PUBLICATION UPDATE

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California Law of Employee Injuries and Workers' Compensation

Publication 270 Release 73 April 2011

HIGHLIGHTS

Legislation

- Legislative actions affecting workers' compensation have been added.

Administrative Regulations

- Changes made through Register 2010, No. 50 (12/10/10) have been added.

California Rules of Court

- Amendments effective 1/1/2011 have been added.

Cases and Decisions

- Recent important case law is included.

Summary Rating and Consultative Rating

- Checklists for requesting a Summary Rating and a Consultative Rating using EAMS have been added.

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CALIFORNIA STATUTES. Legislation affecting workers' compensation enacted during the 2010 legislative session have been added, including the following:

Public Employees; Leaves of Absence in Lieu of Disability Benefits. The legislature has amended Labor Code Section 4850, applied retroactively to January 1, 2010, to include employees of the City and County of San Francisco, excluding city police officers and city, county, and district firefighters, among those granted leaves of absence without loss of salary, in lieu of temporary disability benefits, when injured in the course of their duties. [*See* Ch. 3, § 3.114[1].]

Fair Employment and Housing Act; Age Discrimination; Medicare. The legislature has amended the California Fair Employment and Housing Act, Government Code Section 12940, adding subsec-

tion (a)(5)(B), to provide that the FEHA provisions relating to discrimination on the basis of age do not prohibit an employer from providing health benefits or health care reimbursement plans to retired persons that are altered, reduced, or eliminated when the retiree becomes eligible for Medicare benefits. [*See* Ch. 10, § 10.70[3][a][viii].]

California Insurance Guarantee Association; Insolvent Insurers. The legislature has amended Insurance Code Section 1063.1 to delete an order of receivership as a qualification for being an insolvent insurer whose claims will then be covered by the California Insurance Guarantee Association. This change means that the definition of "insolvent insurer" is limited to an insurer, other than SCIF, against which an order of liquidation with a finding of insolvency has been entered by a court of competent jurisdiction. [*See* Ch. 2, § 2.84[1].]

Death Benefits; Duration of Payments. The legislature has amended Labor Code Section 4703.5, adding subsection (b), to provide that payment of death benefits continues until the youngest child reaches the age of 19 if the child is still attending high school and is receiving the benefits as a child of an active member of one of the specified law enforcement or firefighting agencies who is primarily engaged in active law enforcement or firefighting activities and is killed in the performance of duty. [*See* Ch. 9, § 9.02[5].]

Contractors; Workers' Compensation Insurance Coverage. The legislature has amended Business & Professions Code Section 7125 and Insurance Code Section 11665 to extend the operation of these statutes until January 1, 2013, with respect to a license that is active on January 1, 2011, with a C-39 roofing classification, and to require the suspension of any license that, after January 1, 2011, is active and has had the C-39 roofing classification removed, if the licensee is found by the registrar of contractors to have employees and to lack a valid Certificate of Workers' Compensation Insurance or Certification of Self-Insurance. [*See* Ch. 3, § 3.134.]

Contractors; Workers' Compensation Insurance Coverage. The legislature has added Business & Professions Code Section 7127 to provide that, if an employer subject to licensure fails to secure the payment of workers' compensation, and whether that employer is or is not licensed, the registrar may, in addition to any other administrative remedy, issue and serve on that employer a stop order prohibiting the use of employee labor, and that failure to observe a stop order is a misdemeanor punishable by imprisonment in the county jail up to 60 days or by a fine up to $10,000, or both. [*See* Ch. 3, § 3.134.]

Individually Identifiable Information. The legislature has amended Labor Code Section 138.7 to provide that, until January 1, 2017, the State Department of Health Care Services may use individually identifiable information for purposes of seeking recovery of Medi-Cal costs incurred by the state for treatment provided to injured workers that should have been incurred by employers and insurance carriers. [*See* Ch. 1, § 1.12[2].]

Cancer Presumption. The legislature has amended Labor Code Section 3212.1 to provide that the presumption that cancer occurring in certain peace officers and firefighters arose out of, and in the course of, employment be extended following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 120 months. [*See* Ch. 3, § 3.113[4][b].]

CALIFORNIA REGULATIONS.

Official Medical Fee Schedule; Air Ambulances. Effective July 13, 2010, 8 Cal. Code Reg. § 9789.70 has been amended to exclude air ambulances from the official medical fee schedule. [*See* Ch. 22, § 22.05[2].]

Medical Provider Network and Employee Information. Effective October 8, 2010, 8 Cal. Code Reg. §§ 9767.3, 9767.6, 9767.8, 9767.12, 9767.16, 9880, 9881, 9881.1, and 10139 have been amended, as part of the Division of Workers' Compensation's 12-point plan, to streamline MPN notices and procedures and update the employee information provided to workers. [*See* Ch. 5, § 5.05[13][c], [d], [f]; Ch. 22, § 22.01[3]; AppD, §§ F2.08[1], F2.09[1], F6.01[1].]

CALIFORNIA RULES OF COURT.

Appellate Rules. Effective January 1, 2011, the Judicial Council has amended Rules of Court 8.204, regarding contents and form of briefs, and 8.504, regarding form and contents of petition, answer, and reply. [*See* Ch. 34, §§ 34.11[3], 34.22[2].]

CASES.

California Published Cases.

