California WCAB Noteworthy Panel Decisions Reporter

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Noteworthy Panel Decisions Defined

CAUTION: These decisions have not been designated a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to these panel decisions and should also verify the subsequent history of the decisions. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236]. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)].

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How to Cite This Reporter

Cite the commentary articles in this reporter as: ____ (title of article), ___ (vol. #) Cal. WCAB NPD Rptr. ___ (page #) (month year) (LexisNexis)

Example: Is *Tenet/Centinela* Dead? 1 Cal. WCAB NPD Rptr. 2 (June 2010) (LexisNexis)

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Featured Panel Decisions for This Issue

Attorney's Fees; Lien Recovery

Harper v. Kaiser, 2021 Cal. Wrk. Comp. P.D. LEXIS 254. In this case, which will be of great interest to applicant's attorneys, the WCAB panel denied the attorney's fee sought by applicant's attorney for collection of an EDD lien. The WCAB provides an excellent discussion of lien claimant's obligations with respect to attendance at hearings in order to avoid liability for attorney's fees and clarifies the definition of "participation" within the meaning of Labor Code § 4903.2. [See case headnotes under the heading ATTORNEY'S FEES for "Topics Covered in This Issue"].

Discrimination; Labor Code § 132a; Mitigation of Damages During Covid-19 Pandemic; Reinstatement

Scagliotti v. Elmore Toyota, 2021 Cal. Wrk. Comp. P.D. LEXIS 273. This case addresses applicant's entitlement to Labor Code § 132a benefits during the Covid-19 pandemic, specifically addressing the conditions required for applicant's reinstatement to his employment, the consequences if applicant refuses to return to work when it is deemed safe to do so, and applicant's entitlement to lost wages in connection with a failure to seek pandemic unemployment benefits. The WCAB provides a thorough discussion of these very timely issues, and the case will be of great interest to workers' compensation practitioners litigating discrimination claims in the COVID-19 era. [See case headnotes under the heading DISCRIMINATION and COVID-19 PANDEMIC for "Topics Covered in This Issue"].

Commentary: *Insurance Coverage Disputes Made Simple*

Insurance Coverage Disputes Made Simple

Whether or not a workers' compensation insurance policy covers a particular employee on the date of alleged injury should be a very straightforward matter because all workers' compensation insurance policies provide coverage to all of an employer's employees unless certain employees are specifically excluded from coverage. Nonetheless, "coverage disputes" continue to be vigorously litigated. A recent example is *Nevarez v. American Choice Van Lines,* 2021 Cal. Wrk. Comp. P.D. LEXIS 65 (Board Panel Decision) (*Nevarez*). In that case a unanimous panel rejected an insurer's claim that a valid limiting and restricting endorsement was included in the policies issued to American Choice Van Lines and/or or Go East Movers (Go East Movers) during Efrain Nevarez' (applicant's) alleged cumulative trauma period. Not only is the panel's decision instructive on insurance coverage and the regulations applicable to workers' compensation insurance policies, but it also clarifies the role of the workers' compensation arbitrator (WCA) and the process by which an insurer may seek rescission of an insurance policy.

Applicant, a mover, alleged a cumulative trauma injury through August 30, 2015, while employed by Go East Movers. American Casualty Insurance Company and Valley Forge Insurance Company (American) issued a policy of workers' compensation insurance to Go East Movers for the period December 15, 2011 through December 11, 2015. According to American, the policy only covered two clerical employees. During a final audit conducted in 2016, American discovered, apparently for the first time, that Go East Movers actually employed movers. American disputed coverage, and the dispute was set for arbitration before an agreed WCA. During the arbitration, American

sought to rescind its policy with Go East Movers on the basis that Go East Movers misrepresented the nature of its business and the classification of its employees. The WCA found insufficient evidence of fraudulent misrepresentation. He also found that the limiting endorsements in the insurance policies failed to comply with applicable regulations. The insurers were found liable for any workers' compensation benefits that might be awarded to applicant, but the WCA's order did not prohibit them from disputing the date of injury.

American sought reconsideration of that decision, contending that the WCA erred by finding insufficient evidence of fraudulent misrepresentation to warrant rescission of the insurance policy. American also claimed that the WCA should have found that the policy it issued to Go East Movers was a valid policy of workers' compensation insurance with coverage only and exclusively for clerical employees.

In rejecting those claims, the panel begins its discussion with a review of the laws pertinent to workers' compensation insurance. Foremost, it reminds us that all employers in the state of California are required to obtain workers' compensation insurance through a duly authorized insurance company or receive approval to self-insure. (Lab. Code § 3700.) Next, it explains that all California workers' compensation insurance policies are subject to regulation by the Department of Insurance. (See Ins. Code §§ 11651, 11657, 11658.) Insurance Code section 11651 makes the insurer directly and primarily liable to any proper claimant for payment of compensation for which the employer is liable, subject to provisions, conditions and limitations of the policy. In fact, each policy of workers' compensation insurance is required to contain a clause to that effect. (Ins. Code §11651, *supra*.) An insurer may issue a workers' compensation policy that insures only a part of an employer's liability for compensation, provided the policy receives prior approval from the Insurance Commissioner and is consistent with applicable rules. (Lab. Code § 11657.) If such a limiting and restricting endorsement is not in compliance with the regulations adopted by the Insurance Commissioner, the policy is considered to be "unlimited," meaning that the insurance policy provides coverage to all of an employer's employees. (Ins. Code §§ 11657, 11659, 11660.)

Because the dispute in *Nevarez* was whether the policies of workers' compensation insurance issued by American to Go East Movers provided coverage to applicant for the alleged injury it was required to be arbitrated before a WCA. (Lab. Code §5275(a).) The primary duty of the WCA is to determine whether an insurance policy and/or policies provide workers' compensation insurance coverage for an applicant's employer/alleged employer on applicant's date of injury or alleged date of injury. Absent consent of all parties, the WCA cannot determine issues of employment or date of injury.

