

PUBLICATION UPDATE

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California Law of Employee Injuries and Workers' Compensation

Publication 270 Release 78

September 2013

HIGHLIGHTS

Administrative Regulations

- Changes made through Register 2013, No. 18 (5/3/13) have been added.

Court Cases; WCAB En Bancs and Significant Panel Decisions; WCAB Decisions Denied Judicial Review

- Recent important decisions have been added, including those interpreting SB 863 Reforms.

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CALIFORNIA REGULATIONS. The following rule changes have been added:

Hospital Outpatient Departments and Ambulatory Surgical Centers. The Division of Workers' Compensation has amended the regulations, 8 Cal. Code Reg. §§ 9789.30–9789.39, governing fee schedules of hospital outpatient departments and ambulatory surgical centers. [See Ch. 22, § 22.05[2].]

Independent Bill Review. The Division of Workers' Compensation, implementing relevant statutory provisions enacted by SB 863, has promulgated emergency regulations, 8 Cal. Code Reg. §§ 9792.5.1–9792.5.15, governing independent bill review. [See Ch. 5, § 5.02[2][e].]

Special Alerts. These have been included regarding the following emergency regulations:

- Qualified Medical Evaluators; Electronic Document Filing. [See Ch. 1, Special Alert.]
- Self-Insurance. [See Ch. 2, Special Alert.]
- Independent Medical Review; Interpreter Certification; WCAB Rules of Practice and Procedure: Medical Treatment. [See Ch. 5, Special Alert.]
- Permanent Disability Rating Determination. [See Ch. 8, Special Alert.]
- Lien Filing Fees; WCAB Rules of Practice and Procedure: Liens. [See Ch. 30, Special Alert.]

Division of Workers' Compensation's

Lien Filing Instructions. The DWC, as part of its implementation of SB 863, has posted step-by-step instructions on new lien filing requirements that went into effect January 1, 2013 [see <http://www.dir.ca.gov/dwc/liens.htm>]. DWC's "at a glance" guide is included in this release. [See Ch. 30, § 30.20[1].]

CALIFORNIA CASES. The following cases have been discussed.

Published Cases.

Vocational Rehabilitation; Appeals.

The court of appeal in *The Kroger Co. v. Workers' Comp. Appeals Bd. (Rodriguez)* (2012) 210 Cal. App. 4th 952, has held that the employer perfected its appeal of the Rehabilitation Unit's November 2007 award of VRMA by timely filing a petition for appeal, which was pending on the date on which the repeal of VR became effective, making the award not final and, thus, unenforceable, and the employer's failure to file a declaration of readiness within the time period allowed for perfection of an appeal did not affect perfection of the appeal. [See Ch. 27, § 27.13.]

Employment Contracts; Arbitration; Employees or Independent Contractors.

The court of appeal in *Elijahjuan v. Superior Court* (2012) 210 Cal. App. 4th 15, has held that the contract between the parties requiring arbitration of disputes "with regard to its application or interpretation" did not cover the present lawsuit because that lawsuit did not concern application or interpretation of the contract, but instead sought to enforce rights arising under the Labor Code benefitting employees but not independent contractors. [See Ch. 3, § 3.130.]

Disability Discrimination; Dismissal from Employment; Interactive Process.

The court of appeal in *Mooney v. County of Orange* (2013) 212 Cal. App. 4th 865, has held that the plaintiff was neither "dismissed" from employment by the defendant because of disability, within the meaning of Government Code Section 31725, nor "separated" from employment by the defendant, within the meaning of Government Code Section 31721(a), with the court emphasizing the interactive process engaged in by the defendant. [See Ch. 10, § 10.70[3][d][i].]

Civil Actions Against Employers; Negligent Hiring and Supervision; Violations of Civil Code Section 51.7.

The court of appeal in *Ventura v. ABM Industries, Inc.* (2012) 212 Cal. App. 4th 258, affirmed the trial court's judgment entered in favor of the plaintiff, a former employee of the defendant, on causes of action for negligent supervision and hiring and violation of Civil Code Section 51.7, and found, *inter alia*, that the defendant waived the exclusive remedy defense against the cause of action for negligent hiring and supervision. [See Ch. 11, § 11.05[4].]

