CASE LAW UPDATE
2021

The opinions expressed herein are not the opinions of the State of California, the Department of Industrial Relations, the Workers' Compensation Appeals Board, the Division of Workers' Compensation, or other judges. They are the opinions of the presenter only. Each case is different and must be evaluated on its own merits.

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SUPREME COURT and COURT OF APPEAL CASES

1. Exclusive Remedy

Gund v. County of Trinity (California Supreme Court) 85 C.C.C. 735

On March 13, 2011, the California Highway Patrol received a phone call from a female caller who whispered, "Help me." The call was relayed to the Trinity County Sheriff's Department, which was almost 100 miles away from the caller.

A deputy sheriff knew that the Gunds lived near the caller.

The deputy called Norma Gund and explained to her that the neighbor had called 911. He asked if Mrs. Gund would check on the neighbor, because he was still hours away. The deputy also asked if Mr. Gund was home, and when Mrs. Gund said no, he told Mrs. Gund not to go to the neighbor's home by herself.

When Mrs. Gund asked what was said in the 911 call, the deputy sheriff responded, "Help me." The deputy sheriff did not tell Mrs. Gund that the caller had whispered, that the CHP dispatcher believed she had been trying to call secretly or that the dispatcher's return calls went straight to voicemail.

The deputy then mentioned the impending arrival of a major storm, which must be what this is all about, and stated, it's probably no big deal.

Believing the emergency to be weather-related, the Gunds went to the neighbor's home.

Mrs. Gund went in while Mr. Gund stayed in the truck. Mrs. Gund was attacked by a man who had just killed the neighbor and her boyfriend.

Mr. Gund heard the commotion, entered the home and saw the man holding down his wife and cutting her throat with a knife.

The man then attacked Mr. Gund by tasing him, punching him and cutting his throat.

Despite their injuries, both the Gunds were able to escape.

The Gunds later filed a civil action against Trinity County ("the County") and the deputy sheriff, alleging that the deputy had sought to secure their assistance by falsely assuring them the neighbor's call was probably weather-related and knowingly withholding pertinent facts.

The County and deputy sheriff asserted that workers' compensation was the exclusive remedy because they sustained their injuries while engaged in active law enforcement service under Labor Code §3366.

The Gunds argued that §3366 did not apply because of the deputy sheriff's alleged misrepresentations, and because they did not understand themselves to be engaged in "active law enforcement service" when they complied with his request.

The California Supreme Court majority upheld the Court of Appeal's decision that workers' compensation was the Gunds' exclusive remedy.

The court found that pursuant to Labor Code §3366, a civilian is entitled to workers' compensation from a public entity if: (1) a peace officer asked for assistance with a task that qualifies as active law enforcement; and (2) the civilian was injured while engaged in that requested service.

The court majority found that there was no dispute that the Gunds assisted at the request of a peace officer. The only dispute was whether the requested assistance involved "active law enforcement services."

The majority concluded that responding to a 911 call for unspecified help was "active law enforcement" for the purposes of §3366. The majority explained that although "active law enforcement service" does not include every conceivable function a peace officer can perform, it concluded that the phrase includes a peace officer's duties directly concerned with functions such as enforcing laws, investigating and preventing crime and protecting the public.

The court further stated that an overly narrow interpretation of active law enforcement service, or one that turns on subjective factors, would leave without recourse many individuals injured while obliging a peace officer's request for assistance, undermining its civilian-protective purpose.

The majority reasoned that the workers' compensation model makes the public agency liable for the costs of the injuries of people assisting police with requested active law enforcement service, whether or not the requesting officer was ultimately at fault.

The court added that the simpler, quicker availability of these benefits can incentivize individuals to oblige a peace officer's request for help, because they will ostensibly be less concerned with the financial consequences of potential injury or death.

The majority of the court concluded that the Gunds were deemed to be employees under Labor Code §3366 because responding to a 911 call of an unknown nature was "active law enforcement" under §3366.

The court rejected the Gunds' argument that whether they engaged in active law enforcement depended in part on what they subjectively believed to be true.

The court added that the deputy sheriff's omissions or misrepresentations did not change the conclusion. Even when an employer intentionally conceals and misrepresents hazards in order to induce an individual to accept employment, it explained, workers' compensation is the individual's exclusive remedy.

The court majority also stated that allowing allegations of misrepresentation to take claims like this outside the workers' compensation system would disturb the carefully balanced scheme the Legislature designed.

The majority concluded simply alleging that a request for assistance contained a misrepresentation, without more, does not preclude application of §3366 and the exclusivity provision.

The dissenting opinion disagreed that the deputy sheriff asked the Gunds to perform an active law enforcement task. The dissent believed it was objectively reasonable for the Gunds to believe they were asked to render neighborly assistance with a relatively risk-free, weather-related problem.

The dissent would have held that the Gunds were not subject to §3366.

2. Apportionment

City of Santa Clara v. Workers' Compensation Appeals Board (Justice) (Court of Appeal, published) 85 C.C.C. 467

Barbara Justice, while employed as a workers' compensation claims adjuster from November 1991 until she retired in December 2011, fell at work on November 22, 2011 and suffered an injury to her left knee. After Justice injured her left knee, she developed pain and problems in her right knee, which was found to be a compensable consequence of the injury to her left knee. In June 2012, Justice had total knee replacement surgery on the right knee. In September 2013, she had total knee replacement surgery on her left knee. The applicant was evaluated by an agreed medical examiner in orthopedic surgeon, Dr. Anderson. He prepared his initial report in March 2016. He prepared five supplemental reports and was deposed twice.

Dr. Anderson testified that an MRI revealed significant preexisting degeneration, all of which predated the fall at work: an "old" tear of the anterior cruciate ligament, "marked loss of articular cartilage in the medial compartment," "moderate loss of articular cartilage in the lateral compartment," and "moderate loss in the patellofemoral joint." There was also scar tissue on both knees indicating that Justice had undergone a "significant open procedure" at some point in the past.

Based on Justice's medical history, Dr. Anderson testified that there was significant preinjury degeneration in both knees. In response to questions on what precipitated the need for total knee replacement surgery, Dr. Anderson agreed that total knee replacement was not required because of the meniscus tear from the specific injury, but rather as a result of the underlying arthritis, because a meniscal tear does not require a knee replacement. Rather, Dr. Anderson determined that the fall at work hastened the need for total knee replacement surgery by lighting up the underlying pathology. Dr. Anderson opined that absent the underlying pre-existing arthritis, it was medically probable that the applicant would not have had a total knee replacement as she did when she did. As a result, Dr. Anderson apportioned 50% of the bilateral knee disability to the nonindustrial, preexisting degeneration in the knees.

The workers' compensation judge determined that Justice had sustained permanent partial disability of 48%, which was worth $59,110.00. The workers' compensation judge held that prior to the decision in *Hikida v. Workers' Comp. Appeals Bd*. (2017) 12 Cal.App.5th 1249

(*Hikida*), he would "have issued a decision awarding [permanent disability] with 50% apportionment based upon Dr. Anderson's opinion." However, the workers' compensation judge understood ***Hikida*** to preclude apportionment in this case: ***Hikida*** holds that where medical treatment here, the bilateral knee replacement surgery results in an increase in permanent disability, which should be awarded without apportionment." The workers' compensation judge emphasized that he was bound by the ***Hikida*** decision: Accordingly, the judge awarded permanent disability with no apportionment.

Defendant sought reconsideration with the board, arguing that the judge erroneously applied *Hikida* to the facts of this case. The judge issued a report and recommendation on the petition for reconsideration, recommending that the WCAB deny reconsideration. The WCAB granted reconsideration, but only to amend the award to correct a clerical error. The WCAB rejected the merits of the petition for reconsideration on the apportionment issue for the reasons stated in the judge's report, which it adopted and incorporated as its decision. A petition for writ of review was filed and granted by the appellate court.