The panel affirmed the WCA's finding that American provided workers' compensation insurance coverage for Go East Movers. In its rejection of American's claim that the workers' compensation policies it issued to Go East Movers only covered clerical employees, the panel observed that it was incumbent upon American to provide evidence in the form of policy documents compliant with the requirements of the Insurance Commissioner to substantiate that contention. Because American failed to do so, the panel found a lack of sufficient evidence from which to conclude that the policies were limited. Without an endorsement explicitly limiting the policies to clerical employees, the policies issued by American were "unlimited," meaning that they provided workers' compensation insurance coverage to all of Go East Movers' employees. And, assuming *arguendo*, Go East Movers failed to report their payroll to American, that would not be a basis for excluding employees from coverage the panel observed, citing *Florists Mutual Ins, Co. v. Workers' Comp. Appeals Bd*. (2015) 80 Cal. Comp. Cases 582 (writ den.).

The panel also rebuffed American's assertion of WCA error for failure to consider rescission of the insurance policy because of Go West Movers' alleged misrepresentation with regard to its employees and their respective classifications. This aspect of the panel's decision is particularly informative. The panel acknowledges that a workers' compensation insurance policy can be rescinded based upon a material misrepresentation by the insured. (*Southern Ins. Co. v. Workers' Comp. Appeals Bd.* (*Berrios*) (2017) 11 Cal.App.5th 961.) Furthermore, when a defendant disputes coverage on the basis that it rescinded a workers' compensation insurance policy, the WCA has jurisdiction to determine whether such a policy was validly rescinded. (*Bankers Indem. Ins. Co. v. Ind. Acc. Com. (Merzoian*) (1935) 4 Cal. 2d 89.) A contract of insurance may be rescinded in accordance with the procedure set forth in Civil Code section 1691. That statute requires the party to a contract, upon discovery of facts entitling them to rescind, to give prompt notice of rescission to the other party and restore or offer to restore everything of value obtained

under the contract. Not only did American fail to raise rescission as an issue at the arbitration, it didn't even claim that it had rescinded Go East Movers' insurance policy. Thus, the panel observes, the issue of whether American rescinded Go East Movers' policy is entirely hypothetical, and the WCA has no obligation to determine hypothetical questions.

Nevarez serves as a good reminder that an insured's failure to include an employee (or employees) on payroll is not a valid basis to deny coverage unless the workers' compensation insurance policy includes a specific limiting endorsement approved by the Insurance Commissioner to that effect. Absent an approved limiting endorsement, the policy extends coverage to all employees. A material misrepresentation by the insured can give rise to rescission of the insurance policy; however, the party seeking rescission must give notice of the rescission and restore or offer to restore everything of value received under the contract. If you find yourself involved in a coverage dispute, look back to *Nevarez*—it won't steer you wrong.

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TOPICS COVERED IN THIS ISSUE

Noteworthy Panel Decisions reported in this issue are arranged by topic in alphabetical order below.

Attorney's Fees

Hazel Harper, Applicant v. Kaiser, Athens Administrator, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 254

W.C.A.B. No. ADJ11666325—WCAB Panel: Commissioner Snellings, Chair Zalewski, Commissioner Lowe

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 5, 2021

Attorney's Fees—Lien Recovery—WCAB, affirming WCJ's decision, held that Labor Code § 4903.2 precluded applicant's attorney from recovering fee from Employment Development Department's (EDD) lien recovery, when WCAB found WCJ was within her discretion to deny attorney's fees where she found EDD's attendance at 5/15/2019 lien hearing constituted sufficient "participation" in WCAB proceedings within meaning of Labor Code § 4903.2(b) to avoid liability for attorney's fees, and WCAB rejected applicant's attorney's assertion that term "participation" requires more than mere "attendance" at proceedings, when case law interpreting Labor Code § 4903.2 has equated appearance or presence of lien claimant's representative at proceeding to participation. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 20.02[2][i], 30.27; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.36, Ch. 17, § 17.33[4][b].]

Kevin Torres, Applicant v. Artic Mechanical, Travelers Property Casualty Company of America, administered by Sedgwick, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 253

W.C.A.B. No. ADJ11197293—WCAB Panel: Commissioners Sweeney, Lowe, Deputy Commissioner Schmitz

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 6, 2021

Attorney's Fees—Writ of Review—WCAB awarded applicant's attorney fee in amount of $5,200.00 under Labor Code § 5801 for time spent responding to defendant's Petition for Writ of Review, when WCAB considered attorney's time, effort, care, experience, skill, and results obtained in opposing Petition, in addition to complexity of issues raised by defendant requiring response from applicant's attorney, length of reply, and number of cases cited, and found that instant case was one of average complexity involving Labor Code § 4660.1(c)(1), and further found that $5,200.00 was fair and reasonable fee for attorney's services based on attorney's rate of $400.00 per hour. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 34.24; Rassp & Herlick, California Workers' Compensation Law, Ch. 20, § 20.22.]

COVID-19 Pandemic

Oscar Scagliotti, Applicant v. Elmore Toyota, Defendant, 2021 Cal. Wrk. Comp. P.D. LEXIS 273

W.C.A.B. No. ADJ9298865—WCAB Panel: Commissioner Sweeney, Chair Zalewski, Commissioner Lowe

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 22, 2021

Discrimination—Labor Code § 132a—Mitigation of Damages During COVID-19 Pandemic—Reinstatement—WCAB, granting reconsideration and affirming WCJ's findings, held that (1) applicant reasonably attempted to mitigate his damages during period defendant refused to reinstate him to his position in violation of Labor Code § 132a, and was entitled to recover lost wages for that period, when WCAB found that applicant credibly testified he

filed six applications with potential employers during period of unemployment and also contacted five other potential employers whose identities he could not recall, (2) applicant's duty to mitigate damages did not include duty to seek unemployment benefits for which defendant could subsequently claim credit against its liability, (3) applicant's failure to search for work after his 3/2020 termination from job with another employer did not suggest he removed himself from labor market given circumstances of COVID-19 pandemic, and (4) applicant is entitled to reinstatement to his service advisor position with defendant when applicable governmental guidelines indicate that reopening may safely take place, and any refusal by applicant to return to his position after guidelines permit reopening may be deemed waiver of his right to reinstatement. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.11[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.27[1].]

