PUBLICATION UPDATE

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California Workers' Compensation Law, 6th Ed.

Publication 80117 Release 7 December 2007

HIGHLIGHTS

2007 Legislation

- Legislative actions affecting workers' compensation have been added.

Administrative Regulations

- Changes made through Register 2007, No. 41 (10/12/07) have been added.

California Rules of Court

- Amendments to the Rules of Court, effective 1/1/2007, have been added.

Case Law

- Recent important decisions have been added.

CALIFORNIA STATUTES. Legislation affecting workers' compensation enacted during the 2007 legislative session have been added, including the following:

Insurer Deposits; Non-California Insurers. In amending Insurance Code Sec. 11691, the legislature has required an insurer domiciled in a state where the deductible held by a large-deductible policy is paid to the estate of the insurer instead of to the guarantee association to base its California deposit for large-deductible policies on the gross amount owed, not on the net. [See Ch. 3, § 3.32.]

Insurer Reserves. In amending Insurance Code Secs. 923.5 and 11558, the legislature has repealed the requirement that workers' compensation insurers deposit 65 percent of earned premiums into reserve accounts. [See Ch. 3, § 3.11[9]; Ch. 12, § 12.23[5].]

Inpatient Facility Fees for Burn Cases. The legislature has authorized the Administrative Director, commencing January 1, 2008, to adopt and revise, no less frequently than biennially, an official medical fee schedule for inpatient facility fees for burn cases. [See Ch. 4, § 4.26[1].]

Temporary Disability; Maximum Period. The legislature has amended Labor Code Sec. 4656 to provide that aggregate disability payments for a single injury oc-

curring on or after January 1, 2008, causing temporary disability will not extend for more than 104 compensable weeks within a period of five years from the date of injury. [See Ch. 6, § 6.12.]

Medical Treatment Caps; Utilization Schedule. The legislature has provided that the limitations on the number of visits for specified therapies set forth in Labor Code Sec. 4604.5(d)(1) do not apply to visits for post-surgical physical medicine and post-surgical rehabilitation services provided in compliance with a post-surgical treatment utilization schedule established by the Administrative Director. [See Ch. 4, § 4.26[3][b].]

Payroll Verification Audits. That legislature has provided that, if an employer fails to provide for access by the insurer or its authorized representative to its records, to enable the insurer to perform an audit to determine the remuneration earned by the employer's employees during the policy period, the employer will be liable for a total premium for the policy equal to three times the insurer's then-current estimate of the annual premium on the expiration date of the policy. [See Ch. 3, § 3.11[7].]

CALIFORNIA REGULATIONS. Changes include the following:

Medical Treatment Utilization Schedule. In promulgating 8 Cal. Code Reg. Secs. 9792.20-9792.23, the Administrative Director has adopted, as required by Lab. Code Sec. 5307.27, a medical treatment utilization schedule. [See Ch. 4, § 4.26[3][b].]

Electronic Adjudication Management System (EAMS). At the time this release went to press, the DWC and WCAB announced *proposed* regulations regarding EAMS. Once these regulations are finalized and officially adopted, they will be added to this publication. For further information on EAMS, see the 2008 Edition of *Workers' Compensation Laws of California* (see "Publication Update" sheet).

CALIFORNIA RULES OF COURT. The following rules of court changes have been added:

Rules Affecting Appellate Procedure. The California Supreme Court has amended and renumbered various California Rules of Court, effective January 1, 2007. These amendments have been inserted throughout the text, as required by the subject matter, but they are concentrated in the text's discussion of appellate review. [See Ch. 20, Review by Appellate and Supreme Court.]

CALIFORNIA CASES. The following case developments have been added:

Permanent Disability; Apportionment. The California Supreme Court in *Brodie v. W.C.A.B.* (2007) 40 Cal. 4th 1313, has held that "Formula A" adopted by the Supreme Court in Fuentes v. W.C.A.B., pursuant to which the percentage of disability attributable to a new injury is calculated by subtracting the old permanent disability rating from the new permanent disability rating, then consulting the table for the award due this difference, remains the proper method for calculating apportionment. [See Ch. 7, §§ 7.44[1], 7.46[3].]