The court of appeal started by pointing out that before the 2004 amendments, apportionment based on causation was prohibited. Before Senate Bill (SB) 899, apportionment based on causation was limited to circumstances where the apportioned disability was the result of the natural progression of a preexisting, nonindustrial condition and such nonindustrial disability would have occurred in the absence of the industrial injury. With SB 899, the Legislature overhauled the statutes governing apportionment. Labor Code §4663 now provides that apportionment of permanent disability shall be based on causation. Section 4664, subdivision (a), in turn, provides that the employer shall only be liable for the percentage of permanent disability directly caused by the industrial injury. The new approach to apportionment is to look at the current disability and parcel out its causative sources—nonindustrial, prior industrial, current industrial—and decide the amount directly caused by the current industrial source.

The issue of the causation of permanent disability, for purposes of apportionment, is distinct from the issue of the causation of an injury.

Thus, the percentage to which an applicant's injury is causally related to his or her employment is not necessarily the same as the percentage to which an applicant's permanent disability is causally related to his or her injury.

Section 4663, subdivision (b) requires that a physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall address in that report the issue of causation of the permanent disability.

In *Hikida*, the injured worker was diagnosed with carpal tunnel syndrome.

She underwent carpal tunnel surgery to treat the condition. Following the surgery, the injured worker developed chronic regional pain syndrome (CRPS), a condition that caused her debilitating pain in her upper extremities and severely impaired her ability to function. The agreed medical examiner found the injured worker to be "permanently and totally disabled from the labor market. He further found her permanent total disability was due entirely to the effects

of the CRPS that she developed as a result of the failed carpal tunnel surgery. He further concluded that her carpal tunnel condition itself was 90% due to industrial factors and 10% to nonindustrial factors.

The Second District Court of Appeal, after issuing a writ of review, concluded that the injured worker was entitled to a permanent disability award without apportionment.

The court concluded there was no dispute that the disabling carpal tunnel syndrome from which the petitioner suffered was largely the result of her many years of clerical work with Costco. It followed that Costco was required to provide medical treatment to resolve the problem, without apportionment. The surgery went badly, leaving the petitioner with a far more disabling condition—CRPS—that will never be alleviated. California workers' compensation law relieves Costco of liability for any negligence in the provision of the medical treatment that led to the petitioner's CRPS. It does not relieve Costco of the obligation to compensate the petitioner for this disability without apportionment.

The court reasoned that while the apportionment rule was based on statute, the long-standing rule that employers are responsible for all medical treatment necessitated in any part by an industrial injury, including new injuries resulting from that medical treatment, derived not from those statutes but from these two principles: (1) medical care for industrial injuries must be provided without apportionment, and (2) the consequences of that medical care are covered by the workers' compensation system.

The court determined that the workers' compensation judge erred in relying on the 2004 amendment to support apportioning petitioner's award, and the board erred in upholding his decision.

In this case, the petitioner contends that the workers' compensation judge and the board erred in determining that Justice's permanent disability should not be apportioned.

The court agreed with petitioner that apportionment of Justice's permanent disability was required.

The court stated that *Petaluma v. WCAB*, 83 C.C.C. 1869 is instructive. In that case, police officer Aaron Lindh was engaged in a canine training exercise at work when he took three to six blows to the left side of his head. He first suffered severe headaches, and weeks later "suddenly lost most of the vision in his left eye. The qualified medical examiner found that Lindh had a congenital abnormality that caused poor blood circulation in his left eye. The examiner opined that without the injury, Lindh most likely would have retained a lot of his vision in that eye, although he could not 'guess' how much." Thus, the examiner apportioned 85% of the permanent disability to the preexisting condition, and 15% to the industrial injury.

However, the judge found that no apportionment was warranted, and the board affirmed that finding, stating that the underlying condition was merely a risk factor that predisposed Lindh to having a left eye injury, but the actual injury and its resultant disability, the left eye blindness, were entirely caused by industrial factors.

On review, the First District Court of Appeal annulled the board's decision, concluding that apportionment was appropriate because there was substantial medical evidence that the asymptomatic condition or pathology was a contributing cause of the disability.

In this case the court went on that as in *Petaluma*, the injured worker in the instant case had an extensive preexisting pathology that when combined with an industrial injury, led to permanent disability. The preexisting pathology was well documented. Dr. Anderson opined that absent the underlying preexisting arthritis, it was medically probable that applicant would not have had total knee replacement when she did. While the fall at work hastened the need for the replacement, the unrebutted medical evidence established that the underlying pathology was a substantial causal factor in the permanent disability. Where there is unrebutted substantial medical evidence that nonindustrial factors played a causal role in producing the permanent disability, the Labor Code demands that the permanent disability shall be apportioned.

Faced with this unrebutted substantial medical evidence, the WCAB should have parceled out the causative sources and decided the amount directly caused by the current industrial source. Here, the agreed medical examiner's initial report, five supplemental reports, and two depositions were unrebutted and constituted substantial medical evidence that Justice's preexisting knee pathology was a significant causal factor in producing her permanent disability following total knee replacement surgery.

The workers' compensation judge and the board believed that *Hikida* dictated a different result. The appellate court disagreed.

An employee is entitled to compensation for a new or aggravated injury which results from the medical or surgical treatment of an industrial injury. Both of these principles are correct statements of the law. However, it does not follow that an employer is responsible for the consequences of medical treatment without apportionment, when that consequence is permanent disability.

In contrast to *Hikida*, the permanent disability in this case was not caused entirely by the industrial medical treatment. The medical treatment did not result in a new, unexpected compensable consequential injury. Rather, the surgery was quite successful, and it significantly increased Justice's ability to walk and engage in weight-bearing activities. Based on a careful review of Justice's medical history, Dr. Anderson found that the permanent disability was caused 50% by industrial factors and 50% by nonindustrial factors.

Dr. Anderson's findings constituted unrebutted substantial medical evidence. It was error for the workers' compensation judge and the board to ignore unrebutted substantial medical evidence that nonindustrial factors, in part, caused Justice's permanent disability.

Respondent Justice argues that notwithstanding *Hikida*, the award with no apportionment was correct under the law. She contends that she had worked for 20 years without any discussion of a need for total knee replacement, that the fall at work was the "precipitating event" leading to the need for total knee replacement surgery, and that therefore the total knee replacement was "directly caused by the work injury." Because the total knee replacement provided the sole basis

for the disability rating, Justice contends that it was appropriate to conclude that there should be no apportionment. According to her, "neither knee surgeries would have occurred if she had not fallen at work."

The court found that Justice's arguments were misplaced. Whether or not an asymptomatic preexisting condition that contributed to the disability would, alone, have inevitably become manifest and resulted in disability, is immaterial. Although she is correct that an employer is responsible for the portion of the permanent disability "directly caused" by industrial factors, implicit in this inquiry is a determination of whether other nonindustrial factors also indirectly caused the permanent disability. In this case, Dr. Anderson concluded that Justice had significant nonindustrial preexisting knee degeneration, which caused 50% of the postsurgical permanent disability. Whether or not the workplace injury "directly caused" the need for surgery, the apportionment statutes nevertheless demand that the disability be sorted among direct and indirect causal factors. In this case, there was unrebutted substantial medical evidence that Justice's permanent disability was caused, in part, by an extensive preexisting knee pathology. Apportionment was therefore required.

The Workers' Compensation Appeals Board's decision was annulled, and the matter was remanded to the board with directions to make an award apportioning Justice's permanent disability 50% to nonindustrial factors and 50% to her industrial injuries.

3. Injury

Michael Perani v. Island Graphics (Court of Appeal, unpublished) 85 C.C.C. 477

Applicant was employed from November 1988 until April of 1995 as a software engineer for Island Graphics. In 1994, he filed a workers' compensation claim for hands, wrists, and arms. He was declared permanent and stationery in 1996. In September 1998, applicant entered into a stipulated award with National Surety Corporation (Fireman's Fund), the insurer of Island Graphics. Per this stipulation, applicant sustained injury to his bilateral upper extremities. The stipulation indicated that there is a need for medical treatment to cure or relieve from effects of the injury. Applicant was awarded 37.2% permanent disability.

