

PUBLICATION UPDATE

Route to: ☐ _____ ☐ _____ ☐ _____ ☐ _____
☐ _____ ☐ _____ ☐ _____ ☐ _____

California Law of Employee Injuries and Workers' Compensation

Publication 270 Release 81

March 2015

HIGHLIGHTS

2014 Legislation

- Legislative action affecting workers' compensation has been added.

Administrative Regulations

- Changes made through Register 2014, No. 48 (11/28/14) have been added.

Court Cases; WCAB Decisions; WCAB Decisions Denied Judicial Review

- Recent important decisions have been added.

Forms

- Appendix D, Forms, has been updated.

Free Weekly eNewsletter Alerts

- Sign up today. See information below.

FREE CALIF. WORKERS' COMP eNEWSLETTER. Stay abreast of the lat-

est California workers' comp developments and build your current awareness to help your clients. This free, weekly eNewsletter covers state news, blogs, and much more. Find out why thousands of workers' compensation attorneys, judges, and claims professionals rely on this free eNewsletter published by LexisNexis. To subscribe, contact

Robin.E.Kobayashi@lexisnexis.com and be sure to request the California eNewsletter.

CALIFORNIA STATUTES. Legislation affecting workers' compensation enacted during the 2014 legislative session has been added, including the following:

Utilization Review Procedures. The legislature has amended Lab. Code § 4610.5 to change from one page to a maximum of two pages the permitted length of the Administrative Director form that the employer is required to give the employee as part of the notification of a utilization review decision that denies,

modifies, or delays a treatment recommendation and that the employee may then return to the Administrative Director to initiate an independent medical review. [See Ch. 5, § 5.02[2][d].]

Liens. The legislature has amended Lab. Code § 4903 to include in those amounts that the WCAB is authorized to allow as liens certain medical-legal expenses to which the employee is entitled under a specified provision for the purpose of proving or disproving a disputed claim. [See Ch. 30, § 30.01.]

Liens; Filing and Activation Fees. The legislature has amended Lab. Code § 4903.07 to specify that the reimbursement of lien filing fees and lien activation fees to which lien claimants are entitled is to be paid the employer of the injured worker. [See Ch. 30, § 30.20[1].]

Liens; Assignments. The legislature has amended Lab. Code § 4903.8 to authorize assignment of payment of a lien for medical or hospital treatment if the assignment was completed prior to January 1, 2013, or if it was required by a contract that became enforceable and irrevocable prior to January 1, 2013. [See Ch. 30, § 30.25[1].]

Priority Hearings; Illegally Uninsured Employers. The legislature has amended Lab. Code § 5502 to add to the list of cases entitled to priority hearings cases in which the employee is or was employed by an illegally uninsured employer and the disputed issues are employment or injury. [See Ch. 24, § 24.11[1][c], Ch. 25, § 25.09[2]; Ch. 26, §§ 26.02[1], 26.04[1][d].]

Employer's First Report of Injury. The legislature has amended Lab. Code § 6409.1 to require every employer to make an immediate report by telephone or email to the Division of Occupational Safety and Health of every case involving an employee's serious injury or illness or death. [See

Ch. 25, § 25.20[3].]

Joint (General-Special) Employment.

The legislature has enacted Lab. Code § 2810.3, requiring a client employer to share with a labor contractor all civil legal responsibility and civil liability for all workers supplied by that labor contractor for the payment of wages and the failure to obtain valid workers' compensation coverage. [See Ch. 3, § 3.145.]

CIGA; Premiums. The legislature has amended Ins. Code § 1063.5 to provide that, commencing January 1, 2015, the amount an insurer is required to pay to CIGA annually is increased from one percent to two percent of the insurer's net direct written premiums. [See Ch. 2, § 2.84[1].]

Permanent Disability; Presumption of Total Disability. The legislature has amended Lab. Code § 4662 to change the language defining the presumption of total permanent disability of an injury to the brain from "resulting in incurable mental capacity or insanity" to "resulting in permanent mental incapacity." [See Ch. 8, § 8.02[2]; Ch. 32, § 32.03[1].]

Interpreters. The legislature has amended Lab. Code § 4600, deleting language it had added in 2013 specifying that the requirement that a person meet any requirements established via regulations promulgated by the Administrative Director in order to be a qualified interpreter commenced on March 1, 2014, and deleting other language added in 2013, i.e., "notwithstanding any other effective date established in regulations." [See Ch. 23 § 23.13[3].]

Time Limits; Proceedings for Aggravated Disabilities. The legislature has amended Lab. Code § 5410 to delete language regarding instituting proceedings for vocational rehabilitation services, which

were abolished by the legislature, effective January 1, 2009. [See Ch. 24, § 24.03[2][a], [c], [3]; Ch. 31, § 31.05[1], [4].]

CALIFORNIA REGULATIONS. The following rule changes have been added:

Predesignation of Personal Physician.

The Division of Workers' Compensation has amended various of the regulations regarding predesignation of personal physicians, including:

- 8 Cal. Code Reg. § 9780 Definitions [See Ch. 5, § 5.07[1], [6], [7][b].]
- 8 Cal. Code Reg. § 9780.1 Employee's Predesignation of Personal Physician [See Ch. 5, § 5.04[4].]
- 8 Cal. Code Reg. § 9783 DWC Form 9783 Predesignation of Personal Physician [See AppD, § F9.11.]
- 8 Cal. Code Reg. § 9783.1 DWC Form 9783.1 Notice of Personal Chiropractor or Personal Acupuncturist [See AppD, § F9.12.]

Reporting Duties of Primary Treating Physician. The Division of Workers' Compensation has amended 8 Cal. Code Reg. § 9785 regarding the reporting duties of the primary treating physician, most significantly 8 Cal. Code Reg. § 9785(a)(1)–(2), (b)(3)–(4), (g). [See Ch. 22, §§ 22.05[2], [5], 22.08[3][b].]

