THIS BOOKLET CONTAINS THE
FILING INSTRUCTIONS AND PUBLICATION UPDATE

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California Law of Employee Injuries and Workers' Compensation

Publication 00270 Release 64 September 2006

HIGHLIGHTS

Legislation

- Legislation affecting workers' compensation law enacted early in the 2006 legislative session have been added.

Administrative Regulations

- Changes made through Register 2006, No. 24 (6/16/2006) have been added.

Court Cases; WCAB Decisions; WCAB Decisions Denied Judicial Review

- Recent important decisions have been added.

California Rules of Court

- Amendments to the California Rules of Court, effective 1/1/2006 and 7/1/2006, have been added.

Forms

- New and revised forms added.

CALIFORNIA LEGISLATION. Legislation affecting workers' compensation law enacted early in the 2006 legislative session have been added, including the following:

Medical Liens Filing Fees. In repealing Labor Code Section 4903.05, the legislature has repealed the requirement, enacted in 2003, that a filing fee of $100 accompany each lien for medical treatment expenses or for medical-legal expenses, and it has enacted Labor Code Section 4903.6, placing specified restrictions on the filing of such liens. [*See* Ch. 30, §§ 30.04, 30.05.]

CALIFORNIA REGULATIONS. Changes made through Register 2006, No. 21 (5/26/2006) have been added, including the following:

Claims Adjuster Standards. The Insurance Commissioner has promulgated regulations, 10 Cal. Code Reg. §§ 2592-2592.14, effective February 22, 2006,

setting forth minimum standards of training, experience, and skill for claims adjusters, medical-only claims adjusters, and medical bill reviewers. [*See* Ch. 2, § 2.37.]

Predesignation of Personal Physician. The Administrative Director has promulgated final regulations, 8 Cal. Code Reg. §§ 9780-9784, effective March 14, 2006, regarding predesignation of personal physicians and an employee's request to change physicians. [*See* Ch. 5, §§ 5.02[4], 5.05[1], [6][a], [b], [7][a], [b], [13][b]; Ch. 22, §§ 22.01[4], 22.02[1]-[4], 22.03[1], [2].]

Medicare. The Department of Health & Human Services has promulgated amendments to 42 C.F.R. §§ 411.20-411.45, effective April 25, 2006, regarding the interaction between workers' compensation settlements and injured workers' entitlement to Medicare. [*See* Ch. 29, § 29.09[2][a], [c], [e], [g], [3][a].]

CALIFORNIA RULES OF COURT. The following rules of court changes have been added:

Petitions for Writ of Review—Certificate of Interested Entities or Persons. The California Supreme Court has amended California Rule of Court 57, effective July 1, 2006, to require each party, other than the Appeals Board, to comply with the requirements of California Rule of Court 14.5, concerning serving and filing a Certificate of Interested Entities or Persons. [*See* Ch. 34, §§ 34.11[2][d], 34.14[1]; Appendix D, §§ F20.01[2], F20.02[2].]

CALIFORNIA CASES. The following case developments have been added:

Permanent Disability; Apportionment. The court of appeal in *Nabors v. W.C.A.B.* (2006) 140 Cal. App. 4th 217, 223–228, has followed *E & J Gallo Winery v. W.C.A.B. (Dykes)* (2005) 134 Cal. App. 4th 1536, and held that the correct formula for apportioning awards to an employee who sustained multiple disabling injuries while working for the same employer required calculating the most recent award without regard to whether the previous award existed, then subtracting the dollar amount of the previous award from the dollar amount of the subsequent award. Thus, as in Dykes, "Formula C," rejected in Fuentes, was held to be, following SB 899, the correct formula. *See* Ch. 8, §§ 8.05[1], 8.07[2][d][i].]

Civil Actions—Hirer's Exercise of Retained Control—Landowner's Duties About Hidden Hazardous Conditions. The Supreme Court in *Kinsman v. Unocal Corp.* (2005) 37 Cal. 4th 659, has held that a landowner who hires an independent contractor may be liable to the contractor's employee injured by an undisclosed hazard on the hirer's land, even if the hirer does not retain control over the work, if certain conditions are present. [*See* Ch. 3, § 3.133.]

Employer Denial of Claims—Time to Deny—Estoppel. The court of appeal in *Fleetwood Enterprises, Inc. v. W.C.A.B. (Moody)* (2005) 134 Cal. App. 4th 1316, cited *Honeywell v. W.C.A.B. (Wagner)* (2005) 35 Cal. 4th 24, which held that an employer's duty to notify an employee that his or her claim is rejected arises only when the employee actually files a formal claim and that the only exception to this rule is an estoppel when the employer has led the employee to believe that the filing of a claim form is not necessary, in which case the employer's 90-day period for rejecting the claim pursuant to Labor Code Section 5402(b), and avoiding the presumption of compensability, may begin before the claim is actually filed if the employee suffered some loss of benefits or setback as to the claim. [*See* Ch. 24, § 24.01[4]; Ch. 25, §§

25.03[2], 25.20[2], [4].]

Injury AOE/COE. The court of appeal in *Fleetwood Enterprises, Inc. v. W.C.A.B. (Moody)* (2005) 134 Cal. App. 4th 1316, has held that an employee's injury was not industrial since the accident occurred after the business portion of the trip was complete and while the employee and his wife were engaged in non-industrial sightseeing in Italy. [*See* Ch. 4, §§ 4.117[2], 4.157[3].]

Injury AOE/COE—Off-Duty Recreational Activity. The court of appeal in *City of Stockton v. W.C.A.B. (Jenneiahn)* (2006) 135 Cal. App. 4th 1513, has held that the evidence did not support a finding that a police officer subjectively believed that his employer expected him to engage in an occasional pickup game of basketball, and that, even if there were evidence of the officer's subjective belief, that belief would not have been objectively reasonable. [*See* Ch. 4, § 4.25[4].]