In February 1999, Perani consulted with a neurologist. Applicant was suffering from thoracic outlet syndrome (TOS).

In 2001, applicant was involved in a non-industrial automobile accident, this resulted in an increase in the upper extremity problem. From 2005 through 2009, he worked part time for a company called Autodesk, which was insured by Travelers.

In 2009, applicant submitted medical bills for treatment of his TOS to Fireman's Fund, which were denied. In 2012, Fireman's Fund sent a letter to applicant denying liability for the injury to TOS due to the fact that this condition was nonindustrial. Neurologist Dr. Ansell was appointed as a QME. After examining applicant and reviewing the medical records, he concluded that applicant suffered from TOS and found the injury to be 100% attributable to applicant's work at Island Graphics.

In 2016, applicant, Autodesk and Travelers reached a Compromise and Release (C&R) of the workers' compensation claim brought against Autodesk. The C&R stated, "no part of the settlement is for the self-procured medical alleged against Fireman's Fund."

On July 5, 2016, Dr. Ansell prepared a supplemental report stating that the need for future medical care should be apportioned as follows: Island Graphics, 40%; Autodesk, 50%; and the nonindustrial automobile accident, 10%.

On October 18, 2019, the judge issued an award in which he denied the applicant's claim for reimbursement of expenses for TOS. The judge noted that the award was limited to the upper extremities. The judge was of the opinion that applicant's condition of TOS was unrelated to the upper extremities.

Applicant filed a petition for reconsideration, which the board denied. Applicant filed for a Writ of Review, which was granted.

The court first looked at the definition of "upper extremity." The court noted that this includes the hand, wrist, elbow, and the shoulder, in other words, the entirety of the arm. The court further noted that the term can be defined even more expansively as the neck and shoulders, essentially everything from the base of the skull down. They also noted that TOS is "a non-specific label" for "upper extremity symptoms due to compression of the neurovascular bundle by various structures in the area just above the first rib and behind the clavicle."

While the thoracic outlet may be located in the upper torso, rather than in the shoulders, arms, wrists or hands, its symptoms, and the symptoms experienced by applicant manifest in those very body parts. The court argued that to say that it is not encompassed in an award for injuries to the upper extremities would be akin to saying an award for an injury to one's leg did not cover pain in that leg because pain originates in the brain and the award did not specify recovery for brain injuries.

The court noted that the 1998 stipulated award did not specify that future medical treatment was authorized only for a particular medical condition. The award broadly stated that the body parts injured were the "bilateral upper extremities" without specifying a particular medical condition. The court stated that had the parties wished to limit future medical treatment to treatment for particular conditions, they could have done so.

Since the WCAB concluded that TOS was not encompassed by the 1998 award at all, it did not consider issues regarding apportionment or industrial causation. Therefore, the court remanded the matter to the board to consider the issues.

The WCAB's opinion was annulled and the matter was remanded to the board for further proceedings.

4. Settlement

Kennedy v. MUFG Union Bank (Court of Appeal, unpublished) 85 C.C.C. 116

On May 19, 2016, applicant took medical disability due to the stress, anxiety, and depression caused by her alleged hostile work environment. While on leave, Union Bank underwent a restructuring which resulted in the elimination of her position. In November 2015, applicant made multiple requests to return to work with an accommodated reduced work schedule. She was informed that Union Bank could not accommodate her request because her position had been eliminated. Applicant alleged that this constituted a termination and discrimination on the basis of her disability.

In December 2015, applicant was determined to be totally disabled and initiated a workers' compensation claim on that basis. She settled her workers' compensation in July 2016 and agreed to submit a voluntary resignation from employment as part of that settlement. Applicant admitted that she was of the understanding that she remained an employee of Union Bank until the time of her resignation.

On December 20, 2016, applicant filed her first amended complaint against defendants. She alleged FEHA causes of action for (1) discrimination based on disability, (2) discrimination based on race, (3) hostile work environment, (4) retaliation, (5) failure to prevent discrimination and harassment, (6) failure to engagement in the interactive process, and (7) failure to accommodate.

Defendants filed a motion for summary judgement. Following the hearing, the trial court issued a written ruling granting the motion for summary judgment.

On appeal, the court looked at the evidence to determine if defendants had met their burden of proof for the summary judgement. In doing so, the court noted that defendants presented the declaration of Union Bank's return-to-work coordinator who stated that plaintiff remained an employee while on disability leave. Defendants also presented excerpts from the applicant's deposition where she admitted filing a workers' compensation claim, claiming a temporary and total disability. She admitted settling the claim in July 2016 and executing a voluntary resignation from her employment as part of that settlement. She confirmed her understanding that she remained an employee until the date of her resignation.

At trial, defendant presented a copy of the application and compromise and release submitted to the workers' compensation appeals board as well as a copy of the executed voluntary resignation. The court stated that this evidence was sufficient to negate any claims premised on the existence of a termination, since it showed that applicant wasn't terminated but resigned her employment. The court found absent a threshold showing of a termination there can be no claim for wrongful termination and no claim for termination based on discriminatory motives or impermissible retaliation. The court found that this was sufficient evidence to shift the burden on summary judgement and required applicant to show a triable issue of material fact. Plaintiff failed to show evidence of a triable dispute and therefore the judgement was affirmed.

5. Subsequent Injuries Benefit Trust Fund

Todd v. Subsequent Injuries Benefits Trust Fund (en banc) 85 C.C.C. 576

Applicant, a former police officer, sustained a cumulative trauma injury arising out of and in the course of his employment with the City of Los Angeles to his kidneys, heart, psyche, and in the form of hypertension during the period from January 1, 1990 through November 25, 2009.

The Minutes and Summary identified the disputed issues for trial as permanent disability, apportionment, and attorney's fees. Under "Other Issues," SIBTF also disputed applicant's claim of 100% permanent disability.

The workers' compensation judge took judicial notice of a Findings and Award issued on March 6, 2012 against defendant employer of 64% permanent disability as a result of applicant's injury to his kidneys, heart, and in the form of hypertension.

Following the award of 64% permanent disability, applicant filed a petition to reopen for new and further disability related to applicant's psychiatric injury. This petition was resolved by way of stipulation to 68% permanent disability, which included credit for the previous award of 64%.

Five prior stipulated awards offered by applicant were admitted at the May 17, 2016 trial on the issue of SIBTF benefits as follows: Stipulation with Request for Award in case ADJ6807484 with Award dated November 23, 2009; Stipulation with Request for Award in case VNO 0486348 (ADJ671938) with Award dated December 28, 2005; Stipulation with Request for Award in case VNO 376604 with Award dated July 26, 1999; Stipulation with Request for Award in cases VNO 345088, MON 170580, MON 219930, and MON 210865 with Award dated August 12, 1998; and Stipulation with Request for Award in case MON 170580 with Award dated February 8, 1994

Applicant also offered a vocational assessment report from Broadus & Associates dated August 12, 2015, which was admitted into evidence over SIBTF's objection.

The judge found, in pertinent part, that the sum of applicant's successive disabilities entitled applicant to permanent and total disability.

SIBTF filed a petition for reconsideration that did not dispute that applicant had met the threshold for SIBTF liability under §4751, nor did it dispute the permanent disability ratings offered by applicant. SIBTF also did not raise an issue with respect to overlap between the successive disabilities. Accordingly, the sole issue presented by the petition was whether the judge correctly combined applicant's prior and subsequent permanent disabilities under §4751 by adding them to find that applicant is permanently and totally disabled.