Employment Relationships; Minimum Wage Law. The California Supreme Court in *Martinez v. Combs* (2010) 49 Cal. 4th 35, has held that, in actions under Labor Code Section 1194 to recover unpaid minimum wages, the Industrial Welfare Commission's wage orders generally define the employment relationship and, thus, who may be liable, and that an examination of the wage orders' language, history, and place in the context of California wage law makes clear that those orders do not incorporate the federal definition of employment. [*See* Ch. 3, § 3.06[2].]

Vocational Rehabilitation; Vocational Rehabilitation Maintenance Allowance; Sunsetting. The court of appeal in *Los Angeles County Fire Department v. W.C.A.B. (Norton)* (2010) 184 Cal. App. 4th 1287, has held that the employee was entitled to that part of the Appeals Board's award of vocational rehabilitation maintenance allowance that was not included in the employer's December 30, 2008, petition for reconsideration and, therefore, became final before repeal of Labor Code Section 139.5. [*See* Ch. 35, Special Alert.]

Civil Actions; Workers' Compensation Coverage; Contractor's License; Suspension of License. The court of appeal in *Loranger v. Jones* (2010) 184 Cal. App. 4th 847, has held that there was insufficient evidence to prove that the plaintiff was an unlicensed contractor while working on the defendants' residence for the purpose of applying the automatic suspension provision of Business and Professions Code Section 7125.2 or the sanctions of Business and Professions Code Section 7031. [*See* Ch. 3, § 3.134.]

Civil Actions; Peculiar Risk Doctrine. The court of appeal in *Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal. 4th 518, has held that the doctrine of peculiar risk did not apply when the plaintiff, an on-the-job-injured independent contractor hired by a subcontractor, sought to hold the defendant general contractor vicariously liable for injuries arising from risks inherent in the nature or location of the hired work over which the independent contractor had, through a chain of delegation, been granted control. [*See* Ch. 3, § 3.133.]

Civil Actions; Standing; Attorney's Fees Awards; Interest. The court of appeal in *Koszdin v. State Compensation Insurance Fund* (2010) 186 Cal. App. 4th 480, has held that the plaintiffs, workers' compensation employees' attorneys, had

standing to seek accrued interest on their Appeals Board attorney fee awards under Labor Code Section 5800. [*See* Ch. 27, §§ 27.01[7][a], 27.11[2][a].]

Civil Actions; Subject Matter Jurisdiction; Attorney's Fees Awards; Interest. The court of appeal in *Koszdin v. State Compensation Insurance Fund* (2010) 186 Cal. App. 4th 480, has held that the trial court lacked subject matter jurisdiction to entertain claims for unpaid interest when the Appeals Board did not expressly order payment of interest in its attorney fee awards. [*See* Ch. 27, §§ 27.01[7][a], 27.11[2][a].]

Civil Actions; Apportionment of Fault; Proposition 51; Sovereign Immunity. The court of appeal in *Collins v. Plant Insulation Co.* (2010) 185 Cal. App. 4th 260, has held that under Proposition 51 fault will be allocated to an entity that is immune from paying for its tortious acts but will not be allocated to an entity that is not a tortfeasor, that is, one whose actions have been declared not to be tortious, and that the U.S. Navy is properly included among those entities to which fault may be apportioned pursuant to Proposition 51. [*See* Ch. 11, § 11.24[1][d].]

Civil Actions; Workers' Compensation Proceedings; Settlement. The court of appeal in *Steller v. Sears, Roebuck & Co.* (2010) 189 Cal. App. 4th 175, has held that when, as here, neither the settlement agreement in a civil action nor the judgment in that action expressly required that settlement of a workers' compensation claim between the same parties be approved by the Appeals Board, the judgment will be construed as requiring the Board's subsequent approval. [*See* Ch. 29, § 29.01[2].]

Insurance; Fraud; Summary Adjudication. The court of appeal in *State Compensation Insurance Fund v. Superior Court of San Francisco County, Onvoi Business Solutions, Inc., Real Party in Interest* (2010) 184 Cal. App. 4th 1124, held that the relevant facts in the case were not susceptible of only one legitimate inference and that the plaintiff alleged that the conspiracy involving the defendant was ongoing, even during the present litigation, an allegation that, if proved, would deprive the defendant of the Code of Civil Procedure Section 338(d) statute of limitations defense. [*See* Ch. 2, § 2.03[4].]

Fair Employment and Housing Act; Good Faith Interactive Process. The court of appeal in *Milan v. City of Holtville* (2010) 186 Cal. App. 4th 1028, has held that, because Government Code Section 12940(n) states that the employer is required to engage in an interactive process with the employee "in response to a request for reasonable accommodation by an employee," no such interactive process was required when the employee failed to make such a request to the employer. [*See* Ch. 10, § 10.70[3][d].]

Permanent Disability; AMA *Guides*; 2005 Permanent Disability Rating Schedule. The court of appeal in *Milpitas Unified School District v. W.C.A.B. (Guzman)* (2010) 187 Cal. App. 4th 808, affirming *Almaraz v. Environmental Recovery Services; Guzman v. Milpitas Unified School District* (2009) 74 Cal. Comp. Cases 1084 (Appeals Board en banc opinion), has held that the language of Labor Code Section 4660(b)(1) and (c) permits reliance on the entire AMA *Guides*, including its instructions on the use of clinical judgment, in deriving an employee's impairment rating, and that rebuttal of the permanent disability rating established by the 2005 Permanent Disability Rating Schedule must be supported by substantial evidence. [*See* Ch. 8, § 8.02[3], [4][a]; Ch. 32, §§ 32.01[3][a][ii], 32.02[2][a],

32.03A[1].]