Penalties—Delay in Payment of Benefits—Retroactive Application of SB 899. The court of appeal in *McCarthy v. W.C.A.B.* (2006) 135 Cal. App. 4th 1230, has held that the SB 899 version of Labor Code Section 5814 applied to unreasonable delays or refusals to pay compensation that occurred prior to June 1, 2004, the operative date of the statute, with the court of appeal following *Abney v. Aera Energy* (2004) 69 Cal. Comp. Cases 1552 (Appeals Board en banc opinion), pet. for writ of rev. den. sub nom. *Abney v. W.C.A.B.* (2005) 70 Cal. Comp. Cases 460 (writ denied), and *Green v. W.C.A.B.* (2005) 127 Cal. App. 4th 1426. [*See*Ch. 10, § 10.40[1].]

Exclusive Remedy—Fraud—Standard of Proof—Preponderance of Evidence. The court of appeal in *People v. Thompson* (2006) 136 Cal. App. 4th 24, has held that a civil action for violation of Insurance Code Section 1871.7(b) arising from fraudulent acts made unlawful by Penal Code Section 550(a)(10) did not violate the exclusive remedy provision of the workers' compensation law, and that a preponderance of the evidence was the appropriate standard of proof for liability under Insurance Code Section 1871.7. [*See* Ch. 2, § 2.03[2].]

California Insurance Guarantee Association—Covered Claims. The court of appeal in *California Ins. Guarantee Assn. v. W.C.A.B. (White)* (2006) 136 Cal. App. 4th 1528, followed *California Ins. Guarantee Assn. v. W.C.A.B. (Karaiskos)* (2004) 117 Cal. App. 4th 350, and held that an EDD lien for temporary unemployment compensation disability benefits paid to disabled workers was an obligation to the State of California because EDD was a department of the state, so that its lien claim was not, pursuant to Insurance Code Section 1063.1(c)(4), a "covered claim" that CIGA was required to pay. [*See* Ch. 2, § 2.84[3][d].]

Qualified Medical Examinations; Procedures; Injuries Prior to January 1, 2005. The court of appeal in a pair of companion cases, Nunez v. W.C.A.B. (2006) 136 Cal. App. 4th 584, and Cortez v. W.C.A.B. (2006) 136 Cal. App. 4th 596, has held that the pre-SB 899 version of either Labor Code Section 4061 or 4062 applied when a medical evaluation of a represented employee was required to resolve a dispute arising out of an injury occurring before January 1, 2005. [*See* Ch. 22, § 22.06[1][a]; Ch. 32, § 32.06[2][a].]

Civil Actions—Anti-SLAPP Actions. The court of appeal in *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal. App. 4th 464, has held that a civil action by physicians and others against insurers and employers, alleging that, after the plaintiffs

submitted physicians' bills to the defendants for payment, and filed liens in numerous workers' compensation cases before the Appeals Board, the defendants collectively conspired to contest, delay, and avoid payment of those bills and liens, when the court found that the complaint related to protected activity under the anti-SLAPP statute and that the defendants had shown a probability of prevailing on the plaintiffs' complaint, based on the applicability of the *Noerr-Pennington* doctrine that parties who petition the government for redress, i.e., the defendants' request that the Appeals Board consolidate numerous medical lien claims filed by parties who became the plaintiffs in this civil action, are generally immune from antitrust liability. [*See* Ch. 11, § 11.06[3].]

Civil Actions—Hirer's Liability. The court of appeal in *Michael v. Denbeste Transportation, Inc.* (2006) 137 Cal. App. 4th 1082, has held that the *Privette* and *Kinsman* doctrines applied to the issue of liability of the hirers of subcontractors for injuries to those who worked for those subcontractors, regardless of whether those injured were employees of the subcontractors or independent contractors. [*See* Ch. 3, § 3.133.]

Employment Relationships; Residential Employees. The court of appeal in *California State Automobile Association Inter-Insurance Bureau v. W.C.A.B. (Hestehauge)* (2006) 137 Cal. App. 4th 1040, annulling an Appeals Board Significant Panel decision, has held that a worker injured while painting a house was not a residential employee of the homeowners within Labor Code Sections 3351(d) and 3352(h), which were the only relevant statutes for defining "employee" under the facts of the present case, and that Labor Code Section 3715(b), relied on by the Board, was inapplicable to the present case, since that statute applied to only uninsured homeowners, whereas the homeowners in present case were insured. [*See* Ch. 3, § 3.36[1].]

Liens—Medical Treatment—Burden of Proof. The court of appeal in *Zenith Insurance Co. v. W.C.A.B.* (2006) 138 Cal. App. 4th 373, has held that the lien claimants, outpatient medical treatment centers, in order to establish their right to reimbursement, bore the initial burden of proving they were properly licensed or accredited, and that they had not carried this burden in the present case. [*See* Ch. 30, § 30.04.]

Insurance—Subrogation—Covenant of Good Faith and Fair Dealing—Breach of Contract. The court of appeal in *Tilbury Constructors, Inc. v. State Compensation Insurance Fund* (2006) 137 Cal. App. 4th 466, has held that the insurer's alleged failure to properly investigate third-party responsibility for an accident suffered by the insured's employee, resulting in an allegedly unreasonably low settlement of the insurer's claim against the third party, causing an increase in the insured's workers' compensation insurance premiums, gave rise to neither a cause of action for tortious breach of the covenant of good faith and fair dealing nor an action for breach of contract. [*See* Ch. 2, § 2.70[2].]

