

## PUBLICATION UPDATE

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# Rassp & Herlick, California Workers' Compensation Law

Publication 80117 Release 17

June 2017

## HIGHLIGHTS

### Key Developments in the Law

- 2016 Legislation
- Rule changes through Register 2017 No. 4 (1/27/2017)
- Case law developments throughout, including Ch. 7, Permanent Disability Payments and Ch. 8, Subsequent Injuries Benefits Trust Fund

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### 2016 LEGISLATION:

**Employees; Definitions.** The legislature has amended Lab. Code, § 3351 to provide that an officer or member of a board of

directors may elect to be excluded from coverage in accordance with Lab. Code, § 3352(p). [See Ch. 2, § 2.03[5].]

**Employees; Definitions.** The legislature has amended Lab. Code, § 3351 to provide that a general partner of a partnership or a managing member of a limited liability company may elect to be excluded from coverage in accordance with Lab. Code, § 3352(q). [See Ch. 2, § 2.03[4][a].]

**Excluded from Definition of "Employee."** The legislature has amended Lab. Code, § 3352 to reconfigure the provisions that exclude from the definition of "employee" persons whose employment was, or was contracted to be, for fewer than 52 hours, or for wages of not more than \$100. [See Ch. 2, § 2.05[2].]

**Medical Treatment; Requests for Payment.** The legislature has amended Lab. Code, § 4603.2 to recast provisions governing the content and timeframes for health care providers' requests for payment. [See Ch. 4, § 4.21.]

**Individually Identifiable Information.**

The legislature has amended Lab. Code, § 138.7 to delete the sunset date of January 1, 2017, and has repealed a later-enacted version of that statute that would have come into effect on that date if the sunset provision of the earlier-enacted version had been allowed to operate. [See Ch. 1, § 1.06[4].]

**Claims Administrators; Notices; Regulatory Duties of Administrative Director.** The legislature has amended Lab. Code, § 138.4 to mandate that the AD adopt regulations to provide employees with notice that they may access medical treatment outside the workers' compensation system following the denial of the claim. [See Ch. 6, § 6.02[2].]

**Medical Treatment; Review of UR Decision; Drug Formulary.** The legislature has amended Lab. Code, § 4610.5 to provide for review of UR decisions regarding medication prescribed pursuant to the drug formulary. [See Ch. 4, §§ 4.03[3], 4.10[7][b].]

**Medical Treatment; IMR; Drug Formulary.** The legislature has amended Lab. Code, § 4610.6 to provide a timeframe for IMR of disputes over medication prescribed pursuant to the drug formulary. [See Ch. 4, § 4.11[4].]

**Liens; Contents.** The legislature has amended Lab. Code, § 4903.05 to provide that, for liens filed on or after January 1, 2017, the lien must be accompanied by an original bill in addition to either the full statement or itemized voucher supporting the lien. [See Ch. 17, § 17.10[4].]

**Liens; Declarations.** The legislature has amended Lab. Code, § 4903.05 to provide that, for liens filed on or after January 1, 2017, any lien claim for expenses under Labor Code section 4903(b) that is subject to a filing fee must be accompanied by a sworn declaration stating that the dispute is

not subject to an IBR and IMR under Labor Code sections 4603.6 and 4610.5, respectively, and that the lien claimant satisfies one of the stated categories. [See Ch. 17, § 17.10[4].]

**Liens; Assignments.** The legislature has amended Lab. Code, § 4903.8 to restrict the right to assign liens. [See Ch. 17, § 17.10[5].]

## **RULES OF COURT:**

### **Court of Appeal Published Opinions; No Longer Automatically Depublished When Supreme Court Grants Review.**

The California Supreme Court has amended Cal. Rules of Court, rule 8.1105(e)(2) to provide that grant of review by the Supreme Court of a decision by the court of appeal does not affect the appellate court's certification of the opinion for full or partial publication under Cal. Rules of Court, rule 8.1105(b) or rule 8.1110, but that any such court of appeal opinion, whether officially published in hard copy or electronically, must be accompanied by a prominent notation advising that review by the Supreme Court has been granted. [See Ch. 20, § 20.14[1].]

