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California Law of Employee Injuries and Workers' Compensation

Publication 00270 Release 66 September 2007

HIGHLIGHTS

Administrative Regulations

- Changes made through Register 2007, No. 19 (5/11/2007) have been added.

Rules of Court

- 2007 revisions are included.

Liens

- New material has been added to Ch. 30, *Liens and Lien Enforcement*.

Cases and Decisions

- Recent important case law is included.

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CALIFORNIA REGULATIONS. Changes made through Register 2007, No. 19 (5/11/2007) have been added, including the following:

Administrative Penalties; Pattern and Practice of Violating. In promulgating 8 Cal. Code Reg. §§ 10225–10225.2, the Administrative Director has specified the amounts of, and procedures for imposing, penalties for employer behavior deemed to violate Labor Code § 5814.6. [*See* Ch. 10, § 10.40[1].]

Physician Services. In amending 8 Cal. Code Reg. § 9789.11, the Administrative Director has established maximum allowable reimbursement amounts for certain procedures for physician services rendered on or after February 15, 2007. [*See* Ch. 22, § 22.05[2].]

Pharmacy Services; Repackaged Drugs. In promulgating 8 Cal. Code Reg. § 9789.40, the Administrative Director has set forth the maximum reasonable fee for a pharmacy service or a drug not covered by a Medi-Cal payment system, i.e., for so-called "repackaged drugs." The regulation applies to all pharmaceuticals dispensed or provided on or after March 1, 2007. [*See* Ch. 22, § 22.05[2].]

CALIFORNIA RULES OF COURTS. The reorganized rules approved by the Judicial Council, effective January 1, 2007, have been incorporated in this release throughout the text and the forms. [*See, e.g.,* Ch. 34, §§ 34.11[2][a]-34.12, 34.14, 34.22; Appendix D, Forms F20.01, F20.02].

LIENS. The discussions of medical treatment liens and liens for medical-legal expenses have been substantially revised and expanded. [*See* Ch. 30, §§ 30.04, 30.05.]

CALIFORNIA CASES. The following case developments have been added:

Permanent Disability; Apportionment. The California Supreme Court in *Brodie v. W.C.A.B.* (2007) 40 Cal. 4th 1313, has held that "Formula A" adopted by the Supreme Court in Fuentes v. W.C.A.B., pursuant to which the percentage of disability attributable to a new injury is calculated by subtracting the old permanent disability rating from the new permanent disability rating, then consulting the table for the award due this difference, remains the proper method for calculating apportionment. [*See* Ch. 8, § 8.05[1].]

Penalties; Delay in Payment of Permanent Disability Benefits. The court of appeal in *New United Motors Manufacturing, Inc. v. W.C.A.B. (Gallegos)* (2006) 141 Cal. App. 4th 1533, has held that an employer, pursuant to Labor Code § 5814(b), may avoid a Labor Code § 5814 penalty if the potential violation of that statute is discovered by the employer prior to a claim for a penalty by the employee, and the fact that the employee discovered the potential violation before the employer did is immaterial. [*See* Ch. 10, § 10.40[1].]

Penalties; Delay in Payment of Permanent Disability Benefits; Attorney's Fees. The court of appeal in *New United Motors Manufacturing, Inc. v. W.C.A.B. (Gallegos)* (2006) 141 Cal. App. 4th 1533, has held that, for an award of attorney's fees pursuant to Labor Code § 5814.5 to be sustained on appeal, the record must reveal the amount of attorney's fees incurred by the employee in enforcing payment of the unreasonably delayed benefits. [*See* Ch. 10, § 10.42.]

Temporary Disability; Seasonal Workers. The court of appeal in *Signature Fruit Co. v. W.C.A.B. (Ochoa)* (2006) 142 Cal. App. 4th 790, has held that, pursuant to Labor Code § 4653, temporary disability during a seasonal employee's in-season period of regular employment was payable based on two-thirds of the employee's in-season average weekly earnings, but the seasonal employee was not entitled to temporary disability during the off-season when the parties stipulated that the employee did not have any off-season earnings. [*See* Ch. 7, § 7.04[7].]

Psychiatric Injury; Actual Events of Employment. The court of appeal in *Sonoma State University v. W.C.A.B. (Hunton)* (2006) 142 Cal. App. 4th 500, has held that an employee's psychiatric injury satisfies the standard for compensability set forth in Labor Code § 3208.3(b)(1) only if it is proven that events of employment were predominant as to all causes combined of the psychiatric disability taken as a whole. [*See* Ch. 4, §§ 4.02[3][a], 4.69[3][a].]

Psychiatric Injury; Sudden and Extraordinary Employment Condition. The court of appeal in *Matea v. W.C.A.B.* (2006) 144 Cal. App. 4th 1435, has held that lumber falling from its rack into the aisle and onto an employee's leg was such an uncommon, unusual, and totally unexpected event that it would naturally be expected to cause psychic disturbances even in a diligent and honest employee, making the psychiatric injury compensable even though the employee had worked for the employer for fewer than six months. [*See* Ch. 4, § 4.02[3][d].]

Permanent Disability; Apportionment; Presumption; Overlap; Burden of Proof. The court of appeal in *Kopping v. W.C.A.B.* (2006) 142 Cal. App. 4th 1099, has held that, although the employee, pursuant to Labor Code § 4664(b), was not entitled to prove that he was medically rehabilitated from his prior permanent disability when he sustained the subsequent industrial injury, the employer/insurer had the burden of proving overlap between the current disability and the previous disability in order to establish its right to apportionment of the employee's permanent disability. [*See* Ch. 8, §§ 8.05[1], [2][c], [3], 8.06[5][a], [d], 8.07[2][c].]

Permanent Disability; Apportionment; Substantial Evidence. The court of appeal in *E.L. Yeager Construction v. W.C.A.B. (Gatten)* (2006) 145 Cal. App. 4th 922, has held that an independent medical evaluator's opinion constituted substantial evidence on apportionment because it was based on an MRI and x-rays, which clearly showed degenerative disc disease at almost every level of the employee's lower spine, and on the fact that the employee had had minor back problems prior to his industrial injury, and because the independent medical evaluator stated in his deposition that his apportionment was based on reasonable medical probability. [*See* Ch. 8, § 8.05[2][a].]