Discovery

Steve Renick, Applicant v. Cast and Crew Entertainment Services, LLC, American Zurich Insurance Company, c/o Sedgwick Claims Management Services, Inc., Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 255

W.C.A.B. No. ADJ11802545—WCJ Martha Gaines (MDR); WCAB Panel: Commissioners Lowe, Snellings, Deputy Commissioner Schmitz

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 1, 2021

Discovery—Due Process—WCAB, denying reconsideration, found WCJ did not violate defendant's due process rights by closing discovery at mandatory settlement conference and setting matter for trial, when defendant had multiple opportunities to timely complete discovery by obtaining supplemental report from panel qualified medical evaluator but failed to do so, and WCAB concluded that any failure by defendant to complete discovery prior to its closure was solely due to its own lack of diligence. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 26.04[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.04[2].]

Shalene Evans Jeffery, Applicant v. Securitas Security Services USA, Sedgwick Claims Management Services, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 271

W.C.A.B. No. ADJ10762069—WCJ Robert F. Spoeri (MDR); WCAB Panel: Commissioner Sweeney, Deputy Commissioner Schmitz, Commissioner Lowe

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 18, 2021

Discovery—Depositions—WCAB, denying removal, affirmed WCJ's finding that defendant was not entitled to third deposition of applicant, when WCAB reasoned that under Code of Civil Procedure § 2025.610, after deposition is concluded neither party may take subsequent deposition unless there is agreement by parties to allow another deposition or finding by WCJ of good cause to compel such deposition, and here there was no agreement and WCJ determined good cause standard was not met because evidence defendant was hoping to obtain from additional deposition was not sufficiently relevant to issues of temporary disability, permanent disability and apportionment since applicant was working, medical reporting indicated defendant had minimal liability, and WCJ was concerned about potential for abuse of discovery process. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 25.41; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.45[2].]

Discrimination

Oscar Scagliotti, Applicant v. Elmore Toyota, Defendant, 2021 Cal. Wrk. Comp. P.D. LEXIS 273

W.C.A.B. No. ADJ9298865—WCAB Panel: Commissioner Sweeney, Chair Zalewski, Commissioner Lowe

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 22, 2021

Discrimination—Labor Code § 132a—Mitigation of Damages—Reinstatement—WCAB, granting reconsideration and affirming WCJ's findings, held that (1) applicant reasonably attempted to mitigate his damages during period defendant refused to reinstate him to his position in violation of Labor Code § 132a, and was entitled to recover lost wages for that period, when WCAB found that applicant credibly testified he filed six applications with potential employers during period of unemployment and also contacted five other potential employers whose identities he could not recall, (2) applicant's duty to mitigate damages did not include duty to seek unemployment benefits for which defendant could subsequently claim credit against its liability, (3) applicant's failure to search for work after his 3/2020 termination from job with another employer did not suggest he removed himself from labor market given circumstances of COVID-19 pandemic, and (4) applicant is entitled to reinstatement to his service advisor position with defendant when applicable governmental guidelines indicate that reopening may safely take place, and any refusal by applicant to return to his position after guidelines permit reopening may be deemed waiver of his right to reinstatement. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.11[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.27[1].]

Expedited Hearings

Nora Corado, Applicant v. Sherri Ghodsian, Federal Insurance Company, administered by Chubb Group Los Angeles, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 261

W.C.A.B. No. ADJ13608876—WCAB Panel: Commissioners Razo, Lowe, Chair Zalewski

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 4, 2021

Expedited Hearings—WCAB, granting removal, rescinded WCJ's Order taking matter off expedited hearing calendar over applicant's objection on basis that applicant's injury claim was denied and therefore not appropriate for expedited hearing, and WCAB returned matter to trial level for further proceedings and for WCJ to create evidentiary record, when WCAB found that although 8 Cal. Code Reg. § 10782 and WCAB Policy and Procedure Manual limit expedited hearings to accepted injury claims, Labor Code § 5502(b) contains no such limitation and allows expedited hearings where, as here, medical treatment or medical-legal examination is disputed, and WCAB further found that 8 Cal. Code Reg. § 10782(c) permits WCJ to re-designate expedited hearing to mandatory settlement conference as warranted in order to allow parties to adjudicate dispute. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 25.09[2], 26.02[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.04[3].]

Findings and Awards

Rosa Cervantes, Applicant v. Classic Cosmetics, Inc., Majestic Technology, adjusted by AmTrust North America, North River Insurance Company, adjusted by Crum & Forster, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 267

W.C.A.B. Nos. ADJ8578580, ADJ8570120—WCAB Panel: Commissioners Razo, Snellings, Lowe

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 15, 2021

Findings and Awards—Issues For Decision—Due Process—WCAB, granting reconsideration, rescinded WCJ's joint decision in connection with applicant's two workers' compensation claims, and returned matter to trial level for further proceedings and new decision, when WCAB found WCJ exceeded his authority by determining issues that were not submitted for decision at trial, particularly with respect to applicant's Labor Code § 5412 date of injury in her claim for cumulative injury, noting that because applicant had not elected against either of two defendants, assigning new date of injury could impact which insurer or insurers were liable for payment of award pursuant to Labor Code § 5500.5, and that determining issue without giving parties notice and opportunity to be heard violated parties' right to due process. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 26.10[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.30.]

Injury AOE/COE

Steve Renick, Applicant v. Cast and Crew Entertainment Services, LLC, American Zurich Insurance Company, c/o Sedgwick Claims Management Services, Inc., Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 255

W.C.A.B. No. ADJ11802545—WCJ Martha Gaines (MDR); WCAB Panel: Commissioners Lowe, Snellings, Deputy Commissioner Schmitz

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 1, 2021

Injury AOE/COE—Substantial Medical Evidence—WCAB, denying reconsideration, affirmed WCJ's finding that applicant suffered injury AOE/COE to his lumbar spine, cervical spine, left hip, right knee, and hearing during period 1/1/2015 to 11/1/2018, resulting in temporary disability from 2/11/2019 through 6/3/2020, based, in part, on 6/4/2020 report of applicant's primary treating physician, when WCAB found physician's report was substantial evidence to support finding of industrial injury notwithstanding report's internal inconsistency regarding whether or not applicant had returned to work, where physician adequately reviewed applicant's medical history and concluded applicant had reached maximum medical improvement, and defendant failed to show that error or ambiguity in physician's report had any relevance to his ultimate opinion regarding applicant's industrial injury or period of temporary disability. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.05[2][a], 27.01[1][c], 34.16[1], [3][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.01[4][a], [c], Ch. 16, § 16.51[2].]

