new RRTW unit will work with employees injured after 1/1/04 who may be entitled to supplemental job displacement benefits. DWC Newsline Bulletin #62.08. For more information on the RRTW, go to www.dir.ca.gov/DWC/rehab.html.

Temporary Disability & LC 4850

B5 - In 2009, this is the maximum weekly temporary disability rate: **Answer:** B. \$958.01 – up from \$916.33 in 2008. Note: The minimum TD rate in 2009 is \$143.70. Bonus question: the mileage rate for 2009 is 55 cents per mile.

B6 - Pedro's employer provides its employees with cell phones and company vehicles, with the only restriction that employees must seek permission to call or drive to Mexico. When he was injured, Pedro wants the value of these items included in his earnings for purposes of calculating his indemnity rate. Do you include these items? **Answer:** B. These are not included. Employees often have the opportunity to use employer-owned property, such as tools, but the primary purpose is to benefit the employer rather than to compensate the employee. Free flight passes and ski lift tickets are strictly for use by employees on their own time. Martinez v. WCAB (2008), 73 CCC 1105 (writ denied).

B8 - Life pensions now include an annual cost-of-living allowance. The COLA calculation starts when? **Answer:** C. A life pension starts only after all permanent disability has been paid. That is when the COLA kicks in. Loya v. Arrowhead Brass Products 2008 Cal. Wrk. Comp. PD LEXIS 95 (noteworthy panel decision).

I29 - Joe is a probation officer for the county, who is eligible for 4850 pay when off on an industrial injury. His rate of pay was higher on the date of injury than it was when the disability started. With respect to what Joe will be paid when off work, what will he receive? **Answer:** A. Joe is paid his salary as of the time of the disability, as 4850 benefits are paid based on earnings at the time of disability in order to replace the salary an employee loses at that time. Jimenez v. Kings County (2008), 2008 Cal. Wrk. Comp. PD LEXIS 432 (noteworthy panel decision).

I30 - Dave had injuries in February 2005 and April 2005, both of which contributed to his temporary disability. For purposes of the two-year limit on TD, he wants TD for each injury period running consecutively. The employer argues that the TD should run concurrently. **Answer:** A. Where independent injuries result in concurrent periods of TD, the two-year limitation likewise runs concurrently. Foster v. WCAB (2008) 161 Cal.App.4th 1505, 73 CCC 466.

N43 - Virginia is a correctional officer for the State who is off work on industrial disability leave (IDL). She wants two years of TD on top of this. **Answer:** B. Because IDL is the functional equivalent of TD, they are treated the same, so Virginia gets only two years maximum from combined IDL and TD. Under the statutory scheme, State employees are limited to a maximum of two years of combined TD, including IDL. Brooks v. WCAB (2008) 161 Cal.App.4th 1522, 73 CCC 447. See also Wiley v. WCAB (2008) 73 CCC 604 (unpublished court of appeal) and Cortes v. WCAB (2008) 73 CCC 1289 (unpublished court of appeal). Note: The same limitation applies for Education Code section 44043, "Continued Salary Benefits." Mt. Diablo Unified School District v. WCAB (Rollick) (2008) 165 Cal.App.4th 1154, 73 CCC 1212.

Permanent Disability

B15 - Since the adoption of SB 899, multiple cases have addressed the subject of whether the 1997 PDR schedule applies or the 2005 schedule. As a result of judicial decisions in 2008, the appellate courts have: **Answer:** C. Still not given a final definitive answer. "Which schedule to use" cases still frequently come before the appellate courts, but due to conflicts among the opinions, supreme court clarification is needed.

O69 - Applicant attorneys often hire vocational rehabilitation experts to prove permanent total disability. They want the employer to pay for these expert costs. Choose the best answer in determining the employer's liability for such costs. **Answer:** D. Such costs are subject to judicial discretion, and assessed on a case-by-case basis and may be reimbursed even if the applicant is unsuccessful or the report is inadmissible. Barr v. WCAB (2008) 164 Cal.App.4th, 173, 73 CCC 763 affirming the WCAB's 2007 en banc decision in Costa v. Hardy Diagnostics (2007) 72 CCC 1492. Note: Costs for a life care plan were denied in the November 2008 unpublished court of appeal decision California Nurse Life Care Planning, Inc. v. WCAB (Escobedo) 73 CCC 1529.