Official Medical Fee Schedule. The Division of Workers' Compensation has amended various of the regulations containing the official medical fee schedule [See Ch. 22, § 22.05[2]], including:

- 8 Cal. Code Reg. § 9789.12.2 Calculation of the Maximum Reasonable Fee: Services Other than Anesthesia

- 8 Cal. Code Reg. § 9789.12.3 Status Codes C, I, N, and R
- 8 Cal. Code Reg. § 9789.12.4 "Buy Report": Reimbursement for Unlisted Procedures/Procedures Lacking RBRVUs
- 8 Cal. Code Reg. § 9789.12.8 Status Codes
- 8 Cal. Code Reg. § 9789.19 Update Table
- 8 Cal. Code Reg. § 9789.30 Hospital Outpatient Departments and Ambulatory Surgical Centers: Definitions
- 8 Cal. Code Reg. § 9789.31 Hospital Outpatient Departments and Ambulatory Surgical Centers: Adoption of Standards
- 8 Cal. Code Reg. § 9789.32 Hospital Outpatient Departments and Ambulatory Surgical Centers: Applicability
- 8 Cal. Code Reg. § 9789.33 Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule: Determination of Maximum Reasonable Fee
- 8 Cal. Code Reg. § 9789.37 DWC Form 15 Election for High Cost Outlier
- 8 Cal. Code Reg. § 9789.39 Update Table by Date of Service

Medical-Legal Expenses and Comprehensive Medical-Legal Evaluations. The Division of Workers' Compensation has amended regulations regarding medical-legal expenses and comprehensive medical-legal evaluations [See Ch. 5, § 5.08[2][a]; Ch. 22, § 22.09[2], [3]], including:

- 8 Cal. Code Reg. § 9793 Definitions

- 8 Cal. Code Reg. § 9794 Reimbursement of Medical-Legal Expenses
- 8 Cal. Code Reg. § 9795 Reasonable Level of Fees for Medical-Legal Expenses, Follow-up, Supplemental and Comprehensive Medical-Legal Evaluations and Medical-Legal Testimony

Return to Work. The Division of Workers' Compensation has amended regulations regarding retraining, return to work, and supplemental job displacement benefit [See Ch. 7, § 7.02[4][d][iii] (return to work); Ch. 35, §§ 35.03, 35.0435.06 (supplemental job displacement benefit)], including:

- 8 Cal. Code Reg. § 10116.9 Definitions for Articles 6.5 (return to work) and 7.5 (supplemental job displacement benefit)
- 8 Cal. Code Reg. § 10117 Offer of Work; Adjustment of Permanent Disability Payments
- 8 Cal. Code Reg. § 10118 Form DWC AD 10118 "Notice of Offer of Work for Injuries Occurring Between January 1, 2005, and December 31, 2012, Inclusive"
- 8 Cal. Code Reg. § 10133.31 Supplemental Job Displacement Nontransferable Voucher for Injuries Occurring on or After January 1, 2013
- 8 Cal. Code Reg. § 10133.32 Form DWC-AD 10133.32 "Supplemental Job Displacement Nontransferable Voucher for Injuries Occurring on or After January 1, 2013"
- 8 Cal. Code Reg. § 10133.33 Form DWC-AD 10133.33 "Description of Employee's Job Duties Form"
- 8 Cal. Code Reg. § 10133.34 Offer of Work for Injuries Occurring on or After January 1, 2013
- 8 Cal. Code Reg. § 10133.35 Form DWC-AD 10133.35 "Notice of Offer of Regular, Modified, or Alternative Work for Injuries Occurring on or After January 1, 2013"
- 8 Cal. Code Reg. § 10133.36 Form DWC-AD 10133.36 "Physician's Return-to-Work & Voucher Report"
- 8 Cal. Code Reg. § 10133.51 Notice of Potential Right to Supplemental Job Displacement [Repealed]
- 8 Cal. Code Reg. § 10133.52 "Notice of Potential Right to Supplemental Job Displacement Form" [Repealed]
- 8 Cal. Code Reg. § 10133.53 Form DWC-AD 10133.53 "Notice of Offer of Modified or Alternative Work for Injuries Occurring Between January 1, 2004, and December 31, 2012, Inclusive"
- 8 Cal. Code Reg. § 10133.56 Requirement to Issue Supplemental Job Displacement Nontransferable Training Voucher
- 8 Cal. Code Reg. § 10133.57 Form DWC-AD 10133.57 "Supplemental Job Displacement Nontransferable Training Voucher Form for Injuries Occurring Between January 1, 2004, and December 31, 2012, Inclusive"
- 8 Cal. Code Reg. § 10133.58 State Approved or Accredited Schools
- 8 Cal. Code Reg. § 10133.60 Termination of Claims Administrator's Liability for the Supplemental Job Displacement Benefit

Lien Fees. The Division of Workers' Compensation has amended regulations regarding lien fees [*See* Ch. 30, § 30.20[1]], including:

- 8 Cal. Code Reg. § 10207 Initial Lien Filing Fees
- 8 Cal. Code Reg. § 10208 Lien Activation Fees
- 8 Cal. Code Reg. § 10208.1 Lien Fee Refunds

Medical Provider Networks. The Division of Workers' Compensation has amended regulations regarding Medical Provider Networks, including:

- 8 Cal. Code Reg. § 9767.5 Access Standards [*See* Ch. 5, § 5.03[1].]
- 8 Cal. Code Reg. § 9767.5.1 Physician Acknowledgments [*See* Ch. 5, § 5.03[1].]
- 8 Cal. Code Reg. § 9767.6 Treatment and Change of Physicians within Medical Provider Network [*See* Ch. 5, § 5.03[4].]
- 8 Cal. Code Reg. § 9767.7 Second and Third Opinions [*See* Ch. 5, § 5.03[4], [5].]
- 8 Cal. Code Reg. § 9767.9 Transfer of Ongoing Care into Medical Provider Network [*See* Ch. 5, § 5.03[3].]
- 8 Cal. Code Reg. § 9767.10 Continuity of Care Policy [*See* Ch. 5, § 5.03[3].]
- 8 Cal. Code Reg. § 9767.12 Employee Notification [*See* Ch. 5, § 5.03[3].]
- 8 Cal. Code Reg. § 9767.17 Petition for Suspension or Revocation of Medical Provider Network [*See* Ch. 5, § 5.03[7].]
- 8 Cal. Code Reg. § 9767.17.5 DWC Petition for Suspension or Revocation of Medical Provider

Network Form [*See* Ch. 5, § 5.03[7].]