Permanent Disability; Retroactive Application of 2005 Permanent Disability Rating Schedule. The court of appeal in *State Compensation Insurance Fund v. W.C.A.B. (Echeverria)* (2007) 146 Cal. App. 4th 1311, has held that the WCAB's decision to apply the 1997 permanent disability rating schedule was not supported by substantial evidence, since a 12/15/2004 single-sentence report by the treating physician stating the physician's belief that permanent disability was within reasonable medical probability as a result of the employee's 7/21/2004 industrial injury was not followed by any other treating physician's report that provided reasoning to support the physician's conclusion, and that medical opinion is not substantial evidence if it does not indicate the reasoning behind the physician's opinion. [*See* Ch. 8, § 8.02[4][a].]

Injury AOE/COE. The court of appeal in *Pettigrew v. W.C.A.B.* (2006) 143 Cal. App. 4th 397, has held that an employee did not suffer an industrial injury when, on his way to work as a correctional officer for the California Department of Corrections, the employee stopped to render aid at an accident scene and was injured. [*See* Ch. 4, § 4.130[2].]

Employment Relationships; Independent Contractors. The court of appeal in *JKH Enterprises, Inc. Department of Industrial Relations* (2006) 142 Cal. App. 4th 1046, has held that substantial evidence supported the determination by the Department of Industrial Relations that the drivers for plaintiff courier service were functioning as employees rather than as true independent contractors and that the question of the hirees' status must be considered in light of the history and remedial and social

purposes of the Workers' Compensation Act. [*See* Ch. 3, § 3.08.]

Employment Relationships; Standard of Review; Substantial Evidence. The court of appeal in *JKH Enterprises, Inc. Department of Industrial Relations* (2006) 142 Cal. App. 4th 1046, has held that the trial court applied the correct standard of judicial review of a determination by the Department of Industrial Relations that drivers for plaintiff courier service were functioning as employees, namely, the substantial evidence standard rather than independent judgment. [*See* Ch. 34, § 34.03[2].]

Employment Relationships; Unlicensed Contractors. The court of appeal in *Robert P. Heiman v. W.C.A.B. (Aguilera)* (2007) 149 Cal. App. 4th 724, has held that an unlicensed contractor and a property management firm that hired it were jointly and severally liable to an injured employee of the contractor for workers' compensation, and that the homeowners' association, which had hired the property management firm, was also liable for workers' compensation. [*See* Ch. 3, § 3.134.]

California Insurance Guarantee Association; Covered Claims; Other Insurance. The court of appeal in *Parkwoods Community Association v. CIGA* (2006) 141 Cal. App. 4th 1362, has held that CIGA was not liable to pay the claim of a community association because, pursuant to Insurance Code § 1063.1(c)(9)(i), other insurance was available to the claimant in the form of the developer and the general contractor's excess insurance coverage. [*See* Ch. 2, § 2.84[3][a].]

Civil Actions; Employment Relationship. The court of appeal in *Mendoza v. Brodeur* (2006) 142 Cal. App. 4th 72, has held that the plaintiff, injured while repairing the defendant's roof, was the defendant's employee pursuant to Labor Code § 2750.5, which operated to allow the plaintiff's lawsuit, despite the fact that the plaintiff, by virtue of Labor Code § 3352(h), was not an employee of the defendant for workers' compensation purposes, when the court of appeal found that the plaintiff was not a licensed roofing contractor and, therefore, not an independent contractor. [*See* Ch. 3, §§ 3.36[2][b], 3.49[3].]

Civil Actions; Statute of Limitations. The court of appeal in *Valdez v. Himmelfarb* (2006) 144 Cal. App. 4th 1261, has held that, when the plaintiff/employee's personal injury action is filed under Labor Code § 3706, the defendant/employer's liability is determined under rules of pleading and proof that differ significantly from those of a common-law personal injury action, and that, therefore, this statute creates a statutory cause of action for personal injuries subject to the three-year statute of limitations in Code of Civil Procedure § 338(a). [*See* Ch. 11, § 11.02[4][m].]

Death Benefits; Decedent's Estate. The court of appeal in *Six Flags, Inc. v. W.C.A.B. (Rackchamroon)* (2006) 145 Cal. App. 4th 91, has held that Labor Code § 4702(a)(6)(B), providing that death benefits may be payable to the estate of a deceased employee, is unconstitutional. [*See* Ch. 9, § 9.02[4][d.2].]

Petitions for Reconsideration; Time to File; Amended Award. The court of appeal in *Nestle Ice Cream Co. v. W.C.A.B. (Ryerson)* (2007) 146 Cal. App. 4th 1104, has held that the WCJ's amendment of an award by increasing the amounts of retroactive temporary disability payments and vocational rehabilitation maintenance allowance awarded meant that the employer's subsequent petition for reconsideration, timely filed as to the amended award,

but untimely as to the original award, was timely filed. [*See* Ch. 28, §§ 28.03[2], 28.20.]

Public Employees; Disability Retirement. The court of appeal in *Pellerin v. Kern County Employees' Retirement Association* (2006) 145 Cal. App. 4th 1099, has held that, if a public employee qualifies for a service-connected disability retirement based on the Government Code § 31720.5 presumption that the employee's heart condition arose out of employment, and the county employees' retirement association awards a service-connected disability retirement because it cannot rebut that presumption, the association was required by law to grant the employee's service-connected disability retirement pursuant to Government Code § 31720. [*See* Ch. 3, § 3.116[3].]

Disability Indemnity Benefits; Average Weekly Earnings. The court of appeal in *County of San Joaquin v. W.C.A.B. (Davis)* (2007) 147 Cal. App. 4th 1459, has held that the fact of having been injured while on jury duty, which paid $5 per day, did not justify paying the employee, whose regular job was as an attorney, benefits computed at less than the maximum rate of pay. [*See* Ch. 6, § 6.02[5].]