Qualified Medical Evaluators; Ex Parte Communications. The court of appeal in *Alvarez v. W.C.A.B.* (2010) 187 Cal. App. 4th 575, has held that, because a certain degree of informality in workers' compensation procedures has been recognized, not every conceivable ex parte communication with a panel QME permits a party to obtain a new evaluation from another panel QME pursuant to Labor Code Section 4062.3(f). [*See* Ch. 22, § 22.06[3].]

Serious and Willful Misconduct by Employer. The court of appeal in *Bigge Crane & Rigging Co. v. W.C.A.B. (Hunt)* (2010) 188 Cal. App. 4th 1330, has held that the defendant crane operator was not a "managing officer" of the defendant employer within the meaning of Labor Code Section 4553(c), so that his conduct could not support an award of additional compensation, and that the defendant general foreman and supervisor, even assuming that he qualified as a "managing officer" of the defendant employer, did not engage in serious and willful misconduct. [*See* Ch. 10, § 10.01[1][a], [3].]

California Insurance Guarantee Association; Covered Claims. The court of appeal in *Fireman's Fund Insurance Co. v. W.C.A.B. (Colamaria)* (2010) 189 Cal. App. 4th 101, has held that, based on statutory language, legislative history, and judicial decisions, joint and several liability of general and special employers to employees working as temporary employees of the special employer was not extinguished by Labor Code Section 3602(d), which allows general and special employers to avoid duplicate insurance coverage and premiums by agreeing to insure for workers' compensation with a specified insurer. [*See* Ch. 2, § 2.84[3][a].]

Exclusive Remedy; Termination of Employment; Arbitration. The court of Appeal in *SunLine Transit Agency v. Amalgamated Transit Union, Local 1277 (Navarette)* (2010) 189 Cal. App. 4th 292, has held that an arbitration award finding that an employee's employment was not terminated for just/proper cause did not invade the exclusive jurisdiction of the Appeals Board. [*See* Ch. 4, § 4.65[2]; Ch. 21, § 21.03[2][c].]

Psychiatric Injuries; Actual Events of Employment; Good-Faith Personnel Actions. The court of appeal in *San Francisco Unified School District v. W.C.A.B. (Cardozo)* (2010) 190 Cal. App. 4th 1, has held that that, when read together, the plain meaning of Labor Code Section 3208.3(b)(3) and (h) is that the entire set of industrial and nonindustrial causal factors must be taken into consideration in determining whether a psychiatric injury was substantially caused by good-faith personnel actions. [*See* Ch. 4, §§ 4.02[3][f], 4.69[3][d].]

Federal Cases.

Employment Relationships; Choice of Law. The U.S. Court of Appeals, Ninth Circuit, in *Narayan v. EGL, Inc.*, 616 F.3d 895 (9th Cir. 2010) has held that contracts between the plaintiff drivers and the defendant freight and package delivery company, specifying that the plaintiffs were independent contractors, not employees of the defendant, and specifying that the contracts were to be "interpreted under laws of State of Texas," did not mean that the present dispute was to be resolved pursuant to Texas law rather than California law. [*See* Ch. 3, § 3.22[3].]

Employment Relationships; Summary Judgment. The U.S. Court of Appeals, Ninth Circuit, in *Narayan v. EGL, Inc.*, 616 F.3d 895 (9th Cir. 2010) has held that the

district court's summary judgment for the defendant was improper since, under California law, there existed at the very least sufficient indicia of an employment relationship between the plaintiffs and the defendant that could lead a reasonable jury to find the existence of such a relationship. [*See* Ch. 3, § 3.03.]

Malicious Prosecution; Chiropractors; Manipulation Under Anesthesia. The U.S. District Court, Eastern District of California, in *Ambrose v. Coffey*, 75 Cal. Comp. Cases 338 (E.D. Cal. 2010) has held that the outcome of a lawsuit by various chiropractors, alleging, inter alia, false arrest and malicious prosecution, against a district attorney, a district attorney's investigator, and an insurance company and its employee, each of whom had been instrumental in the filing of criminal complaints against the chiropractors that alleged, inter alia, felony offenses premised on the illegality of MUA, would turn in part on whether, at the time criminal proceedings were instituted against the chiropractors, it was clearly established that performance of MUA was lawful under California law. [*See* Ch. 5, § 5.02[3A].]

Insurance; Comprehensive General Liability Policy; Exclusions for Workers' Compensation. The U.S. District Court, Southern District of California, in *Prescott Companies v. Mt. Vernon Fire Insurance Co.*, 75 Cal. Comp. Cases 362 (S.D. Cal. 2010) has held that an insurer had no obligation to defend an insured against claims arising from an industrial injury to the insured's employee, when the insurer covered the insured with a comprehensive general liability policy that contained (1) an exclusion for bodily injury to any employee "arising out of or in the course of" employment, and (2) an exclusion of any "obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law." [*See* Ch. 2, § 2.81.]

Medicare Secondary Payer; Reimbursement; Beneficiary's Attorney. The U.S. District Court, Northern District of West Virginia, in *U.S. v. Harris*, 2009 U.S. Dist. LEXIS 23956 (N.D.W.V. 2009) has held that an attorney who represented a Medicare beneficiary in a personal injury lawsuit, and who received his fee from the settlement proceeds in that case, was liable to CMS for reimbursement in the amount that Medicare had paid for the beneficiary's medical treatment stemming from the injury. [*See* Ch. 29, § 29.09[2][c].]

