

PUBLICATION UPDATE

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HIGHLIGHTS

2011 Legislation

- Legislative actions affecting workers' compensation have been added.

Administrative Regulations

- Changes made through Register 2011, No. 38 (9/23/2011) have been added.

Case Law

- Recent important decisions have been added.

New Chapter on Supplemental Job Displacement Benefits

- See new Chapter 21

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NEW CHAPTER ON SUPPLEMENTAL JOB DISPLACEMENT BENEFITS. Ch. 21, Vocational Rehabilitation, has been deleted from the treatise as a consequence of the legislature's repeal,

effective January 1, 2009, of Labor Code Sec. 139.5, the statute pursuant to which the vocational rehabilitation system operated. Discussion of the Appeals Board's continuing jurisdiction to enforce or terminate vocational rehabilitation rights that "vested" prior to that date, previously in Ch. 21, which is the only aspect of the Board's jurisdiction over vocational rehabilitation that has survived the statutory repeal, is now in Ch. 13, § 13.13[2]. Discussion of Supplemental Job Displacement Benefits, remains in Ch. 21, which is now entitled Supplemental Job Displacement Benefits.

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CALIFORNIA STATUTES. Legislation affecting workers' compensation en-

acted during the 2010 legislative session, not included in previous releases, and the 2011 legislative session have been added, including the following:

Unemployment Insurance; Disability; Eligibility for Benefits. The legislature has amended Unemployment Insurance Code Secs. 2626 and 2629 to delete (1) vocational rehabilitation, which no longer exists, from the factors that may affect the definition of “disability” and (2) the vocational rehabilitation maintenance allowance, which also no longer exists, from the list of “other benefits” whose receipt make an individual ineligible to receive unemployment disability benefits. [See Ch. 17, § 17.37.]

Unemployment Insurance; Voluntary Plans. The legislature has enacted Unemployment Insurance Code Sec. 3254.1 to provide for voluntary plans administered by a small-business-third-party administrator, as defined, that administers voluntary disability plans on behalf of its clients, subject to specified requirements. The statute remains in effect through December 31, 2014, and as of that date is repealed. [See Ch. 17, § 17.41.]

Court Administrator Position Eliminated. The legislature has eliminated the position of court administrator that it created in 2002. (see Stats. 2011, ch. 559, § 1) [See Ch. 1, § 1.06[1], Ch. 16, § 16.04[3].] **Note:** Stats. 2011 Ch. 559 (AB 1426), effective October 7, 2011, removed the position of court administrator and distributed the duties to the Workers’ Compensation Appeals Board and the Administrative Director of the Division of Workers’ Compensation. **Legislative Findings and Declarations:** The Legislature finds and declares that the court administrator in the Division of Workers’ Compensation, created pursuant to Chapter 6 of the Statutes of

2002, fails to achieve the intended uniformity and expedition of proceedings in the district offices of the workers’ compensation appeals board. The court administrator creates divided lines of authority and accountability, and it does not promote coordination of the functions of the Division of Workers’ Compensation. The Legislature therefore intends to eliminate the position of the court administrator and to reassign the powers and duties of the court administrator to the Workers’ Compensation Appeals Board or to the Administrative Director of the Division of Workers’ Compensation, as appropriate. Stats. 2011 Ch. 559 §1. All regulations adopted by the court administrator shall remain in effect unless amended or repealed by either the Workers’ Compensation Appeals Board or the Administrative Director of the Division of Workers’ Compensation. Regulations of the court administrator that have been adopted pursuant to Sections 5307, 5500.3, or subdivision (a) of Section 5502 shall be deemed to be regulations of the Workers’ Compensation Appeals Board. All other regulations of the court administrator shall be deemed to be regulations of the Administrative Director of the Division of Workers’ Compensation. Stats. 2011 Ch. 559 §17.

Pharmacy Services; Compounded Drug Products. The legislature has enacted provisions governing maximum reimbursements for specified pharmacy services and compounded drug products. (see Stats. 2011, ch. 545) [See Ch. 4, § 4.26[1].]

Contractors’ Licenses; Workers’ Compensation Coverage. The legislature has required a workers’ compensation insurer to report to the registrar a licensee whose workers’ compensation insurance policy has been canceled as a consequence of the insurer’s premium audit or investi-

gation. (*see* Stats. 2011, ch. 686) [*See* Ch. 3, § 3.37[1].]

Contractor's License Renewal; Workers' Compensation Coverage. The legislature has provided that, at the time of renewal, all active contractors' licensees with an exemption for workers' compensation insurance, submitted pursuant to Business & Professions Code Sec. 7125(b), must either recertify the licensee's exemption by completing a recertification statement on the license renewal form or provide a current and valid Certificate of Workers' Compensation Insurance or Certificate of Self-Insurance. (*see* Stats. 2011, ch. 546) [*See* Ch. 3, § 3.37[1].]

Vocational Experts; Fee Schedule. The legislature has ordered the Administrative Director to adopt a fee schedule that establishes reasonable hourly fees for services provided by vocational experts, and it has instructed the Appeals Board not to allow vocational expert fees in excess of those that are reasonable, actual, and necessary. (*see* Stats. 2011, ch. 555) [*See* Ch. 16, § 16.47.]

Independent Contractors; Misclassification. The legislature has enacted penalties for willful misclassification of an individual as independent contractor and made a person who advises an employer to so misclassify an individual jointly and severally liable with the employer, with a person who provides advice to his or her employer and an attorney who provides legal advice excepted from this provision. (*see* Stats. 2011, ch. 706) [*See* Ch. 2, § 2.24[1].]

Workers' Compensation Insurance; Dispute Resolution; Arbitration Clauses. The legislature has provided that an insurer intending to use a dispute resolution or arbitration agreement to resolve disputes arising in California out of a workers' compensation insurance policy or endorse-

ment issued to a California employer must disclose to the employer, contemporaneously with any written quote that offers to provide insurance coverage, that choice of law and choice of venue or forum may be a jurisdiction other than California and that these terms are negotiable between the insurer and the employer. (*see* Stats. 2011, ch. 566) [*See* Ch. 3, § 3.11[9].]

CALIFORNIA REGULATIONS.

NOTE: AB 1426, 2011 Ch. 559, effective October 7, 2011, removed the position of Court Administrator and distributed its duties to the Workers' Compensation Appeals Board and the Administrative Director of the Division of Workers' Compensation.