Permanent Disability; Apportionment; Compromise and Release. The Appeals Board has held en banc in *Pasquotto v. Hayward Lumber* (2006) 71 Cal. Comp. Cases 223 (Appeals Board en banc opinion) that an order approving a compromise and release, without more, is not a "prior award of permanent disability" within the meaning of Labor Code Section 4664(b), that, when there is no "prior award of permanent disability," medical reports and other evidence relating to the prior indus-

trial injury that was settled by compromise and release still may be relevant in determining whether any permanent disability found after the subsequent industrial injury was caused by "other factors" under Labor Code Section 4663(c), and that the concept of medical rehabilitation from a prior industrial disability remained viable under Labor Code Section 4663, although, even if an injured employee had medically rehabilitated from a prior industrial disability, this did not necessarily preclude the prior industrial injury from being an "other factor" causing the employee's subsequent disability. [*See* Ch. 8, §§ 8.05[1], 8.06[5][a].]

CAUTION: *The following panel 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 these decisions.*

Temporary Disability; Earnings; Seasonal Workers. The Appeals Board, in a Panel Decision, has held in *Magana v. Signature Fruit Co.*, 2005 Cal. Wrk. Comp. P.D. LEXIS 26 (Appeals Board panel decision) that, following the legislature's reinstitution of a temporary disability indemnity "floor," effective January 1, 2003, the correct method of determining a seasonal worker's temporary disability indemnity rate was to annualize the worker's average weekly earnings and multiply by two-thirds to provide a consistent year-round rate of no less than the statutory minimum. [*See* Ch. 6, § 6.02[5]; Ch. 7, § 7.04[7].]

Penalties—Delay in Adjusting Medical Liens. The Appeals Board, in a Panel Decision, has held in *Wyrick v. Robinsons-May*, 2005 Cal. Wrk. Comp. P.D. LEXIS 23 (Appeals Board panel decision) that Labor Code Section 5814(e) did not bar an employee's claim for penalties for the employer's alleged unreasonable delay in adjusting liens for self-procured medical treatment, since the employee was not alleging unreasonable delay in authorizing medical treatment. [*See* Ch. 10, § 10.40[1].]

Penalties—Delay in Payment of Permanent Disability Benefits—Exclusion of Penalty Issues. The Appeals Board, in a Panel Decision, *Sherrod v. United Airlines*, 2006 Cal. Wrk. Comp. P.D. LEXIS 4 (Appeals Board panel decision), has dismissed an employee's petition for penalties filed 9/29/2004 to the extent that the petition claimed penalties accruing prior to 9/28/2004, pursuant to Labor Code Section 5814(c), when it found that the issue of such penalties was not raised at the mandatory settlement conference held on or about 6/14/2004 or at the trial on 9/28/2004, and that there was no express exclusion of such penalties in the findings and award issued on 10/1/2004. [*See* Ch. 10, § 10.40[1].]

Medical Treatment—ACOEM Guidelines. The Appeals Board, in a Panel Decision, *Taylor v. State of California/Department of Rehabilitation*, 2005 Cal. Wrk. Comp. P.D. LEXIS 49 (Appeals Board panel decision), has awarded medical treatment recommended by the employee's treating physician, consisting of a gym membership, a weight loss program, an orthopedic mattress, and housekeeping services, despite the employer's contention that it was not within the parameters of the ACOEM Guidelines, with the Board finding that the treatment met the requirements of those Guidelines and that the employee offered several evidence-based guidelines in response to the employer's contention as to the inapplicability of the ACOEM Guidelines, while the employer failed both to rebut these with

other evidence-based guidelines and to explain why it believed that the ACOEM Guidelines did not apply. [*See* Ch. 22, § 22.05[6][b].]

Medical Treatment—American College of Occupational and Environmental Medicine Guidelines—Presumption of Correctness. The Appeals Board, in a Panel Decision, has held in *Finklang v. American Medical Response*, 2006 Cal. Wrk. Comp. P.D. LEXIS 2 (Appeals Board panel decision) that the presumption of correctness of the ACOEM Guidelines on the issue of the extent and scope of medical treatment applied only after substantial expert medical evidence has been produced to demonstrate the applicability of the Guidelines to the recommended treatment. [*See* Ch. 5, § 5.02[1]; Ch. 22, § 22.05[6][b].]

Permanent Disability—Permanent Disability Rating Schedule. The Appeals Board, in a Panel Decision, has held in *Camacho v. United Marble & Granite*, 2005 Cal. Wrk. Comp. P.D. LEXIS 47 (Appeals Board panel decision) that the pre-SB 899 permanent disability rating schedule applied to a case in which the injury occurred on September 3, 2003, since there was a "report by a treating physician indicating the existence of permanent disability" dated October 1, 2004, thus fulfilling the requirement of Labor Code Section 4660(d). [*See* Ch. 8, § 8.02[4][a].]

Permanent Disability; Apportionment; "Lighting Up"—Effect of SB 899. The Appeals Board, in a Panel Decision, has held in *Sherman v. Los Angeles Unified School District*, 2005 Cal. Wrk. Comp. P.D. LEXIS 37 (Appeals Board panel decision) that the SB 899 version of Labor Code Section 4663 did not destroy the principle that a compensable injury and disability may result from the "lighting up" of an underlying disease. [*See* Ch. 4, § 4.93; Ch. 8, § 8.05[1].]

Permanent Disability; Rating Schedule. The Appeals Board, in a divided Panel Decision, has held in *Vera v. Sapper Construction Co.*, 2005 Cal. Wrk. Comp. P.D. LEXIS 50 (Appeals Board panel decision) that a treating physician's report that stated that the employee "does currently have the existence of permanent disability," but also stated that the employee was not permanent and stationary, was not substantial evidence as to the existence of permanent disability in support of the employee's claim to have his permanent disability rated under the pre-SB 899 rating schedule, since the treating physician's report was internally inconsistent by stating, in effect, that the employee was both permanently and temporarily disabled at the same time. [*See* Ch. 8, § 8.02[4][a].]

Liens—Interpreters. The Appeals Board, in a Panel Decision, has held in *Garcia v. Great Valley Poultry*, 2005 Cal. Wrk. Comp. P.D. LEXIS 40 (Appeals Board panel decision) that an employer was liable, pursuant to 8 Cal. Code Reg. § 9795.3(a)(7), for an interpreter's lien for services during an employee's examination by his primary treating physician. [*See* Ch. 23, § 23.13[3].]