- 8 Cal. Code Reg. § 9767.18 Random Reviews [*See* Ch. 5, § 5.03[6].]
- 8 Cal. Code Reg. §§ 9767.19 Administrative Penalty Schedule; Hearing, Mitigation, and Appeal [*See* Ch. 5, § 5.03[6].]

WCAB Rules. The Appeals Board has exercised its rulemaking function to repeal, renumber, and/or amend Rules of the Court Administrator, as well as to amend or repeal various WCAB Rules, including:

- 8 Cal. Code Reg. § 10390, Place of Filing Documents After Initial Application or Case Opening Document [*See* Ch. 23, § 23.12[2][a]; Ch. 25, § 25.06A[1].]
- 8 Cal. Code Reg. § 10391, Filing of Documentary Evidence [*See* Ch. 23, § 23.12[2][h]; Ch. 25, § 25.06A[7].]
- 8 Cal. Code Reg. § 10392, Time of Filing Documents [*See* Ch. 23, § 23.12[2][e]; Ch. 25, § 25.06A[4].]
- 8 Cal. Code Reg. § 10393, Filing of Medical Reports, Medical-Legal Reports, and Various Records [*See* Ch. 23, § 23.12[2][g]; Ch. 25, § 25.06A[6].]
- 8 Cal. Code Reg. § 10414, Declaration of Readiness to Proceed [*See* Ch. 23, § 23.14[2][d]; Ch. 25, § 25.08[1].]
- 8 Cal. Code Reg. § 10416, Objection to Declaration of Readiness to Proceed [*See* Ch. 25, § 25.08[2].]
- 8 Cal. Code Reg. § 10417, Walk-Through Documents [*See* Ch. 23, §§ 23.11[2], 23.14[2][m], 23.15; Ch. 25, § 25.08[4]; Ch. 26,

- § 26.04[1][a]; Ch. 29, § 29.03[8]; Ch. 30, §§ 30.22[1], [3], 30.24[2][a]; Ch. 32, § 32.05[3][b][ii], [5].]
- 8 Cal. Code Reg. § 10470, Emergency Petition for Stay [See Ch. 23, § 23.11[2a]; Ch. 25, § 25.08[5].]
 - 8 Cal. Code Reg. § 10548, Continuances [See Ch. 26, § 26.02[3].]
 - 8 Cal. Code Reg. § 10549, Appearances in Settled Cases [See Ch. 26, § 26.01[3][c].]
 - 8 Cal. Code Reg. § 10552, Expedited Hearing Calendar [See Ch. 5, §§ 5.02[2][c], 5.07[3][a]; Ch. 22, § 22.05[6][b][iii], [iv]; Ch. 23, § 23.14[2][c]; Ch. 24, §§ 24.01[4], 24.11[1][c]; Ch. 25, §§ 25.09[2], 25.20[4], 25.23; Ch. 26, § 26.02[1].]
 - 8 Cal. Code Reg. § 10555, Priority Conference Calendar [See Ch. 24, §§ 24.11[1][c]; Ch. 26, § 26.02[1].]
 - 8 Cal. Code Reg. § 10561, Sanctions [See Ch. 23, § 23.15.]
 - 8 Cal. Code Reg. § 10563, Appearances Required of Parties to Case-in-Chief [See Ch. 26, § 26.01[3][a].]
 - 8 Cal. Code Reg. § 10563.1, Other Appearances Required [See Ch. 30, § 30.22[5][a].]
 - 8 Cal. Code Reg. § 10592, Assignment of Consolidated Cases [See Ch. 23, § 23.16.]
 - 8 Cal. Code Reg. § 10740, Transcripts [See Ch. 23, § 23.12[4].]
 - 8 Cal. Code Reg. § 10750, Record of Proceedings [See Ch. 1, § 1.11[5][a]; Ch. 23, § 23.12[3].]
 - 8 Cal. Code Reg. § 10751, Adju-

dication File [See Ch. 1, § 1.11[5][a]; Ch. 23, § 23.12[3].]

- 8 Cal. Code Reg. § 10208.5, Access to and Viewing Adjudication Files [See Ch. 1, § 1.11[5][b]; Ch. 23, § 23.12[3a].]
- 8 Cal. Code Reg. § 10208.6, Prohibitions on Document Inspection [See Ch. 1, § 1.11[5][b], [c]; Ch. 23, § 23.12[3b].]
- 8 Cal. Code Reg. § 10754, Sealing Documents [See Ch. 1, § 1.11[5][d]; Ch. 23, § 23.12[3c].]
- 8 Cal. Code Reg. § 10760, Recording of Trial Level Proceedings [See Ch. 26, § 26.02[4].]
- 8 Cal. Code Reg. § 10770, Filing and Service of Lien Claims [See Ch. 20, § 20.04[1]; Ch. 30, § 30.20[1], [2]; Ch. 31, § 31.20[2].]
- 8 Cal. Code Reg. § 10770.1, Lien Conferences and Lien Trials [See Ch. 30, § 30.22[2], [5][a], [b].]
- 8 Cal. Code Reg. § 10995, Mandatory Arbitration [See Ch. 33, § 33.01[1][b], [2][b], [3][b], [c], [d], [4].]
- 8 Cal. Code Reg. § 10996, Voluntary Arbitration [See Ch. 33, § 33.01[2][a], [b], [4].]