Medical-Legal Travel Expenses; Mileage Rate. The mileage rate for medical and medical-legal travel expenses has been increased to 55.5 cents per mile, effective July 1, 2011. This rate must be paid for travel on or after July 1, 2011, regardless of the date of injury. Labor Code Sec. 4600, in conjunction with Government Code Sec. 19820 and the Department of Personnel Administration regulations, establishes the rate payable for mileage reimbursement for medical and medical-legal expenses and ties it to the Internal Revenue Service. The updated mileage reimbursement form is posted on the DWC Website at <http://www.dir.ca.gov/dwc/forms.html>. [*See* Ch. 4, § 4.17[1].]

Official Medical Fee Schedule; Payment for Medical Treatment. Various subsections of 8 Cal. Code Reg. § 9792.5 have been amended, including a provision limiting the regulation's applicability to only medical treatment rendered before October 15, 2011. Additionally, 8 Cal. Code Reg. §§ 9792.5.0-9792.5.3 have been promulgated to govern medical treatment billing and payment on and after October

15, 2011, including provisions to govern electronic billing and payment on and after October 18, 2012. [See Ch. 4, § 4.26[2].]

Return-to-Work Program; Employer Reimbursement. As a consequence of the January 1, 2010, repeal of Labor Code Sec. 139.48, the statute that had authorized employer reimbursements for accommodating injured workers returning to work, the Division of Workers' Compensation has repealed 8 Cal. Code Reg. §§ 10119 and 10120, thereby eliminating such reimbursements. [See Ch. 6, § 6.24.]

CALIFORNIA CASES.

Supreme Court:

Employment Relationships; Residential Employees. The California Supreme Court in *Cortez v. Abich* (2011) 51 Cal. 4th 285, has held that work rendered on a residential remodeling project in which significant portions of the house are demolished and rebuilt, and new rooms are added, does not fall within the Labor Code Sec. 6303(b) "household domestic service" provision for employment excluded under Cal-OSHA. [See Ch. 2, § 2.26[3].]

Third Party Actions; Comparative Negligence; Proposition 51; Respondeat Superior; Negligent Entrustment. The California Supreme Court in *Diaz v. Carcamo* (2011) 51 Cal. 4th 1148, has held that comparative fault principles do not apply to an employer that is only vicariously liable for negligent acts of its employee under the doctrine of respondeat superior. [See Ch. 12, § 12.16[5].]

Permanent Total Disability; Cost of Living Adjustments. The California Supreme Court in *Baker v. W.C.A.B. (X.S.)* (2011) 52 Cal. 4th 434, has held that the legislature intended that the cost of living adjustments to total permanent disability benefits and life pension benefits, as autho-

rized by Labor Code Sec. 4659(c), be calculated and applied prospectively commencing on January 1 following the date on which the injured worker first becomes entitled to receive, and actually begins receiving, such benefit payments, i.e., the permanent and stationary date in a case of total permanent disability benefits, and the date on which partial permanent disability benefits become exhausted in a case of life pension payments. [See Ch. 7, § 7.53.]

Court of Appeal Published Opinions:

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. 12, §§ 12.01[3], 12.27[5].]

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. 18, § 18.01[2].]

Civil Actions; Independent Psychiatric Examinations; Attorney's Presence. The court of appeal in *Toyota Motor Sales, U.S.A., Inc. v. Superior Court* (2010) 189 Cal. App. 4th 1391, has held that the trial court abused its discretion when, in grant-

ing the defendant employer's motion to compel an independent psychiatric examination of the plaintiff employee, it ordered that the plaintiff's counsel be permitted to monitor the examination from a separate room, since the plaintiff demonstrated no legitimate need for such monitoring and the defendant produced evidence that such monitoring might compromise the integrity of the examination. [See Ch. 12, § 12.20[4].]

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 Sec. 4062.3(f). [See Ch. 15, § 15.04[3][a].]

Medical Examiners; Ex Parte Communications. The court of appeal in *State Farm Insurance Co. v. W.C.A.B. (Pearson)* (2011) 192 Cal. App. 4th 51, has held that ex parte communications by the employee and the lien claimant (the employee's husband) to a medical examiner violated the prohibition against ex parte communications and that the violation required disqualification of the medical examiner and the striking of her reports and testimony. [See Ch. 15, § 15.04[3][a].]

Medical Treatment; Home Care. The court of appeal in *State Farm Insurance Co. v. W.C.A.B. (Pearson)* (2011) 192 Cal. App. 4th 51, has held that that an award of compensation to the lien claimant for caregiver services was unreasonable, not authorized by Labor Code Sec. 4600(a), and not supported by substantial evidence. [See Ch. 4, § 4.16.]

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 Sec. 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. 7, § 7.00.]

Permanent Disability; 2005 Permanent Disability Rating Schedule; Diminished Future Earning Capacity. The court of appeal in *Ogilvie v. W.C.A.B.; City and County of San Francisco v. W.C.A.B.* (2011) 197 Cal. App. 4th 1262, *pet. for rev. den. sub nom. Ogilvie v. W.C.A.B.* (10/26/2011), has held that, to rebut the application of the rating schedule on the basis that the scheduled earning capacity adjustment is incorrect, an employee may challenge the presumptive scheduled percentage of permanent disability prescribed to his or her injury by showing an error in the earning capacity formula, the data, or the result derived from the data in formulating the earning capacity adjustment, or by showing that the rating was incorrectly applied or that the disability reflected in the rating schedule is inadequate in light of medical complications aggravating the employee's disability, or that, due to his or her industrial injury, the employee is not amenable to rehabilitation and, therefore, has suffered a greater loss of future earning capacity than reflected in the scheduled

rating. [See Ch. 7, § 7.00.]

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 Sec. 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. 3, § 3.34[3].]

Exclusive Remedy; Termination of Employment; Arbitration. The court of appeal in *SunLine Transit Agency v. Amalgamated Transit Union, Local 1277 (Navalette)* (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. 12, § 12.20[4]; Ch. 13, § 13.08[1].]

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 Sec. 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. 11, § 11.17.]

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 Sec. 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. 10, § 10.24[5].]