Bankruptcy; Recoverable Preferences; Criminal Restitution Payments. The U.S. Court of Appeals, Ninth Circuit, in *Silverman v. Zamora*, 616 F.3d 1001 (9th Cir. 2010) has held that, under the plain language of 11 U.S.C.S. Section 547(b), criminal restitution payments that otherwise meet the requirements of that statute are recoverable preferences in a Chapter 7 bankruptcy. [*See* Ch. 2, § 2.03[2].]

Employment Discrimination; California Department of Fair Employment and Housing; Americans with Disabilities Act; Equal Employment Opportunity Commission. The U.S. Court of Appeals, Ninth Circuit, in *Stiefel v. Bechtel Corp.*, 624 F.3d 1240 (9th Cir. 2010) has held that, when a plaintiff files a disability discrimination complaint with a state agency acting, with respect to ADA complaints, as an agent of the EEOC, and receives a right-to-sue letter from the state agency, the plaintiff need not file a separate complaint with the EEOC nor receive an EEOC right-to-sue letter in order to file the suit. [*See* Ch. 10, §§ 10.60[4], 10.72.]

Employment Discrimination; Americans with Disabilities Act; Post-Termination Claims. The U.S. Court of

Appeals, Ninth Circuit, in *Stiefel v. Bechtel Corp.*, 624 F.3d 1240 (9th Cir. 2010) has affirmed the district court's dismissal of the plaintiff's claim of post-termination employment discrimination under the ADA and held that, after the plaintiff was laid off, he failed to take the steps necessary to give the defendant a chance to rehire him. [*See* Ch. 10, § 10.60[4].]

California WCAB En Banc Opinions.

Permanent Disability; Rating; Whole Person Impairment. The Appeals Board en banc in *Blackledge v. Bank of America* (2010) 75 Cal. Comp. Cases 613 (Appeals Board en banc opinion) has set out the respective rules and responsibilities of a physician, the WCJ, and the rater in assessing an injured employee's whole person impairment under the AMA *Guides*. [*See* Ch. 8, § 8.02[3].]

California Unpublished Court of Appeal Cases.

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.*

Temporary Disability; Permanent Disability; Substantial Evidence. The court of appeal in *E & J Gallo Winery v. W.C.A.B. (Garcia)* (2010) 75 Cal. Comp. Cases 408 (court of appeal opinion not published in official reports) has held that substantial evidence supported the Appeals Board's award of temporary disability and its deferral of a permanent disability determination pending further development of the medical record. [*See* Ch. 34, § 34.16[1].]

Temporary Disability; Permanent and Stationary; Substantial Evidence. The court of appeal in *Livengood v. W.C.A.B.* (2010) 75 Cal. Comp. Cases 690 (court of appeal opinion not published in official reports) has held that, because the WCJ made conflicting findings regarding the employee's temporary disability status, each supported by substantial evidence, the Appeals Board's order denying reconsideration must be annulled and the matter remanded. [*See* Ch. 7, § 7.02[1].]

Permanent Disability; Rating; Unauthorized Medical Treatment. The court of appeal in *Leprino Foods v. W.C.A.B. (Barela)* (2010) 75 Cal. Comp. Cases 415 (court of appeal opinion not published in official reports) has affirmed an Appeals Board decision as based on substantial evidence and held that nothing in the Labor Code provisions regarding medical treatment dispute resolution evidenced a legislative intent to restrict the level of permanent disability awards to that resulting from treatment obtained only under the workers' compensation system. [*See* Ch. 8, § 8.02[4][a].]

Permanent Disability; Permanent and Stationary Status; Application of 1997 Schedule for Rating Permanent Disabilities; Good Cause to Reopen. The court of appeal in *Avila-Gonzalez v. W.C.A.B.* (2010) 75 Cal. Comp. Cases 1069 (court of appeal opinion not published in official reports) has held that the interpretations of Labor Code Section 4660(d) in *Genlyte Group v. W.C.A.B. (Zavala)* and *Zenith Insurance Co. v. W.C.A.B. (Cugini)*, adopted after the WCJ's original decision in the present case, constituted a change in the law from the interpretation adopted in *Vera v. W.C.A.B.* and, thus, constituted good cause to reopen that decision pursuant to Labor Code Section 5803, and that the interpretations of Labor Code Section 4660(d) adopted in *Genlyte* and *Zenith* should govern the determination of which permanent disability rating schedule ap-

plies in the present case. [*See* Ch. 8, § 8.02[4][a].]

Insurance; Medical Provider Networks; Notice. The court of appeal in *Krause v. W.C.A.B.* (2010) 75 Cal. Comp. Cases 683 (court of appeal opinion not published in official reports) has held that the Appeals Board did not err by failing to treat certain notification errors regarding the employer's MPN as a basis for the employee to treat outside the MPN. [*See* Ch. 5, § 5.05[13][c].]

Psychiatric Injury; Six-Month Employment Rule; Sudden and Extraordinary Employment Condition. The court of appeal in *Campos v. W.C.A.B.* (2010) 75 Cal. Comp. Cases 565 (court of appeal opinion not published in official reports) has held that the employee's psychiatric injury was caused by an employment condition that was both sudden and extraordinary, when it found that the employee, a tree trimmer sustained injury when suspended halfway up an 80-foot tree that he was cutting and the trunk of the tree fell, hitting him in the chest and causing serious physical and psychiatric injuries. [*See* Ch. 4, § 4.02[3][d].]