Liens—Filing Fee—Reimbursement. The Appeals Board, in a Panel Decision, has held in *Cardoso v. Gabilan View Farms*, 2006 Cal. Wrk. Comp. P.D. LEXIS 6 (Appeals Board panel decision) that, pursuant to Labor Code Section 4603.2(b)(1)(B), and in light of 8 Cal. Code Reg. § 10250, a lien claimant, who performed medical-legal services as a qualified medical evaluator, was entitled to be reimbursed by the employer for the $100 lien filing fee, when the lien claimant had recovered a contested amount in the Ap-

peals Board proceedings. [*See* Ch. 30, § 30.05.]

Attorney's Fees. The Appeals Board, in a Panel Decision, *Harun v. County of Los Angeles*, 2005 Cal. Wrk. Comp. P.D. LEXIS 53 (Appeals Board panel decision), has denied an employee's attorney's request for costs incurred in responding to an employer's petition for writ of review, when the attorney did not provide receipts to corroborate the actual costs incurred. [*See* Ch. 34, § 34.23.]

Spinal Surgery—Second Opinions. The Appeals Board, in a Panel Decision, has held in *Benedict v. Sports Authority*, 2006 Cal. Wrk. Comp. P.D. LEXIS 7 (Appeals Board panel decision) that an employer who had failed to timely object to a treating physician's recommendation of spinal surgery had missed its opportunity to object and would have no right to contest any subsequent recommendation of spinal surgery by the consulting physician to whom the treating physician had referred the matter. [*See* Ch. 22, § 22.06[2][b][i].]

CAUTION: *The following court of appeal cases were not certified for publication. Practitioners should proceed with caution when citing to these unpublished cases and should also verify the subsequent history of these cases.*

Permanent Disability; Apportionment; Retroactive Application of SB 899. The court of appeal in *Filco Folsom v. W.C.A.B.* (Butler) (2005) 70 Cal. Comp. Cases 1408 (court of appeal opinion not published in official reports) has held that the present case, decided by the WCJ after enactment of SB 899 but under the influence of *Scheftner v. Rio Linda School District* (2004) 69 Cal. Comp. Cases 1281 (Appeals Board en banc opinion), must be reconsidered in light of the court of appeal's annulment of that decision in *Rio Linda Union School District v. W.C.A.B.* (Scheftner) (2005) 131 Cal. App. 4th 517. [*See* Ch. 8, § 8.05[1].]

Permanent Disability; Apportionment; Retroactive Application of SB 899. The court of appeal in *National Staff Network v. W.C.A.B.* (Mann-Harrison) (2005) 70 Cal. Comp. Cases 1678 (court of appeal opinion not published in official reports) followed the court of appeal in *Rio Linda Union School District v. W.C.A.B.* (Scheftner) (2005) 131 Cal. App.4th 517, and *Kleemann v. W.C.A.B.* (2005) 127 Cal. App. 4th 274, to hold that the employee's permanent disability claim was still pending on the effective date of SB 899, thereby subjecting her award of permanent disability to apportionment between her industrial injury and her congenital abnormalities in her neck and left shoulder blade, when the medical evidence was conflicting as to the relative importance of the injury and the congenital abnormalities as causes of her disability. [*See* Ch. 8, §§ 8.05[1], 8.06[1].]

Injury AOE/COE—Compensable Consequences—Medical Treatment. The court of appeal in *County of San Bernadino v. W.C.A.B.* (Andrews) (2005) 70 Cal. Comp. Cases 1561 (court of appeal opinion not published in official reports) has held that no medical evidence supported the Appeals Board's finding that two epidural injections given for a worker's industrially-caused back pain were responsible for the worker's diabetes. [*See* Ch. 4, § 4.66[1][a].]

Injury AOE/COE—Evidence. The court of appeal has held in *Geo Group/The Wackenhut Corp. v. W.C.A.B.* (Ball) (2005) 70 Cal. Comp. Cases 1672 (court of appeal opinion not published in official reports) that the Appeals Board committed no error when it considered that the employee's testimony, regarding how specific workplace instances of sexual harassment,

stress, and heat exposure caused much of her industrial injury, was unrebutted by the employer, and that the Appeals Board acted well within its authority by considering that the employer failed to present testimony explaining or refuting the employee's testimony. [*See* Ch. 4, § 4.05[2][a].]

Injury AOE/COE—Evidence. The court of appeal in *Paradise Valley Hospital v. W.C.A.B. (Sangcap)* (2005) 70 Cal. Comp. Cases 1685 (court of appeal opinion not published in official reports) has held that substantial evidence did not support the Appeals Board's grant of compensation benefits to an employee who suffered a stroke while working as an intensive care unit nurse, when the court of appeal found that, even if it assumed that the employee's job stress caused her cholesterol level to increase, and although medical evidence showed that an elevated cholesterol level was a risk factor for stroke because it accelerated the atherosclerotic process, no evidence supported the finding that the employee suffered from atherosclerosis. [*See* Ch. 34, § 34.16[1], [3][b].]

Claim for Benefits—Time to File—Statute of Limitations. The court of appeal in *Davenport v. W.C.A.B.* (2005) 70 Cal. Comp. Cases 1566 (court of appeal opinion not published in official reports) has held that an employee's claim for workers' compensation benefits was not barred by the one-year statute of limitations in Labor Code Section 5405, even though the claim was filed approximately six years after the date of injury, when the court found that the employer never provided the employee with the notice required by Labor Code Section 5401. [*See* Ch. 24, §§ 24.01[2], 24.04[6].]

