

## PUBLICATION UPDATE

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# California Law of Employee Injuries and Workers' Compensation

Publication 270    Release 93

March 2021

## HIGHLIGHTS

### 2021 Legislation & Prop. 22

- Statutory changes have been made.

### Regulatory Changes

- R 9792.23.6, R 9792.23.8, R 9792.23.11, and R 9792.23.12 are addressed.

### Cases

- Recent developments, including recent en bancs, have been added.

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**2020 LEGISLATION.** The following legislation has been added to this release, and includes new legislation addressing the COVID-19 pandemic:

**Presumption of Industrial Causation; COVID-19.** The legislature has added Lab. Code §§ 3212.86, 3212.87, and 3212.88, defining "in-

jury" to include illness or death resulting from COVID-19 under specified circumstances, until January 1, 2023, and creating a rebuttable presumption that a COVID-19-related injury is industrial and compensable for specified dates of injury. The new provisions require employees to exhaust their paid sick leave benefits and meet specified certification requirements before receiving any temporary disability benefits or, for police officers, firefighters, and other specified employees, to exhaust their leave of absence benefits. Additionally, the new provisions make claims related to COVID-19 illnesses presumptively compensable beginning 30 days or 45 days, rather than 90 days, after a claim is filed if the claim is not rejected. Until January 1, 2023, the new presumption of industrial injury related to COVID-19 applies to all employees whose co-employees experience specified levels of positive testing, and whose employer has five or more employees. [See Ch. 4, § 4.138[4][r]; Ch. 7, § 7.03[1], [3].]

**Employer Notice Requirements; COVID-19.** The legislature has added Lab. Code § 6409.6 to provide that employers who receive notice of potential exposure to COVID-19 must notify employees who were on the premises within the infectious period that they may have been exposed, and provide information regarding COVID-19-related benefits to which the employees may be entitled, including workers' compensation benefits. [See Ch. 4, § 4.138[4][r].]

**Paid Sick Leave; COVID-19.** The legislature has added Lab. Code §§ 248 and 248.1, effective September 9, 2020, and applicable retroactively to April 16, 2020 for food sector workers, to provide supplemental paid sick leave for covered workers during the COVID-19 pandemic. These provisions will expire on December 31, 2020, or upon the expiration of any federal extension of the Emergency Paid Sick Leave Act established by Pub. Law 116-127, whichever is later. [See Ch. 4, § 4.138[4][r]; Ch. 7, § 7.03[1].]

**Study of COVID-19 Impacts on Workers' Compensation.** The legislature has added Lab. Code § 77.8, to order the Commission on Health and Safety and Workers' Compensation to conduct a study of COVID-19's impact on workers' compensation claims and the workers' compensation system, including overall impacts on indemnity benefits, medical benefits, and death benefits, with consideration of differences in the impacts across differing occupational groups, and including the effect of the new Lab. Code §§ 3212.87 and 3212.88. [See Ch. 1, § 1.18.]

**Employment Relationships; Employees versus Independent Contractors.** The legislature has repealed Lab. Code § 2750.3, the statute codifying the California Supreme Court's holding in *Dynamex Operations West, Inc. v. Superior Court*, enacted in 2019, and revised and recast the statute's provisions in Lab. Code §§ 2775–2786 in a new Article 1.5, Chapter 2, Division 3, of the Labor

Code. Under Labor Code Section 2775, a person providing labor or services for remuneration on or after January 1, 2020, is considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of certain specified conditions are satisfied. The statutory framework provides extensive exceptions to the general rule, and exempts specified occupations and professions, including newspaper distributors and carriers, as set forth in Labor Code Sections 2776–2784. [See Ch. 3, § 3.03.]