CAUTION: *The following en banc decisions of the Workers' Compensation Appeals Board were reported in this release. Practitioners should verify the subsequent history of these decisions before citing to them.*

Medical Treatment; Medical Provider Networks; Notice. The Appeals Board en banc in *Knight v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1423 (Appeals Board en banc opinion) has held that the employer was liable for medical treatment self-procured by the employee because the employer neglected or refused to provide reasonable medical treatment by failing to provide required notice to the employee of his rights under the employer's medical provider network. [*See* Ch. 5, § 5.05[13][c], [d].]

Medical Treatment; Medical Provider Network Statutes; Retroactive Application. The Appeals Board en banc in *Babbitt v. Ow Jing dba National Market* (2007) 72 Cal. Comp. Cases 70 (Appeals Board en banc opinion) has held that an employer may satisfy its obligation to provide reasonable medical treatment by transferring an injured worker into its network in conformity with applicable statutes and regulations regardless of the date of injury or the date of the award of future medical treatment. [*See* Ch. 5, § 5.05[13][c].]

WCAB's Duty to Develop Record. The Appeals Board en banc in *Costa v. Hardy Diagnostic* (2006) 71 Cal. Comp. Cases 1797 (Appeals Board en banc opinion) has held that it has the authority and duty to develop the record when necessary to accomplish substantial justice by obtaining additional evidence, including medical evidence, at any time during the proceedings. [*See* Ch. 26, § 26.04[2].]

Permanent Disability; 2005 Permanent Disability Rating Schedule; Validity of Schedule. The Appeals Board en banc in *Costa v. Hardy Diagnostic* (2006) 71 Cal. Comp. Cases 1797 (Appeals Board en banc opinion) has upheld the validity of the 2005 permanent disability rating schedule, holding that the employee had not met his burden of proving the schedule invalid. [*See* Ch. 8, § 8.02[4][a], Ch. 32, § 32.03A[1].]

Permanent Disability; 2005 Permanent Disability Rating Schedule; Ratings; Rebuttal Evidence; Costs. The Appeals Board en banc in *Costa v. Hardy Diagnostic* (2006) 71 Cal. Comp. Cases

1797 (Appeals Board en banc opinion) has held that Labor Code § 4660, as amended by SB 899, allows parties to present rebuttal evidence to a permanent disability rating under the 2005 permanent disability rating schedule and that the costs of such rebuttal evidence may be allowable. [*See* Ch. 32, § 32.01[3][a][ii].]

Permanent Disability; Retroactive Application of 2005 Permanent Disability Rating Schedule. The Appeals Board en banc in *Baglione v. Hertz Car Sales* (2007) 72 Cal. Comp. Cases 444 (Appeals Board en banc opinion), *pet. for writ of rev. filed* 5/21/2007, has, by a 4–3 vote, rescinded its previous decision in *Baglione v. Hertz Car Sales* (2007) 72 Cal. Comp. Cases 86 (Appeals Board en banc opinion), which had also been decided by a 4-3 vote, and held that, for compensable claims arising before January 1, 2005, in order for the 1997 schedule for rating permanent disabilities to apply, pursuant to Labor Code § 4660(d), the existence of permanent disability must be indicated in either a pre-2005 comprehensive medical-legal report or a pre-2005 report from a treating physician, and that, otherwise, the 2005 permanent disability rating schedule applied. [*See* Ch. 8, § 8.02[4][a].]

Permanent Disability; Retroactive Application of 2005 Permanent Disability Rating Schedule. The Appeals Board en banc in *Pendergrass v. Duggan Plumbing* (2007) 72 Cal. Comp. Cases 456 (Appeals Board en banc opinion), *pet. for writ of rev. filed* 5/21/2007, has, by a 4-3 vote, rescinded its previous decision in *Pendergrass v. Duggan Plumbing* (2007) 72 Cal. Comp. Cases 95 (Appeals Board en banc opinion), which had also been decided by a 4-3 vote, and held that, for compensable claims arising before January 1, 2005, only if the last payment of temporary disability indemnity was made for any period of temporary disability ending before that date would the 1997 schedule for rating permanent disabilities apply to determine the extent of permanent disability, pursuant to Labor Code § 4660(d), and that otherwise the 2005 permanent disability rating schedule applied. [*See* Ch. 8, § 8.02[4][a].]

CAUTION: *The following panel decisions have been designated "significant panel decisions" 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.*

Medical Treatment; Spinal Surgery; Disputes; Procedure. The Appeals Board in *Brasher v. Nationwide Studio Fund* (2006) 71 Cal. Comp. Cases 1282 (Appeals Board Significant Panel decision) has clarified the procedures for resolving disputes regarding a treating physician's recommendation for spinal surgery, including the responsibilities of the DWC's Medical Unit. [*See* Ch. 22, §§ 22.05[6][c][iv], 22.06[2][b][i].]

Disqualification of WCJ; Appearance of Bias Against Attorney. The Appeals Board in *Robbins v. Sharp Healthcare* (2006) 71 Cal. Comp. Cases 1291 (Appeals Board Significant Panel decision) has held that bias or the appearance of bias solely against an attorney or a law firm, as opposed to bias against a party whom that attorney or law firm represents, may be ground for disqualification of the WCJ. [*See* Ch. 1, § 1.11[3][a].]

Medical Examinations; Represented Employees. The Appeals Board in *Ward v. City of Desert Hot Springs* (2006) 71 Cal. Comp. Cases 1313 (Appeals Board Significant Panel decision) has held that, for claimed industrial injuries occurring on or after January 1, 2005, in which the employee is represented by an attorney, dis-

putes regarding compensability of the alleged industrial injury must be resolved, pursuant to Labor Code § 4060(c), by the procedure provided in Labor Code § 4062.2. [*See* Ch. 22, § 22.06[1][a], [2][a], [8]; Ch. 32, § 32.06[2][a], [3].]

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.*

Vocational Rehabilitation Maintenance Allowance; Credit. The court of appeal in *Gamble v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1015 (court of appeal opinion not published in official reports) has held that an employer is not entitled to a credit against VRMA owed to an employee for wages the employee earned from another employer. [*See* Ch. 35, § 35.11[1], [3].]