Employment Relationships. The court of appeal in *Duenas v. W.C.A.B. (Ayala)* (2010) 75 Cal. Comp. Cases 829 (court of appeal opinion not published in official reports) has held that, pursuant to Labor Code Section 3352(h), the worker was excluded from coverage for workers' compensation benefits at the time of his injury because he had worked for the defendant for fewer than 52 hours and had been paid less than $100 by the defendant. [*See* Ch. 3, § 3.36[2][b].]

Utilization Review; Objection to Utilization Review Determinations; Timeliness. The court of appeal in *Trimas Corp. v. W.C.A.B. (Rendon)* (2010) 75 Cal. Comp. Cases 856 (court of appeal opinion not published in official reports) has held that the employer, by questioning the AME on deposition long after expiration of the 20-day period specified by Labor Code Section 4062(a) for objecting to utilization review determinations, indicated its agreement to submit the matter to the Appeals Board. [*See* Ch. 22, § 22.06[2][a].]

Serious and Willful Misconduct by Employers; Evidence. The court of appeal in *Ford Construction Co. v. W.C.A.B. (Newell)* (2010) 75 Cal. Comp. Cases 953 (court of appeal opinion not published in official reports) has held that the evidence did not support the Board's finding that the employer, in violation of Labor Code Section 4553, engaged in serious and willful misconduct that was the proximate cause of the accident that killed an employee, when many witnesses testified that the method employed by the deceased and his coworker was an acceptable method of performing the task during which the deceased was killed. [*See* Ch. 10, § 10.01[4][b].]

Discovery; HIV Data. The court of appeal in *Children's Hospital & Research Center Oakland v. W.C.A.B. (McKnight)* (2010) 75 Cal. Comp. Cases 1111 (court of appeal opinion not published in official reports) has held that a discovery order requiring the employer hospital to review its medical records of children who participated in the employer's Parent Infant Program for 14 different years during the employment of an employee, who sought workers' compensation benefits based on allegations that she contracted the HIV virus as a result of her contact with an unidentified HIV-infected child or children in that program, and to disclose by month the number of children in the program who were HIV-positive, when the court found that such an order violated the "absolute" protection afforded by Health & Safety

Code Section 120975, which provides that no person may be compelled in any legal proceeding to "identify or provide identifying characteristics that would identify any individual who is the subject of a blood test to detect antibodies to HIV." [*See* Ch. 25, § 25.43.]

Petitions to Reopen; Good Cause; New and Further Disability. The court of appeal in *California Highway Patrol v. W.C.A.B. (Griffin)* (2010) 75 Cal. Comp. Cases 1241 (court of appeal opinion not published in official reports) has held that, although Labor Code Section 5410 requires a causal connection between any alleged new and further disability and the original injury, a petition to reopen for good cause, other than for new and further disability, under Labor Code Section 5803 does not require a causal connection to the original injury. [*See* Ch. 31, § 31.04[2][d].]

California WCAB Decisions Denied Writ of Review.

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.*

Awards; WCAB Jurisdiction; Stipulations. The Appeals Board in *California Insurance Guarantee Association v. W.C.A.B. (Villanueva)* (2010) 75 Cal. Comp. Cases 745 (writ denied) has held that the WCJ had jurisdiction more than five years after the employee's industrial injuries to his neck, back, head, and left shoulder to issue a stipulated award entitling the employee to benefits for injury to his "low back," and that such benefits were properly awarded, based on the parties' intent, notwithstanding the WCJ's earlier final order in which the WCJ specifically determined that the employee suffered no injury to his low back but only to his "upper back." [*See* Ch. 24, § 24.13[2].]

Stipulations; Setting Aside. The Appeals Board in *City of Anaheim v. W.C.A.B. (Ott)* (2010) 75 Cal. Comp. Cases 371 (writ denied) has held that the parties' stipulation to use the 2005 Permanent Disability Rating Schedule to rate permanent disability caused by an injury incurred during a cumulative trauma period ending 1/18/2003 was incorrect because the employer stopped paying temporary disability indemnity before 1/1/2005, requiring the employer to provide the employee with notice pursuant to Labor Code Section 4061 and making the 1997 Schedule for Rating Permanent Disabilities applicable under Labor Code Section 4660(d). [*See* Ch. 26, § 26.06[2].]

Psychiatric Injuries; Six-Month Employment Rule. The Appeals Board in *Martinez v. W.C.A.B.* (2010) 75 Cal. Comp. Cases 381 (writ denied) has held that the employer could raise, for the first time at trial, application of the six-month employment requirement as a defense to the employee's claim for psychiatric injury, since the parties' stipulation, at the mandatory settlement conference, to the employee's psychiatric injury and the employer's failure to raise the defense earlier did not preclude the employer from timely raising the six-month rule. [*See* Ch. 4, § 4.02[3][d].]

Psychiatric Injuries; Predominant Cause Requirement. The Appeals Board in *Trugreen Landcare v. W.C.A.B. (Gomez)* (2010) 75 Cal. Comp. Cas. (MB) 385 (writ denied) has held that two separate industrial causes of injury to the psyche may be combined to satisfy the compensability requirement that actual events of employment were predominant as to all causes combined of that injury. [*See* Ch. 4, § 4.02[3][a].]