**California Insurance Guarantee Association; Covered Claims.** The legislature has amended Ins. Code § 1063.1 to expand “covered claims” to include: (1) benefits under the workers’ compensation law of state’s other than California if the injured worker is a California resident and not otherwise entitled to coverage from another organization similar to CIGA; (2) obligations for medical services provided by a medical facility owned by a state or federal agency; and (3) claims arising under a policy that has been statutorily allocated or assumed by a company that later becomes insolvent, if the claim would have been covered had the original company been liquidated. [See Ch. 2, § 2.84[2], [3][d].]

**Insurance Coverage; Policy Renewal.** The legislature has amended Ins. Code § 678 to require an offer of renewal stating a reduction of limits or elimination of coverage to identify the specific limits being reduced or the coverage being eliminated by the

offer of renewal. [See Ch. 2, § 2.61[2].]

#### **Employees; Military Personnel.**

The legislature has amended Mil. & Vet. Code § 562, which includes specified military members as employees of the state, to change the name of the “State Military Reserve” to the “State Guard” and make other conforming changes. [See Ch. 3, § 3.112[2], [3]; Ch. 6, § 6.05[4]; Ch. 26, § 26.06[9][b].]

### **CALIFORNIA PROPOSITION 22.**

**Independent Contractors; Gig Workers.** On November 3, 2020, voters approved California Proposition 22, known as the “App-Based Drivers as Contractors and Labor Policies Initiative,” defining app-based rideshare and delivery drivers as independent contractors, not employees, and exempting companies such as Uber and Lyft from having to classify their gig workers in California as employees. [See Ch. 3, § 3.03.]

### **REGULATORY CHANGES.**

**Utilization Review; Medical Treatment Guidelines; Mental Health.** The AD has amended 8 Cal. Code Reg. §§ 9792.23.6, 9792.23.8, 9792.23.11, and 9792.23.12, effective for medical treatment services rendered on or after September 21, 2020, to incorporate by reference the ACOEM’s most recent treatment guidelines to the Clinical Topics section of the MTUS. The ACOEM guidelines that are incorporated by reference into the MTUS include, Knee Disorders Guideline (ACOEM

December 3, 2019), Workplace Mental Health Guideline: Depressive Disorders (ACOEM January 13, 2020), Occupational/Work-Related Asthma Guideline (ACOEM June 5, 2020), and Occupational Interstitial Lung Disease Guideline (ACOEM November 8, 2019). [See Ch. 5, § 5.02[1]; Ch. 22, § 22.05[6][a].]

**CASE LAW DEVELOPMENTS.** The following cases have been added:

#### ***Published Cases***

**Employees; Persons Engaged in Active Law Enforcement Assisting Police Officers.** The Supreme Court in *Gund v. County of Trinity* (2020) 10 Cal. 5th 503, 268 Cal. Rptr. 3d 119, 85 Cal. Comp. Cases 735, 472 P.3d 435, held that plaintiffs were engaged in “active law enforcement service” within the meaning of Labor Code Section 3366 when they were beaten while checking on the welfare of a neighbor at the request of a county deputy, and concluded that their civil claims against the county were barred by the exclusive remedy rule, despite alleged misrepresentations made by the deputy regarding the nature of the risk involved in his request for assistance. [See Ch. 8, § 3.48.]

**Exclusive Remedy Rule; Failure to Maintain Safe Work Environment; Employer’s COVID-19 Response.** The U.S. District Court for the Southern District of California in *Brooks v. Corecivic of Tennessee LLC* (2020) 85 Cal. Comp. Cases 843, 2020 U.S. Dist. LEXIS 162429 (S.D. Cal. 2020), found that an em-

ployee could pursue a constructive discharge claim against her employer for failure to maintain a safe work environment in violation of public policy based on the employer’s alleged inadequate COVID-19 response. However, the district court dismissed the employee’s claims for negligent supervision and intentional infliction of emotional distress, finding that those claims were barred by the exclusive remedy rule as the employer’s response to the pandemic did not fall outside the compensation bargain. [See Ch. 11, § 11.05[1][b], [2].]

