PUBLICATION UPDATE

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Rassp & Herlick, California Workers' Compensation Law

Publication 80117 Release 12 November 2012

HIGHLIGHTS

New Seventh Edition

- New look, new format, new title
- New binders & tabs included

Complete Chapter Rewrites

- Chs. 2, 3, 7, 14, 17, and 19

New Enhancements

- Quick Guide
- Trend Alerts
- Presumption Chart

Key Developments in the Law

- Case law and rule updates
- Special Alerts: SB 863 Reforms

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NEW SEVENTH EDITION. The new Seventh Edition of Rassp & Herlick, ***California Workers' Compensation Law***, continues the legacy of Stanford Herlick with insightful analysis and commentary by Editor-in-Chief Robert G. Rassp, Esq., along with contributions from Frederick W. Bray, Esq., Steven M. Green, Esq., Carol L. Joyce, Esq., David Bryan Leonard, Esq., and Jay Shergill, Esq. In addition, all citations have been reformatted to follow the *California Style Manual*. For more details, see the Foreword on p. xix.

eBOOK VERSION. The new Seventh Edition of Rassp & Herlick, *California Workers' Compensation Law* is available in eBook format.

SPECIAL ALERTS. Special Alerts regarding SB 863 have been added to Chs. 3, 4, 7, and 17. We will follow up by updating the chapters with legislative changes in the midyear 2013 release.

CHAPTER REWRITES. The following chapters have been streamlined and revised to ensure quick answers to your every day questions about the law: Ch. 2, Covered Employments—Employment Issues; Ch. 3, Insurance and Self-Insurance; Ch. 7, Permanent Disability Payments; Ch. 14, Notice, Statute of Limitations, and

Continuing Jurisdiction; Ch. 17, Liens; and Ch. 19, Reconsideration by Workers' Compensation Appeals Board; Administrative Appeals.

QUICK GUIDE. A Quick Guide organized by topic, along with corresponding statute and rule citations, has been added to the beginning of Volume One to help you quickly locate key topics in the publication.

PRESUMPTION CHART. A completely revised and updated Presumption Chart for public safety members has been added to Ch. 10, § 10.33[4].

TREND ALERTS. Trend Alerts that focus on recent WCAB noteworthy panel decisions have been added throughout the chapters to keep you apprised of current trends and developments in the law:

- Equitable principles for resolving disputes. *See* Ch. 1, § 1.07[2].
- Liability for non-MPN treatment. *See* Ch. 4, § 4.18[8][c].
- Proof of proper MPN notice. *See* Ch. 4, § 4.18[8][c].
- Home health care provided by spouse. *See* Ch. 4, § 4.16.
- Applicant's changing of MPN doctor. *See* Ch. 4, § 4.18[8][d].
- Temporary disability indemnity and termination for cause. *See* Ch. 6, § 6.01[1].
- Temporary disability and non-medical evidence. *See* Ch. 6, § 6.01[1].
- Undocumented worker and modified duty. *See* Ch. 6, § 6.10.
- Prescription drugs impact on permanent disability. *See* Ch. 7, § 7.40[2].
- Medical reports and apportionment. *See* Ch. 7, § 7.40[2].
- Vocational reports and future earning capacity. *See* Ch. 7, § 7.12[2][a].
- Grip loss metric in AMA Guides. *See* Ch. 7, § 7.12[1][c].
- Medical or vocational opinion on permanent total disability. *See* Ch. 7, § 7.12[2][d][i].
- WCJ's role in rating permanent disability. *See* Ch. 7, § 7.31.
- Credit over-advanced in a different case. *See* Ch. 7, § 7.51.
- Apportionment and prior awards from other benefit systems. *See* Ch. 7, § 7.42[3].
- Petition to reopen re permanent disability rating. *See* Ch. 7, § 7.12[1][a].
- Non-registered domestic partner not a surviving spouse. *See* Ch. 9, § 9.11.
- Horseplay turning into altercation. *See* Ch. 10, § 10.06[1].
- Causation of injury vs. causation of disability. *See* Ch. 10, § 10.01[1][b].
- Notice of termination vs. effective date. *See* Ch. 10, § 10.02[1].
- Workplace injury or death resulting from assault. *See* Ch. 10, § 10.10[2].
- Penalty awards and use of pre-SB 899 case law. *See* Ch. 11, § 11.11[3].
- Utilization review denial reviewed by PQME. *See* Ch. 15, § 15.04[3][a].
- Ex parte communication with PQME. *See* Ch. 15, § 15.04[3][a].
- Attorney's fees and ex parte communication with PQME. *See* Ch. 15, § 15.04[3][a].
- Treating physician's assessment of permanent disability. *See* Ch.

15, § 15.04[3][a].