Vocational Rehabilitation; Statute of Limitations. The court of appeal in *Fresno Unified School District v. W.C.A.B. (Butcher)* (2006) 71 Cal. Comp. Cases 1391 (court of appeal opinion not published in official reports) has held that an employee's claim for vocational rehabilitation benefits, made more than five years after the date of injury, was timely, when the employee filed a petition to reopen for new and further disability, seeking an increase in permanent disability benefits, within the five-year limitations period of Labor Code § 5410, then, nearly 14 months later, and nearly six years after the date of injury, amended the petition to reopen by adding a claim for vocational rehabilitation benefits. [*See* Ch. 24, § 24.03[2]; Ch. 35, § 35.50[2][a].]

Vocational Rehabilitation; Vocational Rehabilitation Maintenance Allowance. The court of appeal in *Paramount Farms v. W.C.A.B. (Garcia de Velasquez)* (2006) 71 Cal. Comp. Cases 1406 (court of appeal opinion not published in official reports) has held that an employer's attempt to change qualified rehabilitation representatives after the parties had agreed to one caused a delay in making vocational rehabilitation maintenance allowance payments that entitled the employee to receive increased vocational rehabilitation maintenance allowance payments. [*See* Ch. 35, § 35.11[3].]

Vocational Rehabilitation; Reinstatement of Services; Statute of Limitations. The court of appeal in *Gomez v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1714 (court of appeal opinion not published in official reports) has held that the Appeals Board lacked jurisdiction to award reinstatement of vocational rehabilitation services, when the employee elected to interrupt her vocational rehabilitation services, then never sought to reinstate those services within the five-year statute of limitations period of Labor Code § 5410, but rather inquired, within that period, only about obtaining settlement of those services. [*See* Ch. 24, § 24.03[2]; Ch. 35, § 35.83.]

Psychiatric Injury; Actual Events of Employment; Evidence. The court of appeal in *Krause v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1032 (court of appeal opinion not published in official reports) has held that an employee, who claimed a psychiatric injury as a compensable consequence of an admitted industrial orthopedic injury, presented no credible medical evidence that actual employment events predominantly caused an injury to her psyche, when the court found that her testimony was not credible when she testified that none of the events that occurred in her life around the time of her industrial orthopedic injury caused her stress. [*See* Ch. 4, § 4.02[3][b].]

Psychiatric Injury; Sudden and Extraordinary Employment Condition. The court of appeal in *Puga v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 195 (court of appeal opinion not published in official reports) has held that an employee's claim for psychiatric injury was not compensable because the employee, injured when she fell off a ladder while engaged in her regular and routine employment activities of installing and repairing ceiling fans in a chicken house, had not worked for the employer for at least six months and the employee's alleged psychiatric injury was not caused by an extraordinary employment condition. [*See* Ch. 4, § 4.02[3][d].]

Mandatory Settlement Conference; Discovery. The court of appeal in *Simas v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1056 (court of appeal opinion not published in official reports) has held that the WCJ properly took the case off calendar at the mandatory settlement conference and ordered additional discovery for further development of the record. [*See* Ch. 26, § 26.04[2].]

Mandatory Settlement Conference; Close of Discovery. The court of appeal in *Shank v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1735 (court of appeal opinion not published in official reports) has held that the Appeals Board's basis for excluding an untimely medical report was supported by both law and substantial evidence, when the employee, on the date of the mandatory settlement conference, had obtained an appointment for a medical-legal examination on a date two weeks later, when the Board found that the medical-legal examination could have been discovered by exercise of due diligence prior to the mandatory settlement conference. [*See* Ch. 26, § 26.04[2].]

Mandatory Settlement Conference; Close of Discovery. The court of appeal in *Savemart Stores, Inc. v. W.C.A.B. (Oneto)* (2006) 71 Cal. Comp. Cases 1727 (court of appeal opinion not published in official reports) has held that the Appeals Board properly excluded from evidence, pursuant to Labor Code § 5502(e)(3), a surveillance video tape obtained by the employer following trial, when the employer's petition for writ of review presented no argument or explanation as to why a similar video tape could not have been discovered by exercise of due diligence prior to the mandatory settlement conference. [*See* Ch. 26, § 26.04[2].]

WCAB Jurisdiction; Tribal Sovereign Immunity; Waiver. The court of appeal in *Sullivan v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1065 (court of appeal opinion not published in official reports) has held that the Appeals Board had no jurisdiction over an employee's Labor Code § 132a discrimination claim because the employer Indian tribe had not clearly, expressly, and unequivocally waived its tribal sovereign immunity with respect to the employee, who worked as a surveillance agent at the tribe's casino. [*See* Ch. 21, § 21.02[2].]

WCAB Jurisdiction; Final Orders; Res Judicata. The court of appeal in *Doody v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1219 (court of appeal opinion not published in official reports), annulling an Appeals Board decision that awarded CIGA a credit for overpayment of attendant care benefits, held that the Board lacked jurisdiction to consider the issue, which had been decided by the Board against CIGA in the first petition for reconsideration in the case, and CIGA had not sought judicial review of that decision, which had then become a final decision entitled to res judicata effect. [*See* Ch. 21, § 21.08[1].]

WCAB's Continuing Jurisdiction; Petitions to Reopen; New and Further Dis-

ability. The court of appeal in *Gomez v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1721 (court of appeal opinion not published in official reports) has held that, when the employee timely filed a petition to reopen within five years after the date of injury but claimed benefits for temporary total disability that commenced more than five years after the date of injury, the WCAB did not have jurisdiction. [*See* Ch. 7, § 7.03[5]; Ch. 24, § 24.03[3][b].]

WCAB Decisions; Sufficiency of Decisions. The court of appeal in *Paramount Farms v. W.C.A.B. (Lopez)* (2006) 71 Cal. Comp. Cases 1397 (court of appeal opinion not published in official reports), remanding the case to the Appeals Board, has held that the Board did not sufficiently state the evidence relied upon and specify in detail the reasons for its decision to enable the court to determine for which of the claimed 103 interpreting services the Board had ordered the employer to pay. [*See* Ch. 28, § 28.34.]