#### ***WCAB en banc decisions***

**COVID-19 State of Emergency—No. 4; Time Limits For Filing of Documents.** The Appeals Board en banc in *In re: COVID-19 State of Emergency En Banc—No. 4* (2020) 85 Cal. Comp. Cases 573 (Appeals Board en banc opinion), has reinstated rules previously suspended due to the COVID-19 state of emergency, pertaining to the time limits for WCJs and arbitrators to respond to petitions for reconsideration, removal or disqualification with respect to petitions filed on or after September 1, 2020. Suspension of other rules remains in effect until further notice. [See Ch.1, § 1.11[4], Ch. 28, § 28.25.]

**COVID-19 State of Emergency—No. 5; Rescission of Suspension of WCAB Rules; Dismissal For Failure to Appear.** The Appeals Board en banc in *In re: COVID-19 State of Emergency En Banc—No. 5* (2020) 85 Cal. Comp.

Cases 921 (Appeals Board en banc opinion), has, effective October 27, 2020, reinstated rules previously suspended due to the COVID-19 state of emergency, regarding dismissal of an application or lien claim for failure to appear at a mandatory settlement conference, trial or lien trial. [See Ch.1, § 1.11[4], Ch. 26, § 26.01[3][a], Ch. 30, § 30.22[5][c].]

**COVID-19 State of Emergency—No. 6; Rescission of Suspension of WCAB Rules; Document Filing.** The Appeals Board en banc in *In re: COVID-19 State of Emergency En Banc—No. 6* (2020) 85 Cal. Comp. Cases 924 (Appeals Board en banc opinion), has, effective December 1, 2020, reinstated rules previously suspended due to the COVID-19 state of emergency, regarding the 20-day requirement to file documentary trial exhibits. The rules will become effective again with respect to all workers' compensation matters as of December 1, 2020. [See Ch.1, § 1.11[4]; Ch.22, § 22.08[4][e]; Ch. 23, § 23.12[2][d]; Ch. 25, § 25.06A[3].]

**COVID-19 State of Emergency—No. 7; Suspension of Timeframes for Assignment of Walk-Through Cases.** The Appeals Board en banc in *In re: COVID-19 State of Emergency En Banc—No. 7*, 2020 Cal. Wrk. Comp. LEXIS 103 (Appeals Board en banc opinion), temporarily suspended W.C.A.B. Rules 10789(c), regarding the required timeframes for assignment of walk-through cases based on the continued state of emergency and health

concerns related to COVID-19. The Appeals Board also expressly authorized the presiding WCJs at each district office to restrict and/or prioritize allowable walk-through documents as needed to expedite claim resolution or account for limited capacity in their respective offices. [See Ch.1, § 1.11[4]; Ch. 23, § 23.11[2]; Ch. 25, 25.08[4].]

**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 their subsequent history.*

**Injury AOE/COE; Presumption of Industrial Causation for Pneumonia; Correctional Officers.** The Appeals Board in *Marshall v. W.C.A.B.* (2020) 85 Cal. Comp. Cases 499 (writ denied), has held that the statutory presumption of industrial causation outlined in Labor Code § 3212.10, applicable to pneumonia suffered by correctional officers, does not apply to the condition pneumonitis, despite its almost identical symptoms, based on the condition's distinct etiology and the absence of language in the statute expressly covering pneumonitis. [See Ch. 4, § 4.138[4][m].]

**Subsequent Injuries Benefits Trust Fund; Threshold Requirements for Liability.** The Appeals Board in *Tejada v. W.C.A.B.* (2020) 85 Cal. Comp. Cases 5099 (writ denied), has held that for purposes establishing subsequent injury benefits eligibility, disability from non-

compensable injuries, such as a statutorily-barred psychiatric injury, does not count towards the 35 percent threshold requirement in Labor Code § 4751(b). [See Ch. 8, § 8.09[1], Ch. 31, § 31.20[4][c].]