Psychiatric Injuries; Good Faith Personnel Actions. The Appeals Board in *Sedgwick Claims Management Services, Inc. v. W.C.A.B. (Manguiat)* (2010) 75 Cal. Comp. Cases 1037 (writ denied) has held that the employer failed to meet the burden of proving that the employee/deputy sheriff's psychiatric injury "was substantially caused by a lawful, nondiscriminatory, good faith personnel action" so as to bar the employee's claim for compensation under Labor Code Section 3208.3(h). [*See* Ch. 4, §§ 4.02[3][f], 4.69[3][d].]

Psychiatric Injuries; Good Faith Personnel Actions; Suicide. The Appeals Board in *Stafford v. W.C.A.B.* (2010) 75 Cal. Comp. Cases 1040 (writ denied) has held that a decedent/armed guard's industrially-related suicide was not compensable under Labor Code Section 3208.3(h) because the employer's investigation of the decedent regarding an alleged theft constituted a regular, objectively reasonable, and routine personnel decision made and carried out in good faith, based on the totality of circumstances. [*See* Ch. 4, §§ 4.02[3][f], 4.69[3][d].]

Presumption of Industrial Causation; Cancer; Firefighters. The Appeals Board in *County of Ventura v. W.C.A.B. (Bastian)* (2010) 75 Cal. Comp. Cases 513 (writ denied) has found the presumption of industrial causation in Labor Code Section 3212.1 applicable when the employee, who developed breast cancer while employed as a firefighter, identified two specific instances of exposure to benzene and diesel fuel, known carcinogens, during her employment, and held that the employer failed to rebut the statutory presumption of compensability, notwithstanding the AME's opinion that the employee's breast cancer was non-industrial and evidence that the employee was genetically pre-disposed to breast cancer because she carried an abnormal BRCA-2 gene. [*See* Ch. 3, § 3.113[4][b].]

Medical Provider Networks; Notice Requirements; Transfer of Care. The Appeals Board in *Godinez v. W.C.A.B.* (2010) 75 Cal. Comp. Cases 525 (writ denied) has held that an employee was required to transfer her medical treatment into her employer's MPN, one year following receipt of notice for completion of treatment for a "serous and chronic" condition, when the employer had sent proper transfer notices to the employee on three separate occasions and sent copies to the employee's attorney and her primary treating physician, and separate proof of service by mail was not necessary to prove that the requisite notices had been mailed. [*See* Ch. 5, § 5.05[13][c].]

Medical Treatment; Conservatorships; Costs. The Appeals Board in *Hodgman v. W.C.A.B.* (2010) 75 Cal. Comp. Cases 910 (writ denied) has held that the employee was not entitled to be reimbursed for legal and court costs incurred to create and maintain the conservatorship of the estate and the person as ancillary to medical treatment for his industrial injury. [*See* Ch. 31, § 31.21[1].]

Medical Treatment; Spinal Surgery. The Appeals Board in *County of Sonoma v. W.C.A.B. (Fifer)* (2010) 75 Cal. Comp. Cases 1018 (writ denied) has held that the employer was liable for providing spinal surgery to the employee with a cervical/thoracic spine injury, notwithstanding the AME's opinion that the employee's need for spinal surgery was unrelated to her industrial injury, since the employer had failed to properly or timely comply with 8 Cal. Code Reg. Section 9788.1 or 9788.11 in objecting to the treat-

ing physician's request for authorization to perform surgery. [*See* Ch. 22, § 22.06[2][b].]

Contribution; Time to Initiate Proceedings. The Appeals Board in *Zurich Insurance Co. v. W.C.A.B. (Goodrich)* (2010) 75 Cal. Comp. Cases 552 (writ denied) has held that third-party administrator Sedgwick's claim for contribution/reimbursement against multiple insurers for benefits paid to an employee with admitted industrial injuries was not barred by the one-year statute of limitations in Labor Code Section 5500.5(e). [*See* Ch. 31, § 31.13[2][a].]

Contribution; Effect of Prior Stipulation. The Appeals Board in *Chartis Insurance v. W.C.A.B. (Hardin)* (2010) 75 Cal. Comp. Cases 891 (writ denied) has held that the carrier seeking contribution was not bound under the doctrine of res judicata by its prior stipulation with the employee regarding the date of the employee's injury, since the carrier against whom contribution was being sought was not a party to the stipulation. [*See* Ch. 31, § 31.13[2][e].]

California Insurance Guarantee Association; Contribution and Reimbursement. The Appeals Board in *Marriott International, Inc. v. W.C.A.B. (Gonzalez)* (2010) 75 Cal. Comp. Cases 913 (writ denied) has rescinded the WCJ's finding that the Board had no jurisdiction over CIGA's request for reimbursement against a co-defendant filed after the employee's claim for injuries was dismissed, and held that, although the WCJ's order dismissing the claim did not reserve jurisdiction over CIGA's right to reimbursement and CIGA should have protected its rights via a timely petition for reconsideration of the dismissal order, the order was intended to dismiss only the employee's case, not CIGA's right to contribution/reimbursement. [*See* Ch. 2, § 2.84[3][c].]

Sanctions. The Appeals Board in *Billups v. W.C.A.B.* (2010) 75 Cal. Comp. Cases 650 (writ denied) has held that an employer was not liable for sanctions under Labor Code Section 5813 or 8 Cal. Code Reg. § 10561, because the treating physician's request for authorization of medical treatment was sent to an incorrect address and was not clearly identified. [*See* Ch. 23, § 23.15.]