Penalties; Delay in Payment of Permanent Disability Benefits. The court of appeal in *New United Motors Manufacturing, Inc. v. W.C.A.B. (Gallegos)* (2006) 141 Cal. App. 4th 1533, has held that an employer, pursuant to Labor Code Sec. 5814(b), may avoid a Labor Code Sec. 5814 penalty if the potential violation of that statute is discovered by the employer prior to a claim for a penalty by the employee, and the fact that the employee discovered the potential violation before the employer did is immaterial. The court

also held that, for an award of attorney's fees pursuant to Labor Code Sec. 5814.5 to be sustained on appeal, the record must reveal the amount of attorney's fees incurred by the employee in enforcing payment of the unreasonably delayed benefits. [See Ch. 11, § 11.11[2].]

Temporary Disability; Seasonal Workers. The court of appeal in *Signature Fruit Co. v. W.C.A.B. (Ochoa)* (2006) 142 Cal. App. 4th 790, has held that, pursuant to Labor Code Sec. 4653, temporary disability during a seasonal employee's in-season period of regular employment was payable based on two-thirds of the employee's in-season average weekly earnings, but the seasonal employee was not entitled to temporary disability during the off-season when the parties stipulated that the employee did not have any off-season earnings. [See Ch. 5, § 5.04[1].]

Psychiatric Injury; Actual Events of Employment. The court of appeal in *Sonoma State University v. W.C.A.B. (Hunton)* (2006) 142 Cal. App. 4th 500, has held that an employee's psychiatric injury satisfies the standard for compensability set forth in Labor Code Sec. 3208.3(b)(1) only if it is proven that events of employment were predominant as to all causes combined of the psychiatric disability taken as a whole. [See Ch. 10, § 10.24[3].]

Permanent Disability; Apportionment; Presumption; Overlap; Burden of Proof. The court of appeal in *Kopping v. W.C.A.B.* (2006) 142 Cal. App. 4th 1099, has held that, although the employee, pursuant to Labor Code Sec. 4664(b), was not entitled to prove that he was medically rehabilitated from his prior permanent disability when he sustained the subsequent industrial injury, the employer/insurer had the burden of proving overlap between the current disability and the previous disability in order to establish its right to apportionment of the employee's permanent disability. [See Ch. 7, § 7.46[3].]

Permanent Disability; Apportionment; Substantial Evidence. The court of appeal in *E.L. Yeager Construction v. W.C.A.B. (Gatten)* (2006) 145 Cal. App. 4th 922, has held that an independent medical evaluator's opinion constituted substantial evidence on apportionment because it was based on an MRI and x-rays, which clearly showed degenerative disc disease at almost every level of the employee's lower spine, and on the fact that the employee had had minor back problems prior to his industrial injury, and because the independent medical evaluator stated in his deposition that his apportionment was based on reasonable medical probability. [See Ch. 7, § 7.44[2].]

Permanent Disability; Retroactive Application of 2005 Permanent Disability Rating Schedule. The court of appeal in *State Compensation Insurance Fund v. W.C.A.B. (Echeverria)* (2007) 146 Cal. App. 4th 1311, has held that the WCAB's decision to apply the 1997 schedule for rating permanent disabilities was not supported by substantial evidence, since a 12/15/2004 single-sentence report by the treating physician stating the physician's belief that permanent disability was within reasonable medical probability as a result of the employee's 7/21/2004 industrial injury was not followed by any other treating physician's report that provided reasoning to support the physician's conclusion, and that medical opinion is not substantial evidence if it does not indicate the reasoning behind the physician's opinion. [See Ch. 7, Important Note.]

Permanent Disability; Retroactive Application of 2005 Permanent Disability Rating Schedule; Comprehensive

Medical-Legal Report. The court of appeal in *Costco Wholesale Corp. v. W.C.A.B. (Chavez)* (2007) 151 Cal. App. 4th 148, has held that, pursuant to Labor Code Sec. 4660(d), a pre-2005 comprehensive medical-legal report permitted the use of the 1997 schedule for rating permanent disabilities only if that report indicated the existence of permanent disability, and that the notice mandated by Labor Code Sec. 4061 is required to be given together with the last payment of temporary disability indemnity, so that, pursuant to Labor Code Sec. 4660(d), such notice permitted the use of the 1997 schedule only if the employer were required to give it prior to 2005. [See Ch. 7, Important Note.]