#### **Permanent Disability; Rating; Combining Multiple Disabilities.**

The Appeals Board in *ACE American Ins. Co. v. W.C.A.B. (Botto)* (2020) 85 Cal. Comp. Cases 590 (writ denied), held that the WCJ correctly calculated an employee's overall permanent disability by adding impairments for each shoulder based on the QMEs opinion that the shoulder impairments had a synergistic effect and that adding them produced a more accurate measure of applicant's disability than combining them using the CVC. [See Ch. 32, § 32.03A[1].]

**Temporary Disability Indemnity; Employer's Failure to Offer Suitable Modified Work.** The Appeals Board in *Green Valley Farm Supply, Inc. v. W.C.A.B. (Rivera)* (2020) 85 Cal. Comp. Cases 617 (writ denied), upheld the WCJ's finding that a commercial truck driver was not precluded from receiving temporary total disability indemnity for his 2019 industrial injury based on his termination from employment due to a reckless driving conviction and consequential loss of insurance coverage, when the employer made no showing that modified duty was available to the employee or that a bona fide offer of such was made, and there was no evidence that the loss of insurance would have prevented the employee from performing light du-

ties that did not involve driving. [See Ch. 7, § 7.02[4][c].]

#### **Liens; Medical Provider's Criminal Conduct.**

The Appeals Board in *Employers Ins. Group v. W.C.A.B. (Juarez)* (2020) 85 Cal. Comp. Cases 671 (writ denied), upheld a finding that a medical provider suspended from the workers' compensation system pursuant to Labor Code Section 139.21(a)(1) for unlawful sexual conduct with a minor was not entitled to recover payment on his liens for medical services rendered after the conduct occurred based on the presumption in Labor Code Section 139.21(g) that the liens arose from or were connected to the criminal conduct resulting in his suspension. [See Ch. 5, § 5.10.]

#### **Third Party Actions; Claim for Credit; University of California.**

The Appeals Board in *Regents of the University of California Irvine v. W.C.A.B. (Klimkiewicz)* (2020) 85 Cal. Comp. Cases 678 (writ denied), denied a credit claim by the University of California, Irvine, for a worker's civil settlement recovery against the Regents of the University of California for injuries incurred by the worker while working at the Irvine campus, based on its finding that the University of California campuses are not individual legal entities separate from the Regents, and that the worker, although he worked at the Irvine campus, was legally an employee of the Regents. [See Ch. 11, § 11.42[5][a].]

#### **Permanent Disability; Rating; Combining Multiple Disabilities.**

The Appeals Board in *United Airlines, Inc. v. W.C.A.B. (Van Dyne-Parmet)* (2020) 85 Cal. Comp. Cases 685 (writ denied), upheld an award of permanent disability calculated under the 1997 Schedule for Rating Permanent Disabilities, where the employee's impairments were added rather than combined using the multiple disabilities table in the 1997 Schedule. [See Ch. 32, § 32.03A[1].]

**Presumption of Industrial Causation; Statutory Extension of Presumption.** The Appeals Board in *Contra Costa County v. W.C.A.B. (Lemay)* (2020) 85 Cal. Comp. Cases 665 (writ denied), upheld a finding that the statutory extension applicable to the presumption of industrial causation for cancer and heart injury applied against the county in favor of a county deputy whose conditions first manifested at his subsequent employment as a police officer with a community college district, which was not subject to the presumption. [See Ch. 4, § 4.138[3].]

**Injury AOE/COE; Affirmative Defenses; Intoxication.** The Appeals Board in *Southern Ins. Co. v. W.C.A.B. (Hindawi)* (2020) 85 Cal. Comp. Cases 631 (writ denied), affirmed a finding that the employer did not meet its burden of proving the intoxication defense to applicant's claim for industrial injury even though applicant tested positive for drugs after his injury, when there was insufficient evidence regarding when the drug was ingested relative to the timing of the injury and whether the employee was impaired when the

injury occurred. [See Ch. 4, § 4.20[4][a].]