Medical Treatment, Liens & Utilization Review Issues

B11 - Jose had 76 chiropractic treatments, but the WCAB determined he was entitled to only 24 per Labor Code section 4604.5. Jose claims the 24 limit is unconstitutional. Answer: C. The limit is constitutional. The legislature has full authority to regulate the workers' compensation system. By limiting the benefits, the legislature was recognizing a perceived crisis at the time of the statute, and it therefore is constitutional. Facundo-Guerrero v. WCAB (2008) 163 Cal.App.4th 640, 73 CCC 785. Note: There is no such limit on acupuncture treatment in the Labor Code.

N38 - SB Surgery Center billed \$23,529 for outpatient surgery. Defendant paid \$1,667.66. SB wants the rest of the money. At trial, neither party presented evidence of fees accepted for the same services by outpatient surgery centers in the same geographic area. At the time, there was no official medical fee schedule (OMFS) for outpatient surgery centers. In deciding the rights of the parties, choose the best answer: Answer: A. The lien claimant has the affirmative burden of proving by a preponderance of the evidence its lien is reasonable. The bills by themselves do not establish reasonableness, and while the OFMS is some measure of reasonableness, it cannot by itself be used prior to its effective date. Tapia v. Skill Master Staffing (2008) WCAB en banc decision, 73 CCC 1338.

G53 - In its final appearance in workers' compensation BINGO, we look at a case we've seen before as a WCAB en banc decision, a court of appeal decision, and now as a California Supreme Court decision. Bryce injured various body parts in 2003. When the treating doctors requested an MRI, State Compensation Insurance Fund referred the matter for Utilization Review, after which years of litigation took place involving expedited hearings, appellate procedures, and attempts to utilize various Labor Code sections to determine the issue. The Supreme court decided:

A. Employers must use the UR process for resolving any and all requests for medical treatment.

B. The employer may not opt out of the UR process and utilize the dispute resolution procedures of Labor Code section 4062.

C. Employees may still use section 4062 to object to employer decisions regarding treatment requests.

Answer: All of the above. State Compensation Insurance Fund v. WCAB (Sandhagen) (2008) 44 Cal.4th 230.

Penalties, Serious & Willful Misconduct, & LC 132a

I19 - Los Angeles County has a complex system for compensating sheriffs for accumulated vacation time vis-à-vis retirement. Those who in the last year of their employment are on 4850 time are paid for the hours, but those payments are not included in pensionable income, thereby affecting their retirement pay. If the officer does not take 4850 pay, the hours are pensionable. This practice is: Answer: While D may be true, B is the correct answer. Because someone never injured on the job will collect more in pension than someone who has had an injury, this is discrimination prohibited by Labor Code section 132a. Los Angeles County Professional Peace Officers' Association v. County of Los Angeles (2008), 165 Cal.App.4th 63, 73 CCC 1235.

N41 - Lisa, a senior claims adjuster for an insurance company, sustained upper extremity injuries. She went off work on temporary disability and never returned. She was terminated after being off in excess of the company's leave policy, with no indication of her ability to return to work in the future. Because the reason for her absence is the industrial injury, she filed a Labor Code section 132a claim.

On these facts, does Lisa win? **Answer:** Lisa loses. The employer did not treat industrially injured employees less favorably than non-industrially injured employees. Therefore, applicant did not meet her burden of proof to show discrimination. Wolfe v. WCAB (2008), 73 CCC 556 (writ denied).

Injury AOE/COE, Statute of Limitations Presumptions

B14 - Dave is a SWAT team member in the Beverly Hills Police Department. Assignment to SWAT is voluntary, and officers must pass an annual fitness test. Dave gets paid training four days per month. The test was scheduled for January. While on vacation in Jackson, Wyoming in December, Dave took a run and fell, breaking his ankle. Naturally, he wants workers' compensation benefits. **Answer:** C. Compensable if Dave reasonably and objectively believed that his employer expected participation in this off-duty activity so he could maintain his fitness. Dave was engaged in training and maintaining fitness for an imminent employer-mandated physical fitness test. If he did not continue his physical training during this period, he might not be able to fulfill the expectation of the City to be physically fit. Tomlin v. WCAB (2008) 162 Cal.App.4th 1423, 73 CCC 593.