## **CASE LAW DEVELOPMENTS:**

### *Supreme Court:*

**Negligence; Duty of Care; Asbestos; Take-Home Exposure.** The California Supreme Court in *Kesner v. The Superior Court of Alameda County* (2016) 1 Cal. 5th 1132, has held that the duty of employers and premises owners to exercise ordinary care in the use of asbestos includes preventing exposure to asbestos carried by bodies and clothing of on-site workers, when it is reasonably foreseeable that the workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members. [See Ch. 10, § 10.01[4][c].]

### ***Court of Appeal Published Opinions:***

**Death AOE/COE; Evidence.** The court of appeal in *Guerra v. Workers' Comp. Appeals Bd.* (2016) 246 Cal. App. 4th 1301, has held that a restaurant employee's death was AOE/COE when the employee, whose arteries were prone to bleed because of lesions caused by tuberculosis, died from a pulmonary hemorrhage while taking out the garbage, since the physician retained by the decedent employee's family opined that death from bleeding had to do with his taking out the garbage, either from coughing induced by exposure to trash fumes or from heavy isometric lifting of the trash. [See Ch. 9, § 9.02[2].]

**Liens; Filing Fees; Constitutionality.** The court of appeal in *Chorn v. Workers' Comp. Appeals Bd.* (2016) 245 Cal. App. 4th 1370, has held that Lab. Code, § 4903.05 did not deprive a medical liens holder of state constitutional rights to due process (Cal. Const., art. I, § 7), equal protection (Cal. Const., art. I, § 9), or petition for redress of grievances (Cal. Const., art. I, § 3). [See Ch. 17, § 17.10[4].]

**Liens; Assignment of Liens; Constitutionality.** The court of appeal in *Chorn v. Workers' Comp. Appeals Bd.* (2016) 245 Cal. App. 4th 1370, has held that Lab. Code, § 4903.8 did not substantially impair a medical liens holder's right to contract (Cal. Const. art. I, § 9). [See Ch. 17, § 17.10[5].]

**WCAB Jurisdiction; Utilization Review; Independent Medical Review; Timeframes.** The court of appeal in *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Margaris)* (2016) 248 Cal. App. 4th 349, has held that the time limit in Lab. Code, § 4610.6(d), providing that an IMR organization "shall complete its review and make its determination in writing . . . within 30 days of the receipt of

the request for review and supporting documentation," is directory only, not mandatory. [See Ch. 4, § 4.11[4].]

**Salary in Lieu of Disability Benefits; California Highway Patrol Officers.** The court of appeal in *Hernandez v. Workers' Comp. Appeals Bd.* (2016) 2 Cal. App. 5th 549, has held that the California Highway Patrol improperly charged part of the Lab. Code, § 4800.5 leave-of-absence benefit to an officer's accrued annual vacation leave, which constituted "loss of salary." [See Ch. 6, § 6.21[1].]

**Laches; Delay in Filing Claim.** The court of appeal in *Truck Insurance Exchange v. Workers' Comp. Appeals Bd. (Kwok)* (2016) 2 Cal. App. 5th 394, has held that, when an employee's claim for workers' compensation benefits was filed more than seven years after the accident, but the insurer was on notice of the employee's injury since the day after the injury occurred but never provided the employee with a claim form and notice of potential eligibility for workers' compensation benefits, there was no delay by the employee in filing his claim, and, thus, laches could not be applicable. [See Ch. 14, § 14.15[1].]

**Civil Actions; Class Actions; Certification of Class; Overcharges for Copying Patient Medical Treatment Records.** The court of appeal in *Nicodemus v. Saint Francis Memorial Hospital* (2016) 3 Cal. App. 5th 1200, has granted a plaintiff's request for certification of a class, when the plaintiff showed fulfillment of the two prerequisites under Civ. Code, § 382. [See Ch. 17, § 17.70[1][c].]