**Permanent Disability; Rebuttal of Scheduled Rating; Vocational Evidence.** The Appeals Board in *County of Alameda v. W.C.A.B. (Williams)* (2020) 85 Cal. Comp. Cases 792 (writ denied), held that injured workers are entitled to use vocational evidence to attempt to rebut permanent disability ratings reflected in the permanent disability rating schedule for post-January 1, 2013 dates of injury. [See Ch. 8, § 8.02[3], Ch. 32, § 32.03A[1].]

**Employer's Serious and Willful Misconduct.** The Appeals Board in *State of California, Dept. of Corrections and Rehabilitation v. W.C.A.B. (Ayala)* (2020) 85 Cal. Comp. Cases 811, 814–815 (writ denied), held that injuries suffered by three correctional officers in a premeditated attack on prison staff by inmates were caused by the employer's serious and willful misconduct, when the Appeals Board found that the employer's deliberate failure to address the threat of attack while armed with specific knowledge, through memos and inmate interviews, of when it was expected to occur was more than mere negligence and constituted a reckless disregard for its employees' safety, with knowledge of the probable danger of serious injury. [See Ch. 10, § 10.01[4][b].]

**Workers' Compensation Judges; Disqualification.** The Appeals Board in *Infinity Staffing v. W.C.A.B. (Guillen)* (2020) 85 Cal. Comp. Cases 867 (writ denied), denied the employer's

petition to disqualify the WCJ based on the WCJ's testimony in a criminal case against the injured employee for workers' compensation insurance fraud, when there was no showing that the WCJ expressed unqualified opinions or beliefs as to the merits of the employee's claim pursuant to Code of Civil Procedure Section 641(f), nor did the employer establish bias or the appearance of bias by the WCJ. [See Ch.1, § 1.11[3][b][iii], Ch. 26, § 26.03[2].]

**Stress-Related Physical Injuries; Inapplicability of Good Faith Personnel Action Defense.** The Appeals Board in *County of San Bernardino v. W.C.A.B. (Cortes)* (2020) 85 Cal. Comp. Cases 854 (writ denied), held that the good faith personnel action defense in Labor Code Section 3208.3(h), applicable to claims for psychiatric injury, did not apply to bar an employee's claim for stress-related physical injuries. [See Ch. 4, § 4.02[3][f].]

**Permanent Disability; Apportionment; Prior Awards.** The Appeals Board in *Hom v. W.C.A.B.* (2020) 85 Cal. Comp. Cases 863 (writ denied), awarded an employee 10 percent permanent disability after subtracting the employee's prior award of permanent disability, pursuant to Labor Code Section 4664, from his overall permanent disability following a subsequent injury to the same body part. The Appeals Board found that apportionment was not precluded on the basis that different AMA *Guides* methodologies were utilized to calculate permanent dis-

ability for each of the employee's injuries, where the same AMA *Guides* edition was used and the employer established overlap. [See Ch. 8, § 8.07[2][c].]

**Permanent Disability; Rebuttal of Scheduled Rating; Vocational Evidence.** The Appeals Board in *State Comp. Ins. Fund v. W.C.A.B. (Ortega)* (2020) 85 Cal. Comp. Cases 946 (writ denied), rejected defendant's assertion that amendments to Labor Code § 4660.1 eliminated the mechanism for using vocational evidence to rebut the scheduled permanent disability rating for injuries occurring on or after 1/1/2013. [See Ch. 8, § 8.02[3], Ch. 32, § 32.03A[1].]

**Petition for Contribution; Statute of Limitations.** The Appeals Board in *Brotherhood Mut. Ins. Co. v. W.C.A.B. (Lewis)* (2020) 85 Cal. Comp. Cases 931 (writ denied), held that defendant's Declaration of Readiness to Proceed was sufficient, for purposes of the statute of limitations, to "institute proceedings" within one year of the approval of a compromise and release, and that the defendant's failure to timely file a petition for contribution did not bar its contribution claim. [See Ch. 24, § 24.03[7], Ch. 31, § 31.13[2][a].]