Sanctions. The Appeals Board in *Houston v. W.C.A.B.* (2010) 75 Cal. Comp. Cases 770 (writ denied), on its own motion, removed the matter to itself and, absent a showing of good cause, imposed sanctions in the sum of $1,000 under Labor Code Section 5813 and 8 Cal. Code §10561 on an attorney for an employee with an alleged cumulative trauma, after the employee's attorney secured an ex parte order awarding attorney's fees on an inappropriate "walk-through" basis without prior notice and without disclosing to the WCJ that her prior request for attorney's fees had been denied by a different WCJ, two weeks earlier. [*See* Ch. 23, § 23.15.]

Permanent Disability; Rating; AMA *Guides*. The Appeals Board in *MV Transportation, Inc. v. W.C.A.B. (Williams)* (2010) 75 Cal. Comp. Cases 656 (writ denied) has held that nothing in Labor Code Section 4660 requires physicians to use the AMA *Guides* for establishing a diagnosis, but that physicians are directed to use the AMA *Guides* to find impairments based on clinical findings, as was done here by the AME. [*See* Ch. 32, § 32.03A[1].]

Permanent Disability; Rating; AMA *Guides*. The Appeals Board in *Sonoma County Office of Education v. W.C.A.B. (Sanchez)* (2010) 75 Cal. Comp. Cases

1228 (writ denied) has held that the WCJ correctly determined the employee's permanent disability pursuant to *Almaraz v. Environmental Recovery Services; Guzman v. Milpitas Unified School District*, based on grip loss, when the AME indicated that the three-percent whole person impairment allowing for peripheral neuropathy under a strict reading of the AMA *Guides* was an inadequate measure of the employee's impairment. [*See* Ch. 8, § 8.02[3], [4][a]; Ch. 32, §§ 32.01[3][d], 32.02[2][a], 32.03A[1].]

Permanent Disability; Application of 2005 Permanent Disability Rating Schedule. The Appeals Board in *Neitzke v. W.C.A.B.* (2010) 75 Cal. Comp. Cases 661 (writ denied) has held that the 2005 Permanent Disability Rating Schedule applied to rate permanent disability resulting from the employee's June 2004 admitted industrial left knee injury, when there was no indication from a treating physician that the employee's condition was permanent and stationary or that the employee had suffered any permanent disability prior to January 2005, and that operative reports and diagnostic studies alone indicating the existence of permanent disability could not be relied on without a corroborating medical opinion from a physician. [*See* Ch. 8, § 8.02[4][a].]

Statute of Limitations; Time to File Claims. The Appeals Board in *City of Los Angeles v. W.C.A.B. (Johns)* (2010) 75 Cal. Comp. Cases 755 (writ denied) has upheld the WCJ's finding that an employee's 1999 claims for industrial injury to his heart on April 12, 1998, and during a cumulative period from 1967 through January 1987 were not barred by the statute of limitations since the employer did not establish, for the purpose of Labor Code Section 5412, that the employee had a disability and knew that the disability was industrially caused more than one year prior to the time the employee filed his claims. [*See* Ch. 24, § 24.03[6][b].]

Statute of Limitations; Cumulative Trauma. The Appeals Board in *Zenith Insurance Co. v. W.C.A.B. (Yanos)* (2010) 75 Cal. Comp. Cases 1303 (writ denied) has held that an employee's claim for cumulative trauma filed in February 2004 was not barred by the one-year statute of limitations, when the Board found that the employee first knew that her injuries were work-related and became aware of the time limit within which to file a claim upon meeting with her attorney in January 2004, even though she first suffered disability in January 2002 and was told by her treating physician as early February 2003 to file a workers' compensation claim, because she did not know what cumulative trauma was or that she had to file within one year. [*See* Ch. 24, § 24.03[6][b].]

Subsequent Injuries Benefits Trust Fund; Medical-Legal Process. The Appeals Board in *Duncan v. W.C.A.B. (Moyers)* (2010) 75 Cal. Comp. Cases 762 (writ denied) has held that an employee with cumulative trauma injuries was entitled to obtain medical-legal evaluations in her Subsequent Injuries Benefits Trust Fund case without returning to the AME used in her workers' compensation case-in-chief or otherwise using the AME or QME process, and that the Subsequent Injuries Benefits Trust Fund was obligated to pay the reasonable costs of evaluations so obtained. [*See* Ch. 8, § 8.09[6]; Ch. 31, § 31.20[4][e].]

Vocational Rehabilitation; Sunsetting. The Appeals Board in *Ferguson Sanchez v. W.C.A.B.* (2010) 75 Cal. Comp. Cases 786 (writ denied) has held that when the Board, on 12/11/2008, denied reconsideration of the WCJ's award to an employee of retroactive vocational rehabilitation mainte-

nance allowance, and the employer's right to appeal that decision did not expire before 1/1/2009, the employee's right to vocational rehabilitation maintenance allowance did not vest, and repeal of Labor Code Section 139.5, effective 1/1/2009, operated to extinguish her inchoate right. [*See* Ch. 35, Special Alert.]