Third Party Actions; Exclusive Remedy; Judicial Estoppel; Volunteers. The

court of appeal in *Minish v. Hanuman Fellowship* (2013) 214 Cal. App. 4th 437, has held that the trial court erred in granting summary judgment in a defendant non-profit organization's favor, either on the affirmative defense of workers' compensation as the plaintiff's exclusive remedy or on a judicial estoppel theory, when the plaintiff was volunteering for the organization when she was injured from a fall off a forklift. [See Ch. 3, § 3.82[5]; Ch. 21, §§ 21.03[1][b], 21.04[1][a].]

Medical Treatment; Self-Procured Treatment; Primary Treating Physicians. The court of appeal in *Adventist Health v. Workers' Comp. Appeals Bd.* (2012) 211 Cal. App. 4th 376, held that an injured employee was not entitled to reimbursement for treatment she received from certain physicians because they were not her primary treating physician. [See Ch. 5, § 5.07[10][d].]

Medical Reports. The court of appeal in *Adventist Health v. Workers' Comp. Appeals Bd. (Fletcher)* (2012) 211 Cal. App. 4th 376, annulling an Appeals Board order withholding inclusion of a physician's medical reports from an injured employee's medical records, held that there was neither statutory authority nor good cause to support such an order. [See Ch. 22, § 22.08[3][a].]

Temporary Disability; 104-Week Limit. The court of appeal in *County of Alameda v. Workers' Comp. Appeals Bd. (Knittel)* (2013) 213 Cal. App. 4th 278, salary continuation benefits paid to an injured public safety officer counted toward the 104-week limit on temporary disability payments specified in Labor Code Section 4656(c)(2). [See Ch. 7, § 7.02[2][c].]

WCAB En Banc and Significant Panel Opinions.

Jurisdiction; Forum Selection Clauses.

The Appeals Board en banc in *McKinley v. Arizona Cardinals* (2013) 78 Cal. Comp. Cases 23 (Appeals Board en banc opinion) has declined to exercise jurisdiction over a claim of industrial injury when there was a reasonable mandatory forum selection clause in the employment contract specifying that claims for workers' compensation must be filed in Arizona. [See Ch. 21, § 21.07[5].]

Air Ambulance; Official Medical Fee Schedule. The Appeals Board en banc in *Enriquez v. Couto Dairy* (2013) 78 Cal. Comp. Cases 323 (Appeals Board en banc opinion) has held that: (1) neither the California Constitution nor the Labor Code prevents the Board from finding preemption of the regulation that contains the official medical fee schedule for air ambulance services; (2) the federal Airline De-regulation Act preempts that regulation if a lien claimant for air ambulance services is "an air carrier that may provide air transportation"; and (3) the air ambulance provider has the burden of showing that it is "an air carrier that may provide air transportation," including showing that it is authorized to provide interstate air transportation. [See Ch. 22, § 22.05[2].]

Liens; Activation Fee. The Appeals Board en banc, affirming an Appeals Board significant panel decision, *Figueroa v. B.C. Doering Co.* (2013) 78 Cal. Comp. Cases 336 (Appeals Board significant panel decision), has held in *Figueroa v. B.C. Doering Co.* (2013) 78 Cal. Comp. Cases 439 (Appeals Board en banc opinion) that, when a lien claim falls within the newly enacted lien activation fee requirements of Labor Code Section 4903.06: (1) the lien activation fee must be paid prior to commencement of the lien conference, which is the time when the conference is scheduled to begin, not the time when the case is actually called; (2) if the lien claimant fails to

pay the lien activation fee prior to commencement of the lien conference and/or fails to provide proof of payment at the conference, its lien must be dismissed with prejudice; (3) breach of the employer's duty to serve the required documents or to engage in settlement negotiations does not excuse the lien claimant's obligation to pay the lien activation fee; and (4) notice of intention is not required prior to dismissing a lien with prejudice for failure to pay the lien activation fee or failure to present proof of payment of the lien activation fee at the lien conference. [See Ch. 30, § 30.20[1].]

Liens; Activation Fee. The Appeals Board in a significant panel decision has held in *Mendez v. Le Chef Bakery* (2013) 78 Cal. Comp. Cases 454 (Appeals Board significant panel decision) that a lien claimant was not required to pay the lien activation fee prior to a 2013 lien trial, when the Board found that a declaration of readiness was filed prior to January 1, 2013, that the lien conference took place prior to January 1, 2013, and that the lien trial took place in 2013 without any intervening 2013 lien conference, so that the lien claim did not fall within the newly enacted lien activation fee requirements of Labor Code Section 4903.06(a), which became effective on January 1, 2013. [See Ch. 30, § 30.20[1].]