Service-Connected Survivor Death Benefits; Presumption of Industrial Causation; Cancer; Law Enforcement Officer. The court of appeal in *Sameyah v. Los Angeles County Employees Retirement Association* (2010) 190 Cal. App. 4th 199, has held that substantial evidence supported the trial court's decision that defendant employer had rebutted the cancer presumption set forth in Government Code Sec. 31720.6(a), (b) by making the requisite showing outlined in Government Code Sec. 31720.6(c), i.e., by establishing the primary site of the decedent employee's lymphoma and by demonstrating that carcinogens to which the decedent was exposed during performance of his job duties were not reasonably linked to his Burkitt's lymphoma. [See Ch. 10, § 10.33[5].]

Third Party Actions; Hirer's Negligent Exercise of Retained Control. The court of appeal in *Angelotti v. The Walt Disney Co.* (2011) 192 Cal. App. 4th 1394, has held that the evidence compelled the conclusion that the plaintiff was the special employee of the defendant film production company, that the workers' compensation exclusivity rule precluded any recovery against that defendant or its defendant employee, and that the undisputed evidence showed that other defendants did not provide equipment used by the plaintiff when injured and did not exercise their retained

control in any manner that affirmatively contributed to the plaintiff's injury. [See Ch. 12, § 12.16[8].]

Third Party Actions; Hirer's Negligent Exercise of Retained Control. The court of appeal in *Tverberg v. Fillner Construction, Inc.* (2011) 193 Cal. App. 4th 1121, has held that the plaintiff presented sufficient evidence of a triable issue of fact on whether the defendant general contractor had direct liability for the plaintiff's injury, on the theory that the general contractor negligently exercised retained control over workplace safety and thereby affirmatively contributed to the plaintiff's injury. [See Ch. 12, § 12.16[8].]

Insurance; Breach of Contract; Breach of Covenant of Good Faith and Fair Dealing. The court of appeal in *Edward Carey Construction Co. v. State Compensation Insurance Fund* (2011) 194 Cal. App. 4th 657, has held that the insured's complaint for an alleged refusal to provide benefits due under an insurance policy stated sufficient causes of action for breach of contract and tortious breach of the covenant of good faith and fair dealing and that workers' compensation was not the exclusive remedy of the insured against the insurer. [See Ch. 3, § 3.11[9].]

Penalties; Unreasonable Delay in Payment of Temporary Disability Benefits. The court of appeal in *Coca-Cola Enterprises, Inc. v. W.C.A.B. (Espinoza)* (2011) 194 Cal. App. 4th 809, has held that a Labor Code Sec. 5814 penalty must be based on the difference between the temporary total disability rate to which the employee was entitled pursuant to Labor Code Sec. 4453(a)(9), i.e., two-thirds of the employee's average weekly earnings, and the amount the employer actually paid to the employee. [See Ch. 6, § 6.06[2].]

Penalties; Unreasonable Delay in Pay-

ment of Temporary Disability Benefits; Contents of Claim File. The court of appeal in *Coca-Cola Enterprises, Inc. v. W.C.A.B. (Espinoza)* (2011) 194 Cal. App. 4th 809, has held that reliance by the Appeals Board, when imposing a Labor Code Sec. 5814 penalty for underpayment of temporary total disability, on the regulation requiring that the claim file contain documentation of the injured employee's average weekly earnings was misplaced, so that any delay by the employer in providing a wage statement to the employee did not authorize imposition of a penalty by the Board. [See Ch. 11, § 11.11[2].]

Workers' Compensation Lump-Sum Settlements; Marriage Dissolution Actions; Community Property. The court of appeal in *In re Marriage of Ruiz* (2011) 194 Cal. App. 4th 348, has held that, once the trial court determined that the workers' compensation award was partially community property and partially separate property, it became the trial court's responsibility to make an equitable apportionment, with neither party having the burden of proof on this issue. [See Ch. 7, § 7.01[3].]

Federal Cases:

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. Sec. 547(b), criminal restitution payments that otherwise meet the requirements of that statute are recoverable preferences in a Ch. 7 bankruptcy. [See Ch. 3, § 3.11[7].]

Income Tax; Workers' Compensation Benefits; Social Security Disability Benefits. The U.S. Tax Court in *Sherar v. Commissioner* (2011) T.C. Summary Opinion 2011-44, 2011 Tax. Ct. Summary LEXIS 42, in an opinion that is not to be

treated as precedent for any other case, has held that certain workers' compensation benefits are taxable as though they were Social Security benefits. [See Ch. 22, § 22.05[5].]

WCAB Jurisdiction; Federal Subject Matter Jurisdiction. The U.S. Court of Appeals, Ninth Circuit, in *U.S. Fidelity & Guaranty Co. v. Lee Investments*, 641 F.3d 1126 (9th Cir. 2011) has held that the trial court had subject matter jurisdiction over an insurance company's diversity action seeking rescission of a workers' compensation policy and was not required to dismiss the case on the grounds that exclusive jurisdiction was vested by California law in the Appeals Board. [See Ch. 12, § 12.23[5].]

WCAB En Banc Opinions:

Medical Treatment; Interpreter Services. The Appeals Board en banc in *Guiron v. Santa Fe Extruders* (2011) 76 Cal. Comp. Cases 228 (Appeals Board en banc opinion) has held that, pursuant to the employer's obligation under Labor Code Sec. 4600 to provide medical treatment reasonably required to cure or relieve an injured worker from the effects of his or her injury, the employer is required to provide reasonably required interpreter services during medical treatment appointments for an injured worker who is unable to speak, understand, or communicate in English. [See Ch. 16, § 16.49[2].]

Medical Treatment; Medical Provider Networks; Treatment Outside of Networks; Medical Reports; Admissibility. The Appeals Board en banc in *Valdez v. Warehouse Demo Services* (2011) 76 Cal. Comp. Cases 330 (Appeals Board en banc opinion) has held that, when unauthorized treatment is obtained outside a validly established and properly noticed MPN, reports from non-network physicians are in-

admissible and, therefore, may not be relied on, and that the employer is not liable for the cost of such non-network reports. [See Ch. 4, § 4.18[8][d], [e].]