The appeals board in the decision stated as follows:

In a claim for SIBTF benefits, an employee must establish that a disability preexisted the industrial injury. (§4751). Evidence of a preexisting disability may include prior stipulated awards of permanent disability or medical evidence. In order to be entitled to benefits under §4751, an employee must prove the following elements:

(1) a preexisting permanent partial disability;

(2) a subsequent compensable injury resulting in additional permanent partial disability:

(a) if the previous permanent partial disability affected a hand, an arm, a foot, a leg, or an eye, the subsequent permanent disability must affect the opposite and corresponding member, and this subsequent permanent disability must equal to 5% or more of the total disability, when considered alone and without regard to, or adjustment for, the occupation or age of the employee; or

(b) the subsequent permanent disability must equal to 35% or more of the total disability, when considered alone and without regard to, or adjustment for, the occupation or the age of the employee;

(3) the combined preexisting and subsequent permanent partial disability is greater than the subsequent permanent partial disability alone; and

(4) the combined preexisting and subsequent permanent partial disability is equal to 70% or more. (§4751.)

Once the threshold requirements are met, §4751 specifically provides that applicant "shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury compensation for the remainder of the combined permanent disability existing after the last injury." (§4751; emphasis added.)

Entitlement to SIBTF benefits begins at the time the applicant becomes entitled to permanent disability payments. (*Baker v. Workers' Comp. Appeals Bd. (Guerrero*) (2017) 13 Cal.App.5th 1040, 1050 [82 Cal.Comp.Cases 825].)

The appeals board then found as follows:

Prior and subsequent permanent disabilities shall be added to the extent they do not overlap in order to determine the "combined permanent disability" specified in §4751.

The 1997 and 2005 Permanent Disability Rating Schedules indicate that the MDT or Combined Values Chart (CVC) are to be used in a single injury and not in successive injuries.

SIBTF is liable, under §4751, for the total amount of the "combined permanent disability," less the amount due to applicant from the subsequent injury and less credits allowable under §4753.

6. Voucher

Dennis v. State of California Department of Corrections and Rehabilitation (Dennis II) (en banc) 85 C.C.C. 28

The board held en banc that Regulation Section10133.54 was invalid because it extended the statutory authority granted to the administrative director under Labor Code §§4658.5 (c) 4658.7 (h), and restricts the exclusive power the WCAB to adjudicate compensation claims, including disputes over supplemental job displacement benefits (SJDB).

The WCAB reasoned that it had exclusive jurisdiction pursuant to the California Constitution and Labor Code §5300 to adjudicate workers' compensation disputes.

The WCAB stated that Regulation Section 10133.54 was invalid because it required the administrative director to issue a written determination and order concerning a supplemental job displacement benefits (SJDB) dispute and limits the period for parties to appear before the WCAB.

The board held that Regulation Section 10133.54 restricts and usurps the exclusive adjudicatory power of the WCAB because it exceeds the express language of Labor Code §§4658.5 (c) and 4658.7 (h) allowing the administrative director to adopt regulations for the administration of the SJDB voucher.

The board stated that neither statute authorizes the administrative director to adjudicate SJDB disputes.

7. Procedure

In Re: COVID-19 State of Emergency, EN BANC – No. 1 85 C.C.C. 296

As a result of the COVID-19 emergency, the WCAB issued multiple en banc decisions pursuant to their authority. At the beginning of the pandemic, en banc no. 1 suspended Regs. 10755, 10756, 10888, the regulations that allowed for dismissal of a case or a lien claim for failure to appear. This en banc suspended §§10961(a), 10962(c), 10990(f)(3)(e), 10995(c)(3) also gave judges and arbitrators unlimited time to answer a petition for reconsideration or removal. The WCAB also suspended Reg. 10500(b)(6), the requirement for two witness signatures on a C&R. It also allowed that signatures be electronic. En banc no. 1 also suspended Reg. 10628, stating that service now may be made electronically with or without the parties consent.

In RE: COVID-19 State of Emergency, EN BANC – No. 2 85 C.C.C. 299

Normally, and pursuant to AD Regulation 10205.7(c), e-mailing documents to a district office is prohibited. However this emergency en banc allowed for certain and limited documents to be sent via e-mail, specifically documents that are subject to a statutory limitation and could not otherwise be e-filed, JET filed or filed by mail.

In RE: COVID-19 State of Emergency, EN BANC – No. 3 85 C.C.C. 409

In their third State of Emergency en banc, the WCAB suspended Regulation Sections 10620 and 10670(b)(3). These are the sections that require exhibits for trial to be filed 20 days prior to trial. This en banc suspended that requirement.

In RE: COVID-19 State of Emergency, EN BANC – No. 4 85 C.C.C. 573

The WCAB rescinded suspension of rules 10961(a), 10962(c), 10990(f)(3)(E), 10995(c)(3).

In RE: COVID-19 State of Emergency, EN BANC – No. 5 85 C.C.C. 921

The WCAB rescinded suspension of rules 10755, 10756, 10888.

In RE: COVID-19 State of Emergency, EN BANC – No. 6 85 C.C.C. 924

In its sixth en banc, the WCAB rescinded its suspension of 10620 and 10670(b)(3). This returned the requirement that trial exhibits be filed 20 days before trial.

In RE: COVID-19 State of Emergency, EN BANC – No. 7 85 C.C.C. 1021

In this en banc, the WCAB suspended Regulation section 10789(c). This is in the walk-through section and states, "Each district office shall have a designee of the presiding workers' compensation judge available to assign walk-through cases from 8:00 a.m. to 11:00 a.m. and 1:00 p.m. to 4:00 p.m. on court days." They noted that §10789(a) is permissive only, and that walk-throughs may be restricted at the discretion of the PWCJ. This includes the authority to decline to assign a document that is submitted for walk-through. The WCAB stated: "The PWCJs are empowered to prioritize which documents may be assigned on a walk-through basis to expedite resolution of claims and to account for limited capacity in their respective offices in determining whether to permit a document to be assigned as a walk-through."

8. Due Process

Gao v. Chevron Corporation (SPD) (_____ C.C.C. _____)

Applicant filed an Application for Adjudication, alleging a psyche injury sustained while employed by Chevron from May 2, 2014 to July 2, 2015. The matter proceeded to trial on March 10, 2020. Applicant provided in-person testimony. Trial could not be completed in time and was continued to June 9. As of March 16, due to the pandemic, district offices stopped conducting in-person hearings. On May 7, 2020, the 'California Governor Gavin Newsom issued Executive Order N-63-20, which stated as relevant here:

> Any statute or regulation that permits a party or witness to participate in a hearing in person, a member of the public to be physically present at the place where a presiding officer conducts a hearing, or a party to object to a presiding officer conducting all or part of a hearing by telephone, television, or other electronic means, is suspended, provided that all of the following requirements are satisfied:

a) Each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits;

b) A member of the public who is otherwise entitled to observe the hearing may observe the hearing using electronic means; and

c) The presiding officer satisfies all requirements of the Americans with Disabilities Act and Unruh Civil Rights Act.

On August 20, 2020, the workers' compensation judge (WCJ) issued a letter to the parties, stating that it was possible to conduct a video trial, and asking whether either party objected to completing the trial via that format. Defendant filed an objection on August 24, 2020, stating it was opposed to a trial via any method except in-person testimony, and seeking a continuance until in-person testimony could safely be provided.

On August 25, 2020, apparently without waiting for a response from applicant, the WCJ issued an order continuing the September 1, 2020 trial, stating that due process required continuing the trial to allow for in-person testimony from defendant's witnesses, because applicant had previously given in-person testimony. Applicant filed a petition for removal.

The WCAB noted that video trials are now available at the WCAB. The panel provided an extensive discussion of due process. They noted that the WCJ issued a letter asking if the parties would agree to a video trial and when defendant filed an objection, the judge issued the continuance. They found that this course of action was not consistent with due process. They went on to discuss the WCJ continuing the case to allow for in-person testimony and state:

> "The WCAB's transition to remote hearings is not based upon some bureaucratic whimsy, but rather upon the advent of a global pandemic that has cost the lives of hundreds of thousands, and caused fundamental shifts in the behavior of most of the world's population. Due process is the process that is due under the circumstances as we find them, not as we might wish them to be. Executive Order N-63-20 represents the Governor's best judgment as to how to strike a fair balance between the due process rights of participants in hearings, the necessity of protecting the public from real and significant harm, and the state's responsibilities under the California Constitution to provide efficient, timely resolution of disputes in order to secure benefits for eligible injured workers."