Liens; Activation Fee; Costs. The Appeals Board en banc in *Martinez v. Terrazas* (2013) 78 Cal. Comp. Cases 444 (Appeals Board en banc opinion) held that: (1) a claim for medical-legal expenses may not be filed as a petition for costs under Labor Code Section 5811; and (2) medical-legal lien claimants who withdrew their liens and filed petitions for costs prior to the present decision may pursue recovery through the lien process if they comply with the lien activation fee requirements of Labor Code Section 4903.06 and if their

liens have not otherwise been dismissed. [See Ch. 30, § 30.20[1].]

Unpublished Court of Appeal Cases.

CAUTION: *The following court of appeal cases were not certified for publication. These cases may not be cited or relied on by a court or a party in any other action pursuant to California Rules of Court, Rule 8.1115(a). These cases are included in this publication for purposes of providing useful guidance or foundation when formulating arguments. Practitioners should verify the subsequent history of these cases.*

Injury AOE/COE; Volunteers. The court of appeal in *County of Riverside v. Workers' Comp. Appeals Bd. (Taylor)* (2012) 77 Cal. Comp. Cases 1033 (court of appeal opinion not published in official reports) has held that the Appeals Board erred in finding that either an applicant was an "employee" covered by the workers' compensation laws or she was entitled to benefits as a member of a "posse comitatus," when the applicant was injured while training her horse for membership in the sheriff's "mounted posse program." [See Ch. 3, § 3.82[5].]

Employment Relationships; Prisoners. The court of appeal in *Espinosa v. Workers' Comp. Appeals Bd.* (2013) 78 Cal. Comp. Cases 89 (court of appeal opinion not published in official reports) has held that a Los Angeles County jail inmate, injured while working as a cook in the jail, was not an employee of the county and, therefore, not eligible for workers' compensation benefits, when an order enacted by the county board of supervisors provided that jail inmates may be compelled to work while incarcerated. [See Ch. 3, § 3.101[3].]

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.*

Statute of Limitations; Cumulative Trauma Injuries. The Appeals Board in *Geren v. Workers’ Comp. Appeals Bd.* (2012) 77 Cal. Comp. Cases 999 (writ denied) has held that the employee’s claim for injuries during the period May 2004 to May 2005 was barred by the one-year statute of limitations in Labor Code Section 5405(a), when it found that the employee’s date of injury under Labor Code Section 5412 was in 2006, at which time she suffered disability and was told by her physician that the disability was work-related, but she did not file an application until November 2010, and the employee’s alleged unawareness of her legal right to file for workers’ compensation benefits due to her unfamiliarity with the concept of cumulative trauma did not act to toll the statute of limitations. [See Ch. 24, § 24.03[6][b].]

Permanent Disability; Permanent Total Disability; Rating. The Appeals Board in *The Limited v. Workers’ Comp. Appeals Bd. (Dewey)* (2012) 77 Cal. Comp. Cases 1003 (writ denied) has held that the medical evidence and the reporting of the employee’s vocational expert supported a finding that the employee incurred 100 percent permanent disability, and that the factors of disability for the employee’s physical and psychiatric conditions did not overlap to such a degree that only the employee’s orthopedic factors of disability should be utilized for purposes of rating her permanent disability. [See Ch. 8, § 8.02[4][a]; Ch. 32, § 32.02[2][a].]

Permanent Disability; Rating; Vocational Expert Testimony. The Appeals

Board in *Charter Communications, Inc. v. Workers’ Comp. Appeals Bd. (Waters)* (2012) 77 Cal. Comp. Cases 1132 (writ denied) allowed the employee to rebut the scheduled rating through cross-examination of the rater rather than by presenting diminished future earning capacity evidence prior to the rating, and allowed vocational expert testimony to rebut the rating after the mandatory settlement conference and after the formal rating was issued. [See Ch. 8, § 8.02[3]; Ch. 32, § 32.02[2][a].]