**Service-Connected Disability Retirement; Timeliness of Application.** The court of appeal in *Cameron v. Sacramento County Employees' Retirement System* (2016) 4 Cal. App. 5th 1266, has held that

substantial evidence supported a finding that the plaintiff's application for service-connected disability retirement was not timely. [See Ch. 22, § 22.04[6].]

**Civil Actions Against Employers; Exclusive Remedy Rule.** The court of appeal in *Lee v. West Kern Water District* (2016) 5 Cal. App. 5th 606, has held that a plaintiff's civil action against her employer was not barred by the exclusive remedy rule for a psychiatric injury she suffered, while working as a cashier at the employer's front counter, when a robbery occurred and she handed over money to a person she believed was a robber, although she later learned that the robbery was a mock robbery conducted by three co-employees, of which she had no notice, and which led her to be subsequently treated for psychiatric injury. [See Ch. 12, § 12.09[1].]

**Workers' Compensation Insurance; Illegally Uninsured Employers; Penalties.** The court of appeal in *Taylor v. Department of Industrial Relations, Division of Labor Standards Enforcement* (2016) 4 Cal. App. 5th 801, has held that "calendar year" in Lab. Code, § 3722(b) means "one year back from the date that the director determines an employer has been uninsured on the date the citation is issued." [See Ch. 11, § 11.03[1].]

**Petitions for Writ of Review; WCAB Decisions; Finality.** The court of appeal in *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal. App. 5th 658, has held that a WCJ's denial "without prejudice" of an employer's motion to strike a medical report, followed by the Appeals Board's dismissal and denial of the employer's petitions for removal and reconsideration, did not constitute a final decision and, thus, was not appealable. [See Ch. 20, § 20.01[2].]

**WCAB Jurisdiction; Advance Disabil-**

**ity Pension Payments; Penalties.** The court of appeal in *Gage v. Workers' Comp. Appeals Bd.* (2016) 6 Cal. App. 5th 1128, has held that the Appeals Board has jurisdiction to impose penalties under Lab. Code, § 5814 for unreasonable delay or denial of advance disability pension payments, which qualify as compensation under Lab. Code, § 3207, available under Lab. Code, § 4850.4 to local peace officers disabled on the job. [See Ch. 6, § 6.21[3].]

**Injury AOE/COE; Subcontractor's Employee; Hirer's Liability.** The court of appeal in *Khosh v. Staples Construction Co.* (2016) 4 Cal. App. 5th 712, has held that the injured employee presented sufficient evidence that his employer's hirer retained control over the employee's work, but there was no evidence that the hirer affirmatively contributed to his injury. [See Ch. 12, § 12.06[9].]

#### **Federal Cases:**

**Utilization Review; Allegations of Illegality; Exclusive Remedy Rule.** The U.S. District Court, Central District of California, in *Electronic Waveform Lab, Inc. v. EK Health Services* (C.D. Cal. 2016) 81 Cal. Comp. Cases 270, has held that the defendants' denials of treatment based on allegedly fraudulent UR decisions was an issue subject to the exclusive remedy rule of workers' compensation law and, thus, could not form the basis for claims of intentional interference with prospective economic advantage or violation of unfair competition law, but that allegations that the defendants engaged in acts such as intimidation of patients and physicians were not subject to the exclusive remedy rule since they did not fall within the scope of "normal insurer activity." [See Ch. 4, § 4.10[3].]

**California Insurance Guarantee Association; Medicare; Sovereign Immunity.**

The U.S. District Court, Central District of California, in *Calif. Ins. Guar. Assn. v. Burwell* (C.D. Cal. 2016) 81 Cal. Comp. Cases 349, has held that the California Guarantee Act's claims filing deadline transgresses the limits of state power and is, thus, inapplicable to claims by the United States. [See Ch. 3, § 3.33[3].]