Francisco Siles Rivas, Applicant v. Brake Land, LLC, Tower Insurance Company, In Liquidation, Administered By Intercare On Behalf of California Insurance Guarantee Association, Star Insurance, Administered By Illinois Midwest, Uninsured Employers Benefits Trust Fund, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 257

W.C.A.B. No. ADJ10045593—WCAB Panel: Commissioner Lowe, Chair Zalewski, Commissioner Sweeney

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed September 28, 2021

Injury AOE/COE—Substantial Medical Evidence—WCAB, granting reconsideration, rescinded WCJ's decision that applicant did not sustain industrial injury while employed as automobile mechanic during cumulative period ending on 7/10/2016, and returned matter to trial level for further development of medical record, when WCJ found applicant did not sustain industrial injury based on applicant's lack of credibility, but WCAB observed that many facts relied upon by WCJ were not material to issue of whether applicant suffered industrial injury and that there was medical evidence in record indicating applicant had received medical treatment for back pain between 2010 and 7/2015, and WCAB concluded that to clarify issue of injury AOE/COE and to ensure substantial justice in this matter, record must be further developed with medical opinions incorporating WCJ's credibility determinations, and discussing, among other issues, whether applicant's need for medical treatment was caused by industrial or nonindustrial conditions. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.05[2][a], 27.01[1][c], 34.16[1], [3][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.01[4][a], [c], Ch. 16, § 16.51[2].]

Henrietta Collins, Applicant v. AC Transit, PSI, Adjusted By Atkins Administrators, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 275

W.C.A.B. Nos. ADJ11360280, ADJ12092966—WCAB Panel: Deputy Commissioner Ingels, Chair Zalewski, Commissioner Razo

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 15, 2021

Injury AOE/COE—Stress-Related Physical Injuries—Heart Disease—WCAB, granting reconsideration, held that applicant, while employed as bus driver, suffered industrial injury in form of cardiac arrest during cumulative period ending on 2/28/2018 based on medical opinion of internist indicating that daily industrial stressors, including 2016 sexual assault, contributed to applicant's heart disease and eventual cardiac arrest, and in reversing WCJ's finding of non-compensability, WCAB explained that although applicant did not allege psychiatric injury as part of cumulative injury claim, WCJ incorrectly relied on legal standards applicable for determining compensability of stress-related psychiatric injury instead of those applicable to stress-related physical injury such as cardiac arrest. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§

4.02[3][a], 4.68[1], [3], 4.69[3][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, §§ 10.04[1], 10.06[3][b], [4].]

Richard Johnson (Deceased), Applicant v. Lawler's Woodcrest Service, State Compensation Insurance Fund, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 268

W.C.A.B. No. ADJ9807875—WCJ Stefanie Ashton (AHM); WCAB Panel: Deputy Commissioner Schmitz, Commissioners Snellings, Razo

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 4, 2021

Injury AOE/COE—Death Under Unknown Circumstances—WCAB, denying reconsideration, affirmed WCJ's finding that applicant met burden of proving decedent, while working as tow truck driver on 8/7/2014, suffered heart injury AOE/COE, resulting in his death, when WCAB reasoned that where there is no direct evidence regarding events surrounding injury/death, circumstantial evidence is sufficient to support finding of compensability if it is based on reasonable inferences arising from reasonable probabilities flowing from evidence, and WCAB determined in this case that undisputed evidence showed decedent performed physical labor for defendant before he was found non-responsive on defendant's premises, and that medical evidence established decedent's work activities would have had nexus to his fatal ventricular fibrillation so long as activities were proximate to death, and WCAB drew reasonable inference from evidence in record that decedent performed physical work activities for defendant proximate to his ventricular fibrillation resulting in his sudden death. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.05[2][b]; Rassp & Herlick, California Workers' Compensation Law, Ch. 9, § 9.02[2], Ch. 10, § 10.01[4][b].]

Erika Spence, Applicant v. City of Los Angeles, PSI, Defendant, 2021 Cal. Wrk. Comp. P.D. LEXIS 276

W.C.A.B. No. ADJ10987859—WCAB Panel: Commissioner Razo, Chair Zalewski, Commissioner Lowe

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 6, 2021

Injury AOE/COE—Off-Duty Recreational/Athletic Activities—WCAB, granting reconsideration and reversing WCJ's decision, held that applicant police officer was barred under Labor Code § 3600(a)(9) from pursuing claim for industrial injury to her right foot incurred while she was playing with other women from Los Angeles Police Department in basketball tournament hosted by private organization, when WCAB, applying two-pronged test set forth in *Ezzy v. W.C.A.B.* (1983) 146 Cal. App. 3d 252, 194 Cal. Rptr. 90, 48 Cal. Comp. Cases 611, found that testimonial evidence demonstrated that applicant did not subjectively believe her participation in basketball tournament was required, and additionally, applicant was not required to play in tournament as part of her employment nor would she have incurred any negative consequences had she not participated. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.25; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.03[6].]

Jurisdiction

Daryl Hart, Applicant v. Oakland Invaders, North River Insurance Company, administered by Crum & Forster, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 269

W.C.A.B. No. ADJ13982977—WCJ Marco Famiglietti (ANA); WCAB Panel: Commissioners Snellings, Razo, Deputy Commissioner Schmitz

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 15, 2021

WCAB Jurisdiction—Settlement of Prior Claims—Issue and Claim Preclusion—Burden of Proof—WCAB, denying reconsideration, found that defendant failed to carry its burden of proving applicant professional football player's current injury claim was same as his prior claim for cumulative trauma during overlapping years which was previously settled by Compromise and Release agreement, when WCAB reasoned that burden was on defendant to produce substantial evidence applicant's claim was barred by claim preclusion (*res judicata*) or issue preclusion (collateral estoppel), which defendant did not do, and that because applicant had no obligation to voluntarily assist defendant in proving claim was barred, applicant's failure to appear and testify at trial did not create adverse inference or shift burden to applicant to establish current claim was for new injury rather than

for flare-up of condition settled in prior claim. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 21.08[2], 29.01[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 13, § 13.10; Ch. 18, § 18.13[1], [2].]