FEDERAL CASES. The following cases have been added:

Employment Relationships; Employees; Independent Contractors. The U.S. Court of Appeals, Ninth Circuit, has held in *Ruiz v. Affinity Logistics Corp.* (9th Cir. 2014) 754 F.3d 1093, 79 Cal. Comp. Cases 897, that the plaintiffs, home delivery drivers, were employees, not independent contractors, of the defendant, a home delivery service, when it found, following *S.G. Borello & Sons*, that the defendant had the

right to control the details of the plaintiffs' work, which, under *Borello*, constituted the "most important or most significant consideration" in determining whether workers were employees or independent contractors. [See Ch. 3, § 3.06[2].]

Employment Relationships; Employees; Independent Contractors. A panel of the U.S. Court of Appeals, Ninth Circuit, has held in *Alexander v. FedEx Ground Package System, Inc.* (9th Cir. 2014) 765 F.3d 981, 79 Cal. Comp. Cases 1161, that the plaintiff FedEx drivers were employees, not independent contractors, as a matter of law under California's right-to-control test, as set forth in *Borello*. [See Ch. 3, § 3.07[1].]

CALIFORNIA CASES. The following cases have been added:

Published Cases.

Employment Relationships; Summary Judgments; Triable Issues of Fact. The court of appeal in *Global Hawk Ins. Co. v. Le* (2014) 225 Cal. App. 4th 593, 170 Cal. Rptr. 3d 403, 79 Cal. Comp. Cases 623, has held that triable issues of fact existed as to whether an injured truck driver was an employee or an independent contractor and, thus, as to whether the trucking company's liability insurer could be found liable for injuries suffered by the truck driver. [See Ch. 3, § 3.130.]

Employment Relationships; Newspaper Carriers; Class Actions. The California Supreme Court in *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal. 4th 522, 173 Cal. Rptr. 3d 332, 79 Cal. Comp. Cases 760, 327 P.3d 165, has held that whether an employer-employee relationship exists turns foremost on the degree of the hirer's right to control how the end result is achieved, and that, in turn, whether the hirer's right to control can be shown on a class-wide basis will depend on the extent

to which individual variations in the hirer's rights vis-à-vis each putative class member exist, and whether such variations, if any, are manageable. [See Ch. 3, § 3.06[2].]

Employment Relationships; Wrongful Termination. The court of appeal in *Yau v. Allen* (2014) 229 Cal. App. 4th 144, has held that the plaintiff adequately pleaded his cause of action for wrongful termination in violation of public policy, when he alleged that he was terminated as a mechanic employed by a Ford dealer because he complained to his superiors that his supervisor and coworkers were submitting fraudulent warranty claims to Ford Motor Co., which, if true, implicated statutes proscribing theft and fraud, potentially harmed Ford Motor Co., and undermined the fundamental public interest in a workplace free from crime. [See Ch. 2, § 2.62[2][e].]

Employment Relationships; Definitions of Employee; Certification of Class. The court of appeal in *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County; Charles Lee et al., Real Parties In Interest* (2014) 230 Cal. App. 4th 718, 179 Cal. Rptr. 3d 69, 79 Cal. Comp. Cases 1366, has held that the trial court correctly allowed the plaintiff/workers to rely on the Industrial Welfare Commission's definition of "employment relationship" for purposes of claims falling within the scope of Wage Order No. 9-2001, but that, for purposes of claims falling outside the scope of Wage Order No. 9-2001, the common-law definition of "employee," as set forth in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, controls. [See Ch. 3, § 3.06[2].]

Injury AOE/COE; Off-Duty Athletic Activities. The court of appeal in *Young v. W.C.A.B.* (2014) 227 Cal. App. 4th 472, 173 Cal. Rptr. 3d 643, 79 Cal. Comp. Cases

751, has held that an employee, a county jail correctional sergeant, injured while performing jumping jacks at home, was injured AOE/COE, when the court found that the employee satisfied the two-prong test set forth in *Ezzy v. W.C.A.B.*, i.e., that he subjectively believed that his participation in the injury-producing activity was expected by the employer, and that this belief was objectively reasonable, with the court noting that the legal standard that must be met to find a belief objectively reasonable focuses on the specific activity in which the employee was involved when the injury occurred. [See Ch. 4, § 4.25[3][c].]

Fair Employment and Housing Act; Immigration Status; Federal Preemption. The California Supreme Court in *Salas v. Sierra Chemical Co.* (2014) 59 Cal. 4th 407, 173 Cal. Rptr. 3d 689, 79 Cal. Comp. Cases 782, 327 P.3d 797, has held that neither (1) the Fair Employment and Housing Act nor (2) Gov. Code § 7285(a), providing that all rights available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment or been employed in California, is preempted by the federal Immigration Reform and Control Act, 8 U.S.C.S. § 1101 et seq., but that federal preemption does bar an award of lost pay damages under the Fair Employment and Housing Act for any period of time after the employer's discovery of the employee's ineligibility under federal law to work in the United States. [See Ch. 3, § 3.31.]

Fair Employment and Housing Act; Defenses; After-Acquired Evidence and Unclean Hands. The California Supreme Court in *Salas v. Sierra Chemical Co.* (2014) 59 Cal. 4th 407, 173 Cal. Rptr. 3d 689, 79 Cal. Comp. Cases 782, 327 P.3d 797, has held that to allow after-acquired

evidence to be a complete defense would eviscerate the public policies embodied in the Fair Employment and Housing Act by allowing an employer to engage in invidious employment discrimination with total impunity, but that the doctrines of after-acquired evidence and unclean hands do have a bearing on employment discrimination and retaliation claims brought under the Fair Employment and Housing Act. [See Ch. 3, § 3.31.]