The WCAB stopped short of issuing a blanket rule that it is always unreasonable to continue for in-person testimony but determined that based on the executive order, the current circumstances, and the purposes of the workers' compensation system, the default position should be to proceed with remote trials. The burden should be on the party requesting the continuance to prove that the facts of a specific case require a continuance. The order was rescinded and the matter returned to the judge for further proceedings.

The appeals board panel found no due process problem in proceeding with the trial remotely.

In previous cases, the appeals board held that a WCJ could determine witness credibility during a telephonic trial, based on the inflection and tone of spoken testimony.

Therefore, the WCJ's ability to determine the credibility of witnesses alone is not likely to be sufficient for a continuance.

WRIT DENIED CASES

9. Attorney Fees

Shandler & Associates v. Asvar, Odjaghian & Associates (W/D) 85 C.C.C. 54

Applicant suffered a traumatic brain injury at 19 years old after falling from a scaffold while painting a home on May 5, 2004. Applicant suffered significant cognitive and psychiatric symptoms which left him permanently totally disabled requiring his father to act as his guardian. For the first five years of the case, applicant was represented by Shandler & Associates. Applicant was subsequently represented by Asvar, Odjaghian & Associates (AOA), who handled the case from 2009 through the 2012 approval of a C&R agreement in the amount of $8.9 million, which resulted in attorney's fees of $1,182,357. A dispute arose between the two firms about the division of attorney's fees. The workers' compensation judge determined that the proper division would be $1,182,357 to AOA and $152,643 to Shandler. The workers' compensation judge (WCJ) in determining the division relied on Reg. 10775 and *Bentley v. IAC* (11 C.C.C. 204), including the care exercised in representing the applicant, the time involved, and the result obtained. Shandler filed for reconsideration.

The judge explained in the report that Shandler's handling of the case was flawed from the start when the intake interview was conducted by a clerical employee. Shandler had no hands-on involvement with the case and the applicant never met with an attorney from the Shandler firm despite many requests. Additionally, Shandler never attempted to settle applicant's claim after the P&S report nor did they make any significant effort to manage applicant's complex medical treatment.

In contrast, AOA took impressive care and responsibility of the case. They provided applicant with a guardian ad litem and conservator. There were numerous personal and phone contacts with attorneys, they obtained home health care for the applicant, and undertook extraordinary efforts to settle the case resulting in the record-setting resolution.

The judge noted in the report that there was limited case law on the issue of fee division and observed that various formulas have been used. The judge concluded that the best formula to use was to account for the reasonable value of opening a case file for applicant, and place a specific monetary value on each component of the settlement agreement, including permanent disability, retrospective home care for periods prior to the approval for the C&R, prospective home care, post settlement, and other medical benefits provided by the C&R. The judge then assessed the contribution of each law firm with respect to these various components. Totaling the values of

each component and applying the *Bentley* factors, the judge allocated the total attorney's fee award between the two firms.

The WCAB adopted and incorporated the report and recommendation on reconsideration. The petition for writ of review was denied by the appellate court.

10. Contribution

Brotherhood Mutual Insurance Company v. WCAB (W/D) 85 C.C.C. 931

In August 2018, GuideOne, the insurer, filed a Petition for Joinder of Brotherhood pursuant to Labor Code §5500.5(b). In September 2018, GuideOne settled the case with the applicant by way of a compromise and release agreement for a continuous trauma injury. Eight days later, the judge issued an order joining Brotherhood as a party defendant.

In mid-January 2019, GuideOne filed a DOR stating the issue was the joinder order and that the complete medical file had been served on Brotherhood in mid-November 2018. Brotherhood objected at the end of January, stating that further medical discovery was necessary before a hearing on contribution issues.

The case remained off calendar pending further discovery from February through August 2019. During that time, the insurers exchanged emails on issues involving discovery and settlement of the contribution claim.

Absent agreement, GuideOne filed another DOR in mid-October 2019 for a mandatory settlement conference (MSC). Co-defendant objected, advising that it was awaiting a report from a panel QME. There was correspondence back and forth on further discovery and possible settlement.

At an MSC on December 18, 2019, Brotherhood reserved the right to raise the issue of an untimely filed petition for contribution for the arbitrator to decide.

The matter proceeded to arbitration, with Brotherhood claiming the claim was barred because GuideOne had not filed a timely petition for contribution within one year of the date the compromise and release was approved by the judge.

GuideOne argued that 'its January 2019 DOR had raised the contribution issue and the parties engaged in settlement negotiations thereafter and therefore there were grounds for an estoppel from asserting the statute of limitations. The arbitrator agreed with GuideOne and the recon was denied. A writ of review was filed to the Court of Appeal.

The writ was denied and the court issued a short opinion with that denial noting that Labor Code §5500.5 (e) allows a defendant that is held liable in a cumulative trauma case the opportunity to institute proceedings before the board to apportion liability or obtain contribution.

The settlement was approved on September 17, 2018, and is an award for purposes of the statute of limitations in Labor Code §5500.5(e).

GuideOne had to institute proceedings before September 17, 2019. The appeals board denied the petition for reconsideration.

Brotherhood argued that co-defendant had to file a petition for contribution as the only mechanism to request action by the board.

According to the court, though the arbitrator observed in his discretion that a better practice is filing of an actual petition for contribution that clears any confusion, the WCAB's conclusion that the declaration of readiness to proceed was sufficient to institute the contribution proceedings is not a clearly mistaken interpretation of §5500.5(e).

Section 5500.5(e) does not specify what document must be used to initiate a contribution proceedings and Rule 10510 has a specific exception for DORs (referring back to Rule 10500).

Furthermore, as the arbitrator pointed out, the Brotherhood DOR objection in January 2019 indicated it was aware of the contribution claim and needed to review evidence regarding the issue when the only issue remaining at that time was contribution.

Accordingly, the court denied Brotherhood's petition for writ of review.

11. Psychiatric injury

County of San Bernardino v. Workers' Compensation Appeals Board (Cortes) (W/D) 85 C.C.C. 854

On October 26, 2017, applicant claimed she sustained injury to head, brain, digestive system, and excretory system while employed as a probation officer. Defendant denied the injury.

Applicant was evaluated by PQME Townsend who noted applicant's conditions were pre-existing but that stress may have exacerbated her condition.

Applicant was evaluated by psychiatric PQME Egan. Egan determined applicant's work-related stress exacerbated her physical symptoms and was the sole cause of her worsening physical health.

On November 12, 2019, after trial, the WCJ issued a decision determining applicant suffered injury to head, brain, digestive system and excretory system but that her claim was barred by the good faith personnel action defense under §3208.3(h) and ordered applicant "take nothing." Applicant filed for reconsideration. WCAB granted reconsideration.

In its opinion, WCAB explained that §3208.3 imposes a different threshold to prove psychiatric injury and requires a showing that the actual events of employment were predominant as to all causes combined of the injury. Psychiatric injuries under §3208.3(h) caused by lawful, nondiscriminatory, good faith personnel actions are not compensable. They found that §3208.3 does not apply when stress causes a physical injury, stating "stress is not a diagnosis, disease or syndrome. It is a non-specific set of emotions or physical symptoms that may or may not be associated with a disease or syndrome…"

Applicant did not claim a psychiatric injury, only that stress aggravated a pre-existing physical condition. Therefore §3208.3 did not apply and the WCJ's findings pertaining to the good faith personnel action defense were erroneous. The WCAB found that the applicant met her burden of proving injury to her digestive and excretory systems, all other issues were deferred for further proceedings at the trial level.

Writ was denied.

REPORTED WORKERS' COMPENSATION APPEALS BOARD AND PANEL DECISIONS

12. Discovery

Harden v. Sacramento (BPD) 85 C.C.C. 421

The appeals board held that medical reports obtained in relation to an applicant's disability retirement benefits could be provided to an agreed medical evaluator (AME) or qualified medical evaluator (QME) in the applicant's workers' compensation claim.