- Discovery vs. privacy. *See* Ch. 15, § 15.48[8].
- Objecting to non-medical records. *See* Ch. 15, § 15.04[3][a].
- Evidence to support reduced attorney's fee. *See* Ch. 15, § 15.48[2].
- Second opinion spinal surgery process. *See* Ch. 15, § 15.04[3][b][ii][A].
- Designating specialty of PQME. *See* Ch. 15, § 15.04[3][a].
- Attorney's fees from lien claimant. *See* Ch. 16, § 16.36.
- Developing record vs. closing discovery. *See* Ch. 16, § 16.04[2].
- Timeframe for supplemental report requests. *See* Ch. 16, § 16.54[14].
- QME consult process vs. QME process. *See* Ch. 16, § 16.54[8].
- Right to select specialty of panel QME. *See* Ch. 16, § 16.54[3].
- Sanctions re three-cent error by WCJ. *See* Ch. 16, § 16.35[2].
- Commutation of attorney's fees and COLA. *See* Ch. 17, § 17.31[2][a].
- *LeBoeuf* rebuttal method. *See* Ch. 17, § 17.12[2][d][iii].
- Attorney fee based on MSA Trust amount. *See* Ch. 18, § 18.12[2].
- Reconsideration vs. removal. *See* Ch. 19, § 19.04[2].
- Skeletal petitions and sanctions. *See* Ch. 19, § 19.06.
- Incapacity to return to work. *See* Ch. 21, § 21.01.

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TOP 11 DEVELOPMENTS:

SB 863 REFORMS

Workers' Compensation Reforms. The comprehensive package of workers' comp reforms in SB 863 contains a plethora of revisions to current law intended to improve delivery of benefits to injured workers while reducing costs for employers. See Special Alerts mentioned above.

CIVIL ACTIONS

Cal-OSHA Provisions; Hirer's Delegation of Duty to Comply. The California Supreme Court in *SeaBright Insurance Co. v. US Airways (Lujan)* (2011) 52 Cal. 4th 590, has held that that the rule of *Privette v. Supirior Court* and its progeny that employees of independent contractors who are injured in the workplace cannot sue the party that hired the contractor applies when the hirer of the contractor failed to comply with workplace safety requirements concerning the subject matter of the contract and the injury is alleged to have occurred as a consequence of that failure. [*See* Ch. 12, § 12.16[8].]

LIENS

Lien Claims. The Workers' Compensation Appeals Board has promulgated regulations, 8 Cal. Code Reg. §§ 10582.5, 10770, and 10770.1, regarding, respectively, dismissal of inactive lien claims for lack of prosecution, filing and service of lien claims, and lien conferences and lien trials. [*See* Ch. 17, §§ 17.113–17.115.]

MEDICAL EVALUATORS

Agreed Medical Evaluator Proposals; Qualified Medical Evaluator Requests;

Timeliness; Prospective Application of WCAB's Decision. 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 1318 (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, that the time period set forth in that statute for seeking agreement on an AME starts with the day after the date of the first written proposal and includes the last day, that the principles set forth in the Board's decision, as to timeliness of seeking a panel of QMEs, apply only prospectively to QME requests made after the date of the Board's initial decision, September 26, 2011, and that the initial decision does not constitute good cause to reopen any order, decision, or award. [*See* Ch. 15, § 15.04[3][a]; Ch. 16, § 16.54[1].]

MEDICAL TREATMENT

Collateral Source Rule. The California Supreme Court in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal. 4th 541, has held that an injured plaintiff whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for medical services received or still owing at the time of trial, since the negotiated rate differential, i.e., the discount that medical providers offer an insurer, is not a benefit provided to the plaintiff in compensation for his or her injuries and, therefore, does not come within the California collateral source rule. [*See* Ch. 4, § 4.26[2]; Ch. 12, § 12.28.]

Medical Provider Networks; Treatment Outside Networks; Medical Reports; Admissibility. The Supreme Court has granted review and depublished the Court of Appeal decision in *Valdez v. Workers' Comp. Appeals Bd.* (2012) 207 Cal. App. 4th 1, which had annulled two WCAB en banc decisions and had held that the statutory scheme governing MPNs, in particular Labor Code Section 4616.6, which provides that "No additional examinations shall be ordered by the appeals board and no other reports shall be admissible to resolve any controversy arising out of this article," does not exclude from consideration medical reports prepared by physicians who are not members of an MPN. The Court of Appeal decision is no longer citable. [*See* Ch. 4, § 4.18[8][d], [e].]

PAYMENT OF BENEFITS

Checks. The court of appeal in *Barrett Business Services, Inc. v. W.C.A.B. (Rivas)* (2012) 204 Cal. App. 4th 597, has held that, because delivery of a check in settlement of the employee's workers' compensation claim did not occur, issuance of the check did not discharge the employer's underlying obligation to the employee, so the employer remained liable on that obligation. [*See* Ch. 11, § 11.11[1].]

PERMANENT DISABILITY

Apportionment. The court of appeal in *State Compensation Insurance Fund v. W.C.A.B. (Dorsett)* (2011) 201 Cal. App. 4th 443, following *Benson* and *Brodie*, has held that, when the AME stated that the employee's two injuries became permanent and stationary at the same time and that his "current level of permanent disability—whatever that level may be—is apportioned 50 percent to the specific injury and 50 percent to the cumulative trauma injury," the employee's successive injuries can and must be rated separately. [*See* Ch. 7, § 7.42[2].]