Permanent Disability; Retroactive Application of 2005 Permanent Disability Rating Schedule. The court of appeal in *Zenith Insurance Co. v. W.C.A.B. (Azizi)* (2007) 153 Cal. App. 4th 461, has held that the notice mandated by Labor Code Sec. 4061 is required to be given together with the last payment of temporary disability indemnity, so that, pursuant to Labor Code Sec. 4660(d), such notice permitted the use of the 1997 schedule only if the employer were required to give it prior to 2005. [See Ch. 7, Important Note.]

Permanent Disability; Retroactive Application of 2005 Permanent Disability Rating Schedule. The court of appeal in *Chang v. W.C.A.B.* (2007) 153 Cal. App. 4th 750, has held that the fact that the Administrative Director could have promulgated the 2005 schedule prior to the January 1, 2005, deadline mandated by Labor Code Sec. 4660(e) did not mean that, only if that schedule had been promulgated between April 19, 2004, the effective date of SB 899, and January 1, 2005, would the new schedule have applied to injuries sustained during 2004. [See Ch. 7, Important Note.]

Civil Actions; Employment Relationship. The court of appeal in *Mendoza v. Brodeur* (2006) 142 Cal. App. 4th 72, has held that the plaintiff, injured while repairing the defendant's roof, was the defendant's employee pursuant to Labor Code Sec. 2750.5, which operated to allow the plaintiff's lawsuit, despite the fact that the plaintiff, by virtue of Labor Code Sec. 3352(h), was not an employee of the defendant for workers' compensation purposes, when the court of appeal found that the plaintiff was not a licensed roofing contractor and, therefore, not an independent contractor. [See Ch. 2, §§ 2.16[4], 2.26[3]; Ch. 11, § 11.07[3]; Ch. 12, § 12.20[4].]

Civil Actions; Statute of Limitations. The court of appeal in *Valdez v. Himmelfarb* (2006) 144 Cal. App. 4th 1261, has held that, when the plaintiff/employee's personal injury action is filed under Labor Code Sec. 3706, the defendant/employer's liability is determined under rules of pleading and proof that differ significantly from those of a common-law personal injury action, and that, therefore, this statute creates a statutory cause of action for personal injuries subject to the three-year statute of limitations in Code of Civil Procedure Sec. 338(a). [See Ch. 12, § 12.03[1].]

Injury AOE/COE. The court of appeal in *Pettigrew v. W.C.A.B.* (2006) 143 Cal. App. 4th 397, has held that an employee did not suffer an industrial injury when, on his way to work as a correctional officer for the California Department of Corrections, the employee stopped to render aid at an accident scene and was injured. [See Ch. 10, § 10.17[2].]

Employment Relationships; Independent Contractors. The court of appeal in *JKH Enterprises, Inc. Department of Industrial Relations* (2006) 142 Cal. App. 4th 1046, has held that substantial evidence

supported the determination by the Department of Industrial Relations that the drivers for plaintiff courier service were functioning as employees rather than as true independent contractors and that the question of the hirees' status must be considered in light of the history and remedial and social purposes of the Workers' Compensation Act. [See Ch. 2, § 2.28[1].]

Employment Relationships; Standard of Review; Substantial Evidence. The court of appeal in *JKH Enterprises, Inc. Department of Industrial Relations* (2006) 142 Cal. App. 4th 1046, has held that the trial court applied the correct standard of judicial review of a determination by the Department of Industrial Relations that drivers for plaintiff courier service were functioning as employees, namely, the substantial evidence standard rather than independent judgment. [See Ch. 19, § 19.01[4].]

Employment Relationships; Domestic Workers Referral Agencies. The court of appeal in *An Independent Home Support Service, Inc. v. Superior Court of San Diego County* (2006) 145 Cal. App. 4th 1418, has held that, by complying with Civil Code Sec. 1812.5095(b)(1)–(9), a referral agency that provided domestic workers to individuals and entities was deemed not to be the employer, for purposes of workers' compensation, of the domestic workers it referred. [See Ch. 2, § 2.28[1].]

Employment Relationships; Unlicensed Contractors. The court of appeal in *Robert P. Heiman v. W.C.A.B. (Aguilera)* (2007) 149 Cal. App. 4th 724, has held that an unlicensed contractor and a property management firm that hired it were jointly and severally liable to an injured employee of the contractor for workers' compensation, and that the homeowners' association, which had hired the property management firm, was also liable for workers' compensation. [See Ch. 2, § 2.26[3].]