Agreed Medical Evaluator Proposals; Qualified Medical Evaluator Requests; Timeliness. The Appeals Board en banc in *Messele v. Pitco Foods, Inc.* (2011) 76 Cal. Comp. Cases 956 (Appeals Board en banc opinion) and *Messele v. Pitco Foods, Inc.* (2011) 76 Cal. Comp. Cases —, 2011 Cal. Wrk. Comp. LEXIS 172 (Appeals Board en banc opinion) has held that, when the first written AME proposal is "made" by mail or by any method other than personal service, the period for seeking agreement on an AME under Labor Code Sec. 4062.2(b) is extended by five calendar days if the physical address of the party being served with that proposal is in California, and the time period set forth in the statute for seeking agreement on an AME starts with the day after the date of the first written proposal and includes the last day, then subsequently issued notice of its intention to modify its decision to state that it applies prospectively, i.e., it governs all panel requests made after September 26, 2011. [See Ch. 16, § 16.54[1].]

Appeals Board Significant Panel Decision:

WCAB Procedure; Case Record. The Appeals Board, in *Hernandez v. AMS Staff Leasing* (2011) 76 Cal. Comp. Cases 343 (Appeals Board significant panel decision), dismissing the employer's petition for removal, held that, when a paper file, an electronic file in EAMS, or a combined paper and electronic file is sent to the Board after the filing of a petition for reconsideration, removal, or disqualification, (1) there must be a complete and properly organized record that includes all documents admitted in evidence, (2) the WCJ bears the respon-

sibility to ensure that all documents in the record are scanned into EAMS, or at least placed in a paper file in proper order, no later than transmission of the file(s) to the Board, and (3) without a proper record, the matter may be returned to the WCJ to properly complete the record. [See Ch. 19, §§ 19.17[1], 19.21.]

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.*

Employment Relationships. The court of appeal in *Duenas v. W.C.A.B. (Ayala)* (2010) 75 Cal. Comp. Cases 829 (court of appeal unpublished opinion) has held that, pursuant to Labor Code Sec. 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. 2, § 2.16[4].]

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 unpublished opinion) has held that the employer, by questioning the AME on deposition long after expiration of the 20-day period specified by Labor Code Sec. 4062(a) for objecting to utilization review determinations, indicated its agreement to submit the matter to the Appeals Board. [See Ch. 15, § 15.04[3][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 unpublished opinion) has

held that the evidence did not support the Board's finding that the employer, in violation of Labor Code Sec. 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. 11, § 11.14[2].]

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 unpublished opinion) has held that the evidence did not support the Board's finding that the employer, in violation of Labor Code Sec. 4553.1, engaged in serious and willful misconduct, when the employee and a coworker were attempting to place a large ripper shank into the tool pocket of a bulldozer, and the ripper shank fell, killing the employee, since the employer did not violate Cal/OSHA Safety Order 5002, which protects employees from standing directly beneath suspended loads, because the evidence indicated that neither the deceased employee nor his coworker stood underneath the ripper shank. [See Ch. 11, § 11.18[1].]

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 unpublished opinion) has held that the interpretations of Labor Code Sec. 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 Sec. 5803, and that the interpretations of Labor Code Sec. 4660(d) adopted in *Genlyte* and *Zenith* should govern the determination of which permanent disability rating schedule applies in the present case. [See Ch. 7, § 7.00.]

Permanent Total Disability; Cost of Living Adjustments. The court of appeal in *Allied Waste Industries, Inc. v. W.C.A.B. (Rojas)* 75 Cal. Comp. Cases 1315 (court of appeal unpublished opinion) has held that that an injured worker was entitled to the cost of living adjustment provided for in Labor Code Sec. 4659(c) as of January 1st following the date of injury. [See Ch. 7, § 7.53.]

Permanent Disability; Apportionment; Substantial Evidence. The court of appeal in *Solano County Probation Department v. W.C.A.B. (Aguilar)* (2011) 76 Cal. Comp. Cases 1 (court of appeal unpublished opinion) has held that the Appeals Board's determination was based on an assumption not supported by the record, noting that the AME's opinion on apportionment was the only evidence in the record on this issue, that there was no basis on which the WCJ could reject it or assume it away, and that a factual finding or decision is not based on substantial evidence if unreasonable, illogical, arbitrary, improbable, or inequitable, considering the entire record and the statutory scheme. [See Ch. 7, § 7.44[2].]

Permanent Disability; 1997 Schedule for Rating Permanent Disabilities. The court of appeal in *Nittel v. W.C.A.B.* (2011) 76 Cal. Comp. Cases 545 (court of appeal unpublished opinion) has held that an employer breached its duty to its employee pursuant to Labor Code Sec. 4061 to give notice of the employer's position regarding

the employee's entitlement to permanent disability at the time the last payment of temporary disability is made and pursuant to 8 Cal. Code Reg. § 9814 when the employer has provided salary or other payments in lieu of or in excess of temporary disability indemnity, thereby entitling the employee to workers' compensation benefits based on the 1997 Schedule for Rating Permanent Disabilities. [See Ch. 7, § 7.00.]

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 unpublished opinion) 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 Sec. 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. 16, § 16.46.]

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 unpublished opinion) has held that, although Labor Code Sec. 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 Sec. 5803 does not require a causal connection to the original injury. [See Ch. 14, § 14.08[4].]

Petitions to Reopen; New and Further Disability. In *State Compensation Insurance Fund v. W.C.A.B. (Romero)* (2011) 76 Cal. Comp. Cases 399 (court of appeal unpublished opinion), involving an attempt to reopen both for new and further disability and for good cause, the court of appeal, annulling the Appeals Board's award of increased permanent disability from 35 percent to 100 percent, has held that the Board's award was invalid on either basis. [See Ch. 14, §§ 14.05, 14.08[1].]

Injury AOE/COE; Petitions to Reopen; New and Further Disability. The court of appeal in *State Compensation Insurance Fund v. W.C.A.B. (Hancock)* (2010) 75 Cal. Comp. Cases 1336 (court of appeal unpublished opinion) has held that that the Appeals Board erred in allowing an employee's petition for new and further disability, filed pursuant to Labor Code Sec. 5410, to include body parts that were neither part of the original award nor compensable consequences of the injuries to the body parts of the original award. [See Ch. 14, §§ 14.05, 14.08[4].]