PSYCHIATRIC INJURIES

Good Faith Personnel Actions; Migraines. The court of appeal in *County of San Bernardino v. W.C.A.B. (McCoy)* (2012) 203 Cal. App. 4th 1469, has held that the Labor Code Section 3208.3(h) good faith personnel action defense precluded recovery for psychiatric injuries with resulting physiological manifestations, including migraine headaches, caused solely by stress from such actions. [*See* Ch. 10, § 10.24[5].]

Six-Month Employment Rule; Sudden and Extraordinary Employment Condition. The court of Appeal in *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Garcia)* (2012) 204 Cal. App. 4th 766, has held that that an employee's fall from a 24-foot ladder during employment as an avocado picker, while sudden, was not extraordinary within the meaning of Labor Code section 3208.3(d) and thus did not give rise to a compensable psychiatric injury. [*See* Ch. 10, § 10.24[2].]

THIRD PARTY ACTIONS

Hirer's Liability; Retained Control. The court of appeal in *Tverberg v. Fillner Construction, Inc.* (2012) 202 Cal. App. 4th 1439, has held that the plaintiff, an independent subcontractor, 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 defendant negligently exercised retained control over workplace safety and thereby affirmatively contributed to the plaintiff's injury. [*See* Ch. 12, § 12.16[8].]

OTHER NOTEWORTHY DEVELOPMENTS:

ATTORNEY'S FEES

Calculation. The Appeals Board in *Munson v. Workers' Comp. Appeals Bd.* (2012) 77 Cal. Comp. Cases 384 (writ denied), affirming the WCJ's finding that an employee's attorney was entitled to a fee equaling 10 percent of the value of a lifetime award of death benefits to a decedent/police officer's mentally incapacitated young adult son, rejected the attorney's position that he was entitled to a 13.7 percent fee based on the above-average complexity of the case, and that the fee should have been calculated on the present value of the dependent son's award, which assumed a 4.7 percent annual COLA/SAWW increase. [*See* Ch. 17, § 17.31[2][a].]

Lien Claimant as Beneficiary. The Appeals Board in *Tapia v. Workers' Comp. Appeals Bd.* (2012) 77 Cal. Comp. Cases 475 (writ denied) has held that the Department of Health Services/Medi-Cal was not a passive beneficiary in an employee's workers' compensation case and, on that basis, upheld the WCJ's order denying the employee's attorney's request for a fee award against a $1,100,000 lien recovery by the Department of Health Services. [*See* Ch. 17, § 17.33[4][b].] See also Trend Alert re *Tapia* in Ch. 16, § 16.36.

CALIFORNIA INSURANCE GUARANTEE ASSOCIATION

Covered Claims; "Assigned" Claims. The court of appeal in *California Insurance Guarantee Association v. W.C.A.B.* (2012) 77 Cal. Comp. Cases 143 (court of appeal unpublished opinion) has held that a collection agency representing lien claimants/medical providers was not excluded by Insurance Code Section 1063.1(c)(9)(B) from pursuing claims against CIGA, since the collection agency was not an "assignee" of the claims within the meaning of the statute. [*See* Ch. 3, § 3.33[3].]

CIVIL ACTIONS

Negligence; Standard of Care; Substantial Evidence. The court of appeal in *Sanchez v. Brooke* (2012) 204 Cal. App. 4th 126, has held that, while expert testimony is generally required to establish the standard of care that applies to any professional, an exception exists when circumstances fall within the realm of common knowledge, and lay jurors were as capable as experts in assessing the adequacy of the employer's lack of response to the obvious risk of fire when an elderly woman being cared for was permitted to smoke in bed. [*See* Ch. 4, § 4.26[2]; Ch. 12, §§ 12.18[1], 12.28.]

Peculiar Risk Doctrine; Premises Liability for Preexisting Hazardous Conditions. The court of appeal in *Gravelin v. Satterfield* (2011) 200 Cal. App. 4th 1209, has held that there was no evidence of a preexisting hazardous condition or of breach of nondelegable duty by the defendant homeowners, in a case in which the plaintiff, installing a satellite dish on the roof of the defendants' residence, decided to access the roof by using a small roof extension located between the house and the carport, which collapsed when he stepped on it, causing him to fall to the ground. [*See* Ch. 12, § 12.16[8].]

CREDIT

Overpayment of Permanent Disability. The Appeals Board in *State Compensation Insurance Fund v. W.C.A.B. (Dunehew)* (2011) 76 Cal. Comp. Cases 1251 (writ denied) has held that the employer was not entitled to credit under Labor Code Sec. 4909 for permanent disability advances paid to the employee for a specific industrial injury against permanent disability indemnity owed in connection with a cumulative trauma injury, when the employee's permanent disability was apportioned among three dates of injury pursuant to SB 899 and *Benson v. W.C.A.B.* [*See* Ch. 6, § 6.21[1].]

Overpayment of Temporary Disability. The Appeals Board in *Ralphs Grocery Co. v. W.C.A.B. (Boyd)* (2011) 76 Cal. Comp. Cases 1096 (writ denied) has held that an employer was not entitled to credit for an injured employee's receipt of approximately $32,000 in real-estate commissions for referrals to his former colleagues. [*See* Ch. 6, § 6.22[2].]