Disability Retirement; Petitions for Writ of Mandate; Standard of Review. The court of appeal in *Rodriguez v. City of Santa Cruz* (2014) 227 Cal. App. 4th 1443, 174 Cal. Rptr. 3d 826, 79 Cal. Comp. Cases 844, has held that the correct standard of review, which the trial court failed to use, of an administrative decision by a local agency (here, the plaintiff's employer) denying the plaintiff's "fundamental vested right to a disability retirement pension if he in fact was disabled" is the trial court's exercise of "its independent judgment on the evidence" to "find an abuse of discretion if the findings are not supported by the weight of the evidence." [See Ch. 3, § 3.116[3].]

Insurance Fraud; Substantial-Factor Test. The court of appeal in *State of California ex rel. Wilson v. Superior Court of Los Angeles County* (2014) 227 Cal. App. 4th 579, 174 Cal. Rptr. 3d 317, 79 Cal. Comp. Cases 874, in a qui tam action against a pharmaceutical company to impose civil penalties for violation of the Insurance Fraud Prevention Act (Ins. Code § 1871 et seq.), held that, for assessment of monetary penalties, Ins. Code § 1871.7 requires proof that the resulting claims for payment for the pharmaceutical company's drugs are in some manner deceitful, though not necessarily containing express misstatements of fact, and that causation may be established under the standard

substantial-factor test, not the but-for test. [See Ch. 2, § 2.03[2].]

Professional Home Health Care Workers; Assumption of Risk; Alzheimer's Patients. The California Supreme Court in *Gregory v. Cott* (2014) 59 Cal. 4th 996, 176 Cal. Rptr. 3d 1, 79 Cal. Comp. Cases 985, 331 P.3d 179, has held that Alzheimer's patients are not liable for injuries to professional in-home caregivers, trained and employed by agencies, who are employed specifically to assist these disabled persons, that in-home caregivers assume the risk of being injured by Alzheimer's patients, and that workers' compensation, rather than tort recovery, is the appropriate means of compensating hired caregivers for injuries caused by Alzheimer's patients. [See Ch. 11, § 11.20[3][b][ii].]

Exclusive Remedy Rule; Power Press Exception. The court of appeal in *LeFiell Manufacturing Co. v. Superior Court of Los Angeles County* (2014) 228 Cal. App. 4th 883, 175 Cal. Rptr. 3d 894, 79 Cal. Comp. Cases 1026, has held that the door that was removed from a swaging machine was not a point of operation guard within the meaning of Labor Code Section 4558(a) as a matter of law. [See Ch. 11, § 11.02[5][b].]

WCAB Decisions; Finality; Propriety of Judicial Review. The court of appeal in *Regents of the University of California v. W.C.A.B. (Lappi)* (2014) 226 Cal. App. 4th 1530, 173 Cal. Rptr. 3d 80, has held that, because the employer's petition sought review of a Board order requiring production of disputed documents to a special master for in camera inspection, the issue before the court was whether the order was an appropriate preliminary step in resolving a discovery dispute, so that the order was reviewable as a final order from which a petition for writ of review may be taken

under Labor Code Section 5950. [See Ch. 34, § 34.10[2].]

Workers' Compensation Proceedings; Evidence Code; Privileges. The court of appeal in *Regents of the University of California v. W.C.A.B. (Lappi)* (2014) 226 Cal. App. 4th 1530, 173 Cal. Rptr. 3d 80, has held that the Evidence Code statutes governing privilege are applicable to workers' compensation administrative proceedings, and that, because Evidence Code Section 915 expressly prohibits a tribunal from ordering a party to produce documents for review as a means of determining the validity of a claimed privilege, the Board erred in ordering that documents claimed by the employer as privileged be produced for a special master to review in camera to determine whether they are privileged. [See Ch. 23, § 23.10[1]; Ch. 25, §§ 25.40[1], 25.41[2]; Ch. 26, § 26.06[4].]

Going and Coming Rule; Required Vehicle Exception; Substantial Evidence. The court of appeal in *Lobo v. Tamco* (2014) 230 Cal. App. 4th 438, 178 Cal. Rptr. 3d 515, 79 Cal. Comp. Cases 1401, a wrongful death action in which the plaintiff sought to hold an employer vicariously liable for the decedent's death from a collision with the automobile of the defendant's employee, held that substantial evidence supported the jury verdict that the defendant's employee was not acting within the scope of his employment at the time of the accident, and that the conflicting evidence would have supported a jury finding that the availability and occasional use of the employee's car to attend to customer complaints provided a benefit to the employer and would also support the actual jury finding that such availability and such occasional use of the employee's car did not provide a benefit to the employer but rather provided a benefit to the employee only. [See Ch. 4, § 4.155[2][b].]

WCAB En Banc Opinion and Significant Panel Decisions.

Utilization Review; Independent Medical Review. The Appeals Board en banc in *Dubon v. World Restoration, Inc.* (2014) 79 Cal. Comp. Cases 1298 (Appeals Board en banc opinion) has held that a UR decision is invalid and not subject to IMR only if it is untimely, while all other disputes regarding a UR decision must be resolved by IMR. [See Ch. 5, § 5.02[2][d].]

Utilization Review; Timeliness. The Appeals Board in *Bodam v. San Bernardino County* (2014) 79 Cal. Comp. Cases 1519 (Appeals Board significant panel decision) has held that: (1) the employer was obligated to comply with all time requirements in conducting UR, including timeframes for communicating the UR decision; (2) a UR decision that is timely made but not timely communicated is untimely; and (3) when UR is untimely and, therefore, invalid, the necessity of the medical treatment at issue may be determined by the Board based on substantial evidence. [See Ch. 5, § 5.02[2][d].]