California Insurance Guarantee Association; Covered Claims; Other Insurance. The court of appeal in *Parkwoods Community Association v. CIGA* (2006) 141 Cal. App. 4th 1362, has held that CIGA was not liable to pay the claim of a community association because, pursuant to Insurance Code Sec. 1063.1(c)(9)(i), other insurance was available to the claimant in the form of the developer and the general contractor's excess insurance coverage. [See Ch. 3, § 3.34[3].]

California Insurance Guarantee Association; Other Insurance. The court of appeal in *California Insurance Guarantee Association v. W.C.A.B. (State Compensation Insurance Fund)* (2007) 153 Cal. App. 4th 524, has held that SCIF, at risk on a worker's specific injury, was jointly and severally liable to pay the worker temporary disability benefits, medical expenses, and vocational rehabilitation maintenance allowance, all of which had been paid to the worker by CIGA, at risk on the worker's cumulative trauma injury. [See Ch. 3, § 3.34[3].]

Death Benefits; Decedent's Estate. The court of appeal in *Six Flags, Inc. v. W.C.A.B. (Rackchamroon)* (2006) 145 Cal. App. 4th 91, has held that Labor Code Sec. 4702(a)(6)(B), providing that death benefits may be payable to the estate of a deceased employee, is unconstitutional. [See Ch. 9, § 9.24.]

Petitions for Reconsideration; Time to File; Amended Award. The court of appeal in *Nestle Ice Cream Co. v. W.C.A.B. (Ryerson)* (2007) 146 Cal. App. 4th 1104, has held that the WCJ's amendment of an award by increasing the amounts of retroactive temporary disability payments and

vocational rehabilitation maintenance allowance awarded meant that the employer's subsequent petition for reconsideration, timely filed as to the amended award, but untimely as to the original award, was timely filed. [See Ch. 19, § 19.06[1].]

Public Employees; Disability Retirement. The court of appeal in *Pellerin v. Kern County Employees' Retirement Association* (2006) 145 Cal. App. 4th 1099, has held that, if a public employee qualifies for a service-connected disability retirement based on the Government Code Sec. 31720.5 presumption that the employee's heart condition arose out of employment, and the county employees' retirement association awards a service-connected disability retirement because it cannot rebut that presumption, the association was required by law to grant the employee's service-connected disability retirement pursuant to Government Code Sec. 31720. [See Ch. 22, § 22.04[6].]

Disability Indemnity Benefits; Average Weekly Earnings. The court of appeal in *County of San Joaquin v. W.C.A.B. (Davis)* (2007) 147 Cal. App. 4th 1459, has held that the fact of having been injured while on jury duty, which paid $5 per day, did not justify paying the employee, whose regular job was as an attorney, benefits computed at less than the maximum rate of pay. [See Ch. 5, § 5.03.]

Discrimination; Labor Code § 132a. The court of appeal in *Andersen v. W.C.A.B.* (2007) 149 Cal. App. 4th 1369, has held that an employer discriminated against an employee by requiring the employee, who had returned to work following industrial injuries, to use earned vacation time rather than sick leave to attend medical appointments needed to care for those industrial injuries, while permitting employees with non-industrial injuries to use their sick leave for medical appointments. [See Ch. 11, § 11.27[6].]

Third-Party Actions; Settlement; Notice and Consent. The court of appeal in *McKinnon v. Otis Elevator Co.* (2007) 149 Cal. App. 4th 1125, has held that, pursuant to Labor Code Secs. 3853, 3859, and 3860(a), when an employer fails to adequately notify its employee of its subrogation lawsuit and proposed settlement involving an alleged third-party tortfeasor and fails to obtain the employee's consent to settlement of that suit, and when the settling alleged third-party tortfeasor, prior to settlement, was or reasonably should have been aware of the possibility of the employee's claim for damages against that alleged tortfeasor, the tortfeasor cannot use mere settlement and dismissal of the employer's subrogation action to bar the employee from maintaining an action for damages against the alleged tortfeasor. [See Ch. 12, § 12.04[1], [3].]