The appeals board concluded the reports were not barred by Rule 35 (e) because they did not address issues under the state's workers' compensation law, and were not obtained for the sole purpose of rebutting the opinion of the QME.

Labor Code §4062.3 provides any party may provide to a QME records prepared or maintained by the employee's treating physician or physicians and medical and nonmedical records relevant to determination of the medical issues.

Defendant contended that §4062.3 (b) does not apply to medical records and reports proposed to be served to a QME. Section 4062.3 (b) provides that information that a party proposes to provide to the QME selected from the panel shall be served on the opposing parties 20 days before the information is provided to the evaluator. If the opposing party objects to consideration of nonmedical records within 10 days thereafter the record shall not be provided to the evaluator. Either party may use the discovery to establish the accuracy or authenticity of nonmedical records prior to the evaluation.

Although §4062.3 (b) does not provide a specific timeline for the opposing party to object the QME's consideration of medical records, the opposing party must object to the providing of medical records to the QME within a reasonable time in order to preserve their objection.

It was acknowledged in a footnote in the matter of *Suon v. California Dairies* 83 C.C.C. 1803 that §4062.3 (b) is silent regarding the course of action if the opposing party objects to consideration of medical records proposed to be provided to the QME.

Section 4062.3 (c) requires the parties to agree on what information will be served on the AME. Since the parties were unable to agree on whether to serve this information to the AME, the appeals board has authority to determine whether these records may be served on the AME.

The parties did not dispute that the medical reports in question were issued in relation to applicant's claim for disability retirement. The issue is whether these reports may be provided to the orthopedic AME and psychiatric QME for applicant's workers' compensation claim.

The board concluded that these reports are admissible in this matter and may be provided to the medical-legal evaluators since they are relevant to determination of medical issues.

The board then rejected defendant's contention that §4062.3 did not apply to the medical records it proposes to serve to the psychiatric QME and the orthopedic AME.

The board then cited Labor Code §5708 that the appeals board is not bound by the common law or statutory rules of evidence. The right to present evidence implicates the right to due process. The board in addition cited *Valdez* in interpreting Labor Code §4064, indicating that the law favors the admissibility of medical reports in workers' compensation proceedings.

In this case, the reports of the two physicians were not obtained in accordance with any provision in the Labor Code and are not treating physician reports. None of these reports may be deemed comprehensive medical evaluations under §4062.2 or reports obtained per §§4605 or 4064(d). They were not issued in relation to applicant's workers' compensation claims. These reports are not being offered into evidence as comprehensive medical evaluations. Therefore, whether the reports are compliant with the medical-legal process mandated by §4062.2 or permissibly obtained per §§4605 or 4064 (d) is not relevant to their admissibility.

Administrative Director (AD) Rule 35 (e) includes a provision excluding an evaluation or consult and report written by physicians other than a treating physician, the primary treating physician or secondary physician or an evaluator through the medical-legal process in Labor Code §§4060-4062, that address permanent disability, permanent impairment or apportionment under the workers' compensation systems unless ruled admissible by a workers' compensation judge.

These two reports at issue do not address the issues of permanent impairment, permanent disability or apportionment under the state workers' compensation laws. Instead these reports address applicant's eligibility for disability retirement from her employer. Therefore, AD Rule 35 (e) does not bar provision of these reports to the QME or AME.

Section 4062.3 (a) permits any party to provide to the medical-legal evaluator medical records relevant to determination of medical issues. This language is fairly expansive. In determining whether the disputed medical reports may be considered relevant, it is noted that the evidence code defines relevant evidence as having any tendency in reason to prove or disprove any disputed fact that is of consequence to determination of the action. This definition has been characterized as manifestly broad.

The orthopedic report evaluated the nature and extent of applicant's neck and back condition resulting from her industrial injury. The psychiatric report evaluated applicant's psychiatric condition in relation to her industrial injury. These are the same body parts pled in applicant's workers' compensation claim and involve the same injurious accident. The board therefore concluded these reports are relevant to determination of the medical issues and applicant's workers' compensation claim and may be provided to the orthopedic and psychiatric medical legal evaluators.

They rescinded the findings and order. They issued a new decision finding the applicant sustained injury AOE/COE and that the reports of both doctors may be provided to the orthopedic AME and psychiatric QME.

The dissenting commissioner would not have allowed the reports because it would invite the parties to deviate from the statutory procedures for medical-legal reports and opened the door to enable other types of medical-legal reports to be admissible outside of the legislative mandated process.

13. Rating

Gonzales v. Cal Fire (BPD) 85 C.C.C. 412

The WCAB rescinded the workers' compensation judge's findings that applicant's industrial injuries to his ears (hearing), right wrist, left elbow, hips, knees, psyche, lower back, and in form of headaches during period June 1, 1983 to August 21, 2015 resulted in 77% permanent disability and that medical evidence justified combining rather than adding impairments.

The WCAB reasoned that the judge's determination of permanent disability was based upon need for "synergistic effect" between impairments as absolute precondition to adding rather than combining impairments, but, as discussed in *De La Cerda v. Martin Selko & Co*. (2017) 83 Cal. Comp. Cases 567 (WCAB noteworthy panel decision), impairments may be added if substantial medical evidence supports the physician's opinion that adding them will result in a more accurate rating of the injured employee's overall permanent disability.

The AMA Guides themselves explain that in appropriate cases, whole person impairments may be added or a multiplier may be used, as opposed to combining impairments. The psychiatric qualified medical evaluator's deposition testimony in this case established that there was no overlap between physical and mental impairments; he agreed, under questioning by applicant's attorney, that in this case reaching a more fair result by adding those disabilities was not equivalent to a medically supported opinion that adding disabilities would result in a more accurate rating, as required by case law.

The WCAB determined that since the qualified medical evaluator opined that there was no overlap between physical and mental impairment, and this suggested that adding impairments may result in a more accurate rating, the medical record must be developed with supplemental reports or additional testimony from the qualified medical evaluator.

14. Serious and Willful

Sauceda v. Fresno Unified School District (BPD) 2020 Cal. Wrk. Comp. P.D. LEXIS 137

The applicant was a long-time teacher who was injured when he was physically attacked by a student in his special needs class.

Sauceda's workers' compensation claim was resolved by Stipulations with Request for Award.

The applicant timely petitioned for increased benefits under Labor Code §4553, contending that his industrial injury was caused by defendant's serious and willful misconduct.

The applicant claimed that defendant was aware that the student assailant had a prior history of attacking two different teachers on separate occasions at a previous school, and was also aware that the student assailant had threatened to hurt or kill applicant.

The employer took no action and refused applicant's request to move the student to a different classroom. Trial testimony corroborated applicant's allegations.

The student assailant's school records confirmed the student's violent tendencies and the prior assaults on teachers. Applicant's manager informed the employer of the history contained in the records. The student assailant became fixated on Sauceda and threatened physical violence against Sauceda. As a result, Sauceda requested that the employer place the student in a different class. A meeting to discuss the request was held with Sauceda, his supervisor, his manager, and the school psychologist, but no action was taken.

Sauceda was told by the principal and other members of the school administration that there was nothing that could be done. The classroom in which Sauceda was assaulted did not have a radio or telephone for use in case of an emergency.

Sauceda's manager testified that she had no authority to transfer the student and could do nothing to resolve the situation. She was aware of the student records, past conduct and threats against Sauceda, but didn't believe that Sauceda would be injured. Sauceda's supervisor testified that all classrooms were supposed to have radios or telephones.

Sauceda also presented expert testimony regarding provisions of the Education Code applicable to his employer. Section 49079 requires a school district to inform a teacher if any of that teacher's students have engaged in or are reasonably expected to engage is such acts as causing, attempting to cause, or threatening to cause physical injury to another person. A knowing failure to inform the teacher about such a student is a misdemeanor offense.