Nurse Case Managers; Requests for Authorization of Medical Treatment; Utilization Review; Expedited Hearings. The Appeals Board in *Patterson v. The Oaks Farm* (2014) 79 Cal. Comp. Cases 910 (Appeals Board significant panel decision) has held that: (1) provision of a nurse case manager is a form of medical treatment under Labor Code Section 4600; (2) an employer may not unilaterally cease to provide approved nurse case manager services when there is no evidence of change in the employee's circumstances or condition showing that the services are no longer reasonably required to cure or relieve from effects of the industrial injury; (3) use of an expedited hearing to address the medical treatment issue in this case is expressly

authorized by Labor Code Section 5502(b)(1); and (4) it is not necessary for the injured worker to obtain a request for authorization from the primary treating physician to be sent to utilization review, then independent medical review, to challenge unilateral termination of the services of a nurse case manager. [See Ch. 5, § 5.02[2][a].]

Pleadings; Verification. The Appeals Board in *Torres v. Contra Costa Schools Ins. Group* (2014) 79 Cal. Comp. Cases 1181 (Appeals Board significant panel decision) noted that, while the WCJ correctly concluded that the employee's appeal was subject to dismissal for failure to comply with Labor Code Section 4610.6(h)'s and 8 Cal. Code Reg. § 10450(e)'s verification requirements, and the employee did not seek to cure the defect before the appeal was dismissed by the WCJ for lack of verification or at any time thereafter, nevertheless, the appropriate course in the present case was to rescind the WCJ's dismissal of the employee's appeal and to return the case to the WCJ. [See Ch. 28, § 28.21[2].]

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.*

Permanent Disability; Rating; Vocational Evidence. The Appeals Board in *Coleman Burke v. W.C.A.B. (Burton)* (2014) 79 Cal. Comp. Cases 713 (writ denied) has affirmed the WCJ's finding that an employee suffered 85 percent permanent disability as the result of a cumulative industrial injury to his hearing and a compensable consequence psychiatric injury during his employment as a musician, basing its decision on the range of evidence,

including the employee's credible testimony regarding his symptoms and limitations and the testimony of the employee's vocational expert, which the Board found was a more accurate reflection of the employee's actual disability than the 53 percent scheduled rating for his impairments described by the agreed medical evaluator and the qualified medical evaluator in psychiatry. [See Ch. 8, § 8.02[3].]

Permanent Disability; Rating; Vocational Evidence. The Appeals Board in *Edge v. W.C.A.B.* (2014) 79 Cal. Comp. Cases 724 (writ denied) has held that an employee failed to establish that her neck, shoulder, hand, and wrist injuries resulted in permanent total disability, when the Board found that the opinion of the employee's vocational expert was insufficient to rebut the diminished future earning capacity (DFEC) adjustment in the 2005 Permanent Disability Rating Schedule pursuant to *Ogilvie v. W.C.A.B.* [See Ch. 8, § 8.02[3].]

Permanent Disability; Apportionment. The Appeals Board in *Morris v. W.C.A.B.* (2014) 79 Cal. Comp. Cases 1348 (writ denied) has held that an employee was not entitled to an award of 100 percent permanent disability for the September 2004 injury alone, without apportionment, "in accordance with the fact" pursuant to Labor Code Section 4662, based on medical evidence showing total loss of earning capacity, since medical evidence alone indicating that the employee was unable to compete in the open labor market, without reports or testimony from a vocational expert, could not rebut the scheduled permanent disability rating as described in *Ogilvie*. [See Ch. 8, § 8.05[2][a].]

Insurance Coverage; Notice of Cancellation; Effect of Bankruptcy Proceedings. The Appeals Board in *Central Metal,*

Inc. v. W.C.A.B. (Moreno) (2014) 79 Cal. Comp. Cases 931 (writ denied) has held that SCIF had no workers' compensation coverage for an employer on February 1, 2011, the employee's date of injury, when the employer filed for Chapter 11 bankruptcy on January 8, 2010, and SCIF, when the employer, as of January 27, 2011, owed over \$134,000 in unpaid deposit and premiums, SCIF cancelled the employer's policy, effective on that date, and, after cancellation of the policy, and one day after the employee's injury, the employer paid \$31,672.25 on the policy, the Board found that SCIF had the legal authority to cancel the policy for unpaid premiums and that, contrary to the employer's contention, the notice of cancellation was not invalidated by the automatic stay order established by bankruptcy or on the basis that the notice erroneously included pre-bankruptcy debt, which the employer knew it did not have to pay because the debt had been discharged in bankruptcy. [See Ch. 2, § 2.61.]

Qualified Medical Evaluators; Discipline. The Appeals Board in *Navarro v. W.C.A.B.* (2014) 79 Cal. Comp. Cases 962 (writ denied) has held that the employee sustained no cumulative industrial injury, based on the employee's testimony and reports issued by a panel qualified medical evaluator, despite the employee's contention that the Board erred in relying on the panel qualified medical evaluator's reports to find no compensable injury because the physician's status as a qualified medical evaluator was suspended during the period when he issued the reports. [See Ch. 1, § 1.12[2A][e].]

Temporary Disability; Permanent and Stationary Status; Utilization Review and Independent Medical Review. The Appeals Board in *San Francisco Police Department v. W.C.A.B. (Casey)* (2014) 79 Cal. Comp. Cases 970 (writ denied) has

held that, notwithstanding that the agreed medical evaluator had declared the employee permanent and stationary, the agreed medical evaluator subsequently reported that, because the employee's primary treating physician requested authorization for him to undergo left knee surgery and debridement, and the employee had decided to move forward with the recommended surgery, he was no longer permanent and stationary, the agreed medical evaluator's reports constituted substantial evidence to support an award of additional temporary total disability, and, despite the timely and otherwise valid utilization review determination that the requested surgery was not medically necessary, which was not appealed through independent medical review, the opinions of the treating physician and the agreed medical evaluator indicating that the employee could benefit from knee surgery justified an award of additional temporary total disability. [See Ch. 5, § 5.02[2][a].]