Injury AOE/COE; Going and Coming Rule; Special Risk Exception. The court of appeal in *Uribe v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1070 (court of appeal opinion not published in official reports) has held that an employee satisfied the burden of proof that his injury arose out of and in the course of employment, in that he established both prongs of the special risk exception to the going and coming rule, i.e., (1) but for his employment, the employee would not have been at the location where the injury occurred, and (2) the risk to the employee was distinctive from the risk to the public generally. [*See* Ch. 4, § 4.156[2].]

Injury AOE/COE; Substantial Medical Evidence. The court of appeal in *Hess v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1225 (court of appeal opinion not published in official reports) has held that the opinion of the employer's qualified medical evaluator constituted substantial evidence in support of the Appeals Board's decision that the employee was 31-percent disabled, despite opinions of the employee's treating physician and qualified medical evaluator that supported a significantly higher level of permanent disability. [*See* Ch. 22, § 22.08[3][c].]

Injury AOE/COE; Medical Evidence. The court of appeal in *Jordan v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1512 (court of appeal opinion not published in official reports) has held that an employee failed to prove that his injury arose out of and occurred in the course of his employment, when the opinions of the employee's and the employer's QMEs were that the employee offered no evidence to support his claim that his pre-existing asthmatic condition had been aggravated by exposure to Aspergillus fungi during his employment as a building inspector. [*See* Ch. 4, § 4.05[2][a].]

Injury AOE/COE; Third Party Actions; Credit. The court of appeal in *Medina v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1535 (court of appeal opinion not published in official reports) has held that an injury sustained by an employee, who tripped and fell while walking to her car on a ramp at the apartment complex where her employer had directed and paid her to live, was not industrial, thereby entitling her employer's workers' compensation insurer to credit in the amount of the employee's net recovery in her third-party action against the apartment complex owner. [*See* Ch. 4, § 4.62[2].]

Injury AOE/COE; Time to File Claim; Notice to Employer. The court of appeal in *Arciga v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 1 (court of appeal opinion not pub-

lished in official reports) has annulled an Appeals Board decision that had ruled an employee's claim untimely when filed more than 30 days after the date of injury and remanded the case for the Board to consider whether the employer had inquiry notice of a possible industrial injury to the employee's hands, pursuant to Labor Code § 5402, when the employee, after several days of pruning her employer's grape vines, had told her supervisors that her hands were so painful and blistered that she could not sleep. [*See* Ch. 24, §§ 24.01[1], 24.04[6].]

Injury AOE/COE; Substantial Evidence. The court of appeal in *Elmore v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 8 (court of appeal opinion not published in official reports) has held that an employee's testimony lacked credibility and that the employer's human resources manager's testimony was more convincing, when the court found that the employee, following an alleged industrial injury, had reported pain to the employer's human resources manager and had told her that the pain was from an old Vietnam injury. [*See* Ch. 4, § 4.05[2][a].]

Petitions to Reopen; Good Cause. The court of appeal in *Walker v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1077 (court of appeal opinion not published in official reports) has held that the Appeals Board's denial of an employee's petition to reopen for industrial back injury was not based on substantial evidence and that the petition should have been granted. [*See* Ch. 31, § 31.04[2][d].]

Petitions to Reopen; New and Further Disability; Compensable Consequence. The court of appeal in *Valley Behavioral Health Network v. W.C.A,B. (Cherry)* (2006) 71 Cal. Comp. Cases 1774 (court of appeal opinion not published in official reports) has held that substantial evidence supported the Appeals Board's award of prior and future medical treatment for an employee's right upper extremity and shoulder as a compensable consequence of the original injury to right wrist. [*See* Ch. 31, § 31.05[2].]

Penalties; Labor Code § 4650. The court of appeal in *Zimarik v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1111 (court of appeal opinion not published in official reports) in dicta has recommended that the Appeals Board reconsider its analysis in *Leinon v. Fisherman's Grotto* (2004) 69 Cal. Comp. Cases 995 (Appeals Board en banc opinion), noting that it is difficult to square *Leinon* with the self-executing nature of Labor Code § 4650 penalties. [*See* Ch. 10, § 10.40[1]; Ch. 32, § 32.04[2].]

Permanent Disability; Apportionment; Burden of Proof; Compromise and Release. The court of appeal in *Oswalt v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1243 (court of appeal opinion not published in official reports) has followed *Pasquotto v. Hayward Lumber* (2006) 71 Cal. Comp. Cases 223 (Appeals Board en banc opinion) and held that an employer did not meet its burden of proving the existence of a prior award of permanent disability in order to establish Labor Code § 4664(b)'s conclusive presumption because the only evidence in the record of resolution of the employee's 1997 claim for an ankle injury was the employee's testimony that he settled that case in compromise and release, and the Appeals Board in Pasquotto ruled that an order approving compromise and release is not, without more, a "prior award of permanent disability" within the meaning of Labor Code § 4664(b). [*See* Ch. 8, §§ 8.05[1], 8.06[5][a].]

Permanent Disability; Apportionment. The court of appeal in *Fresno Unified*

School District v. W.C.A.B. (Stephens) (2006) 71 Cal. Comp. Cases 1505 (court of appeal opinion not published in official reports) has held that, when a QME testified on deposition that it would be speculative for him to conclude that part of an employee's back injury was caused by aging, there were no grounds for apportioning that injury to nonindustrial factors. [*See* Ch. 31, § 31.05[2].]

Permanent Disability; Apportionment. The court of appeal in *Sierra Bible Church v. W.C.A.B. (Clink)* (2007) 72 Cal. Comp. Cases 20 (court of appeal opinion not published in official reports) has upheld the Appeals Board's award to an employee of 77-percent permanent disability, without apportionment, based on the agreed medical evaluator's initial medical reporting. [*See* Ch. 8, § 8.05[3].]