Liens

Maria Gil Soto, Applicant v. Abbott Laboratories, Travelers Property Casualty Company of America, adjusted by Matrix, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 251

W.C.A.B. No. ADJ11122688—WCJ Jeffrey Friedman (OAK); WCAB Panel: Chair Zalewski, Deputy Commissioner Garcia, Commissioner Sweeney

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed September 24, 2021

Liens—Interpreting Services—WCAB, denying reconsideration, upheld WCJ's finding that WCAB lacked jurisdiction under decision in *Meadowbrook Insurance Co. v. W.C.A.B.* (2019) 42 Cal. App. 5th 432, 255 Cal. Rptr. 3d 325, 84 Cal. Comp. Cases 1033, to address parties' dispute over portion of interpreting fees billed by lien claimant, based on lien claimant's failure to submit bills to second bill review pursuant to Independent Bill Review procedure, and WCAB affirmed WCJ's award of $110.00 per hour as proper market rate for interpreting services provided by lien claimant in connection with applicant's 12/28/2015 industrial injury, because that was usual fee accepted for interpreting services at Oakland WCAB and there was no evidence submitted to support higher hourly rate. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.05[3], 23.13[3], 27.01[8][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.21, Ch. 16, §§ 16.35[1], 16.49.]

Medical-Legal Procedure

Armando Diaz Espinoza, Applicant v. Smith Gardens, Inc., Florists' Mutual Insurance Company, administered by Sentry Claims Service, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 258

W.C.A.B. No. ADJ14080327—WCAB Panel: Commissioners Sweeney, Razo, Deputy Commissioner Schmitz

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 5, 2021

Medical-Legal Procedure—Qualified Medical Evaluator Panel Requests—WCAB, granting reconsideration and rescinding WCJ's decision, held that qualified medical evaluator (QME) panel obtained by applicant laborer was invalid and ordered parties to utilize QME panel obtained by defendant to evaluate applicant's claim for 10/29/2020 orthopedic injuries, when WCAB found that defendant's 1/20/2021 letter objecting to applicant's claim for additional injured body parts, which letter applicant relied upon in making his QME panel request, was not valid basis to obtain QME panel under Labor Code § 4060 because although defendant disputed compensability as to some body parts, it accepted liability for others, making Labor Code § 4060 inapplicable, and because defendant's letter did not contain any objection to treating physician's determination to trigger QME panel process, applicant's panel request was not validly made pursuant to procedures in Labor Code §§ 4061 and 4062.2; however, WCAB determined that defendant properly submitted QME panel request on 2/19/2021 in accordance with Labor Code §§ 4061 and 4062.2, after objecting to treating physician's report on 2/4/2021. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.06[1][a], [2], [7], 22.11[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[2], Ch. 16, § 16.54[1].]

Aurea Fisk, Applicant v. BaronHR West, Clear Spring Property and Casualty Company, administered by CCMSI, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 260

W.C.A.B. Nos. ADJ13380667, ADJ13380668—WCJ Edgar Medina (LAO); WCAB Panel: Chair Zalewski, Commissioners Sweeney, Razo

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed September 27, 2021

Medical-Legal Procedure—Qualified Medical Evaluator Panels—Specialty Designation—WCAB, denying reconsideration, affirmed WCJ's decision that qualified medical evaluator (QME) panel in chiropractic specialty issued by Medical Unit at applicant's request to address compensability of her alleged orthopedic injuries was proper and valid, and that defendant's subsequent request for QME panel in specialty of

orthopedic surgery was invalid, when WCAB found that defendant circumvented proper procedure for obtaining replacement panel in different specialty by ignoring requirements in 8 Cal. Code Reg. §§ 31.1(b) and 31.5(a) and instead selecting its own panel in different specialty, and defendant also failed to provide medical evidence to address appropriateness of panel specialty. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[6], [7]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[6], [7].]

Felicia Sonnier, Applicant v. Los Angeles Unified School District, PSI, administered by Sedgwick CMS, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 263

W.C.A.B. No. ADJ10793298—WCAB Panel: Deputy Commissioner Ingels, Chair Zalewski, Commissioner Lowe

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 1, 2021

Medical-Legal Procedure—Admissibility of Medical Reports—Anti-Ghostwriting Statute—WCAB, denying reconsideration, affirmed its prior decision [see *Sonnier v. Los Angeles Unified School District*, 2021 Cal. Wrk. Comp. P.D. LEXIS 197 (Appeals Board noteworthy panel decision)] that defendant was entitled to replacement qualified medical evaluator panel based on violation of Labor Code § 4628(a) by existing panel qualified medical evaluator who signed medical report under penalty of perjury stating he performed review of records although he had not done so, when WCAB reasoned that Legislature's express purpose in enacting Labor Code § 4628 was to prevent type of report ghostwriting that occurred in this matter, and that replacement panel was necessary to preserve integrity of medical-legal evaluation process. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 26.06[12][b][i]; Rassp & Herlick, California Workers' Compensation Law, Ch. 17, § 17.72[2].]