Penalties; Delayed Payment of Interest on Settlement Proceeds. The Appeals Board in *Monterey County Superior Court v. W.C.A.B. (Martinelli)* (2014) 79 Cal. Comp. Cases 1082 (writ denied) has held that an employer may be liable for a penalty for the unreasonably delayed payment of interest on settlement funds, when the Board found that Labor Code Section 5800 interest on settlement proceeds awarded under a compromise and release agreement continued to accrue until the date the settlement was actually paid, and that, pursuant to California Uniform Commercial Code Section 3420, the employer's obligation to pay the award was not discharged simply upon the issuance or the mailing of the settlement check. [See Ch. 10, § 10.40[3][c].]

WCAB Procedures; Selection of Interpreters. The Appeals Board in *Solano v.*

W.C.A.B. (2014) 79 Cal. Comp. Cases 1092 (writ denied) has affirmed a WCJ's order denying the employee's request to select his own interpreter to provide Spanish interpreting services at his deposition noticed by the employer. [See Ch. 23, § 23.13[3].]

Discovery; Depositions; Protective Orders. The Appeals Board in *County of San Bernardino v. W.C.A.B. (Foroughi)* (2014) 79 Cal. Comp. Cases 1200 (writ denied), in which the employee sought to bar the appearance of her supervisor as her employer's representative at her deposition, found sufficient demonstration that the supervisor's presence at the employee's deposition would result in "oppression" within the meaning of Code of Civil Procedure Section 2025.420, based on the employee's contention that the underlying cause of her alleged psychiatric injury was her treatment by the supervisor during the previous five years, and the facts that the employee's prior deposition was terminated after the employee responded to the supervisor's presence with "uncontrollable crying, shaking and severe distress." [See Ch. 25, § 25.41[2].]

Discovery; Depositions; Vocational Expert Interviews. The Appeals Board in *Fetner v. W.C.A.B.* (2014) 79 Cal. Comp. Cases 1204 (writ denied) has held that the employer was entitled to have its vocational expert interview the employee regarding his claim for cumulative industrial injury without using the procedure in Labor Code Section 5710, since, by its plain language, Labor Code Section 5710 applies only to depositions taken by parties, and a vocational expert is not a "party," as defined in 8 Cal. Code Reg. § 10301(x), and would have no authority under Labor Code Section 5710 to depose the employee. [See Ch. 25, § 25.41[2].]

Medical Provider Networks; Location

of Provider's Office. The Appeals Board in *Ayers v. W.C.A.B.* (2014) 79 Cal. Comp. Cases 1334 (writ denied) has held that an injured employee was not authorized to seek medical treatment from a doctor at his Santa Ana office, notwithstanding that this doctor was listed as a provider in the employer's MPN WellComp, when this doctor was listed on the WellComp website at his Beverly Hills office only. [See Ch. 5, § 5.03[4].]

FORMS. The following forms, found in Appendix D, FORMS, promulgated or revised as a result of changes introduced by SB 863 and ensuing regulations, have been included:

- § F9.11 Predesignation of Personal Physician [DWC Form 9783]
- § F9.12 Notice of Personal Chiropractor or Personal Acupuncturist

[DWC Form 9783.1]

TABLES. The following tables, found in Appendix E, TABLES AND PDRS, have been updated:

- Table 14, Maximum and Minimum Indemnity and Earnings
- Table 17, Permanent Partial Disability Indemnity

Matthew Bender provides continuing customer support for all its products:

- Editorial assistance—please consult the “Questions About This Publication” directory printed on the copyright page;
- Customer Service—missing pages, shipments, billing or other customer service matters (1-800-833-9844).
- Outside the United States and Canada, (518) 487-3000, or fax (518) 487-3584;
- Toll-free ordering (1-800-223-1940).



www.lexis.com

Copyright © 2015 Matthew Bender & Company, Inc., a member of the LexisNexis Group.
Publication 270, Release 81, March 2015

LexisNexis, the knowledge burst logo, and Michie are trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.

FILING INSTRUCTIONS

California Law of Employee Injuries and Workers' Compensation

Publication 270 Release 81

March 2015

**Check
As
Done**

- ☐ 1. Check the Title page in the front of your present Volume 1. It should indicate that your set is filed through Release Number 80. If the set is current, proceed with the filing of this release. If your set is not filed through Release Number 80, DO NOT file this release. Please call Customer Services at 1-800-833-9844 for assistance in bringing your set up to date.
- ☐ 2. This Release Number 81 contains only White Revision pages.
- ☐ 3. Circulate the "Publication Update" among those individuals interested in the contents of this release.

Check
As
Done

Remove Old
Pages Numbered

Insert New
Pages Numbered

For faster and easier filing, all references are to right-hand pages only.