Third-Party Recovery; Carrier's Right to Credit. The Appeals Board in *Gonzalez v. Workers' Comp. Appeals Bd.* (2012) 77 Cal. Comp. Cases 452 (writ denied) has held that an agreement between an injured worker's employer, a subcontractor on a construction site, and the general contractor under which the employer waived its subrogation rights did not extinguish the workers' compensation carrier's right to credit for the worker's net third party recovery, absent an express agreement by the carrier to waive its credit rights. [*See* Ch. 12, § 12.08[4].]

Third-Party Recovery; Employee's Action Against Employer. The Appeals Board in *Fireman's Fund Insurance Co. v. W.C.A.B. (Ball)* (2011) 76 Cal. Comp. Cases 813 (writ denied) has held that the defendant insurer was not entitled to credit for settlement monies received by the employee, who suffered specific and cumulative trauma industrial injuries, in a civil suit brought against her employer for wrongful termination, when the reasons for the parties' settlement of the civil suit for $320,000 were unclear in light of the exclusive remedy for workers' compensation. [*See* Ch. 12, § 12.08[4].]

DISCOVERY

Depositions; Spousal Privilege. The Appeals Board in *Zenith Insurance Co. v.*

W.C.A.B. (Mota) (2012) 77 Cal. Comp. Cases 200 (writ denied) has denied the employer's petition for removal from the WCJ's order that the employee's wife could not be compelled to testify at a deposition regarding the employee's drug use and incarceration, based on the marital privilege in Evidence Code Sections 970 and 971. [*See* Ch. 15, § 15.48[2].]

Pre-Trial Conference Statements. The Appeals Board in *Ace American Ins. Co. v. Workers' Comp. Appeals Bd. (Sulek)* (2012) 77 Cal. Comp. Cases 353 (writ denied) found that the employer failed to identify its witnesses in the pretrial conference statement filed at a pretrial conference, and held that the WCJ, pursuant to Labor Code Section 5502(e)(3), correctly excluded those undisclosed witnesses from testifying at the trial, when the Board was not persuaded by the employer's assertion that the statute applied only to pretrial conference statements prepared at mandatory settlement conferences, since such an interpretation exalted form over substance and misconstrued the purpose of the statute and rules. [*See* Ch. 16, § 16.04[2].]

DISCRIMINATION

Disability in the Workplace. The Division of Workers' Compensation has promulgated regulations, 8 Cal. Code Reg. §§ 9708.1–9708.6, to comply with its obligations under various California statutes prohibiting discrimination because of disability in the workplace. [*See* Ch. 11, § 11.27[6][a], [b]][i]–[v].]

EMPLOYMENT STATUS

Independent Contractors. The court of appeal in *Arnold v. Mutual of Omaha Insurance Co.* (2011) 202 Cal. App. 4th 580, has held that the plaintiff, a former insurance agent for the defendant, had been an independent contractor, not an employee, of the defendant and was, thus, not entitled to claimed unpaid employment entitlements, including business-related expenses and wages earned but unpaid. [*See* Ch. 2, § 2.06[2][a].]

Statutory Employees; Volunteer Firefighters. The court of Appeal in *County of Kern v. W.C.A.B. (Petersen)* (2011) 200 Cal. App. 4th 509, 76 Cal. Comp. Cases 1037 has held that a volunteer firefighter with a volunteer fire department who suffered injuries AOE/COE was, pursuant to Labor Code Sec. 3361, a statutory employee of Kern County on the date of his injuries, notwithstanding the county's contentions that the volunteer fire department did not have "full or partial support" or "official recognition" as required under that statute. [*See* Ch. 2, § 2.04[3].]

HEALTH AND SAFETY

Heat Illness Prevention. The court of appeal in *Alvarez Bautista v. State of California* (2011) 201 Cal. App. 4th 716, affirming the trial court's judgment of dismissal of the plaintiffs' action against California officials that alleged that the current heat illness prevention regulation did not ensure the safety of farm workers from heat-related illnesses, held that California Constitution Art. XIV, § 4, granting the legislature plenary power to create a complete system of workers' compensation, was not self-executing insofar as it was a source of a judicially enforceable right. [*See* Ch. 1, § 1.04[1].]

INJURY AOE/COE

Burden of Proof. The court of appeal in *Valero v. Board of Retirement of Tulare County Employees' Retirement Association* (2012) 205 Cal. App. 4th 960, has held that the medical evidence was not of such character and weight as to leave no room for a judicial determination that it was insufficient to support a finding in favor of the plaintiff, who sought and was denied a

service-connected disability retirement, and who bore the burden of proving a connection between his employment and his injury. [*See* Ch. 16, § 16.51[2].]