Permanent Disability; Rating; Diminished Future Earning Capacity. The Appeals Board in *Hernandez v. Workers’ Comp. Appeals Bd.* (2012) 78 Cal. Comp. Cases 56 (writ denied) has held that testimony of a vocational expert did not constitute substantial evidence pursuant to *Ogilvie v. W.C.A.B.* to rebut the scheduled diminished future earning capacity, because the expert did not explain how she reached the conclusion that the Spanish-speaking employee’s inability to speak English and his lack of education beyond elementary school would have no impact on his future earning capacity. [See Ch. 8, § 8.02[3]; Ch. 32, § 32.02[2][a].]

Permanent Disability; Rating; Diminished Future Earning Capacity. The Appeals Board in *Hernandez v. Workers’ Comp. Appeals Bd.* (2012) 78 Cal. Comp. Cases 56 (writ denied) has held that that a vocational expert’s opinion that the employee would have earned \$90,000 in 2012 but for his industrial injury did not constitute substantial evidence to rebut the scheduled diminished future earning capacity, because there was no empirical evidence supporting the expert’s opinion that the market for construction laborers that existed when the employee was injured in 2005 “was still there.” [See Ch. 8, § 8.02[3]; Ch. 32, § 32.02[2][a].]

Permanent Disability; Ratings; AMA Guides.

The Appeals Board in *Athens Administrators v. Workers' Comp. Appeals Bd.* (Kite) (2013) 78 Cal. Comp. Cases 213 (writ denied) has held that the WCJ did not err in combining permanent disability stemming from injury to each of the employee's hips by using simple addition, rather than by using the combined values chart or the reduction method, based on the panel QME's opinion. [See Ch. 7, § 7.02[4][d][iii]; Ch. 32, §§ 32.03A[1], 32.04[3][a].]

Employment Relationships; Exempt Employers; Employment Agency, Employment Counseling, and Job Listing Services Act. The Appeals Board in *From the Heart Home Health Care, Inc. v. Workers' Comp. Appeals Bd.* (Serunjogi) (2012) 77 Cal. Comp. Cases 1143 (writ denied) has held that a domestic employment agency was not entitled to the benefit of Civil Code Section 1812.5095(b), exempting such an agency from the status of employer of a domestic worker for whom it procures domestic work, in connection with an injury incurred by such a worker while providing domestic caretaking services, when the agreement between the worker and the agency required the worker to pay a referral fee to the agency even if the worker was not paid by the domestic care recipient, which was contrary to the prohibition in Civil Code Section 1812.5095(b)(7). [See Ch. 3, § 3.08.]

Psychiatric Injuries; Good Faith Personnel Actions. The Appeals Board in *Time Warner Cable, Inc. v. Workers' Comp. Appeals Bd.* (Aguilar) (2012) 77 Cal. Comp. Cases 1152 (writ denied) has held that an employee's psychiatric claims were not barred by his employer's claim of a good faith personal action, when the employer did not meet its burden of proving that its reassignment of the employee to

a different sales territory when he returned from non-industrial medical leave was a good faith personnel action. [See Ch. 4, § 4.69[3][d].]

Discrimination; Labor Code § 132a.

The Appeals Board in *Gonsalves v. Workers' Comp. Appeals Bd.* (2012) 78 Cal. Comp. Cases 49 (writ denied) has held that that an employer did not violate Labor Code Section 132a by refusing to allow an injured employee to return to work after he had received a medical release to return to work with the restriction that he work only eight-hour days for two weeks. [See Ch. 10, § 10.11[1].]

Presumption of Industrial Causation; Cancer; Peace Officers.

The Appeals Board in *Pesko v. Workers' Comp. Appeals Bd.* (2012) 78 Cal. Comp. Cases 61 (writ denied) has held that a police officer did not sustain industrial injury in the form of throat cancer, when the Board found that the employer had met its burden of rebutting the Labor Code Section 3212.1 presumption of industrial causation by showing that no reasonable link existed between the officer's cancer and his employment. [See Ch. 3, § 3.113[4][b].]

Petitions to Reopen; Change of Law; Mistake of Fact.