Adriana Gonzalez, Applicant v. Huntington Drive Health Rehabilitation, Liberty Mutual Insurance, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 266

W.C.A.B. No. ADJ14413931—WCAB Panel: Chair Zalewski, Deputy Commissioner Garcia, Commissioner Sweeney (concurring separately)

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 18, 2021

Medical-Legal Procedure—Qualified Medical Evaluator Panel Requests—WCAB, granting removal and rescinding WCJ's order, held that applicant, who claimed she suffered industrial back injury while working as nurse through 5/4/2020, properly requested and obtained qualified medical evaluator (QME) panel pursuant to Labor Code §§ 4060 and 4062.2, utilizing defendant's 4/23/2021 delay letter which expressly stated medical-legal evaluation was necessary in order to make decision regarding applicant's claim, when applicant waited requisite time from mailing of defendant's delay letter before requesting QME panel, and WCAB clarified that to extent decisions in *Chavarria v. Crews of California, Inc.*, 2019 Cal. Wrk. Comp. P.D. LEXIS 534 (Appeals Board noteworthy panel decision), and *Rayo v. Certi-Fresh Foods, Inc.* (2018) 83 Cal. Comp. Cases 939 (Appeals Board noteworthy panel decision), contain conflicting analyses regarding timeframe for requesting QME panel, reasoning in *Chavarria* is more persuasive, and although SB 863 amended QME panel process effective 1/1/2013, language in Labor Code § 4060(c) remains unchanged from time of decision in *Mendoza v. Huntington Hospital* (2010) 75 Cal. Comp. Cases 634 (Appeals Board en banc opinion), where WCAB found that Labor Code §§ 4060 and 4062.2, when read together, establish that either party may request QME panel at any time after claim is filed. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.06[1][a], [2], [7], 22.11[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.03[2], Ch. 16, § 16.54[1].]

Antonio Marquez, Applicant v. Roman Catholic Bishop of Monterey, PSI, administered by LWP Claims Solutions, Inc., Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 277

W.C.A.B. Nos. ADJ11986446, ADJ13326888—WCAB Panel: Chair Zalewski, Commissioners Razo, Snellings

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 14, 2021

Medical-Legal Procedure—Assignment of Qualified Medical Evaluators—New Injuries—WCAB, granting reconsideration and amending WCJ's decision, found that applicant who claimed industrial injury to multiple body parts, including his back, while working as custodian/handyman on 6/19/2018 and on 2/21/2020 was entitled to obtain chiropractic qualified medical

evaluator (QME) panel for 2020 injury claim and was not required under *Navarro v. City of Montebello* (2014) 79 Cal. Comp. Cases 418 (Appeals Board en banc opinion), to return to internal medicine QME who evaluated 2018 injury claim, when applicant filed 2020 injury claim after evaluation by internal medicine QME, and WCAB found that pursuant to *Navarro*, operative act in determining right to request different QME panel for subsequent injury is filing of claim form, and WCAB further found that although orthopedic QME obtained as additional panel QME for applicant's 2018 injury claim is not required to be QME for 2020 injury claim as argued by defendant, both orthopedic QME and chiropractic QME are required to address all injury claims filed prior to doctor's evaluation irrespective of which QME evaluates applicant first. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[11]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.54[11].]

Medical Treatment

Sheri Easterly, Applicant v. Social Advocates for Youth San Diego, PSI, Cypress Insurance Company, administered by Berkshire Hathaway Homestate Companies, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 272

W.C.A.B. No. ADJ11315552—WCJ Linda F. Atcherley (SDO); WCAB Panel: Commissioners Lowe, Snellings, Chair Zalewski

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 5, 2021

Medical Treatment—Utilization Review—Timeframe for Expedited Review—WCAB, denying reconsideration, held that defendant did not timely issue utilization review determination of treating physician's 3/4/2021 request for 24-hour home health care, seven days per week for 90 days, in connection with applicant's 12/19/2017 traumatic brain injury, when treating doctor requested expedited review of recommended treatment, which required defendant to issue determination within 72 hours of request rather than within five business days, and WCAB found that because defendant did not meet 72-hour timeframe and also failed to show conditions for expedited review were inapplicable, WCJ had jurisdiction under *Dubon v. World Restoration, Inc.* (2014) 79 Cal. Comp. Cases 1298 (Appeals Board en banc opinion) (*Dubon II*), to determine medical necessity of requested treatment, and WCJ properly awarded home health based on substantial medical evidence. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02[2][c], 22.05[6][b][iii]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.10[4].]

Petitions for Reconsideration

Doreen Erhahon, Applicant v. Kaiser Foundation Hospital, administered by Sedgwick Claims Management Services, Inc., Defendants; Med-Legal, LLC, Real Parties in Interest, 2021 Cal. Wrk. Comp. P.D. LEXIS 252

W.C.A.B. No. SAU10439563—WCAB Panel: Chair Zalewski, Commissioners Razo, Lowe

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed September 28, 2021

Petitions for Reconsideration/Removal—Successive Petitions—WCAB dismissed lien claimant's Petition for Removal challenging WCAB's prior order [see *Erhahon v. Kaiser Foundation Hospital*, 2021 Cal. Wrk. Comp. P.D. LEXIS 150 (Appeals Board noteworthy panel decision)] consolidating lien claims, when WCAB found lien claimant's Petition was impermissibly successive because it was based on same evidence and facts produced at trial and raised in underlying Petition for Reconsideration, and WCAB explained that no party may file successive petition alleging same facts and same law previously addressed by WCAB, unless WCAB's decision was based on new and additional evidence or on new rationale not previously raised. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 28.31; Rassp & Herlick, California Workers' Compensation Law, Ch. 19, §§ 19.04, 19.25.]

Petitions to Reopen

Julian Carillo, Applicant v. HP Hood, LLC, New Hampshire Insurance Company, adjusted by ESIS West WC Claims, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 249

W.C.A.B. No. ADJ9838694—WCAB Panel: Commissioners Lowe, Sweeney, Deputy Commissioner Schmitz

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed September 29, 2021

Petitions to Reopen—New and Further Disability Claims—Statute of Limitations—WCAB, affirming WCJ's decision, found it had no jurisdiction to award new and further disability in connection with applicant warehouse worker's 12/5/2014 back and psychiatric injuries, for which he previously received Stipulated Award of 18 percent permanent disability, when applicant filed Petition to Reopen more than five years following date of injury, after WCAB's jurisdiction to alter award expired under Labor Code § 5804, and while WCAB recognized that pleadings filed prior to expiration of five-year time limitation are liberally construed in determining whether WCAB has continuing jurisdiction, WCAB concluded that pleadings applicant filed seeking to enforce his award of medical treatment and obtain penalties could not be construed as timely Petition to Reopen because none of those documents referenced increased disability, and WCAB found no good cause to allow tolling of statute of limitations under Labor Code § 5803, where applicant's Petition for Reconsideration did not make specific allegations upon which WCAB could conclude time limit in Labor Code § 5410 was tolled or waived, nor did it provide sufficient allegations to grant relief based on applicant's claim of mistake. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 24.13, 31.05; Rassp & Herlick, California Workers' Compensation Law, Ch. 14, §§ 14.04, 14.06.]