Injury AOE/COE; Petitions to Reopen; New and Further Disability. The court of appeal in *State Compensation Insurance Fund v. W.C.A.B. (Hancock)* (2010) 75 Cal. Comp. Cases 1336 (court of appeal unpublished opinion) has held that that the Appeals Board erred in allowing an employee's petition for new and further disability, filed pursuant to Labor Code Sec. 5410, to include body parts that were neither part of the original award nor compensable consequences of the injuries to the body parts of the original award. [See Ch.

14, §§ 14.05, 14.08[4].]

Petitions to Terminate Award of Medical Treatment; Attorney's Fees. The court of appeal in *State Compensation Insurance Fund v. W.C.A.B. (Romero)* (2011) 76 Cal. Comp. Cases 399 (court of appeal unpublished opinion) has held that the employee was properly awarded attorney's fees as costs for successfully resisting the employer's proceedings to terminate the employee's award for future medical treatment, when the court found that the Appeals Board had appropriately reduced the employee's fee request to eliminate overlap between the legal services provided to resist the termination of future medical treatment and the legal services provided in furtherance of the employee's petition to increase permanent disability. [See Ch. 17, § 17.16[5].]

Vocational Rehabilitation; Repeal of Labor Code Sec. 139.5. The court of appeal in *Colleran v. W.C.A.B.* (2010) 75 Cal. Comp. Cases 1322 (court of appeal unpublished opinion) has held that that an employee was entitled to vocational rehabilitation benefits and services as of December 29, 2008, the date on which the Rehabilitation Unit, in a final and enforceable order, determined that she was so entitled, so that she possessed a vested right to vocational rehabilitation that survived the repeal of Labor Code Sec. 139.5, effective January 1, 2009. [See Ch. 21, Special Alert.]

Stipulated Awards; Waiver of Further Industrial Injuries. The court of appeal in *State Compensation Insurance Fund v. W.C.A.B. (Hancock)* (2010) 75 Cal. Comp. Cases 1336 (court of appeal unpublished opinion) has held that a stipulated award covering an employee's low back, left and right knees, and bilateral carpal tunnel, which stated that "this agreement resolves

all issues of liability for any injury specific or cumulative for [the employee's] entire period of employment with this employer," did not constitute a waiver of the employee's right to allege, subsequently, an industrial injury to his bilateral shoulders. [See Ch. 16, § 16.45[2].]

Psychiatric Injuries; Lawful Personnel Actions. The court of appeal in *Miller v. W.C.A.B.* (2011) 76 Cal. Comp. Cases 619 (court of appeal unpublished opinion) has held that no substantial evidence supported the Appeals Board's finding that the employee's supervisor's instructions overriding a physician's order constituted a lawful personnel action within the supervisor's medical scope of authority. [See Ch. 10, § 10.24[5].]

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.*

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. 3, § 3.34[3].]

California Insurance Guarantee Association; Joint and Several Awards; Availability of Other Insurance. The Appeals Board in *Palo Verde Unified School District v. W.C.A.B. (Friel)* (2010) 76 Cal. Comp. Cases 48 (writ denied) has upheld an arbitrator's finding that CIGA, on behalf of an insolvent carrier that had coverage on the date of an employee's specific injury, August 5, 1995, was not liable for any portion of the 100-percent permanent disability awarded jointly as a result of the employee's specific injury plus her cumulative injury, ending on August 5, 1995, during all of which period except the last five weeks, the employer, permissibly self-insured and, thus, a solvent carrier, had liability. [See Ch. 3, § 3.34[3].]

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. 18, § 18.09.]

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. 15, § 15.15.]

Contribution; Statute of Limitations.

The Appeals Board in *Arrowpoint Capital Corp. v. W.C.A.B. (Vasquez)* (2011) 76 Cal. Comp. Cases 488 (writ denied) has held that an elected-against carrier that had filed a petition for contribution within the one-year statutory period and properly served it on the injured employee's employer, thereby timely initiated contribution proceedings, and that the carrier had diligently attempted to identify and serve the other carrier for purposes of seeking contribution but had received no cooperation or response from the employer or that carrier. [See Ch. 14, § 14.13[2]; Ch. 15, § 15.15.]

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. 1, § 1.18.]

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. Sec. 9788.1 or 9788.11 in objecting to the treating physician's request for authorization to perform surgery. [See Ch. 15, § 15.04[3][b][ii][A].]

Medical Treatment; Utilization Review. The Appeals Board in *Academy of Arts College v. W.C.A.B. (Zedd)* (2011) 76

Cal. Comp. Cases 352 (writ denied) has held that a utilization review denial of requested treatment is not valid if signed by a nurse rather than a licensed physician. [See Ch. 4, § 4.26[3][b].]

Medical-Legal Procedure; Medical Reports to Agreed Medical Evaluator.

The Appeals Board in *Montebello Unified School District v. W.C.A.B. (Gallardo)* (2011) 76 Cal. Comp. Cases 582 (writ denied), granting removal, has held that the WCJ erred in ordering the parties to schedule an agreed medical evaluation with an AME on the whom parties no longer agreed, and that under Rule 35 treating physician reports should be provided to an AME or a QME, regardless of whether these reports are admissible in evidence, unless they contain materially false, inaccurate, or inflammatory material. [See Ch. 4, § 4.18[2].]

Medical Treatment; Reasonableness and Necessity; In Vitro Fertilization.

The Appeals Board in *Croushorn v. W.C.A.B.* (2011) 76 Cal. Comp. Cases 674 (writ denied) has held that an employee who suffered industrial injuries was entitled to reimbursement from his employer for the portion of an in vitro fertilization procedure that involved the cost of extraction of his sperm since the employee's inability to father a child was a consequence of his industrial injury. [See Ch. 4, § 4.04[1].]

Medical Treatment; Reasonableness and Necessity; Modifications to Vacation Home.

The Appeals Board in *Croushorn v. W.C.A.B.* (2011) 76 Cal. Comp. Cases 674 (writ denied) has held that modifications to an employee's vacation home to accommodate effects of his industrial injuries did not constitute reasonably required medical treatment, but that the evidentiary record required further development regarding the employee's entitlement to reimbursement

for such modifications based on the employer's agreement to provide modifications to a third home, on which the employee may have detrimentally relied. [See Ch. 4, § 4.04[1].]

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 Sec. 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. 10, § 10.24[5].]

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 Sec. 3208.3(h). [See Ch. 10, § 10.24[5].]