Medical Treatment—American College of Occupational and Environmental Medicine Guidelines. The court of appeal in *Doctors Medical Center of Modesto v. W.C.A.B.* (Bonar) (2005) 70 Cal. Comp. Cases 1637 (court of appeal opinion not published in official reports) has upheld an Appeals Board award of a Tempur-Pedic mattress overlay and pillow, which had been prescribed by the employee's primary treating physician to alleviate pain, and the court found that it need not decide the employer's contention that the ACOEM Guidelines applied beyond the first 90 days following an industrial injury, since the employer had failed to provide the court with a copy of the Guidelines or even to quote or cite any provision in the Guidelines to support its contention. [*See* Ch. 5, § 5.02[1]; Ch. 22, §§ 22.01[1][a], 22.05[6][b].]

WCAB Jurisdiction—Petitions for Reconsideration. The court of appeal in *Saiz v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 23 (court of appeal opinion not published in official reports) has annulled the Appeals Board's denial of reconsideration by operation of law and the Board's order dismissing a petition for removal, when the Board acknowledged that it had lost jurisdiction to remedy the WCJ's erroneous award of temporary disability due to the employee's counsel's error in filing a petition for removal instead of a petition for reconsideration, followed by the Board's inadvertence in failing to timely act on the employee's petition as one for reconsideration, the court of appeal finding that the Board had acted without or in excess of its powers, had issued an unreasonable award, and had issued an award unsupported by substantial evidence. [*See* Ch. 34, § 34.18[2].]

Third Party Actions—Compromise and Release—Credits. The court of appeal in *CNA Casualty of California v. W.C.A.B. (Kirkeby)* (2006) 71 Cal. Comp. Cases 149 (court of appeal opinion not published in official reports), noting that the Appeals

Board had equitable power to reallocate the proceeds of a third-party settlement when an injured employee and his or her spouse have colluded in a civil case to make a bad faith or fraudulent allocation of settlement proceeds in order to defeat an employer's third-party credit rights, has held that the evidence demonstrated that the injured employee and his wife structured the settlement of their personal injury claims to defeat the employer's workers' compensation insurer's credit rights, and it remanded to the Appeals Board to determine the amount of credit to which the insurer was entitled. [*See* Ch. 11, § 11.42[5][a].]

WCAB Decisions—Sufficiency. The court of appeal in *Save Mart Supermarkets v. W.C.A.B. (Hixson)* (2006) 71 Cal. Comp. Cases 171 (court of appeal opinion not published in official reports) annulled an Appeals Board order denying reconsideration and remanded the matter to the Board because it was unable to determine the Board's legal basis for extending the statute of limitations under either Labor Code Section 5400 or Labor Code Section 5405, because the Board had failed to set forth its reasoning in detail, as required by Labor Code Section 5908.5, when the court found that the employee suffered an industrial injury on 5/16/2001 and that the parties stipulated that the employer was notified of the injury in 12/2002. [*See* Ch. 28, § 28.34.]

Compromise and Release—Civil Actions Against Employers—Fair Employment and Housing Act. The court of appeal in *Albertson's, Inc. v. Fair Employment and Housing Commission/State of California* (2006) 71 Cal. Comp. Cases 178 (court of appeal opinion not published in official reports) has held that a workers' compensation settlement, which included an addendum by which the employee waived any claim against her employer and agreed that the settlement would "apply to all unknown and unanticipated injuries and damages resulting from such accident and all rights under Section 1542 of the Civil Code of California" was not a bar to a subsequent accusation against the employer issued by the Department of Fair Employment and Housing. [*See* Ch. 29, § 29.01[2].]

California Insurance Guarantee Association; Covered Claims; Penalties. The court of appeal in *Hernandez v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 369 (court of appeal opinion not published in official reports) has held that CIGA was not liable for Labor Code Section 5814 penalties assessed against an insolvent insurer's preliquidation delays, when the court found that the amendment to Insurance Code Section 1063.1(c)(8), effective January 1, 2004, in which the legislature excluded Labor Code Section 5814 penalties from the definition of "covered claims" for which CIGA was liable, applied to penalty assessments issued by the WCJ in the present case before that date that were not final on that date because the Appeals Board was still reviewing them on reconsideration. [*See* Ch. 2, § 2.84[3][f].]

Penalties—Delay in Payment of Benefits—Stipulations. The court of appeal in *Finley v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 361 (court of appeal opinion not published in official reports) has held that the Appeals Board erred in not enforcing its 1988 award of penalties for delay in payment of temporary disability and medical treatment benefits following a 1990 stipulation in which the injured employee agreed to accept a lump sum for his penalty claims for delay in payment of such benefits "to date," since, at the time of the 1988 award of penalties "in the amount of 10 percent of medical treatment and temporary disability in this case," Labor Code Section 5814 provided that, in the event of an

unreasonable delay in payment of an award, "the full amount of the order, decision or award shall be increased by 10 percent," and since the unambiguous language of the 1990 stipulation demonstrated that the parties intended the lump-sum payment to settle only those penalties owed to the employee at that time, and since the employee had received additional medical treatment and disability benefits after the 1990 stipulation, these post-stipulation benefits were part of the entire amount ultimately awarded, making them subject to the 1988 award of penalties. [*See* Ch. 10, § 10.40[6][a].]

WCAB's Continuing Jurisdiction; Reopening of Awards; New and Further Disability. The court of appeal in *Finley v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 361 (court of appeal opinion not published in official reports) has held that the Appeals Board correctly determined that its jurisdiction to reopen a case to consider additional temporary disability was defeated by the five-year statutes of limitations in Labor Code Sections 5410 and 5804, that a 1990 stipulation purporting to reserve Board jurisdiction in contravention of these statutes was void, and that the employee's orthopedic injury was not an insidious, progressive injury for purposes of the Board's authority to reserve jurisdiction beyond the five-year limit. [*See* Ch. 24, § 24.03[3][b].]