Burden of Proof. The Appeals Board in *Interwoven, Inc. v. W.C.A.B. (Owyang)* (2011) 76 Cal. Comp. Cases 1007 (writ denied) has held that the opinions of a lien claimant's reporting physicians, considered in conjunction with the autopsy report, constituted substantial evidence, when weighed against one opposing medical opinion, to support the Board's finding that the decedent's illness, resulting in autoimmune hemolytic anemia and death, was likely precipitated by a bacterial or viral infection contracted while the decedent was on an extended business trip in China, and that the lien claimant had met its burden under Labor Code Sec. 3202.5 of proving industrial causation, within reasonable medical probability, by a preponderance of the evidence. [*See* Ch. 10, § 10.32[3].]

Idiopathic Seizures. The Appeals Board in *Harris Ranch Inn & Restaurant v. W.C.A.B. (Orrala)* (2011) 77 Cal. Comp. Cases 94 (writ denied) has held that *Employers Mutual Liability Insurance Co. v. I.A.C. (Gideon)* is still the controlling authority on the issue of causation, even post-SB 899, because, although the employee's fall resulted from an idiopathic seizure, the disabling injury arose out of employment because caused by the employee's head striking the cement floor in the work area provided by the employer. [*See* Ch. 10, § 10.23.]

Intoxication. The Appeals Board in *Beyette's Tree Care v. W.C.A.B. (Johnson)* (2011) 76 Cal. Comp. Cases 1323 (writ denied) has held that the employer failed to prove that the employee's injury was proximately caused by his alleged intoxication or that such alleged intoxication was a substantial factor in his injury, when a blood test that was "presumptive positive" for the presence of some drug compound in an "amphetamine screen" was insufficient to establish the intoxication defense. [*See* Ch. 10, § 10.03[1].]

Neutral Risk Doctrine. The Appeals Board in *Lee v. W.C.A.B. (Rincon)* (2012) 77 Cal. Comp. Cases 297 (writ denied) has held that, since the decedent was shot and killed by an unknown assailant while working as a stocking clerk in a liquor store, and there was no evidence indicating the assailant's motive, so that it was unclear whether the attack was personal or industrial in nature, meaning that the death arose under mysterious circumstances with no basis for finding a personal motive, the neutral risk doctrine applied to render the claim compensable. [*See* Ch. 10, § 10.10[1], [3].]

Post-Termination Claims. The Appeals Board in *The Torrance Co. v. W.C.A.B. (Constanza)* (2011) 77 Cal. Comp. Cases 197 (writ denied) has affirmed the WCJ's finding that an employee's claim for specific industrial injuries to his spine and during a cumulative period was not barred by Labor Code Section 3600(a)(10), when the Board found that the Labor Code Section 3600(a)(10)(B) and (D) exceptions to the post-termination claim defense applied. [*See* Ch. 10, § 10.02[1].]

Substantial Medical Evidence. The court of appeal in *American Medical Response v. Workers' Comp. Appeals Bd. (Westerman)* (2012) 77 Cal. Comp. Cases 413 (court of appeal unpublished opinion) has held that substantial medical evidence supported a finding of injury AOE/COE sustained by a paramedic, whose stroke occurred after he had returned home following a 36-hour shift, when the panel QME reported that the employee's work required that he sit for long periods of time,

"predispos[ing] him to in-situ thrombosis in his lower extremities or even pelvis," meaning that a blood clot would form in his lower extremities or pelvis, then travel to his heart, which, in reasonable probability, contained a defect in the atrial septum in the form of a hole, and through this hole to his brain. [*See* Ch. 16, § 16.51[2].]

JURISDICTION

Indian Tribes. The Appeals Board in *Keitt v. Workers' Comp. Appeals Bd.* (2012) 77 Cal. Comp. Cases 455 (writ denied) has held that the employer Indian tribe did not waive its sovereign immunity for purposes of conferring California jurisdiction by allegedly breaching the Tribal Gaming Compact between itself and the State of California. [*See* Ch. 13, § 13.08[3].]

New and Further Disability; Insidious, Progressive Diseases; Statutes of Limitations. The court of Appeal in *Popovich v. W.C.A.B.* (2011) 76 Cal. Comp. Cases 1050 (court of appeal unpublished opinion) has held that an employee's 2009 petition to reopen for new and further disability was timely because she did not suffer disability from her insidious, progressive disease until 2010, at which point the limitations period began to run, when she sustained cumulative injury AOE/COE to her liver, diagnosed in 1999 as Hepatitis C, in 2000 she filed an application for adjudication of her claim, and in 2002 the parties entered into a stipulation that she had not yet suffered either temporary or permanent disability as a result of her injury and that Hepatitis C is an insidious disease process that extends the WCAB's jurisdiction beyond five years from the date of injury. [*See* Ch. 14, § 14.04.]

New and Further Disability; Retroactivity of Venue Provisions. The court of appeal in *Contreras v. W.C.A.B.* (2012) 77 Cal. Comp. Cases 1 (court of appeal unpublished opinion) has held that the venue provision, 8 Cal. Code Reg. § 10397, adopted in conjunction with the adoption of EAMS in 2008, should have been applied to the present case in which a petition to reopen was filed in the wrong WCAB district office in 2004, or else the provision in the venue regulation in operation in 2004, 8 Cal. Code Reg. § 10390, granting the WCAB discretion to "excuse a failure to comply with this rule resulting from mistake, inadvertence, surprise, or excusable neglect," should have been applied. [*See* Ch. 15, § 15.06[4].]