Psychiatric Injuries; Good-Faith Personnel Actions; Headaches. The Appeals Board in *County of San Bernadino v. W.C.A.B. (McCoy)* (2011) 76 Cal. Comp. Cases 504 (writ denied) has held that the good-faith personnel action defense did not bar compensation for temporary disability or medical treatment resulting from migraines, since headaches are not within the definition of "psychiatric injury" as described in Labor Code Sec. 3208.3(a). [See Ch. 10, § 10.24[5].]

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. 10, § 10.01[2].]

Injury AOE/COE; Compensable Consequence 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. 10, § 10.31[2].]

Injury AOE/COE; Compensable Consequence Injuries; Statute of Limitations. The Appeals Board in *Chauhan v. W.C.A.B.* (2011) 76 Cal. Comp. Cases 360 (writ denied) has held that a claim is barred if alleging injury from medical treatment sustained after the date specified in the statute of limitations for claiming new and further disability stemming from the original injury. [See Ch. 10, § 10.31[1].]

Injury AOE/COE; Compensable Consequence Injuries; Substantial Evidence. The Appeals Board in *Prudential Overall Supply v. W.C.A.B. (Hernandez)* (2011) 76 Cal. Comp. Cases 683 (writ denied) has held that reports of an employee's QME constituted substantial evidence to support the WCJ's finding that the employee suffered compensable consequence left knee and low back injuries as a result of an

admitted right knee injury and cumulative trauma to both knees and low back. [See Ch. 10, § 10.32[3].]

Injury AOE/COE; Affirmative Defenses; Initial Physical Aggressor. The Appeals Board in *Securitas Security Services v. W.C.A.B. (Aguilar)* (2011) 76 Cal. Comp. Cases 596 (writ denied) rescinded the WCJ's finding that a security guard's claim for injuries incurred in an attempt to prevent theft of the employer's property was barred by the initial physical aggressor defense and held that, in protecting the employer's property from a shoplifter, the employee was performing duties of benefit to his employer, and that it was not relevant whether the employee's actions were authorized. [See Ch. 10, § 10.06[1].]

Presumption of Industrial Causation; Cancer; Peace Officers. 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. 10, § 10.33[5].]

Presumption of Industrial Causation; Heart Trouble; Peace Officers. The Appeals Board in *City and County of San Francisco v. W.C.A.B. (Smith)* (2011) 76 Cal. Comp. Cases 256 (writ denied) has held that a deceased employee's heart trouble, presumed to be an industrial injury under Labor Code Sec. 3212.5, and with the presumption unrebutted, was the proximate cause of the employee's death, when the employee was involved in a fatal motor vehicle accident on the way home from work, as his car ran out of gas and was

struck by another vehicle. [See Ch. 10, § 10.33[1].]

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. 5, § 5.05[3].]

Temporary Disability; Two-Year Limitation on Indemnity Payments; Amputation Exception. The Appeals Board in *Burrtec 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 Sec. 4656(c)(3)(C), thereby entitling the employee to 240 weeks, rather than only 104 weeks, of temporary disability indemnity. [See Ch. 6, § 6.12.]

Temporary Total Disability. The Appeals Board in *City and County of San Francisco v. W.C.A.B. (Taylor)* (2011) 76 Cal. Comp. Cases 166 (writ denied) has sustained an employee's objection to answering questions about her potential post-retirement income, finding that such questions were not relevant because: (1) answers regarding such income did not negate the employee's clear expression of intent to return to work; and (2) it would be speculation to conclude that the amount of any potential income indicated an intent to retire. [See Ch. 6, § 6.01[1].]

Temporary Disability; Post-Retirement Period of Disability. The Appeals Board in *Kings County v. W.C.A.B.*

(*Revious*) (2011) 76 Cal. Comp. Cases 378 (writ denied) has held that an employee was not precluded from receiving temporary disability indemnity for a period arising after his voluntary retirement, when he demonstrated an intent to continue working in the open labor market via his part-time jobs that he worked concurrently with, and subsequently to, his employment by the employer from which he had retired. [See Ch. 6, § 6.01[1].]

Temporary Disability; Discharge from Employment. The Appeals Board in *Academy of Arts College v. W.C.A.B. (Zedd)* (2011) 76 Cal. Comp. Cases 352 (writ denied) has held that an employer who seeks to terminate an employee's temporary disability benefits on the grounds that the employer has discharged the employee has the burden of proving that the discharge was for good cause. [See Ch. 6, § 6.01[1].]

Temporary Disability; Permanent and Stationary. The Appeals Board in *Cedars-Sinai Medical Center v. W.C.A.B. (Modlin)* (2011) 76 Cal. Comp. Cases 557 (writ denied), rescinding the WCJ's finding that an employee, who suffered an industrial injury in 1997, suffered a second period of temporary disability 2003 through 2005 after having become permanent and stationary in 2002, held that the employee suffered only a single period of temporary disability from 1997 through 2005, based on the medical evidence. [See Ch. 7, § 7.38.]

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. 3, § 3.04[2]; Ch. 9, § 9.21.]

Death Benefits; Amount of Benefit.

The Appeals Board in *Falvo-Peckham v. W.C.A.B.* (2011) 76 Cal. Comp. Cases 172 (writ denied) has held that a dependent daughter of a decedent who died in 2008 was not entitled to annual increases in death benefits based on application of Labor Code Sec. 4453(a)(10). [See Ch. 9, § 9.08[1].]

Death Benefits; Statute of Limitations.

The Appeals Board in *Sedam v. W.C.A.B.* (2011) 76 Cal. Comp. Cases 272 (writ denied) has held that a widow's claim was barred by the statute of limitations, when her husband died on June 12, 2006, of a pulmonary embolism that he developed as a consequence of an eight-hour automobile trip to Stanford Medical center on May 24, 2005, which the Board found to be a medical compensable consequence of the industrial injuries he had sustained in 1999, not a new injury, with the compensable consequence injury relating back to the date of the original injuries and not to be given a new date of injury. [See Ch. 9, § 9.21; Ch. 14, § 14.11[2].]

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. 7, § 7.00.]

Permanent Disability; Rating; AMA

Guides. The Appeals Board in *City of Irvine v. W.C.A.B. (Hansen)* (2011) 76 Cal.