Permanent Disability; Apportionment; Substantial Evidence. The court of appeal in *Linam v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 332 (court of appeal opinion not published in official reports) has held that an employee was 88-percent permanently disabled, not 100-percent permanently disabled as opined by a vocational rehabilitation counselor, when the court found that the WCAB did not rely on the vocational rehabilitation counselor, and that the employee conceded that permanent disability of 88 percent was supported by substantial medical evidence in the form of medical reports. [*See* Ch. 8, § 8.05[2][a].]

Permanent Disability; Apportionment; Substantial Evidence. The court of appeal in *Marsh v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 336 (court of appeal opinion not published in official reports) has held that a finding that 50 percent of the employee's permanent disability was caused by nonindustrial factors was supported by substantial evidence, when the agreed medical examiner's opinion apportioning the employee's disability was supported by sufficient reasons as to how and why his disability was 50-percent caused by osteopenia. [*See* Ch. 8, § 8.05[2][a].]

Permanent Disability; Medical Treatment; Utilization Review. The court of appeal in *Lithia Motors Support Services v. W.C.A.B. (Locke)* (2006) 71 Cal. Comp. Cases 1517 (court of appeal opinion not published in official reports) has held that substantial evidence supported the Appeals Board's finding that surgery performed on an employee was both approved by the employer's insurer and reasonably required to cure or relieve the employee from the effects of his industrial injury, so that the employer was liable for the employee's increased level of permanent disability that resulted from the surgery, despite the employer's later attempts to rescind the approval of the surgery. [*See* Ch. 22, § 22.05[6][c][iii].]

Medical Treatment; Further Medical Treatment; Apportionment. The court of appeal in *County of Stanislaus v. W.C.A.B. (Credille)* (2006) 71 Cal. Comp. Cases 1381 (court of appeal opinion not published in official reports) has held that medical treatment, unlike permanent disability, cannot be apportioned to nonindustrial factors, and that, once it has been established that an industrial injury contributed to the need for medical treatment, Labor Code § 4600 required that the employer provide the treatment. [*See* Ch. 8, § 8.05[4][a].]

Applications for Adjudication; Venue. The court of appeal in *Domino's Pizza v. W.C.A.B. (Kerr)* (2006) 71 Cal. Comp. Cases 1387 (court of appeal opinion not published in official reports) has held that Labor Code § 5501.5(a) mandated that the employee's claim be filed in the county where the employee resides, where the

injury allegedly occurred, or where the employee's attorney has his or her principal place of business. [*See* Ch. 25, § 25.06[2].]

Cumulative Trauma; Statute of Limitations. The court of appeal in *County of Mariposa v. W.C.A.B. (Johnson*) (2006) 71 Cal. Comp. Cases 1499 (court of appeal opinion not published in official reports) has held that an employer failed to prove with substantial evidence that its employee suffered a compensable disability that triggered the commencement of the statute of limitations period, pursuant to Labor Code § 5412, prior to the employee's resignation. [*See* Ch. 24, § 24.03[7][a].]

Cumulative Trauma; Date of Injury; Post-Termination Claims. The court of appeal in *Arciga v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 1 (court of appeal opinion not published in official reports) has held that the fact that the employee's hands hurt over the course of several days of pruning the employer's grape vines, immediately prior to her being terminated from employment, did not necessarily lead to the conclusion that she was aware of or should have known that she was suffering from a cumulative trauma injury, in which case the fact that the employee filed her claim after the 30-day limit set forth in Labor Code § 5400, would not bar the claim. [*See* Ch. 24, § 24.03[7][a].]

Statute of Limitations; Tolling of Statute; Cumulative Trauma Injury. The court of appeal in *Federal Express v. W.C.A.B. (Uhlik)* (2006) 71 Cal. Comp. Cases 1703 (court of appeal opinion not published in official reports) has held that a claim for workers' compensation benefits, alleging cumulative trauma injury, filed almost three years after the employee's last day of work was timely when the employee first learned of the industrial nature of her injury only five months before filing her claim. [*See* Ch. 24, § 24.03[7][b].]

Petitions for Writ of Review; California Rules of Court. The court of appeal in *Fresno Unified School District v. W.C.A.B. (Stephens)* (2006) 71 Cal. Comp. Cases 1505 (court of appeal opinion not published in official reports) has held that the provisions of California Rules of Court, Rule 8.204(d), regarding page limits for attachments to briefs, do not apply to petitions for writs of error. [*See* Ch. 34, § 34.11[2][b].]

California Insurance Guarantee Association; Covered Claims. The court of appeal in *California Ins. Guarantee Assn. v. W.C.A.B. (Guiterrez)* (2006) 71 Cal. Comp. Cases 1661 (court of appeal opinion not published in official reports) has held that CIGA was not required to pay the lien claim of the University of California, Davis Medical Center, because the lien claimant was an agency of the State of California. [*See* Ch. 2, § 2.84[3][d].]

Employment Relationships; Home Care Services. The court of appeal in *Farmers Insurance Group of Companies v. W.C.A.B. (Bell, Berry)* (2006) 71 Cal. Comp. Cases 1694 (court of appeal opinion not published in official reports) has held that claims by two home-care givers for cumulative trauma injuries arising from their employment by a trust created for the purpose of paying for the care needed by their quadriplegic brother were not precluded by the policy provision of the trust fund's workers' compensation insurer that excluded coverage "arising out of the business pursuits of an insured." [*See* Ch. 3, § 3.36[1].]

Employment Relationships; Domestic Workers Referral Agencies. The court of appeal in *An Independent Home Support Service, Inc. v. Superior Court of San Diego County* (2006) 145 Cal. App. 4th 1418, has held that, by complying with

Civil Code § 1812.5095(b)(1)-(9), a referral agency that provided domestic workers to individuals and entities was deemed not to be the employer, for purposes of workers' compensation, of the domestic workers it referred. [*See* Ch. 3, § 3.08.]