Arbitration—Timeliness of Decision. The court of appeal in *Faeth v. W.C.A.B.* (Gault) (2006) 71 Cal. Comp. Cases 355 (court of appeal opinion not published in official reports) has upheld an arbitrator's issuance of the finding of fact and order six months after the parties' submission of additional written arguments, when the minutes of hearing, issued at the same time as the decision, stated that the parties would submit additional briefing and that the arbitrator would prepare the minutes of hearing, at which time the matter would stand submitted. [*See* Ch. 33, § 33.01[4].]

CAUTION: *The following entries are "writ denied" cases. Practitioners should proceed with caution when citing to these cases and should also verify the subsequent history of these cases.*

Psychiatric Injuries—Six-Month Employment Requirement. The Appeals Board in *Aguirre v. W.C.A.B.* (2005) 70 Cal. Comp. Cases 1487 (writ denied) has held that an employee's claim for a psychiatric injury, which was a consequence of an admitted orthopedic injury, was barred despite the fact that the employee was a union member, required to follow the union hall process to obtain employment, thus moving from job to job, so that the employee had not worked for the employer for at least six months before sustaining the admitted orthopedic injury. [*See* Ch. 4, § 4.02[3][d].]

Psychiatric Injuries—Compensable Consequence of Physical Injury—Actual Events of Employment. The Appeals Board in *County of Contra Costa v. W.C.A.B. (Guthery)* (2005) 70 Cal. Comp. Cases 1496 (writ denied) has held a psychiatric injury to be a compensable consequence of two industrial orthopedic injuries, when the employee's treating psychologist and the defense QME found that the psychiatric injury was caused by psycho-social difficulties that stemmed from the employee's unemployment/financial difficulties stemming from his industrial injuries. [*See* Ch. 4, § 4.02[3][b].]

Presumption of Industrial Causation; Heart Trouble; Firefighters. The Appeals Board in *County of Orange v. W.C.A.B. (Sleep)* (2005) 70 Cal. Comp. Cases 1499 (writ denied) applied the Labor Code Section 3212 presumption of compensability to find that a firefighter had sustained a com-

pensable heart injury, when the employer failed to rebut the presumption by showing that a contemporaneous non-work-related event was the sole cause of the firefighter's heart trouble. [*See* Ch. 3, § 3.113[4][a].]

Presumption of Industrial Causation; Heart Trouble; Correctional Officer. The Appeals Board in *Davis v. W.C.A.B.* (2005) 70 Cal. Comp. Cases 1593 (writ denied) has held that an employer successfully rebutted the Labor Code Section 3212.2 presumption of compensability as it applied to a correctional officer who suffered a fatal heart attack, when the medical reports presented by the employer were the only medical evidence in the record and indicated that the decedent did not suffer job stress, and that significant non-industrial risk factors were the cause of the decedent's heart attack. [*See* Ch. 3, § 3.113[2], [4][c].]

Presumption of Industrial Causation—Cancer—Peace Officers. The Appeals Board in *City of San Leandro v. W.C.A.B. (Waltman)* (2005) 71 Cal. Comp. Cases 262 (writ denied) has held that, in the Labor Code Section 3212.5 provision extending the presumption of industrial causation following termination of service for a period of three calendar months for each full year of the requisite service, not to exceed 60 months, the "requisite service" means the entire period of a police officer's injurious employment, even if that employment was with more than one police department, as long as the employment resulted in a cumulative trauma injury. [*See* Ch. 3, § 3.113[4][f].]

Permanent Disability—Rating. The Appeals Board in *Greco v. W.C.A.B.* (2005) 70 Cal. Comp. Cases 1512 (writ denied) has held that, although a worker, such as in the present case, could be 100-percent permanently totally disabled, despite a return to full-time work, that worker, who had now suffered a second industrial injury, did not sustain any additional ratable disability from the second injury, because the worker's medical restrictions limiting the time he could sit in his wheelchair predated his employment with his current employer, and because of the conclusive presumption of Labor Code Section 4662. [*See* Ch. 8, § 8.02[2].]

Permanent Disability; Apportionment; Successive Injuries. The Appeals Board in *City of Santa Clara v. W.C.A.B. (Navarette)* (2005) 70 Cal. Comp. Cases 1713 (writ denied) has held that Labor Code Section 4664(b), as enacted in 2004 by SB 899, which creates a conclusive presumption that a prior permanent disability for which an employee received an award continues to exist at the time of any subsequent disability, did not invalidate the holding in *Wilkinson v. W.C.A.B.* [*See* Ch. 8, § 8.07[2][d][ii].]

Permanent Disability; Apportionment; SB 899. The Appeals Board in *Jones v. W.C.A.B.* (2005) 70 Cal. Comp. Cases 1718 (writ denied) has held that Labor Code Sections 4663, 4664, as amended by SB 899, mandate that "prior percentages of permanent disability be subtracted," that is, "that apportionment be done on a percentage from percentage basis." [*See* Ch. 8, § 8.05[1].]

Permanent Disability; Apportionment. The Appeals Board in *California Water Service v. W.C.A.B. (Pizzurro)* (2006) 71 Cal. Comp. Cases 251 (writ denied) has held that there was no basis for apportionment of an employee's disability, which stemmed from the employee's cumulative trauma neck injury, to non-industrial causation, when the AME attributed 75 percent of the employee's neck pathology to the natural aging process and 25 percent to the

employee's industrial injuries, but gave as his opinion that it was medically probable that the employee's disability was caused exclusively by his industrial injury. [*See* Ch. 8, §§ 8.05[2][a], 8.06[1].]

Permanent Disability; Apportionment. The Appeals Board in *Coca Cola Bottling Co. v. W.C.A.B. (Saucedo)* (2006) 71 Cal. Comp. Cases 279 (writ denied) has held that an AME's report adequately addressed apportionment under Labor Code Sections 4663 and 4664, as enacted by SB 899, when the AME found that an employee's cumulative trauma was responsible for 100 percent of his left and right wrist disabilities and that his specific injury was responsible for 100 percent of his lower back and left ankle disabilities, and that the AME's well-reasoned reports, coupled with the AME's deposition testimony and the employee's credible testimony, constituted substantial evidence to support a permanent disability award of 83 percent, without apportionment to a non-industrial degenerative disc disease. [*See* Ch. 8, §§ 8.05[2][a], 8.06[1].]