Comp. Cases 366 (writ denied) has held that a QME's opinion and a VR expert's testimony constituted substantial evidence of 100-percent permanent disability, sufficient to rebut the scheduled impairment rating under the *AMA Guides*. [See Ch. 7, § 7.00.]

Permanent Disability; 2005 Permanent Disability Rating Schedule; Diminished Future Earning Capacity. The Appeals Board in *Zurich North American Insurance Co. v. W.C.A.B. (Baldrige)* (2011) 76 Cal. Comp. Cases 280 (writ denied) has held that, while it is true that under Labor Code Sec. 4662 permanent total disability must be determined in accordance with facts, and that, although the 2005 Permanent Disability Rating Schedule is prima facie evidence of the level of permanent disability pursuant to Labor Code Sec. 4660, the scheduled rating may be rebutted by other evidence. [See Ch. 7, § 7.00.]

Permanent Disability; Rating; Diminished Future Earning Capacity. The Appeals Board in *Foundation & Earth Retaining Systems v. W.C.A.B. (Torres)* (2011) 76 Cal. Comp. Cases 510 (writ denied) has held that an employee sustained 100-percent permanent disability pursuant to Labor Code Sec. 4662 and the 2005 Schedule, based on the employee's testimony and the testimony of a vocational expert indicating that the employee had 100-percent loss of future earning capacity, which the Board found sufficient to rebut the scheduled rating. [See Ch. 7, § 7.00.]

Permanent Disability; Offers of Regular, Modified, or Alternative Work. The Appeals Board in *Kings County v. W.C.A.B. (Revious)* (2011) 76 Cal. Comp. Cases 378 (writ denied) has held that a deputy sheriff's voluntary PERS service retirement following an industrial injury

did not disqualify him from receiving a 15-percent increase in permanent disability benefits for his employer's failure to make him an offer of work. [See Ch. 7, § 7.51.]

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. 14, § 14.13[1].]

Statute of Limitations for Filing Claim; Employer's Failure to Notify Employee of Right to Compensation Benefits. The Appeals Board in *City of Sonoma v. W.C.A.B. (Cahill)* (2010) 76 Cal. Comp. Cases 37 (writ denied) has held that an employee's claim for salivary gland cancer was not barred by the limitations period in Labor Code Sec. 5405 since the employee's employer had knowledge of his cancer diagnosis and treatment but failed to timely provide the requisite claim form, thereby tolling the one-year statute of limitations, and that evidence that the employee was generally aware of the firefighter's cancer presumption did not establish that he had the knowledge necessary to show the industrial nature of his injury. [See Ch. 14, § 14.01[5].]

Public Employees; Salary in Lieu of Benefits; Post-Retirement Period of Dis-

ability. The Appeals Board in *County of Orange v. W.C.A.B. (Moore)* (2010) 75 Cal. Comp. Cases 1422 (writ denied) has affirmed a WCJ's finding that an employee deputy sheriff who suffered cumulative injuries was entitled to Labor Code Sec. 4850 benefits for a post-retirement period of temporary total disability. [See Ch. 22, § 22.04[7].]

Public Employees; Disability Retirement. The Appeals Board in *Follett v. W.C.A.B.* (2010) 76 Cal. Comp. Cases 41 (writ denied) has held that an employee police officer who suffered periods of temporary disability and 55-percent permanent disability as the result of a cumulative injury to his heart/hypertension, and who was initially granted a service retirement that was changed, nine years later, to a disability retirement made retroactive to his initial retirement date, was barred by Labor Code Sec. 4853 from receiving Labor Code Sec. 4850 benefits after the effective date of his Public Employees' Retirement System disability retirement. [See Ch. 22, § 22.04[7].]

Employment Relationships. The Appeals Board in *Jeffers v. W.C.A.B. (Hidalgo)* (2010) 75 Cal. Comp. Cases 1427 (writ denied) has upheld the WCJ's finding that an illegally uninsured president and sole shareholder of defendant corporations was, as an individual, the decedent employee's sole employer on the date of the decedent's injuries that resulted in his death, and found that the decedent was not an employee of defendant corporations. [See Ch. 2, § 2.23[2].]

Employment Relationships; Employees. The Appeals Board in *Irvine Eurocars v. W.C.A.B. (Van Haastere)* (2011) 76 Cal. Comp. Cases 571 (writ denied) has held that substantial evidence supported the WCJ's finding that the employee, who

worked as a nanny/house manager at the personal residence of a car dealership's president/owner when she suffered injuries, was an employee of the car dealership for workers' compensation purposes, not employed by the president/owner of the dealership as an individual, even though the employee performed no work for the dealership. [See Ch. 2, § 2.16[4].]

Pleadings; Preparation of Answer. The Appeals Board in *Bryant v. W.C.A.B.* (2011) 76 Cal. Comp. Cases 151 (writ denied) has held that the employer was not bound by an admission to earnings set forth in its answer and not precluded from amending its pleadings in subsequent proceedings. [See Ch. 15, § 15.34[2].]

Liens; Repackaged Pharmaceuticals. The Appeals Board in *California Pharmacy Management v. W.C.A.B.* (2011) 76 Cal. Comp. Cases 155 (writ denied) has held that a lien claimant was not entitled to reimbursement of its lien for repackaged drugs dispensed by the treating physician to the injured employee, in the absence of evidence of the cost of the drugs to the dispensing physician. [See Ch. 4, § 4.26[4].]

Discovery; Depositions. The Appeals Board in *Padilla v. W.C.A.B.* (2011) 76 Cal. Comp. Cases 191 (writ denied) has granted an employer's petition for removal from a WCJ's order limiting the type of employer representative allowed to attend the deposition of an injured employee to a representative from human resources/claims management and precluding the employee's manager or co-worker from attending. [See Ch. 15, § 15.438[2].]

Evidence; Admissibility of Medical Reports. The Appeals Board in *Hamilton v. W.C.A.B.* (2011) 76 Cal. Comp. Cases 265 (writ denied) has held that no authority indicates that a medical report is admissible

only if the employee has been evaluated prior to its preparation; lack of a physical evaluation affects the weight of the evidence, not its admissibility. [See Ch. 10, § 10.32[3]; Ch. 16, § 16.51[1], [6].]

Attorney's Fees; Employer Contested Agreed Medical Examiner Evaluation.