Attorney's Fees; Labor Code § 5801. The court of appeal in *Savemart Stores, Inc. v. W.C.A.B. (Oneto)* (2006) 71 Cal. Comp. Cases 1727 (court of appeal opinion not published in official reports) has held that there was no reasonable basis for an employer's petition for writ of review, when the court found that the employer's argument that the Appeals Board acted in excess of its powers by not allowing into evidence a post-trial surveillance video tape unreasonably ignored the well-established confines of Labor Code § 5502(e)(3), and that the employer failed to proffer a good-faith argument as to why the video tapes were not timely procured. [*See* Ch. 20, § 20.02[2][l]; Ch. 34, § 34.24.]

Petitions for Reconsideration; Time to File; Place to File. The court of appeal in *Scott Pontiac GMC v. W.C.A.B. (Olsen)* (2007) 72 Cal. Comp. Cases 346 (court of appeal opinion not published in official reports) has held that the Appeals Board should deem an employer's petition for reconsideration as timely filed on its own motion, pursuant to Labor Code § 5911, when a messenger service, on the last day to make a timely filing, incorrectly filed the petition in the San Francisco District Office of the Department of Workers' Compensation, located on the first floor of the same building in which the Appeals Board is located on the ninth floor, where the petition should have been filed, but where it was not received until seven days after the filing deadline. [*See* Ch. 28, §§ 28.20, 28.23.]

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.*

Lien Claims; Notification. The Appeals Board in *Hewko v. W.C.A.B. (Zetina)* (2006) 71 Cal. Comp. Cases 960 (writ denied) has denied in its entirety a chiropractor's lien claim for medical treatment, when it found that the lien claimant had not given proper notice to the employer until more than three years after the date of injury and after the lien claimant's treatment of the employee had been completed. [*See* Ch. 30, § 30.04[4][b].]

Medical Treatment; American College of Occupational and Environmental Medicine Guidelines. The Appeals Board in *AT&T. W.C.A.B. (Bigel)* (2006) 71 Cal. Comp. Cases 1146 (writ denied) has held that the opinion of an employee's QME indicating that the employee was in need of myofascial pain release therapy and acupuncture to relieve him of the effects of his spinal injuries was sufficient to rebut the Labor Code § 4604.5(c) presumption of correctness of the ACOEM Guidelines on the issue of the extent and scope of medical treatment and to support an award of additional medical treatment at variance with the Guidelines. [*See* Ch. 5, § 5.02[1]; Ch. 22, § 22.05[6][b].]

Medical Treatment; Compensable Consequence Injuries. The Appeals Board in *Salveson v. W.C.A.B. (Coble)* (2006) 71 Cal. Comp. Cases 1457 (writ denied) has held that an employee, who sustained admitted industrial back injuries, was entitled to medical treatment for a liver condition, hepatic encephalopathy, and a fracture of his right arm, as well as 24-hour home health care pursuant to a stipulated award, when substantial medical evidence indicated that the high doses of pain medi-

cation he was taking for his industrial orthopedic injury contributed to his liver disorder and his resulting need for home health care, and that the effects of the medication combined with his other conditions to cause him to fall and fracture his right arm. [*See* Ch. 4, § 4.94[2].]

California Insurance Guarantee Association; Covered Claims; Longshore and Harbor Workers' Compensation Act. The Appeals Board in *California Insurance Guarantee Association v. W.C.A.B. (Badenhop)* (2006) 71 Cal. Comp. Cases 1150 (writ denied) has held that CIGA was required to reimburse an employer who, following the insolvency of the insurer that had covered the employer's liability for California workers' compensation claims and its liability for Longshore and Harbor Workers' Compensation Act claims, had paid an injured employee's medical treatment expenses pursuant to the LHWCA policy, under which the employee, who could have proceeded under either policy, had elected to proceed, then filed a claim for reimbursement against CIGA pursuant to the California workers' compensation policy. [*See* Ch. 2, § 2.84[2].]

California Insurance Guarantee Association; Covered Claims. The Appeals Board in *Allianz Insurance Co. v. W.C.A.B. (Hernandez)* (2006) 71 Cal. Comp. Cases 1437 (writ denied) has held that an insurer's request for reimbursement from CIGA was not a "covered claim" when that insurer had insured the employer during a time period prior to the time period during which the employee suffered a cumulative trauma injury but provided benefits to the employee to avoid potential penalties and filed a petition for reimbursement from the insolvent insurer, which had coverage during the period of the employee's injury, and CIGA. [*See* Ch. 2, § 2.84[3][a].]

California Insurance Guarantee Association; Other Insurance. The Appeals Board in *Blue Cross of California v. W.C.A.B. (Gorgi)* (2006) 71 Cal. Comp. Cases 1587 (writ denied) has held that an employer's group health plan, which paid for an injured employee's medical treatment, then filed a lien against CIGA, was a "health care service provider" and an "insurer," and that the lien claim was not a "covered claim" within the meaning of Insurance Code § 1063.1(c)(5). [*See* Ch. 2, § 2.84[3][b].]

Temporary Total Disability; Permanent and Stationary. The Appeals Board in *Hernandez v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1165 (writ denied) has held that an employee was entitled to temporary total disability ending on the permanent and stationary date given by the employee's qualified medical evaluator, for the employee's industrial injury to both knees, and the fact that the employee needed further medical treatment, including bilateral knee surgery, was not sufficient by itself to conclude that he was temporarily totally disabled during the period after the permanent and stationary date when he had not undergone the suggested surgery. [*See* Ch. 7, § 7.02[2].]

Temporary Disability; Termination of Employment. The Appeals Board in *Manpower Temporary Services v. W.C.A.B. (Rodriguez)* (2006) 71 Cal. Comp. Cases 1614 (writ denied) has held that an employee was entitled to temporary disability benefits for the period following his termination from modified duty, when the employer failed to prove that the termination was for "good cause." [*See* Ch. 7, § 7.02[3][c].]

Temporary Disability; Rate; Earnings. The Appeals Board in *Manpower Temporary Services v. W.C.A.B. (Rodriguez)*

(2006) 71 Cal. Comp. Cases 1614 (writ denied) has held that an employee was entitled to temporary disability benefits for the period following his termination from modified duty based on his modified work earnings, rather than on his pre-injury earnings. [*See* Ch. 6, § 6.01[1].]