#### **WCAB Noteworthy Panel Decisions**

**Caution:** *The following entries are decisions deemed noteworthy by LexisNexis editorial consultants. They are citeable authority, but do not constitute binding precedent. Practitioners should proceed with caution when citing to these cases*

and should also verify their subsequent history.

**Permanent Disability; Apportionment; Conclusive Presumption of Total Disability.** A majority Appeals Board panel in *Fraire v. California Dept. of Corrections and Rehabilitation* (2020) 85 Cal. Comp. Cases 697 (Appeals Board noteworthy panel decision), held that permanent disabilities that are conclusively presumed to be total under Labor Code Section 4662(a) are subject to apportionment based on causation under Labor Code Sections 4663 and 4664(a). [See Ch. 8, § 8.05[1].]

**Medical-Legal Procedure; Panel Qualified Medical Evaluator Specialty Disputes.** The Appeals Board in *Porcello v. State of California, Dept. of Corrections and Rehabilitation* (2020) 85 Cal. Comp. Cases 327 (Appeals Board noteworthy panel decision), held that parties may submit a panel specialty dispute to the WCJ prior to or instead of submitting the dispute to the Medical Director. [See Ch. 22, § 22.11[4].]

**Temporary Total Disability; Offers of Work; COVID-19.** The Appeals Board in *Ceballos v. TriMark Chefs' Toys*, 2020 Cal. Wrk. Comp. P.D. LEXIS 285 (Appeals Board noteworthy panel decision), held that a temporarily partially disabled warehouse worker who declined a job offer at Starbucks as a part-time barista did not act unreasonably in declining the job due to the increased risk of becoming infected with COVID-19 and was, therefore, entitled to receive temporary total dis-

ability indemnity while he was off work. [See Ch. 7, § 7.02[4][c].]

**Temporary Total Disability; Employer's Liability During COVID-19 Shutdown.** The Appeals Board in *Corona v. California Walls, Inc. dba Crown Industrial Operators*, 2020 Cal. Wrk. Comp. P.D. LEXIS 256 (Appeals Board noteworthy panel decision), held that an employee who had returned to work with restrictions following an industrial injury was entitled to temporary total indemnity for the period his employer was required to shut down due to state and local emergency orders in response to COVID-19. The Appeals Board reasoned that because applicant's termination from employment was not for cause but rather was due to the shutdown, the employer was not relieved of its obligation to pay temporary total disability indemnity, despite the employer's inability to offer modified duties to applicant because of COVID-19. [Ch. 7, § 7.02[4][c].]

#### ***Unpublished Cases***

**Caution:** *The following unpublished entries may not be cited or relied upon, except as specified in California Rules of Court, rule 8.1115.*

**Exclusive Remedy Rule; Wrongful Death; Employee's Intoxication.** The Court of Appeal in *Contreras Curiel Corp. v. Superior Court* (2020) 85 Cal. Comp. Cases 829 (court of appeal opinion not published in official reports), held that a plaintiff's wrongful death claim against his mother's employer filed

after his mother was killed in a single-vehicle car accident following her shift at the employer's restaurant, where she allegedly became intoxicated, was barred despite evidence that the employer allowed and encouraged its servers to consume alcohol with customers. [See Ch. 11, § 11.01[2].]

**Civil Liability of Insurer; Non-payment of Benefits.** The Court of Appeal in *Mendoza-Hernandez v. State Compensation Ins. Fund* (2020) 85 Cal. Comp. Cases 765, 775 (court

of appeal opinion not published in official reports), held that an insurer did not act outside the "compensation bargain" by violating a stipulated order to provide home health care services recommended by the plaintiffs physician, and consequently the plaintiff's civil action against the insurer was barred by the workers' compensation exclusivity provisions. [See Ch. 11, § 11.06[2].]

**TABLES.** In Volume 3, Appendix E, Table 14 and Tables 17A, 17B, 17C and 17D have been updated.

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