**Wrongful Termination; Medicinal Marijuana.** The U.S. District Court, Eastern District of California, in *Shepherd v. Kohl's Department Stores, Inc.* (E.D. Cal. 2016) 81 Cal. Comp. Cases 71, has held that the plaintiff employee could not state a cause of action under the FEHA, Government Code section 12940 et seq., based on his employer's refusal to accommodate his use of marijuana, since no evidence indicated that he was terminated because of his disability, namely, acute and chronic anxiety, rather than because of the manner in which he chose to treat that disability, namely, by using medicinal marijuana. [See Ch. 12, § 12.09[4][c].]

#### **WCAB Panel Decisions:**

**Medical Provider Networks; Access Standards; Treating Physicians.** The Appeals Board in *De Guevara v. La Golondrina, Inc.* (2016) 81 Cal. Comp. Cases 472 (Board Panel Decision) has held that an employee's efforts in contacting only five orthopedic surgeons, of approximately 75 on the MPN list, who would not accept her as a patient, did not shift the burden to the employer to establish that reasonable treatment was available within the MPN. [See Ch. 4, § 4.12[4].]

**Medical Treatment; Utilization Review; Prescription Medication Refills.** The Appeals Board in *Ramos v. Patterson Frozen Foods, Inc.* (2016) 81 Cal. Comp. Cases 478 (Board Panel Decision) has held that an employer is not required to show change in an employee's condition to sup-

port UR of requested prescription refills because prescription medication, by its nature, is subject to ongoing evaluation to address its efficacy. [See Ch. 4, § 4.10[3].]

**Psychiatric Injury; Violent Acts; Increased Permanent Disability.** The Appeals Board in *Larsen v. Securitas Security Services* (2016) 81 Cal. Comp. Cases 770 (Board Panel Decision) has held that an employee's psychiatric permanent disability was separately compensable because it resulted from a "violent act" in accordance with Lab. Code, § 4660.1(c), i.e., by being hit by a car while walking through a parking lot. [See Ch. 10, § 10.06[3][a].]

**Medical Treatment; Utilization Review; Time Deadlines; Requests for Authorization.** The Appeals Board in *Czech v. Bank of America* (2016) 81 Cal. Comp. Cases 856 (Board Panel Decision) has held that an employer failed to timely complete UR pursuant to Lab. Code, § 4610, thus entitling the employee to medical treatment, when the employee sent a copy of the request for authorization (RFA) to the employer's attorney rather than to the employer, and the attorney's failure to transmit the RFA to the claims administrator within a reasonable time was unreasonable. [See Ch. 4, § 4.10[4].]

**Supplemental Job Displacement Benefits; Settlement.** The Appeals Board in *Beltran v. Structural Steel Fabricators* (2016) 81 Cal. Comp. Cases 1224 (Board Panel Decision) has held that, when a good faith dispute exists that, if resolved against the injured worker, would defeat his or her entitlement to all workers' compensation benefits, the injured worker may settle his or her potential right to supplemental job displacement benefit voucher by way of a C&R. [See Ch. 21, § 21.01; Ch. 7, § 7.05[3][h].]

#### **Unpublished Court of Appeal Cases:**

**Third Party Actions; Subrogation; Time to File Complaints in Intervention.**

The court of appeal in *Vatuvei v. Citrus and Allied Essences, Ltd.* (2016) 81 Cal. Comp. Cases 184 (court of appeal unpublished opinion) has held that an insurer's request to intervene was not timely filed when the insurer knew of the plaintiff's third party action and the insured's contributory negligence affirmative defense for almost two years but did not seek to intervene until two weeks before the trial date. [See Ch. 12, § 12.02[3].]

**California Insurance Guarantee Association; Covered Claims; Other Insurance; Joint and Several Liability; Compromise and Release.** The court of appeal in *Calif. Ins. Guar. Assn. v. Workers' Comp. Appeals Bd. (Lopez)* (2016) 81 Cal. Comp. Cases 317 (court of appeal unpublished opinion) has held that CIGA had no liability when two insurers entered into a C&R apportioning liability to third parties between them and one insurer subsequently became insolvent, with CIGA assuming liability for its covered claims, since the C&R did not affect the joint and several nature of each insurer's liability to third parties, so that the remaining solvent insurer provided "other insurance." [See Ch. 3, § 3.33[3].]