VOLUME 1

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	1-3.	1-3
<input type="checkbox"/>	1-31 thru 1-33	1-31 thru 1-33
<input type="checkbox"/>	1-45	1-45
<input type="checkbox"/>	1-52.1 thru 1-54.5.	1-53 thru 1-54.6(7)
<input type="checkbox"/>	1-67 thru 1-68.5.	1-67 thru 1-68.5
<input type="checkbox"/>	1-77 thru 1-82.1.	1-77 thru 1-82.2(1)
<input type="checkbox"/>	2-17	2-17 thru 2-18.1
<input type="checkbox"/>	2-77 thru 2-81	2-77 thru 2-82.3
<input type="checkbox"/>	2-111.	2-111 thru 2-112.1
<input type="checkbox"/>	3-17 thru 3-19	3-17 thru 3-20.3
<input type="checkbox"/>	3-30.1 thru 3-32.1.	3-31 thru 3-32.1
<input type="checkbox"/>	3-118.1 thru 3-122.1.	3-119 thru 3-122.3
<input type="checkbox"/>	3-139.	3-139
<input type="checkbox"/>	4-55	4-55 thru 4-56.1
<input type="checkbox"/>	4-184.1 thru 4-185	4-185 thru 4-186.1
<input type="checkbox"/>	5-17	5-17 thru 5-18.1
<input type="checkbox"/>	5-35 thru 5-45	5-35 thru 5-46.1
<input type="checkbox"/>	5-72.1	5-72.1
<input type="checkbox"/>	5-76.17 thru 5-76.37.	5-76.17 thru 5-76.38(3)
<input type="checkbox"/>	5-76.47 thru 5-76.53.	5-76.47 thru 5-76.54(1)
<input type="checkbox"/>	5-83 thru 5-85	5-83 thru 5-86.1
<input type="checkbox"/>	5-101 thru 5-113	5-101 thru 5-113
<input type="checkbox"/>	5-127 thru 5-137	5-127 thru 5-137
<input type="checkbox"/>	7-23 thru 7-28.1.	7-23 thru 7-28.1
<input type="checkbox"/>	8-5.	8-5
<input type="checkbox"/>	8-15	8-15 thru 8-16.1
<input type="checkbox"/>	8-32.21.	8-32.21 thru 8-32.22(1)
<input type="checkbox"/>	8-37 thru 8-40.1.	8-37 thru 8-40.1
<input type="checkbox"/>	10-77 thru 10-78.1	10-77 thru 10-78.1
<input type="checkbox"/>	10-178.1 thru 10-180.1	10-179 thru 10-180.3
<input type="checkbox"/>	11-37 thru 11-38.1.	11-37 thru 11-38.1
<input type="checkbox"/>	11-76.5 thru 11-87.	11-77 thru 11-88.1

VOLUME 2

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	22-3 thru 22-5	22-3 thru 22-5

Check As Done	<u>Remove Old Pages Numbered</u>	<u>Insert New Pages Numbered</u>
<input type="checkbox"/>	22-23 thru 22-39	22-23 thru 22-40.1
<input type="checkbox"/>	22-58.2(5) thru 22-58.2(7)	22-58.2(5) thru 22-58.2(7)
<input type="checkbox"/>	22-58.2(23) thru 22-58.2(25)	22-58.2(23) thru 22-58.2(25)
<input type="checkbox"/>	22-75.	22-75 thru 22-76.1
<input type="checkbox"/>	22-85 thru 22-93	22-85 thru 22-94.1
<input type="checkbox"/>	22-96.5 thru 22-101	22-97 thru 22-102.13
<input type="checkbox"/>	23-1 thru 23-59	23-1 thru 23-67
<input type="checkbox"/>	24-7 thru 24-20.1	24-7 thru 24-20.1
<input type="checkbox"/>	24-51 thru 24-57	24-51 thru 24-57
<input type="checkbox"/>	25-3 thru 25-4.1.	25-3 thru 25-4.1
<input type="checkbox"/>	25-17 thru 25-32.9	25-17 thru 25-32.9
<input type="checkbox"/>	25-43 thru 25-54.1	25-43 thru 25-54.1
<input type="checkbox"/>	25-67 thru 25-70.1	25-67 thru 25-70.7
<input type="checkbox"/>	26-1 thru 26-13	26-1 thru 26-14.1
<input type="checkbox"/>	26-22.1 thru 26-22.3.	26-22.1 thru 26-22.3
<input type="checkbox"/>	26-36.1 thru 26-37	26-37 thru 26-38.1
<input type="checkbox"/>	26-47.	26-47
<input type="checkbox"/>	28-17 thru 28-19	28-17 thru 28-20.1
<input type="checkbox"/>	29-21.	29-21
<input type="checkbox"/>	30-5	30-5 thru 30-6.1
<input type="checkbox"/>	30-47 thru 30-75	30-47 thru 30-95
<input type="checkbox"/>	31-27 thru 31-36.1	31-27 thru 31-36.1
<input type="checkbox"/>	31-51.	31-51
<input type="checkbox"/>	32-27.	32-27
<input type="checkbox"/>	32-62.3 thru 32-73	32-63 thru 32-74.1
<input type="checkbox"/>	33-3 thru 33-11	33-3 thru 33-11
<input type="checkbox"/>	34-9	34-9 thru 34-10.1
<input type="checkbox"/>	35-1 thru 35-11	35-1 thru 35-11

VOLUME 3

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	AppD-3 thru AppD-5	AppD-3 thru AppD-5
<input type="checkbox"/>	AppD-94.13	AppD-94.13 thru AppD-94.14(3)
<input type="checkbox"/>	AppE-1.	AppE-1
<input type="checkbox"/>	AppE-79 thru AppE-87	AppE-79 thru AppE-87
<input type="checkbox"/>	TC-1 thru TC-119.	TC-1 thru TC-119
<input type="checkbox"/>	TS-1 thru TS-69	TS-1 thru TS-71
<input type="checkbox"/>	I-1 thru I-109	I-1 thru I-111

FILE IN THE FRONT OF THE FIRST VOLUME
OF YOUR SET

To order missing pages log on to our self service center, www.lexisnexis.com/printedsc or call Customer Services at 1 (800) 833-9844 and have the following information ready:

- (1) the publication title;
- (2) specific volume, chapter and page numbers; and
- (3) your name, phone number, and Matthew Bender account number.

Please recycle removed pages.

MISSING FILING INSTRUCTIONS?
FIND THEM AT www.lexisnexis.com/printedsc

Use the search tool provided to find and download missing filing instructions,
or sign on to the Print & CD Service Center to order missing pages or
replacement materials. Visit us soon to see what else
the Print & CD Service Center can do for you!



www.lexis.com

Copyright © 2015 Matthew Bender & Company, Inc., a member of the LexisNexis Group.
Publication 270, Release 81, March 2015

LexisNexis, the knowledge burst logo, and Michie are trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.