The Appeals Board in *Adams v. Workers' Comp. Appeals Bd.* (2013) 78 Cal. Comp. Cases 152 (writ denied) held that an injured correctional youth counselor did not show good cause to reopen a stipulated award pursuant to Labor Code Section 5803 based on a change of law due to enactment of Labor Code Section 4663(e), when the Board found that Labor Code Section 4663(e) was not a change of law, but rather was declaratory of existing law and was enacted prior to the issuance of the stipulated award. [See Ch. 31, § 31.04[2][e].]

Death Benefits; Dependents. The Ap-

peals Board in *M & E Construction Co. v. Workers' Comp. Appeals Bd. (Sturgeon)* (2013) 78 Cal. Comp. Cases 161 (writ denied) has held that the daughter of a deceased employee qualified as a total dependent of the decedent under Labor Code Sections 3501 and 4702, when the Board found that dependency is to be determined as of date of injury under Labor Code Section 3502, that in this case the date of injury coincided with the date of death, and that on the date of injury the daughter was 18 years old, in high school, and living with her mother. [See Ch. 9, § 9.05[4][c].]

Medical Treatment; Utilization Review. The Appeals Board in *TIG Insurance Co. v. Workers' Comp. Appeals Bd. (White)* (2013) 78 Cal. Comp. Cases 178 (writ denied) has held that the employer's failure to diligently act on the treating physician's request for assisted living, causing the worker to be removed from the assisted living facility where she had been living for three months and to be dropped off on skid row in downtown Los Angeles, was unreasonable so as to justify a 25 percent penalty under Labor Code Section 5814. [See Ch. 10, § 10.40[1].]

Temporary Disability; Compensation Rate. The Appeals Board in *Bodnar v. Workers' Comp. Appeals Bd.* (2013) 78 Cal. Comp. Cases 224 (writ denied) has held that an injured worker's temporary total disability should be computed under Labor Code Section 4453(c)(1), using the worker's rate of pay after a post-injury pay cut instead of her pay on the date of injury. [See Ch. 6, § 6.02[1].]

California Insurance Guarantee Association; Other Insurance; Pre-Judgment Interest. The Appeals Board in *California Insurance Guarantee Association v. Workers' Comp. Appeals Bd. (Key)* (2013) 78 Cal. Comp. Cases 227 (writ denied) has

affirmed an arbitrator's finding that CIGA, handling claims against the general employer's insolvent workers' compensation carrier, was not entitled to pre-judgment interest on an award of reimbursement against the special employer's carrier for benefits paid to the industrially injured worker. [See Ch. 2, § 2.84[3][c].]

Medical Provider Networks; Access Standards. The Appeals Board in *Robles v. Workers' Comp. Appeals Bd.* (2013) 78 Cal. Comp. Cases 168 (writ denied) has held that, although the employer's MPN did not provide a minimum of three physicians within 15 miles or 30 minutes of the injured employee's residence, the MPN was in compliance with the access standards in 8 Cal. Code Reg. §§ 9767.5(a) and (b) because it had at least three orthopedic surgeons to treat the employee's industrial back injury located within 15 miles of his workplace. [See Ch. 5, § 5.03[1].]

Medical-Legal Procedure; Prohibited Communications With Agreed Medical Evaluator. The Appeals Board in *Trapero v. Workers' Comp. Appeals Bd.* (2013) 78 Cal. Comp. Cases 183 (writ denied) has held that the employee's attorney violated Labor Code Section 4062.3 by handing a recently-procured vocational evaluation report to defense counsel a few minutes prior to the AME's deposition and presenting the report to the AME during the deposition. [See Ch. 22, § 22.06[3].]

Liens; Medical; Statute of Limitations. The Appeals Board in *County of San Bernardino v. Workers' Comp. Appeals Bd. (Hansen)* (2013) 78 Cal. Comp. Cases 232 (writ denied) has affirmed the WCJ's finding that the lien claimant's lien for medical treatment provided to the employee was not barred by the statute of limitations in Labor Code Section 4903.5, when the Board found that the employer acknowledged

“notice” of the lien, as described in Labor Code Section 4904, by stipulating that medical-legal expenses were “payable” to the lien claimant. [See Ch. 30, § 30.21.]

APPENDIX E, TABLES AND SCHEDULES. Tables 14 and 17A have been updated.

APPENDIX F, DWC/WCAB POLICY AND PROCEDURAL MANUAL. The P&P Manual has been updated throughout.

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Publication 270 Release 78

September 2013

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VOLUME 1

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