**Petitions for Writ of Review; WCAB Confession of Error.** The court of appeal in *Pacific Bay Recovery, Inc. v. Workers' Comp. Appeals Bd. (Moore)* (2016) 81 Cal. Comp. Cases 399 (court of appeal unpublished opinion) appeal has summarily granted a lien claimant's petition for writ of review and annulled an Appeals Board order upholding denial of its claim for payment and its petition for reconsideration, and remanded the case for further proceedings, when, in response to the lien claimant's petition for writ of review, the Board notified the court that "one of the

reasons expressed in its . . . Opinion and Order Denying Petition for Reconsideration is in error." [See Ch. 20, § 20.01[1].]

**Psychiatric Injuries; Six-Month Employment Rule; Sudden and Extraordinary Employment Condition.** The court of appeal in *Travelers Casualty & Surety Co. v. Workers' Comp. Appeals Bd. (Dreher)* (2016) 246 Cal. App. 4th 1101, has held that the fact that the employee's injury was unexpectedly catastrophic did not support a finding of an extraordinary employment condition. [See Ch. 10, § 10.06[3][c].]

**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.*

**Medical Provider Networks; Second Opinion Process.** The Appeals Board in *Bautista v. Workers' Comp. Appeals Bd.* (2016) 81 Cal. Comp. Cases 208 (writ den.) has held that an employee was not entitled to a second opinion regarding his psychiatric condition within his employer's MPN, because he did not dispute the treatment for his orthopedic injuries and received no diagnosis by the primary treating physician with regard to his claim for psychiatric injury. [See Ch. 4, § 4.12[8][b].]

**Credit; Civil Actions Against Employer; Sexual Assault and Battery; Fair Employment and Housing Act.** The Appeals Board in *Hartzheim Dodge, Inc. v. Workers' Comp. Appeals Bd. (Navarro)* (2016) 81 Cal. Comp. Cases 362 (writ den.) has held that an employee's injuries arose from the employer's course of conduct during the five-month period of the employee's employment, which violated the employee's fundamental civil right to a workplace free of sexual harassment and

discrimination under the Fair Employment and Housing Act, and that the employee's civil pleading of assault did not bring the claim within the statutory credit rights in Labor Code sections 3600(b) and 3602(b). [See Ch. 12, § 12.09[4][e].]

**Medical Treatment; Utilization Review; Requests for Additional Information.** The Appeals Board in *Wells v. Workers' Comp. Appeals Bd.* (2016) 81 Cal. Comp. Cases 540 (writ den.) has held that a UR organization's request to a treating physician for additional information was not subject to Labor Code section 4610(e) and, therefore, was not invalid for not being signed by a physician. [See Ch. 4, § 4.10[2].]

**Compromise and Release; Scope of Settlement; Release of Liability.** The Appeals Board in *City of Los Angeles v. Workers' Comp. Appeals Bd. (Reichelt)* (2016) 81 Cal. Comp. Cases 615 (writ den.) has held that a police officer's claim for

psychiatric injury as a compensable consequence of chronic hepatitis C caused by needle sticks dating back as early as 1983, filed in 1998, 10 years after the settlement of a prior claim, was not precluded by that 1988 C&R settling the prior claim for cumulative psychiatric injury during the entirety of his employment. [See Ch. 18, § 18.13[3].]

**Medical-Legal Procedure; Medical Evaluator Reporting Timeframes.** The Appeals Board in *Enstar, Inc. v. Workers' Comp. Appeals Bd.* (2016) 82 Cal. Comp. Cases 86 (writ den.) has held that, when there was no timely objection to late QME reports prior to their service, any objection to payment for the reports was waived. [See Ch. 16, § 16.54[6].]

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

**INDEX.** A completely revised index is included.

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