Treating Physicians; Medical Provider Networks; Serious Chronic Conditions. The Appeals Board in *Redlands Insurance Co. v. W.C.A.B. (Craig)* (2006) 71 Cal. Comp. Cases 1189 (writ denied) has held that an employee who sustained an industrial back injury was entitled to delay transfer of his medical treatment to a physician within his employer's insurer's medical provider network and continue treating with his primary treating physician outside the network, when the primary treating physician's reports established that the employee suffered a serious chronic condition, as defined in 8 Cal. Code Reg. § 9767.9(e)(2). [*See* Ch. 5, § 5.05[13][c].]

Uninsured Employers Benefits Trust Fund; Reimbursement of Benefits Paid by Insurance Carrier. The Appeals Board in *Uninsured Employers Benefits Trust Fund v. W.C.A.B. (Fisher)* (2006) 71 Cal. Comp. Cases 1193 (writ denied) has held that it had equitable authority to order the Fund to reimburse an insurance carrier for benefits mistakenly paid to an injured employee. [*See* Ch. 2, § 2.13.]

Salary in Lieu of Disability; Multiple Industrial Injuries. The Appeals Board in *City of Oakland v. W.C.A.B. (Harger)* (2006) 71 Cal. Comp. Cases 1319 (writ denied) has held that Labor Code § 4850 entitles qualified workers to one year of full salary per injury, not per lifetime. [*See* Ch. 3, § 3.114[2].]

Employment Relationships; Presumption of Employment. The Appeals Board in *L & R Construction v. W.C.A.B. (Evans)* (2006) 71 Cal. Comp. Cases 1331 (writ denied) has applied the Labor Code § 3357 presumption of employment to find that an injured worker was an employee of an uninsured and unlicensed roofing subcontractor on the date of his injury, when the subcontractor's testimony that the worker had been terminated prior to his injury was insufficient to rebut the presumption. [*See* Ch. 3, § 3.03.]

Compromise and Release; Setting Aside. The Appeals Board in *Mackill v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1336 (writ denied) has held that case law decided subsequent to the date on which it approved a compromise and release was not grounds to set aside that compromise and release, when the Board found that the parties knew or should have known of the uncertainty of the case law on how to calculate apportionment of permanent partial disability at the time the compromise and release agreement was reached. [*See* Ch. 29, § 29.05[1].]

Insurance Coverage; Agency Relationships; Estoppel. The Appeals Board in *Sincere Oriental Food Corp. v. W.C.A.B. (Ortega)* (2006) 71 Cal. Comp. Cases 1343 (writ denied) has held that a carrier's cancellation of an employer's workers' compensation insurance policy for nonpayment of premiums was effective and that the carrier had no coverage on the date of an employee's injury, when the employer had obtained insurance through a broker, pursuant to a broker's agreement expressly providing that the broker was not an agent of the carrier, and the broker failed to make timely premium payments on the employer's behalf. [*See* Ch. 2, § 2.61[2].]

Permanent Disability; Apportionment. The Appeals Board in *Waste Management, ACE USA v. W.C.A.B. (De La Pena)* (2006) 71 Cal. Comp. Cases 1469 (writ denied) has held that a report of the employee's

treating physician indicating that the employee's permanent disability "is a result of the work-related injury" and "apportionment is not indicated in this case" satisfied the requirements of *Escobedo v. Marshalls.* [*See* Ch. 8, § 8.05[2][a].]

Permanent Disability; Apportionment. The Appeals Board in *Yellow Transportation, Inc. v. W.C.A.B. (Huls)* (2006) 71 Cal. Comp. Cases 1473 (writ denied) has held that an AME's opinion on apportionment of permanent disability did not meet the requirements set forth in *Escobedo v. Marshalls* and did not constitute substantial evidence to justify a finding of apportionment, since the AME provided no basis for his apportionment, he relied on cervical x-rays that contradicted MRI findings, and his opinion was speculative and not based on reasonable medical probability. [*See* Ch. 8, § 8.05[2][a].]

Injury AOE/COE; Going and Coming Rule; Dual Purpose Exception. The Appeals Board in *St. Paul Travelers, Inc. v. W.C.A.B. (Schleifstein)* (2006) 71 Cal. Comp. Cases 1624 (writ denied) has held that an employee's claim stemming from burn injuries was, pursuant to the dual purpose exception, not barred by the "going and coming" rule, when those injuries occurred while the employee was performing a two-day assignment for his employer that included picking up a pool product, calcium hypochlorite, from two of the employer's store locations and transporting it in his private vehicle to the store location where he worked. [*See* Ch. 4, §§ 4.138[2][a], 4.155[2][b].]

Injury AOE/COE; Going and Coming Rule; Special Mission Exception. The Appeals Board in *St. Paul Travelers, Inc. v. W.C.A.B. (Schleifstein)* (2006) 71 Cal. Comp. Cases 1624 (writ denied) has held that an employee's claim for burn injuries was, pursuant to the special mission exception, not barred by the "going and coming" rule, when the injuries occurred while the employee was completing a two-day assignment at his employer's request that included picking up and transporting calcium hypochlorite from two of the employer's store locations to the store where the employee worked. [*See* Ch. 4, § 4.157[2].]

Injury AOE/COE; Going and Coming Rule; Special Risk Exception. The Appeals Board in *St. Paul Travelers, Inc. v. W.C.A.B. (Schleifstein)* (2006) 71 Cal. Comp. Cases 1624 (writ denied) has held that an employee's claim for burn injuries was, pursuant to the special risk/zone of danger exception, not barred by the "going and coming" rule, when the injuries occurred when a chemical that the employee was transporting at his employer's request was ignited by the employee's lit cigarette butt. [*See* Ch. 4, § 4.156[2].]

APPENDIX B: ADMINISTRATIVE DIRECTOR RULES. The regulations in Vol. 3 have been updated.

APPENDIX D: FORMS. The forms in Vol. 3 have been updated.

APPENDIX E: TABLES AND SCHEDULES. The tables and schedules in Vol. 3 have been updated.

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