The workers' compensation judge found that the employer's failure to warn applicant about the student documented violent tendencies thereby putting Sauceda in a position of danger in the classroom constituted serious and willful misconduct.

On reconsideration, the panel majority affirmed the judge's finding.

The majority found the clear language of the Education Code to be significant and unambiguous. Section 49079 of that code places an affirmative duty upon school districts to warn their teacher

employees when they become aware that a student has engaged in or is likely to engage in violent acts, and a knowing failure to provide such warning constitutes a misdemeanor offense.

The majority reasoned, the employer's failure to provide the warning makes it liable to Sauceda under §4553 and the rationale in J*ohns Manville Sales Corp. Private Carriage v. Workers' Comp. Appeals Bd*. (1979) (44 Cal. Comp Cases 878]).

The board concluded that because: (1) the employer knew of the dangerous condition (the threatening student assailant and his past conduct as set forth in the student assailant's records); (2) knew the probable consequence of failing to remove the student from the classroom or take other appropriate action would involve serious injury to Sauceda; and (3) deliberately failed to take corrective action, therefore the applicant's injury was caused by the employers serious and willful misconduct.

The dissenting commissioner balanced between the employer's duty to warn the applicant and the student's right to privacy and based on that would have found the employer did not engaged in serious and willful misconduct pursuant Labor Code §4553.

15. Employment

Arambul v. Ortiz, State Farm Insurance Company (BPD) 2020 Cal. Wrk. Comp. P.D. LEXIS 33

The WCAB in reversing the workers' compensation judge's decision held that applicant, who alleged that he suffered industrial injuries to his head, lumbar spine, thoracic spine, cervical spine, right arm, and right shoulder while working as painter on June 5, 2018, did not come within the statutory exclusion from employment codified in Labor Code §3352(a)(8).

The facts showed that he had worked fewer than 52 hours at time of his injury, however he had contracted for work exceeding the 52 hour statutory requirement.

The WCAB stated that the law was changed in 2017 by amendment to Labor Code §3352 to include as employees residential workers who have worked or have contracted to work for 52 hours or more, even if they have not actually worked 52 hours, and have earned or have contracted to earn $100.00 or more.

The evidence in this case established that applicant was contracted to work for more than 52 hours and had contracted to render his services for wages well over $100.

16. Specialty

Porcello v. State of California Department of Corrections & Rehabilitation (BPD) 85 C.C.C. 327

The WCAB in rescinding the decision of the judge found that defendant's dispute regarding the qualified medical evaluator specialty was premature for decision by the WCAB, and that parties must await the determination by the Medical Unit regarding defendant's objection to chiropractic

specialty before proceeding with the qualified medical evaluations to address medical issues in connection with applicant's orthopedic injury claims.

The WCAB returned the matter to the trial level for the judge to address the panel specialty dispute.

The WCAB stated that nothing in the Labor Code precludes a party from submitting a panel specialty dispute to the judge prior to or instead of submitting the dispute to a medical director.

The WCAB stated that the judge may address this dispute pursuant to general authority to adjudicate workers' compensation claims and to address discovery disputes arising in those claims, and to the extent that the decision in *Portner v. Costco*, 2016 Cal. Wrk. Comp. P.D. LEXIS 499 (appeals board noteworthy panel decision), indicated that a party must submit a panel specialty dispute to the medical director before submitting the dispute to the judge, the WCAB disagreed with its analysis.

17. Penalties

Knight (Deceased) v. Marisan Group, Sentinel Insurance Company, The Hartford (BPD) 2020 Cal. Wrk. Comp. P.D. LEXIS 48

The WCAB, in a split panel opinion, affirmed the workers' compensation judge's finding that defendant was entitled to credit against its liability for death benefits, and was not liable for Labor Code §4650(d) self-imposed penalties on the award of death benefits.

The panel majority concluded that defendant timely paid death benefits within 14 days of the date the award became final as described in *Leinon v. Fishermen's Grotto* (2004) 69 Cal. Comp. Cases 995 (Workers' Compensation Appeals Board en banc decision).

In *Leinon* it was held that an order, decision or award becomes final for purposes of Labor Code §4650(d) when defendant has exhausted all of its appellate rights or has not pursued them.

That defendant did not exhaust its appellate rights as contemplated in *Leinon* until time for seeking appellate review expired 45 days after denial of defendant's petition for reconsideration of the death benefits award, defendant had 14 days after expiration of the 45-day timeframe to pay death benefits.

That defendant paid death benefits before time to seek appellate review expired, therefore they became liable for Labor Code §4650(d) penalty.

According to the WCAB the language in *Leinon* indicating that there is no "grace period" for delay in payment if defendant does not file a petition for writ of review from an adverse decision after reconsideration was non-binding dicta in context of Labor Code §4650(d) liability.

Because defendant in this case owed no self-imposed penalty, the judge did not err in re-characterizing defendant's erroneous payment of self-imposed penalty as payment of interest on the death benefits award, which defendant had not previously paid, and awarding credit for difference between self-imposed penalty paid in error and unpaid interest.

The dissenting commissioner would have found that WCAB in *Leinon* case did not intend to provide a 45-day grace period after reconsideration was denied for defendant to delay payment of benefits, that when defendant does not seek reconsideration of judge's decision or appellate review of WCAB's decision after reconsideration, it must pay benefits within 14 days of that decision, that because defendant here did not seek appellate review of WCAB's October 13, 2017 order denying reconsideration, defendant was required to pay benefits within 14 days of that order.

18. Costs

Davis v. Shasta County (BPD) 2019 Cal. Wrk. Comp. P.D LEXIS 493

The appeals board disallowed the lien of the copy service when the defendant provided the requested records within 30 days of the applicant's attorney's request.

The applicant's attorney, instead of waiting 30 days for voluntary compliance with this request, immediately engaged the copy service to subpoena the records in question.

The appeals board pointed out that Labor Code §5307.9 was intended to reduce discovery costs, and if a defendant voluntarily provides records within 30 days of a written request, there is no legal basis to require defendant to pay for copy costs incurred before the passage of the 30 days.

The appeals board stated that the copy service's recourse was to seek payment directly from applicant's attorney.

19. Due Process

Bedi v. San Mateo County Transit District (BPD) 2020 Cal. Wrk. Comp. P.D. LEXIS 228

On April 22, 2020, applicant filed a Declaration of Readiness for expedited hearing. An expedited hearing took place on May 15, 2020. The Minutes of Expedited Hearing and Summary of Evidence of May 15, 2020 show that all parties, including the EDD's hearing representative, appeared via telephonic conference call due to statewide COVID-19 shelter-in-place orders. The trial started at 11:39 a.m. Findings and Award and Opinion on Decision issued on May 29, 2020, and awarded applicant temporary disability. Defendant filed for reconsideration on the finding of temporary disability and also alleged a violation of due process since the trial was conducted via teleconference line.

In the judge's report and recommendation on reconsideration, the judge noted the Governor's Executive Order N-63-20 paragraph 11, which states:

> 11) Any statute or regulation that permits a party or witness to participate in a hearing in person, a member of the public to be physically present at the place where a presiding officer conducts a hearing, or a party to object to a presiding officer conducting all or part of a hearing by telephone, television, or other electronic means, is suspended, provided that all of the following requirements are satisfied:

a) Each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits;

b) A member of the public who is otherwise entitled to observe the hearing may observe the hearing using electronic means; and

c) The presiding officer satisfies all requirements of the Americans with Disabilities Act and Unruh Civil Rights Act.

The WCAB affirmed the judge's decision, which found that defendant was not denied due process as a result of the telephonic trial necessitated by COVID-19 shelter-in-place restrictions, when Governor Newsom's state of emergency Executive Order N-63-20, issued on May 7, 2020, expressly allows for telephonic hearings, and WCAB noted that despite COVID-19 emergency, DWC and WCAB have not altered scheduling of expedited hearings, that the hearing in this case was properly noticed and evidence was received, that defendant's inability to produce or identify witness at trial was not good cause to reopen the record for additional testimony, and that all parties must be prepared for full trial on the set date, including the presentation of witness testimony.