Vocational Rehabilitation; Sunsetting. The Appeals Board in *Williams v. W.C.A.B.* (2010) 75 Cal. Comp. Cases 797 (writ denied) has rejected the WCJ's reasoning that, because Labor Code Section 4654(d) ceased to exist after the 1/1/2009 repeal of Labor Code Section 139.5, the employer's timely appeal on 1/15/2009 of the Rehabilitation Unit's 12/24/2008 Determination awarding a vocational rehabilitation maintenance allowance was invalid, holding instead that the 12/24/2008 Determination was not a final order resulting in the vesting of the employee's right to vocational rehabilitation benefits prior to the 1/1/2009 repeal of Labor Code Section 139.5. [*See* Ch. 35, Special Alert.]

Compromise and Release; Payment of Proceeds. The Appeals Board in *Yaohan USA Corp. v. W.C.A.B. (Pineda)* (2010) 75 Cal. Comp. Cases 925 (writ denied) has held that the employer was obligated to pay the employee the proceeds of a compromise and release even though the employer had timely sent a settlement check to the employee's attorney for payment to the employee, a check that the employee never received because an employee of the employee's attorney, after forging the employee's signature, cashed the check without the attorney's knowledge. [*See* Ch. 29, § 29.04[6].]

Temporary Disability; Amount of Benefit. The Appeals Board in *Kimball v. W.C.A.B.* (2010) 75 Cal. Comp. Cases 1022 (writ denied) has held that the employee was not entitled to increased temporary disability as a result of a raise in her salary that took effect under her union contract prior to the date temporary disability payments were finally made but over three years after she was declared permanent and stationary. [*See* Ch. 6, § 6.02[7].]

Temporary Disability; Two-Year Limitation on Indemnity Payments; Amputation Exception. The Appeals Board in *Burtec Waste Industries v. W.C.A.B. (Collinwood)* (2010) 75 Cal. Comp. Cases 1175 (writ denied) has held that removal of an employee's breast implants following an industrial injury that damaged the left implant constituted "amputation" within the meaning of Labor Code Section 4656(c)(3)(C), thereby entitling the employee to 240 weeks, rather than only 104 weeks, of temporary disability indemnity. [*See* Ch. 7, § 7.02[1].]

Injury AOE/COE; Burden of Proof. The Appeals Board in *Porras v. W.C.A.B.* (2010) 75 Cal. Comp. Cases 1028 (writ denied) has held that the employee failed to prove by a preponderance of the evidence that he suffered an industrial injury in the form of nasopharyngeal cancer. [*See* Ch. 4, § 4.05[2][a].]

Injury AOE/COE; Qualified Medical Evaluators; 8 Cal. Code Reg. § 30(d)(3). The court of appeal in *Mendoza v. W.C.A.B.* (2010) 75 Cal. Comp. Cases 1204 (writ denied) has denied a writ of review of the en banc decision of the Appeals Board in *Mendoza v. Huntington Hospital* (2010) 75 Cal. Comp. Cases 634 (Appeals Board en banc opinion), which held that 8 Cal. Code Reg. § 30(d)(3) is invalid because it conflicts with Labor Code Sections 4060(c) and 4062.2 and exceeds the scope of Labor Code Section 5402(b). [*See* Ch. 22, § 22.11[1].]

Injury AOE/COE; Compensable Con-

sequence Injuries. The Appeals Board in *Craig v. W.C.A.B.* (2010) 75 Cal. Comp. Cases 1192 (writ denied) has held that an employee with an admitted right shoulder injury did not incur a compensable injury to his left shoulder, three months later, while attempting to place bricks on the roof of his cabin to protect the cabin from an impending storm, as a consequence of his industrial injury, despite the panel QME's contrary opinion, since the employee, in undertaking such activities while temporarily totally disabled and scheduled for surgery due to his industrial injury, acted rashly and with knowledge of the potential risk involved. [*See* Ch. 4, § 4.94[2].]

Injury AOE/COE; Burden of Proof; Cancer. The Appeals Board in *Borges v. W.C.A.B.* (2010) 75 Cal. Comp. Cases 1281 (writ denied) has held that an employee did not meet his burden of proving through substantial evidence that his colorectal cancer was caused by workplace asbestos exposure, since he provided insufficient evidence regarding the nature and extent of his asbestos exposure so as to establish a causal link between his employment and his cancer. [*See* Ch. 3, § 3.113[4][b].]

Death Benefits; Dependents; Carve-Out Agreements. The Appeals Board in *Brunton Enterprises, Inc. v. W.C.A.B. (Shilts)* (2010) 75 Cal. Comp. Cases 1172 (writ denied) has held that a "carve-out" agreement between the decedent's union and the employer did not apply to a non-employee dependent's claim for death benefits. [*See* Ch. 1, § 1.04[1]; Ch. 9, § 9.01[4].]

Medical-Legal Procedure; Panel Qualified Medical Evaluators; Failure to Timely Submit Report. The Appeals Board in *Charkchyan v. W.C.A.B.* (2010) 75 Cal. Comp. Cases 1183 (writ denied) has held that the employee was not entitled to a replacement QME panel on the basis that the original panel QME served his report one day beyond the 30-day time frame allowed for service, when the employee's objection to the report was untimely because it was made after the report was served (although the employee had not yet received it). [*See* Ch. 22, §§ 22.06[4], 22.13.]

CHECKLISTS FOR SUMMARY RATING AND CONSULTATIVE RATING

Checklists for requesting a Summary Rating and a Consultative Rating using EAMS have been added. [*See* Ch. 32, § 32.05[3][b][ii], [5].]

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