New and Further Disability. The Appeals Board in *Travelers Casualty & Surety Co. v. W.C.A.B. (Adam)* (2011) 76 Cal. Comp. Cases 857 (writ denied) has held that the WCJ did not err in dividing liability for the employee's increased permanent disability between Travelers Casualty & Surety and SCIF, using the same percentages as provided in a joint stipulated award, which had represented a settlement of the employee's four claims, three covered by Travelers and the fourth covered by SCIF, with the three cases for which Travelers had coverage being too old to reopen, but the claim covered by SCIF being capable of reopening. [*See* Ch. 14, § 14.04.]

New and Further Disability. The Appeals Board in *Baghoomian v. W.C.A.B.* (2012) 77 Cal. Comp. Cases 288 (writ denied), denying the employee's petition to reopen for new and further disability, has held that the employee failed to sustain his burden under Labor Code Section 3202.5 of proving by a preponderance of the evidence that he suffered new and further disability. [*See* Ch. 14, § 14.05.]

MEDICAL TREATMENT

Medical-Legal Evaluations. The Appeals Board in *Bell Community Medical*

Group v. W.C.A.B. (Herrera) (2011) 76 Cal. Comp. Cases 1079 (writ denied) has ordered an employer's insurer to pay a lien claimant $1,200, based on the lien claimant's billing ledger, in full and final satisfaction of its lien, when the lien claimant, which had provided medical treatment to an injured employee, filed a lien for $21,845, including $4,477.27 for medical-legal evaluation as listed under the Official Medical Fee Schedule. [*See* Ch. 4, § 4.31[6].]

Medical-Legal Procedure; Medical Reports as Evidence. The Appeals Board in *County of Mendocino v. W.C.A.B. (Branscomb)* (2012) 77 Cal. Comp. Cases 177 (writ denied) has held that the WCJ did not err in admitting and relying on panel QME reports legally obtained under Labor Code Sections 4060, 4062.1, and 4064(d) by the City of Willits, the employee's former employer and lien claimant in the employee's present workers' compensation case against the County of Mendocino, in connection with a prior claim by the employee involving an earlier industrial injury while working for the city. [*See* Ch. 15, § 15.04[3][a]; Ch. 16, § 16.51[6].]

Medical Provider Networks; Physicians Within Network. The Appeals Board in *Charter Oak Unified School District v. W.C.A.B. (Cerda)* (2011) 76 Cal. Comp. Cases 1083 (writ denied) has held that an employee who suffered an admitted industrial injury and received medical treatment from a treating physician listed in his employer's MPN contract, but was treated at a different address, through a different entity, and under a different Tax ID from those listed in the MPN contract, was treated within the employer's MPN for purposes of the employer's liability for treatment. [*See* Ch. 4, § 4.18[8][d].]

Utilization Review. The Appeals Board in *Bishop v. W.C.A.B.* (2011) 76 Cal. Comp. Cases 1192 (writ denied) has held that there was not substantial evidence to support the WCJ's award of medical treatment, including housekeeping, pool, and gardening services, when the award was based on reports of the treating physician and the AME and on the employer's alleged failure to conduct timely utilization review of requests for services, with the Board finding that housekeeping, pool, and gardening services did not fall within the definition of "medical treatment" subject to utilization review under Labor Code Sec. 4610(g). [*See* Ch. 4, § 4.26[3][b][iii].]

PERMANENT DISABIILTY

Apportionment; Substantial Evidence. The court of appeal in *Salit v. W.C.A.B.* (2011) 76 Cal. Comp. Cases 1129 (court of appeal unpublished opinion) has held that the Board's finding that the employee did not sustain industrial injury in the form of irritable bowel syndrome was not supported by substantial evidence, and that the Board's apportionment findings related to the employee's fibromyalgia injury were not supported by substantial evidence. [*See* Ch. 7, § 7.40[2].]

Apportionment; Presumption of Total Disability for Brain Injury. The Appeals Board in *City of Santa Clara v. W.C.A.B. (Sanchez)* (2011) 76 Cal. Comp. Cases 799 (writ denied) has held that an employee, who suffered industrial injuries to his right knee and to both knees and his spine during a period of cumulative trauma, incurred 100-percent permanent disability pursuant to the conclusive presumption for brain injury in Labor Code Sec. 4662(d) as the result of a stroke suffered during industrially related knee replacement surgery, thus precluding apportionment. [*See* Ch. 7, § 7.40[1].]

Apportionment; Prior Awards; Over-

lap. The Appeals Board in *Robinson v. W.C.A.B.* (2011) 76 Cal. Comp. Cases 847 (writ denied) has held that nothing in the language of either Labor Code Sec. 4663 or 4664, or in their legislative purpose, supported the conclusion that apportionment under both statutes could not be used in the same case, and that, although the employee's prior lumbar spine permanent disability had been determined and described, initially, based on the ROM Method and the more recent cervical spine permanent disability was determined and described based on the DRE Method, the AME was able to describe and determine both permanent disabilities according to the ROM Method under the AMA *Guides*. [*See* Ch. 7, § 7.42[3].]