The Appeals Board in *Cortez v. W.C.A.B.* (2011) 76 Cal. Comp. Cases 561 (writ denied) affirmed the WCJ's finding that CIGA had sole liability for additional attorney's fees owed to the attorney for an employee with specific and cumulative injuries, attributed to the cumulative trauma case filed by CIGA. [See Ch. 17, § 17.17[2].]

WCAB Jurisdiction; Five-Year Statute of Limitations. The Appeals Board in *National Union Fire Insurance Co. v. W.C.A.B. (Nunez)* (2011) 76 Cal. Comp. Cases 588 (writ denied) has held that the

WCJ was not deprived of jurisdiction under Labor Code Sec. 5804 to issue a decision awarding an employee 100-percent psychiatric permanent disability merely because a stipulated award was issued two days earlier partially resolving the employee's claims for orthopedic and psychiatric injuries during her employment. [See Ch. 14, § 14.06[3].]

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| <input type="checkbox"/> | 7-65 thru 7-77 | 7-65 thru 7-78.5 |
| <input type="checkbox"/> | 7-87 thru 7-90.1. | 7-87 thru 7-90.2(1) |
| <input type="checkbox"/> | 7-90.15 thru 7-105 | 7-91 thru 7-111 |
| <input type="checkbox"/> | 9-13 | 9-13 thru 9-14.1 |
| <input type="checkbox"/> | 9-35 thru 9-43 | 9-35 thru 9-43 |
| <input type="checkbox"/> | 10-9 | 10-9 |
| <input type="checkbox"/> | 10-21. | 10-21 thru 10-22.1 |
| <input type="checkbox"/> | 10-39. | 10-39 thru 10-40.1 |
| <input type="checkbox"/> | 10-63 thru 10-67 | 10-63 thru 10-68.1 |
| <input type="checkbox"/> | 10-87 thru 10-105. | 10-87 thru 10-109 |
| <input type="checkbox"/> | 11-31 thru 11-38.1. | 11-31 thru 11-38.2(1) |
| <input type="checkbox"/> | 11-51 thru 11-56.1. | 11-51 thru 11-56.3 |
| <input type="checkbox"/> | 12-7 | 12-7 thru 12-8.1 |
| <input type="checkbox"/> | 12-31. | 12-31 thru 12-32.1 |
| <input type="checkbox"/> | 12-53. | 12-53 thru 12-54.1 |
| <input type="checkbox"/> | 12-63 thru 12-65 | 12-63 thru 12-66.1 |

Check As Done	<u>Remove Old Pages Numbered</u>	<u>Insert New Pages Numbered</u>
<input type="checkbox"/>	12-85.	12-85 thru 12-86.1
<input type="checkbox"/>	12-95 thru 12-96.1	12-95 thru 12-96.1
<input type="checkbox"/>	12-98.9 thru 12-98.15	12-98.9 thru 12-98.13
<input type="checkbox"/>	12-109	12-109
<input type="checkbox"/>	12-126.1 thru 12-126.4(1)	12-126.1 thru 12-126.4(1)
<input type="checkbox"/>	12-129 thru 12-133	12-129 thru 12-133
<input type="checkbox"/>	13-1	13-1
<input type="checkbox"/>	13-23 thru 13-37	13-23 thru 13-39
<input type="checkbox"/>	14-1 thru 14-63	14-1 thru 14-69

VOLUME 2

Revision

<input type="checkbox"/>	Title page thru xi	Title page thru xi
<input type="checkbox"/>	15-7 thru 15-13	15-7 thru 15-13
<input type="checkbox"/>	15-23 thru 15-52.5	15-23 thru 15-52.7
<input type="checkbox"/>	15-59 thru 15-61	15-59 thru 15-62.7
<input type="checkbox"/>	15-79 thru 15-81	15-79 thru 15-82.1
<input type="checkbox"/>	15-103	15-103 thru 15-104.1
<input type="checkbox"/>	16-13 thru 16-17	16-13 thru 16-17
<input type="checkbox"/>	16-66.1 thru 16-80.12(1).	16-67 thru 16-80.12(9)
<input type="checkbox"/>	16-80.14(11) thru 16-80.14(15).	16-80.14(11) thru 16-80.14(15)
<input type="checkbox"/>	17-3	17-3
<input type="checkbox"/>	17-35 thru 17-43	17-35 thru 17-44.1
<input type="checkbox"/>	17-58.1 thru 17-59	17-59 thru 17-60.1
<input type="checkbox"/>	17-65 thru 17-71	17-65 thru 17-71
<input type="checkbox"/>	18-4.1 thru 18-5.	18-5 thru 18-6.1
<input type="checkbox"/>	18-15 thru 18-17	18-15 thru 18-17
<input type="checkbox"/>	18-35 thru 18-37	18-35 thru 18-37
<input type="checkbox"/>	19-19 thru 19-26.5	19-19 thru 19-26.5
<input type="checkbox"/>	19-37 thru 19-39	19-37 thru 19-39

Tab Card

<input type="checkbox"/>	White "CH. 21 VOCATIONAL REHABILITATION" Tab Card	White "CH. 21 SUPPLEMENTAL JOB DISPLACEMENT BENEFITS" Tab Card
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<input type="checkbox"/>	SPA-21-1 thru SPA-21-3.	Material not replaced
<input type="checkbox"/>	21-1 thru 21-79	21-1 thru 21-5
<input type="checkbox"/>	22-23 thru 22-25	22-23 thru 22-26.1
<input type="checkbox"/>	22-35.	22-35
<input type="checkbox"/>	App-9	App-9 thru App-10.1
<input type="checkbox"/>	App-110.21 thru App-118.7	App-111 thru App-118.11
<input type="checkbox"/>	App-213	App-213 thru App-214.7

Check As Done	<i><u>Remove Old Pages Numbered</u></i>	<i><u>Insert New Pages Numbered</u></i>
<input type="checkbox"/>	App-371 thru App-375.	App-371 thru App-373
<input type="checkbox"/>	App-453 thru App-454.4(1)	App-453 thru App-454.4(1)
<input type="checkbox"/>	TC-1 thru TC-87	TC-1 thru TC-87
<input type="checkbox"/>	TS-1 thru TS-43	TS-1 thru TS-43
<input type="checkbox"/>	I-1 thru I-115	I-1 thru I-113

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