I22 - Firefighter William, a 30-year retired veteran of the fire department, has a history of heart palpitations and mitral valve prolapse, but no evidence of organic heart disease. He now wants a finding of industrial injury so his retirement pension is improved. On these facts: **Answer:** C. William loses. His conditions are not placing his heart in a troubled condition. Garland v. WCAB (2008), 73 CCC 913 (writ denied).

I26 - In 1997, Delores' doctor diagnosed her as having stress from work. This was confirmed by two psychiatrists. In 1999 she took a medical leave and never returned to work. None of her doctors suggested she file a workers' compensation claim. At work, there were no signs about workers' compensation rights; no one told her about workers' compensation rights; and she received no literature on the subject, but she also never told anyone at work that a doctor had said she was suffering from work-related stress. In 2003, she filed a workers' compensation claim. Delores' claim will be: **Answer:** Delores' claim will be denied. If an employer fails to post a notice of employees' workers' compensation rights required by Labor Code section 3550, and the employee is otherwise unaware of her rights, the statute of limitations is tolled until the employee gains actual knowledge that she may be entitled to benefits. Pugh v. WCAB (2008), 73 CCC 1561 (unpublished court of appeal decision).

I27 - Harold, a public safety officer, is a member of the Terrorism Early Warning Group. He was assigned a special vehicle that he was allowed to keep at home so he could rapidly respond to incidents. Generally, vehicles are to be used only for official business, but Harold's impression was that because he was to be available 24/7, he could use the vehicle for personal matters. Harold was involved in a motor vehicle accident and injured while on a personal errand at 11pm. He wants comp benefits. On these facts, does Harold get Comp Benefits? **Answer:** A. Harold gets zip. Vehicles may be used for personal use only if there is a nexus to employment. This does not constitute a special mission. Harold's belief he could use the vehicle for any purpose was not objectively reasonable. Bickel v. WCAB (2008), 73 CCC 875 (writ denied).

G59 - Michelle was an unsalaried parent volunteer at her child's high school. When she fell off the stairs, she filed a civil suit against the school district. Labor Code section 3364.5 allows volunteers to be treated as employees for injury purposes if the district adopts a resolution, which the district did.

The resolution also provides that a current list of volunteers shall be filed with the district's TPA. The district did not do this, so Michelle was not listed. As the judge in this case, you: **Answer:** B. Michelle is limited to workers' compensation. The statute does not require the list, it contemplates only a resolution designating volunteers to be treated as employees for workers' compensation purposes. Salazar v. Livermore Valley Joint Unified School District (2008), 73 CCC 371 (non-published court of appeal decision).

G60 - Michael, a police officer, was injured in a motor vehicle accident while on his way to testify in court on his day off. Michael's injury is: **Answer:** C. Michael's injury is non-compensable, as it is barred by the going and coming rule, going to court is routine and not extraordinary, even on one's day off, and therefore this is not a special mission. Richens v. City of Long Beach (2008) (LBO 0385937) (panel decision after reconsideration.)

O64 - True or false: If public safety personnel develop a methacillin-resistant staphylococcus aureus skin infection (MRSA) that develops or manifests itself during employment, or within 90 days of the last day actually worked, it is presumed to arise from the officer's employment. **Answer:** True. This new presumption was adopted in 2008 and includes an anti-attribution clause prohibiting attribution of cause to any disease or skin infection existing prior to the development of the MRSA infection. Labor Code sections 3212.8(b)(3) and 3212.8(c).

O65 - Esposito, a smoker, is a flight attendant. While on a multi-day assignment out of state, and while staying in a non-smoking hotel, he went out on his balcony for a smoke, only to find himself locked out. While getting off the balcony, he fell to the ground breaking his ankle. His injury is: **Answer:** A. Compensable under the commercial traveler and personal comfort doctrines. While on travel for business, incidental activities – such as smoking – are impliedly within the contemplation of the employment. Esposito v. Northwest Airlines, Inc. 2007 Cal. Wrk. Comp. P.D. LEXIS 217 (noteworthy panel decision).