Apportionment; Successive Injuries. The Appeals Board in *California Indemnity v. W.C.A.B. (Marquez)* (2011) 77 Cal. Comp. Cases 82 (writ denied) has held that the employer did not meet its burden of proving Labor Code Section 4663 or 4664 apportionment of the employee's permanent total disability as between his specific industrial injuries to his neck, chest, back, bilateral upper extremities, knees, and psyche, and his cumulative injuries to the same body parts, and that the WCJ properly issued a single, combined permanent disability award pursuant to the exception to the rule in *Benson v. W.C.A.B.* [*See* Ch. 7, § 7.42[2].]

Cost of Living Adjustments. The court of appeal in *County of Fresno v. W.C.A.B. (O'Brien)* (2011) 76 Cal. Comp. Cases 715 (court of appeal unpublished opinion), following the California Supreme Court opinion 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 authorized 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, § 7.54.]

Cost of Living Increases. The Appeals Board in *American Safety Ins. Co. v Workers' Comp. Appeals Bd. (Chavez)* (2012) 77 Cal. Comp. Cases 360 (writ denied) has affirmed the WCJ's finding that the permanent total disability awarded to the injured employee was subject to the cost of living adjustment in Labor Code section 4659(c), even though the award was paid at less than the maximum rate. [*See* Ch. 7, § 7.54.]

Offers of Regular, Modified, or Alternative Work; Adjustments in Compensation. The Appeals Board in *Smith v. W.C.A.B.* (2011) 76 Cal. Comp. Cases 1355 (writ denied) has rescinded the WCJ's finding that an employee was entitled to a 15 percent increase in permanent disability indemnity pursuant to Labor Code Section 4658(d)(2), when the WCJ's award was based on a literal reading of Labor Code Section 4658(d)(2) and (3)(A), but, due to the AME's retroactive determination of the employee's permanent and stationary date, it was impossible for the employer to offer modified work within the requisite 60 days. [*See* Ch. 6, § 6.24[3].]

Rating; Diminished Future Earning Capacity. The Appeals Board in *Bakerian v. W.C.A.B.* (2011) 76 Cal. Comp. Cases 986 (writ denied) has held that the employee failed to meet his burden of proof to rebut the scheduled diminished future earning capacity adjustment factor pursuant to *Ogilvie v. City and County of San Fran-*

cisco and to establish that he was 100-percent permanently disabled as the result of specific and cumulative industrial injuries, when the Board found insufficient evidence regarding the employee's future earning capacity. [*See* Ch. 7, § 7.12[2][a].]

Rating; AMA *Guides*. The Appeals Board in *Scott's Jack London Seafood, Inc. v. W.C.A.B. (Fitzsimmons)* (2011) 76 Cal. Comp. Cases 1348 (writ denied), following *Almaraz/Guzman*, affirmed the WCJ's finding that the employee incurred 25 percent permanent disability as a result of a back injury, based on the panel QME's opinion, and that the panel QME's opinion was sufficient to rebut a strict application of the AMA *Guides*, when the panel QME found that using the DRE method in Ch. 15 of the AMA *Guides* produced an inaccurate rating because it did not account for the employee's functional loss due to impairment in activities of daily living, then analogized to chapters in the AMA *Guides* addressing gait impairment and hernia because these chapters more accurately reflected the employee's level of impairment. [*See* Ch. 7, § 7.12[1][a].]

PSYCHIATRIC INJURIES

Predominant Cause Requirement; Apportionment Between Multiple Employers. The Appeals Board in *Lewis v. W.C.A.B.* (2011) 77 Cal. Comp. Cases 108 (writ denied) has held that successive injuries with different employers cannot be combined to meet the predominant cause requirement for a psychiatric injury, since each employer may be held liable for only the industrial injuries caused during the period in which the employer employed the injured worker. [*See* Ch. 10, § 10.24[3].]

SERIOUS AND WILLFUL MISCONDUCT

Serious and Willful Misconduct by Employer. The court of appeal in *C.C. Myers, Inc. v. W.C.A.B. (Lockwood)* (2012) 77 Cal. Comp. Cases 129 (court of appeal unpublished opinion) has held that substantial evidence supported the Appeals Board's conclusion that the employer's failure to provide a spotter to help direct the movement of an excavator amounted, under the surrounding circumstances, to serious and willful misconduct. [*See* Ch. 11, § 11.14[2].]

SETTLEMENTS

Compromise and Release; Application of Labor Code § 3202 to **Ambiguities.** The Appeals Board in *Tobar Industries v. W.C.A.B. (Phan)* (2012) 77 Cal. Comp. Cases 300 (writ denied) has held that that the employee did not waive his Labor Code Section 132a claim in settlement of his primary workers' compensation claim via compromise and release, when neither the employee nor defense counsel initialed the Labor Code Section 132a issue in paragraph 9 of the compromise and release form to expressly include Labor Code Section 132a in the settlement. [*See* Ch. 18, § 18.13[3].]