Presumption of Compensability

Stella Aldama, Applicant v. State of California Department of Corrections & Rehabilitation, legally uninsured, administered by State Compensation Insurance Fund – State Contract Services, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 278

W.C.A.B. No. ADJ11213667—WCAB Panel: Chair Zalewski, Commissioners Sweeney, Razo

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 14, 2021

Presumption of Industrial Causation—Heart Trouble—Correctional Officers—WCAB, granting reconsideration and amending WCJ's decision to defer issue of permanent disability, affirmed WCJ's finding that Labor Code § 3212.2 presumption of industrial causation applicable to applicant correctional officer's heart injury/hypertension did not apply to her sleep disorder, diabetes and kidney disease as these conditions were not considered "heart trouble" within meaning of Labor Code § 3212.2. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.138[4][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.07[5][b].]

Psychiatric Injury

Derek Brown, Applicant v. Snooze Holdings, Inc., Employers Assurance Company, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 259

W.C.A.B. No. ADJ10954369—WCAB Panel: Chair Zalewski, Commissioners Razo, Lowe

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 4, 2021

Psychiatric Injury—Increased Permanent Disability—WCAB, granting reconsideration, rescinded WCJ's award of 100 percent permanent disability in connection with applicant's industrial injury to his head, jaw, dental and nervous systems, and psyche, which occurred when he struck his head on prongs of coat rack while working as restaurant server on 2/17/2017, and WCAB returned matter to trial level for clarification regarding whether applicant's psychiatric injury constituted direct injury or was compensable consequence of physical injury for purpose of establishing applicant's entitlement to increased permanent disability under Labor Code § 4660.1(c), when WCAB found qualified medical evaluator's report relied upon by WCJ to find direct causation was unclear as to whether applicant's industrial incident was direct or consequential cause of his psychiatric injury and, therefore, was not substantial medical evidence to support WCJ's finding. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 4.02[3][a], [b], [f], 4.69[1], [3][a], 8.02[4][c][ii], [5], 32.02[2][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.05[3][b][i][ii], 7.06[6], Ch. 10, § 10.06[3][a], [b][i].]

Joseph Chavira, Applicant v. Southland Gunite, Inc., National Liability & Fire Insurance Company, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 270

W.C.A.B. No. ADJ10973875—WCAB Panel: Commissioners Snellings, Razo, Deputy Commissioner Schmitz

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 22, 2021

Psychiatric Injury—Catastrophic Injuries—Increased Permanent Disability—WCAB, granting reconsideration and rescinding WCJ's decision, held that applicant who suffered psychiatric injury as compensable consequence of physical injury to multiple body parts while employed as pool bottom finisher on 1/10/2017, met burden of proving his industrial injury was "catastrophic" under Labor Code § 4660.1(c)(2)(B) and *Wilson v. State of CA Cal Fire* (2019) 84 Cal. Comp. Cases 393 (Appeals Board en banc opinion), thereby entitling him to increased impairment rating for psychiatric injury, when WCAB reasoned that treatment for applicant's injury was significant and life-threatening, requiring multiple hospitalizations for serious conditions resulting from physical injury, and his ability to perform activities of daily living was substantially impacted, and WCAB found that applicant's return to working light duty did not preclude finding of catastrophic injury because work is expressly excluded as activity of daily living by AMA *Guides*, and moreover, *Wilson* decision specifically states that whether injury is catastrophic is not measured by injury's impact on employee's earning capacity. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.02[3][a]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.05[3][b][i], [ii], 7.06[6], Ch. 10, § 10.06[3][a], [b][i]; The Lawyer's Guide to the AMA *Guides* and California Workers' Compensation, Chs. 5, 6, 9.]

Settlements

Roque Neri-Hernandez, Applicant v. Geneva Staffing, Inc., California Insurance Guarantee Association on behalf of CastlePoint National Insurance Company, in liquidation, administered by Intercare, Consolidated Fabricators Corporation, insured by United States Fire Insurance Company, adjusted by Crum & Forster, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 256

W.C.A.B. Nos. ADJ7995806, ADJ11753256—WCAB Panel: Chair Zalewski, Commissioner Lowe, Deputy Commissioner Schmitz

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed September 24, 2021

Settlements—Compromise and Release Agreements—Approval—WCAB, granting reconsideration, rescinded WCJ's decision finding that applicant, while employed as machine operator on 7/11/2011, suffered injury AOE/COE to his right hand and gastrointestinal system, but not to his psyche, with issue of permanent disability deferred, and approved Compromise and Release agreement settling applicant's claim based on its finding that parties' settlement in amount of $575,000.00, less credit and attorney's fee, was adequate and in applicant's best interests. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 29.02[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 18, § 18.01[2], [3].]