20. Utilization Review

Williams v. Chino Valley Independent Fire District (BPD) 2020 Cal. Wrk. Comp. P.D LEXIS 301

The WCAB held that an applicant was entitled to medical treatment for varicose veins in the form of laser therapy because it was certified by Utilization Review, even though the defendant asserted the medical treatment was not related to applicant's industrial skin cancer.

The WCAB reasoned that if the defendant wished to dispute whether the treatment was for an industrially related condition, it was obligated to object to the treating physician's medical determination under Labor Code §4062 and initiate the QME panel process to determine if the treatment for applicant's varicose veins was related to the industrial injury. The defendant did not object until after the Utilization Review and it had already approved the medical treatment.

The WCAB held that once the Utilization Review approved the medical treatment, defendant was obligated to provide the medical treatment and no longer could object under Labor Code §4062.

21. Medical Treatment

Fuller v. Lesley's Pool Mart (BPD) 2020 Cal. Wrk. Comp. P.D LEXIS 303

The WCJ ordered the defendant to provide applicant with all necessary medical treatment in Sweden, where she had moved. Defendant filed a petition for reconsideration. The WCAB upheld the order.

The WCAB further indicated that if the medical treatment for applicant's injury was unavailable in Sweden, defendant was obligated to provide transportation to the United States for her to obtain the medical treatment.

The WCAB explained that this was not an unfettered allowance for international travel as treatment remained limited to what is reasonably required to cure or relieve from the effects of the injury.

The WCAB rejected defendant's contention that the transportation should not be provided from Sweden because it is not contiguous with the United States.

22. Injury

Lujan v. Goodwill Serving the People of Northern Los Angeles (BPD) 2020 Cal. Wrk. Comp. P.D. LEXIS 224

The WCAB held that an applicant's psychiatric injury caused by the death of her infant son was a compensable consequence of her orthopedic injury.

The facts show the applicant was prescribed an analgesic cream for the injury that contained high doses of the drugs tramadol, dextromethorphan and amitriptyline.

Her infant son passed away after accidentally ingesting the cream, which was probably the result of inadvertent transfer from the applicant's hands to the baby's mouth or feeding bottle.

She developed depression, which the WCAB concluded was proximately caused by the original injury.

The WCAB found that the applicant was not engaged in a rashly undertaken activity, as she was not warned that the cream had any harmful ingredients.

The WCAB also found that she had a possible psychiatric injury stemming from an alleged wrongful termination that made her less careful, which led to the lethal dose of medication being transferred to her child.

23. Temporary Disability

Corona v. California Walls (BPD) 48 CWCR 201

Applicant claimed injury to knees, right shoulder, and low back on February 19, 2020. He returned to work with restrictions for about a month until the shutdown orders in March of 2020. He remained off work until the orders were lifted in May of 2020.

Applicant claimed TD from 3/17/20-5/10/20, the period in which the company was shut due to the stay at home order. At trial applicant was awarded the claimed TD. Defendant filed for reconsideration.

In citing prior case law, the WCAB stated that when no evidence is presented of the availability of work of the kind applicant could do while temporarily partially disabled, the ensuring wage

loss had to be attributed to the industrial cause. The burden of proof is on the employer to demonstrate that the cause of the period of lost wages was not the industrial injury. "The fact that it was impossible for defendant to offer modified duties to applicant because of the COVID-19 order is inconsequential." The injured worker's inability to obtain modified work was the operative fact creating the employer's obligation.

They went on to state "the reason the employer is unable to provide modified work is of no matter." They found that applicant's temporary termination from employment was not for cause, or due to his own misconduct, but was due to COVID-19 shelter-in-place orders; as a result, defendant has not met its burden to show that it is released from paying applicant temporary disability benefits.

The board panel affirmed the WCJ's findings.

The WCAB held that a temporarily partially disabled worker unable to continue with modified duty work because of the state and county's COVID-19 shelter-in-place orders was entitled to temporary disability payments for wage loss while the order was in effect.

The employer's inability to provide modified work was inconsequential to its liability for workers' compensation benefits.

24. Supplementary Job Displacement Benefits (SJDB)

Corona v. Kern High School District (BPD) 2020 Cal. Wrk. Comp. P.D. LEXIS 186

The WCAB held that an applicant's termination for cause does not bar entitlement to a SJDB voucher. The facts show after the applicant was declared permanent and stationary, the employer terminated him following much correspondence regarding his return-to-work date and an investigation involving inappropriate sexually harassing behavior.

The WCAB held that pursuant to *Dennis v. State of California 85 C.C.C. 389*, absent a bona fide offer of regular, modified or alternative work, regardless of an employer's ability to make such an offer, and regardless of an employee's ability to accept such an offer, an employee is entitled to an SJDB voucher.

The WCAB, however, held that the applicant did not meet his burden of proving serious and willful misconduct or a violation of Labor Code §132a.

25. Interpreters

Reynoso v. Catchball Products Corp., RCG, LLC (BPD) 2020 Cal. Wrk. Comp. P.D. LEXIS 246

The WCAB held that interpreters must be paid even if it is ultimately determined that the defendant did not employ the applicant.

The WCAB reasoned that pursuant to Labor Code §5811(b), interpreter fees that are reasonably, actually and necessarily incurred must be paid by the "employer."

The WCAB interpreted the word "employer" to mean any defendant against whom a claim for benefits is asserted based on an alleged employment relationship, whether or not there is an ultimate finding of employment.

The WCAB believed that holding otherwise would result in difficulties securing interpreters in workers' compensation proceedings and added that all parties benefit from a system that ensures interpreters reliably receive payment for their services.

26. Evidence

Milla v. United States Security (BPD) 2020 Cal. Wrk. Comp. P.D. LEXIS 330

Applicant claims injury to the left wrist, left elbow, psyche, internal system, left shoulder and cervical spine on August 4, 2017, while employed as a security guard by United Guard Security. Defendant accepted the left wrist and left elbow as compensable, but disputed compensability for the other body parts.

At trial the issue arose if applicant met the six-month requirement of employment to support a psychiatric injury claim under §3208.3(d). To support that claim, applicant submitted photos of himself from Instagram. In ruling on their admissibility, the WCJ stated:

> "the picture was never shown to applicant, applicant never laid foundation and the pictures were not offered into evidence. Also, the URL at the bottom of the page is voice.google.com, not Instagram. The undersigned WCJ felt something was not right with these pictures, but no opportunity was given to ask about the pictures and without being offered into evidence, the defendant had no opportunity to object to their admission. Furthermore, if they were not being offered, defendant could not cross examine the applicant on the pictures and the undersigned WCJ could not ask his questions about the pictures."

On reconsideration, the WCAB discussed the burden of proof on the six-month requirement, stating that once applicant testifies that he worked for the employer for six months the burden shifts to the employer to prove otherwise. They found that the WCJ incorrectly assigned that burden of proof in this matter.

On the Instagram photos, the WCAB noted that the WCJ found that the photos were not offered into evidence and that defendant had no opportunity to cross-examine on the admission of those photos. They noted that the record did not reflect this information. In fact, the minutes of hearing for the first day of trial reflect that applicant offered the photos as an exhibit and there was no objection. There was testimony from applicant regarding one of the photos but defendant did not cross-examine on them. The WCAB noted that the judge also has the right to ask questions about the evidence.

The WCAB acknowledged that the judge raised the issue of authentication of the photos. The WCAB noted that they are not bound by common laws of evidence and have wide latitude to admit evidence pursuant to Labor Code §5708. The WCAB stated: "In the absence of a genuine question regarding whether these photos are inaccurate or unreliable, the photos are presumed to

be an accurate representation of the images they represent and formal authentication of the photos is not required before they may be introduced into evidence."

They note that under Evidence Code §1400, "a writing (in this case a photograph) may be authenticated by '(a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.'"

They returned the matter to the trial level to allow applicant to provide further testimony about each of the photos and whether they were a fair and accurate representation of what they depict.