STATUTE OF LIMITATIONS

Occupational Cancer in Firefighters. *City of Chico v. Workers' Comp. Appeals Bd. (Scholar)* (2012) 77 Cal. Comp. Cases 440, 441–443 (writ denied) The Appeals Board in City of Chico v. Workers' Comp. Appeals Bd. (Scholar) (2012) 77 Cal. Comp. Cases 440 (writ denied) has held that a fire chief's claim for industrial injury in the form of squamous cell carcinoma was not barred by the Labor Code Section 5405 statute of limitations, notwithstanding that he first sought medical evaluation for a lump on his neck in 2004 and that four medical reports issued in 2004 stating that he had squamous cell carcinoma. [*See* Ch. 10, § 10.33[5]; Ch. 14, § 14.01[4].]

STIPULATIONS

Setting Aside. The Appeals Board in *City of San Rafael v. W.C.A.B. (Payne)* (2012) 77 Cal. Comp. Cases 293 (writ denied) has held that the employer did not show good cause to set aside a stipulation made at the mandatory settlement conference that the employee incurred industrial injury through a cumulative period ending on a specified date, notwithstanding the employer's contention that the evidence showed that the employee did not work during this period. [*See* Ch. 16, § 16.45[2].]

Setting Aside; Fraud. The Appeals Board in *California Indemnity Insurance Co. v. W.C.A.B. (Whiteley)* (2011) 76 Cal. Comp. Cases 1332 (writ denied) has upheld the WCJ's order setting aside an earlier stipulated award on the grounds of possible carrier fraud based on a finding that the carrier's failure to adequately assess the employee's disability, a misrepresentation of fact regarding the level of disability, and a failure to provide appropriate treatment with a rush toward an inadequate settlement, was so egregious that it supported a claim of knowing and material misrepresentation, fraud, and overreaching, such that the appropriate remedy was to set aside the stipulated award. [*See* Ch. 16, § 16.45[2].]

SUBSEQUENT INJURIES BENEFITS TRUST FUND

Threshold Requirements for Liability. The Appeals Board in *Catrucco v. Workers' Comp. Appeals Bd.* (2012) 77 Cal. Comp. Cases 372 (writ denied) has held that a permanently partially disabled employee must satisfy the requirements for Subsequent Injuries Benefits Trust Fund benefits based on additional disability from *one* subsequent injury, and that additional subsequent injuries cannot be combined to meet the statutory threshold. [*See* Ch. 8, § 8.01[1].]

TEMPORARY DISABILITY

Average Weekly Earnings; Living Quarters, Utilities, and Car Allowance. The court of appeal in *Motheral v. W.C.A.B.* (2011) 199 Cal. App. 4th 148, 76 Cal. Comp. Cases 720 has held that Labor Code Sec. 4454 mandated inclusion of the market value of an employee's living quarters, utilities, and car allowance in calculation of his average weekly earnings and resulting temporary disability payments. [*See* Ch. 5, § 5.05[1].]

104-Week Limitation. That Appeals Board in *City and County of San Francisco v. W.C.A.B. (Miller)* (2011) 76 Cal. Comp. Cases 1088 (writ denied) has held that the employer's two-year period of liability for temporary disability indemnity, owed to the employee who suffered a cumulative injury through June 1, 2007, commenced with the first payment of temporary disability indemnity on December 18, 2009, and that an earlier payment for one day of wage loss in the amount of $125.95 for the employee's attendance at a panel QME examination did not constitute payment of temporary disability indemnity so as to start the running of the two-year limitation period. [*See* Ch. 6, § 6.12.]

WCAB POWERS

Suspension or Removal of Privilege to Appear Before WCAB. The Appeals Board en banc in *In re Escamilla* (2011) 76 Cal. Comp. Cases 944 (Appeals Board en banc opinion) gave notice that it may, pursuant to Labor Code Sec. 4907, suspend or remove the respondent's privilege to appear before the Board, when the Board en banc found that the respondent had been repeatedly sanctioned for engaging in bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay,

including numerous instances of willful failure to comply with statutory and regulatory obligations, disruptions and delay of proceedings for improper motive, and presenting arguments indisputably without merit. [*See* Ch. 13, § 13.15[4].]

WCAB PROCEDURE

Consolidation of Cases. The Appeals Board in *PBMS, Inc. v. W.C.A.B. (Lobo)* (2011) 76 Cal. Comp. Cases 1015 (writ denied), exercising its discretion under 8 Cal. Code Reg. § 10589(a), has denied the employer's request to consolidate three claims filed by the employee that the Board found not to involve common issues of law. [*See* Ch. 16, § 16.13.]

APPENDIX (RULES). Based on customer feedback, we have removed the appendix from Volume Two since most people rely on *Workers' Compensation Laws of California* (LexisNexis) and online resources for the latest rule changes.

TABLES. New table of cases and table of statutes are included.

INDEX. A completely revised index is included.

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Publication 80117, Release 12, November 2012

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Publication 80117 Release 12 November 2012

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- Package 3 contains a new volume 1 binder.
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