Stipulations

Carmen Baez, Applicant v. Excelsior Farming, LLC, Zenith, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 250

W.C.A.B. Nos. ADJ11423981, ADJ11423986—WCJ Jeremy K. Lusk (FRE); WCAB Panel: Commissioner Sweeney, Deputy Commissioner Schmitz, Commissioner Lowe (dissenting)

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 4, 2021

Stipulations—Setting Aside—WCAB, in split panel opinion, affirmed WCJ's decision setting aside parties' stipulations regarding applicant's level of permanent disability stemming from 4/25/2018 industrial injury, when WCAB panel majority reasoned that WCJ is not bound by parties' stipulations and may inquire into their adequacy, and that here there was good cause to set aside Stipulated Award based on WCJ's finding that qualified medical evaluator's report upon which parties' stipulations were based was not substantial evidence on issue of applicant's permanent disability, and that further development of medical record was necessary; Commissioner Lowe, dissenting, would rescind WCJ's decision setting aside Stipulated Award based on her findings that stipulations are binding on parties pursuant to *County of Sacramento v. W.C.A.B.* (*Weatherall*) (2000) 77 Cal. App. 4th 1114, 92 Cal. Rptr. 2d 290, 65 Cal. Comp. Cases 1, unless there is showing of good cause to set them aside, that alleged insufficiency of doctor's report was not sufficient cause to justify setting aside stipulations in this matter, especially given that applicant was aware of doctor's report and was represented by attorney when she entered stipulations, and that applicant's subsequent change of mind about settling her claim

was not sufficient grounds to permit her to withdraw from parties' settlement agreement. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 26.06[2], 29.01[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, §§ 16.23, 16.45[2]; Ch. 18, § 18.01[1].]

Janice McInroe, Applicant v. County of Los Angeles, PSI, Sedgwick Claims Management, Administrator, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 265

W.C.A.B. No. ADJ7880197—WCAB Panel: Commissioner Sweeney, Deputy Commissioner Schmitz, Chair Zalewski

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed September 27, 2021

Stipulations—Setting Aside—WCAB dismissed defendant's Petition for Reconsideration seeking to set aside Stipulations approved by WCJ, when WCAB reasoned that contract principles apply to workers' compensation settlements and in keeping with those principles there must be meeting of minds between parties for valid settlement agreement to exist, that record in this matter lacked evidence with respect to defendant's contention there was error in parties' Stipulations as to characterization of benefits paid to applicant which affected defendant's credit rights, and that due process required remand of this matter to trial level for hearing so defendant could provide evidence in support of its arguments, and for decision by WCJ regarding whether there was sufficient basis to set aside Stipulated Award based on evidence. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 26.06[2], 29.01[4]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, §§ 16.23, 16.45[2]; Ch. 18, § 18.01[1].]

Supplemental Job Displacement Benefits

Lucia Vidales, Applicant v. Hacienda Farm Services, Inc., Star Insurance Company, administered by Meadowbrook Insurance Group, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 274

W.C.A.B. No. ADJ12895510—WCAB Panel: Chair Zalewski, Commissioners Lowe, Razo

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed October 15, 2021

Supplemental Job Displacement Benefits—Computer Equipment—Penalties—WCAB, granting reconsideration and affirming WCJ's decision, found that applicant who suffered injury to her left wrist while employed as general laborer from 9/30/2018 through 9/30/2019 was entitled to reimbursement for computer equipment in amount of $1,000.00 in addition to 25 percent penalty under Labor Code § 5814, when WCAB found that where injured employees receive Supplemental Job Displacement Benefit vouchers, such as applicant did, they may choose to apply them for reimbursement of expenses incurred with respect to six categories of goods or services, as listed in Labor Code § 4658.7(e), including purchases of computer equipment in amount of up to $1,000.00, that applicant clearly chose to apply her voucher for reimbursement of expenses incurred for computer equipment to develop her general office/computer skills as recommended by vocational consultant, and there was no evidence applicant's purchase of this equipment was ineligible for reimbursement, and that, under these circumstances, defendant's failure to reimburse applicant was unreasonable, thereby entitling applicant to penalty of $250.00. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 35.01; Rassp & Herlick, California Workers' Compensation Law, Ch. 21, § 21.01.]

Temporary Disability

Miguel Ahumada, Applicant v. CSW Contractors and Zurich North America, administered by Creative Risk Solutions, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 264

W.C.A.B. No. ADJ10210301—WCAB Panel: Chair Zalewski, Commissioners Lowe, Sweeney

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed September 24, 2021

Temporary Disability—Unemployment Insurance—WCAB, amending WCJ's decision, found that applicant laborer was temporarily totally disabled for period 10/23/2015 through 11/17/2016, and was entitled to award of benefits for that period, subject to Employment Development Department's lien for reimbursement of unemployment insurance paid to applicant during overlapping period, and regarding

defendant's assertion that applicant could not make claim for wage loss if he was willing and able to work and receiving unemployment benefits, when WCAB noted that injured worker may qualify for unemployment benefits while being temporarily partially disabled, explaining that if worker has temporary medical restrictions, is unable to perform usual job duties and no modified work was offered or provided, worker is temporarily partially disabled, and may be able to seek and obtain other work within medical restrictions. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[4][c]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.11.]

Albert Diaz, Applicant v. State of California, California Military Department, legally uninsured, administered by State Compensation Insurance Fund, Defendants, 2021 Cal. Wrk. Comp. P.D. LEXIS 262

W.C.A.B. No. ADJ12515673—WCJ Michael H. Young (SAL); WCAB Panel: Chair Zalewski, Commissioners Razo, Lowe

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed September 22, 2021

Temporary Disability—Exceptions to Two-Year Cap on Benefits—Chronic Lung Disease—WCAB, granting reconsideration, rescinded WCJ's finding that applicant who contracted Valley Fever while working as plumber on 11/15/2018 had "chronic lung disease" within meaning of Labor Code § 4656(c)(3)(I) and was therefore entitled to temporary disability beyond two-year limitation period, and found that further development of medical record was required on issue of whether applicant had "chronic lung disease," when panel qualified medical evaluator (PQME) stated in his reports that applicant had "residual abnormalities on chest x-ray relating to resolving coccidioidomycosis pneumonia" and suffered from "continued weakness, lassitude and malaise – likely secondary to deconditioning and possibly slow resolution of post-infectious state after coccidioidomycosis," but never specifically diagnosed "chronic lung disease," and WCAB found decision in *Velez v. Electronic Source Company*, 2018 Cal. Wrk. Comp. P.D. LEXIS 368 (Appeals Board noteworthy panel decision), where WCAB panel indicated that finding of "chronic lung disease" did not require specific diagnosis by physician, was not persuasive in this matter because it was factually distinguishable, and that supplemental reporting from PQME was necessary to resolve issue. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.12.]

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