O67 - Jose was found shot to death in the locker room at his workplace. No one knows who did it or why. On his family's claim for death benefits: **Answer:** A. The family prevails because under the Neutral Risk Doctrine, if there is no explanation for a workplace death, presumption arises that it is work-related, which the employer did not rebut. Jetro Cash & Carey Holdings, Inc. v. WCAB (Romero) (2008), 73 CCC 698 (writ denied).

O72 - Donald retired as a firefighter in 1989. He noticed chest pains since the early 1990s, but tests revealed no heart problems. In 2003, more sophisticated testing (which did not exist earlier) revealed coronary artery disease. He filed his claim a few months later. On these facts, choose the best answer. **Answer:** B. Donald's claim is timely because the actual diagnosis of heart trouble did not occur until 2003. The statute of limitations does not begin to run until an employee knows or should have known that his disability was industrial. City of Santa Ana v. WCAB (Smith) (2008), 73 CCC 460 (unpublished court of appeal decision). Note: Donald's skin cancer claim was denied, since he reasonably should have known about the link between sun exposure and skin cancer.

Psyche Injuries

B13 - Psychiatric claims are compensable if based on actual events of employment that are the predominant cause of an injury. Rosemary filed a psych claim alleging that the disdainful reactions of co-workers in response to her mistreatment of them constituted actual events of employment resulting in injury. The court described her as rude, aggressive, unflexible, counterproductive, and creating a negative work atmosphere of doom and gloom. **Answer:** C. Rosemary's claim is non-compensable because it was Rosemary's intentional abuse of her co-workers that was the predominant cause of the injury. To allow an employee to harass co-workers, and when they react unfavorably claim a stress-related injury, invites abuse contrary to the intention of the workers' compensation system. Verga v. WCAB (2008) 159 Cal.App.4th 174, 73 CCC 63.

G57 - George, a sheriff's deputy, claims injury to his psyche as a result of being investigated and suspended based on allegations of sexual harassment. Following a hearing, some of the allegations were sustained and some were not. His initial discipline was reduced. In response to George's psychiatric claim: **Answer:** He loses because the investigation and suspension were good faith personnel actions. Even though not all allegations were sustained, the fact that an adverse personnel decision did result proves the county had good cause to investigate. Such an investigation need not be perfect. Arnold v. County of Alameda (2008), 73 CCC 481 (writ denied).

O70 - Theresa, a teacher, participated in school fund-raising activities. A grand jury investigated allegations of misappropriation of funds by her, which was covered by the press, and another teacher sent an email to all district employees accusing her of misappropriation and bribing the school board. No charges were ever filed, but the fund-raising was discontinued. She filed a psychiatric claim, which the district denied. As the judge in this case, you: **Answer:** A. Theresa prevails. All the events are actual events arising from her employment. The action of the other teacher, the press, and the grand jury are not management decisions constituting personnel actions. Merced City School District v. WCAB (Delgado) (2008), 73 CCC 1115 (writ denied).

Civil Actions, DFEH Claims

O74 - After his industrial hip injury, Robert was released to return to work with various restrictions and the need for certain accommodations. The district expressed concerns about his ability to fulfill his job duties and refused to let him return to work until he was permanent and stationary. Later, he was advised the district could not accommodate certain restrictions, but eventually he was allowed to return to work in a very limited job. Besides his workers' compensation claim, Robert sued the district for failure to engage in the interactive process in good faith. Which of the following is true? **Answer:** D. All of the following: A. If an employer fails to engage in a timely good faith interactive process, an employee may file a civil action. B. The jury awarded Robert damages in excess of \$350,000. C. In addition to the damages, the court awarded attorney fees and costs of another \$580,000. D. All of the above, plus the district had an affirmative duty to offer a reasonable accommodation once it had notice of 1) a release to return to work; 2) Robert's desire to return to work; and 3) his disability as expressed in the work restrictions. Schermerhorn v. Los Angeles Unified School District (2008), 73 CCC 1418 (unpublished court of appeal decision.). Note: Expect many more "failure to participate in the interactive process cases" in the near future as this is an area where many employers are deficient in terms of compliance.