Permanent Disability; Apportionment. The Appeals Board in *Welcher v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 315 (writ denied) has awarded an employee permanent partial disability for a cumulative trauma industrial right leg injury, after apportionment, when the Board relied on *Nabors v. Piedmont Lumber & Mill Co.* (2005) 70 Cal. Comp. Cases 856 (Appeals Board en banc opinion) and found that the employee's overall permanent disability was 71 percent and that the employee had received a 62.5-percent permanent disability stipulated award for a previous industrial right lower and right upper extremity injury while employed by a different employer, and the Board subtracted 62.5 percent from 71 percent and rounded the result to eight percent. [*See* Ch. 8, §§ 8.05[1], 8.07[2][d][i].]

Permanent Disability; Apportionment. The Appeals Board in *Leung v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 437 (writ denied) has held that an AME's apportionment of 75 percent of an employee's overall 43-percent permanent disability to his industrial back injury and 25 percent to an asymptomatic pre-existing degenerative disc disease constituted substantial evidence to support an award of 32-percent permanent disability, after apportionment, pursuant to Labor Code Section 4663 and the standards set forth in *Escobedo v. Marshalls*. [*See* Ch. 8, §§ 8.05[2][a], 8.06[1].]

Permanent Disability; Apportionment. The Appeals Board in *Madayag v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 441 (writ denied) has held that the opinion of the AME that 40 percent of the overall 46-percent permanent disability caused by the employee's back injury should be apportioned to his pre-existing, non-industrial degenerative disc disease constituted substantial evidence to support the Board's finding of apportionment under Labor Code Section 4663, when the Board found that the AME adequately explained the rationale for his opinion as to apportionment, applied correct legal principles, and did not speculate as to causation. [*See* Ch. 8, §§ 8.05[2][a], 8.06[1].]

Third Party Actions; Settlement; Credit. The Appeals Board in *Spectrum Temporary Employees v. W.C.A.B. (Cobley)* (2005) 70 Cal. Comp. Cases 1528 (writ denied) has held that an employee's general employer did not establish its entitlement to credit against workers' compensation benefits it owed to the employee, when the employee had settled his civil suit and his claim of serious and willful misconduct

against his special employer, and the settlement documents failed to allocate the settlement payment between the two claims, since the general employer had no right to a credit against the employee's recovery for the special employer's serious and willful misconduct. [*See* Ch. 11, § 11.42[5][a].]

Third Party Actions—California Insurance Guarantee Association—Credit. The Appeals Board in *Lake v. W.C.A.B.* (2005) 70 Cal. Comp. Cases 1722 (writ denied) has held that CIGA was entitled to take a credit against an injured employee's future workers' compensation benefits for the employee's net recovery from a third party action against an underinsured motorist insurer that had become insolvent and was represented by the Washington Insurance Guarantee Association, which settled the employee's lawsuit. [*See* Ch. 2, § 2.85; Ch. 11, § 11.42[5][a].]

Discrimination—Labor Code Section 132a. The Appeals Board in *Garratt v. W.C.A.B.* (2005) 70 Cal. Comp. Cases 1598 (writ denied) has held that an employer did not violate Labor Code Section 132a by sending a temporarily disabled employee a letter stating that she had voluntarily abandoned her job and was not eligible for temporary disability benefits, when the employer later retracted the letter and there was no showing that the employee suffered a detriment as a consequence of the employer's actions. [*See* Ch. 10, § 10.11[1].]

Discrimination—Labor Code Section 132a. The Appeals Board in *Robbins v. W.C.A.B.* (2005) 70 Cal. Comp. Cases 1738 (writ denied) has held that an employer's decision to permanently replace an employee in her managerial position, during the employee's one and one-half year absence from work due to temporary total disability, and its subsequent refusal to re-employ the employee in that position after her medical release, was based on good faith business necessity and did not violate Labor Code Section 132a. [*See* Ch. 10, § 10.11[2][b].]

Discrimination—Labor Code Section 132a. The Appeals Board in *Hallford v. W.C.A.B.* (2005) 71 Cal. Comp. Cases 69 (writ denied) has held that an employee who neither alleged nor presented evidence that his termination resulted from his industrial injuries, but rather attributed his termination to his union activity, failed to meet his burden of establishing a prima facie case of discrimination under Labor Code Section 132a. [*See* Ch. 10, § 10.11[1].]

Collateral Estoppel—Employer Negligence. The Appeals Board in *Spectra F/X, Inc. v. W.C.A.B. (Avalos)* (2005) 70 Cal. Comp. Cases 1609 (writ denied) has held that the jury's finding of employer negligence in the employee's third-party suit was binding on the employer's workers' compensation insurer for purposes of obtaining credit in the employee's workers' compensation case and that the insurer was collaterally estopped from re-litigating before the Appeals Board the issue of the employer's negligence. [*See* Ch. 11, § 11.42[6].]

Liens—Medical Treatment. The Appeals Board in *St. Joseph's Hospital v. W.C.A.B. (Martin)* (2005) 70 Cal. Comp. Cases 1612 (writ denied) has held that a medical provider was precluded from obtaining an order against CIGA for reimbursement of medical treatment charges until it had fully reimbursed Medi-Cal for the expenses it had paid. [*See* Ch. 29, § 29.04[3][c].]

Liens—Self-Procured Medical Treatment—Notice of Injury to Employer. The Appeals Board in *LSG Sky Chefs v. W.C.A.B. (Naranjo)* (2006) 71 Cal.

Comp. Cases 298 (writ denied), holding that the evidence in the medical record indicating that an employee suffered stress and an episode of chest pain at work was insufficient to prove that the employee knew of the industrial nature of his heart condition, awarded the lien claimant/medical provider reimbursement of its lien for periods of self-procured medical treatment rendered to the employee prior to the time when the employee became aware of industrial causation and first notified the employer of his industrial injury by filing a claim. [*See* Ch. 30, § 30.04.]

California Insurance Guarantee Association—Covered Claims—Medi-Cal Liens. The Appeals Board in *St. Joseph's Hospital v. W.C.A.B. (Martin)* (2005) 70 Cal. Comp. Cases 1612 (writ denied) has held that CIGA was not liable to Medi-Cal for reimbursement of a medical treatment lien, since Medi-Cal was a part of the State of California, whose lien was not a "covered claim" under Insurance Code Section 1063.1(c)(4). [*See* Ch. 2, § 2.84[3][d].]

Injury AOE/COE—Burden of Proof—Exposure to Toxic Chemicals. The Appeals Board in *Stavropoulos v. W.C.A.B.* (2005) 71 Cal. Comp. Cases 99 (writ denied) has held that an employee's widow's QME report did not constitute sufficient evidence to support a finding of industrial injury, because the QME did not identify any toxic chemicals to which decedent was exposed, based his opinion on an inaccurate history, relied on irrelevant medical studies, and did not base his findings on fact. [*See* Ch. 3, § 3.113[4][b].]

Injury AOE/COE—Assaults by Third Parties. The Appeals Board in *Super Mercado Mexico v. W.C.A.B. (Nunez)* (2005) 71 Cal. Comp. Cases 103 (writ denied) has held that a store clerk's a gunshot wound, received in the parking lot of his employer's store while attempting to apprehend thieves who had robbed an independent check cashing business located inside that store, was an industrial injury. [*See* Ch. 4, § 4.53[3][c].]

Medical Treatment—Post-Utilization Review Procedure—Represented Employee. The Appeals Board in *Barr v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 411 (writ denied); Jennings v. W.C.A.B. (2006) 71 Cal. Comp. Cases 424 (writ denied); Lafond v. W.C.A.B. (2006) 71 Cal. Comp. Cases 427 (writ denied); *Simone v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 455 (writ denied); and *Wolochuk v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 458 (writ denied), a group of cases involving highway patrol officers who had received awards of lifetime medical treatment following the development of industrially-related cardiovascular conditions, and whose treating physicians subsequently prescribed a cholesterol-lowering medication as part of the officers' treatment, has held that, when the employer denied liability for the cholesterol medication based on reports of utilization review physicians, the officers were required to follow the post-utilization review dispute resolution procedures set forth in Labor Code Sections 4062 and 4610 and *Willette v. Au Electric Corp.* (2004) 69 Cal. Comp. Cases 1298 (Appeals Board en banc opinion). [*See* Ch. 22, § 22.05[6][c][iv].]

Medical Treatment—ACOEM Guidelines. The Appeals Board in *Regents of the University of California v. W.C.A.B. (Macari)* (2005) 70 Cal. Comp. Cases 1733 (writ denied) has relied on the opinions of the employee's treating physician, his qualified medical examiner, his own credible trial testimony, and the decision in Grom v. Shasta Wood Products (2004) 69

Cal. Comp. Cases 1567 (Appeals Board Significant Panel decision) to find that the employee was entitled to 30 chiropractic visits per year for his chronic low back pain, when the employer had denied chiropractic treatment, based on utilization review reports prepared by doctors who had not examined the employee and had relied on Ch. 12 of the ACOEM Guidelines dealing with acute injury. [*See* Ch. 5, § 5.02[1], [3A]; Ch. 22, § 22.05[6][b].]

Medical Treatment—ACOEM Guidelines—Presumptions. The Appeals Board in *Providence St. Joseph Medical Center v. W.C.A.B. (Gharabaghi)* (2006) 71 Cal. Comp. Cases 82 (writ denied) has held that an employee was entitled to two-level artificial disc replacement surgery, as recommended by the AME, and that the ACOEM Guidelines, relied on by the employer's utilization review physician to deny the surgery, had been rebutted. [*See* Ch. 22, § 22.05[6][c][i].]

Medical Treatment—American College of Occupational and Environmental Medicine Guidelines. The Appeals Board in *Glaxo Smith Kline v. W.C.A.B. (Batterman)* (2006) 71 Cal. Comp. Cases 283 (writ denied) has held that the first right rib resection recommended by the employee's treating physician as a treatment of thoracic outlet syndrome met the requirements of the applicable provisions of the ACOEM Guidelines. [*See* Ch. 22, § 22.05[6][b].]

Temporary Disability—Permanent and Stationary. The Appeals Board in *Lee v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 434 (writ denied) has held that an employee, declared permanent and stationary by his orthopedic physician following treatment for an admitted low back injury, was no longer entitled to temporary disability benefits even though he claimed a psychiatric injury as a compensable consequence of his low back injury and his psychiatric QME stated that the employee was not permanent and stationary with respect to the psychiatric injury, when the QME also stated that the employee had at no time been precluded from doing his work on a purely psychiatric basis. [*See* Ch. 7, § 7.02[2].]

FORMS. The following forms have been included:

Division of Workers' Compensation Forms. The Division of Workers' Compensation has promulgated a new version of 8 Cal. Code Reg. § 9768.10 Mandatory Form, Independent Medical Review Application. [*See* Appendix D, § F9.07.]

Answer to Petition for Penalties. A new form has been added that illustrates an answer to an applicant's petition for penalties pursuant to Labor Code Section 5814. [*See* Appendix D, § F13.06.]

APPENDICES—REGULATIONS. The regulations in Vol. 3 have been updated.

TABLE OF CASES. A revised Table of Cases has been included in this release.

TABLE OF STATUTES. A revised Table of Statutes has been included in this release.

INDEX. A revised index has been included in this release.

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