Workers' Compensation Coverage; Contractors' Licenses; Suspension of License. The court of appeal in *Wright v. Issak* (2007) 149 Cal. App. 4th 1116, in which plaintiff contractor sued defendant homeowners for, inter alia, breach of contract, seeking allegedly unpaid compensation, has held that plaintiff, as an unlicensed contractor, could not sue for payment for work that required a license, that plaintiff's contractor's license had been automatically suspended, pursuant to Business & Professions Code Sec. 7125.2(a)(2), for failure to obtain workers' compensation insurance, and that suspension of a license for failure to obtain workers' compensation insurance does not require the notice from the registrar of contractors that is required for suspension of a license for failure to maintain workers' compensation insurance. [See Ch. 3, § 3.134.]

Petition to Reopen; New and Further Disability; Temporary Disability Benefits. The court of appeal in *Sarabi v. W.C.A.B.* (2007) 151 Cal. App. 4th 920, has held that the Appeals Board had jurisdiction to order additional temporary disability benefits more than five years after the date of injury because the employee had filed a timely petition to reopen and his new and further disability commenced within five years of the date of his injury. [See Ch. 14, § 14.06[2].]

Presumption of Industrial Causation; Heart Trouble; Police Officers. The court of appeal in *California Horse Racing Board v. W.C.A.B. (Snezek)* (2007) 153 Cal. App. 4th 1169, has held that the employee was not entitled to the heart trouble presumption because, even if the Appeals Board was correct that the employee, an investigator for the employer, was a police officer of a political subdivision, pursuant to Labor Code Sec. 3212, the only presumption that applied to that class of employees was the hernia presumption. [See Ch. 10, § 10.33[6].]

Medical Treatment; Medical Provider Networks; Notice. The Appeals Board en banc in *Knight v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1423 (Appeals Board en banc opinion) has held that the employer was liable for medical treatment self-procured by the employee because the employer neglected or refused to provide reasonable medical treatment by failing to provide required notice to the employee of his rights under the employer's medical provider network. [See Ch. 4, § 4.18[8][c], [d].]

Medical Treatment; Medical Provider Network Statutes; Retroactive Application. The Appeals Board en banc in *Babbitt v. Ow Jing dba National Market* (2007) 72 Cal. Comp. Cases 70 (Appeals Board en banc opinion), *pet. for writ of rev. den. sub nom. Babbitt v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 830 (writ denied) has held that an employer may satisfy its obligation to provide reasonable medical treatment by transferring an injured worker into its network in conformity with applicable statutes and regulations regardless of the date of injury or the date of the award of future medical treatment. [See Ch. 4, § 4.18[8][c].]

Permanent Disability; Retroactive Application of 2005 Permanent Disability Rating Schedule. The Appeals Board en banc in *Baglione v. Hertz Car Sales* (2007) 72 Cal. Comp. Cases 444 (Appeals Board en banc opinion) has, by a 4-3 vote, rescinded its previous decision in *Baglione v. Hertz Car Sales* (2007) 72 Cal. Comp. Cases 86 (Appeals Board en banc opinion), which had also been decided by a 4-3 vote, and held that, for compensable claims arising before January 1, 2005, in order for the 1997 schedule for rating permanent disabilities to apply, pursuant to Labor Code Sec. 4660(d), the existence of permanent disability must be indicated in either a pre-2005 comprehensive medical-legal report or a pre-2005 report from a treating physician, and that, otherwise, the 2005 permanent disability rating schedule applied. [See Ch. 7, Important Note.]

Permanent Disability; Retroactive Application of 2005 Permanent Disability Rating Schedule. The Appeals Board en banc in *Pendergrass v. Duggan Plumbing* (2007) 72 Cal. Comp. Cases 456 (Appeals Board en banc opinion) has, by a 4-3 vote, rescinded its previous decision in *Pendergrass v. Duggan Plumbing* (2007) 72 Cal. Comp. Cases 95 (Appeals Board en banc opinion), which had also been decided by a 4-3 vote, and held that, for compensable claims arising before January 1, 2005, only if the last payment of temporary disability

indemnity was made for any period of temporary disability ending before that date would the 1997 schedule for rating permanent disabilities apply to determine the extent of permanent disability, pursuant to Labor Code Sec. 4660(d), and that otherwise the 2005 permanent disability rating schedule applied. [See Ch. 7, Important Note.]

Permanent Disability; 2005 Permanent Disability Rating Schedule; Validity of Schedule. The Appeals Board en banc in *Costa v. Hardy Diagnostic* (2006) 71 Cal. Comp. Cases 1797 (Appeals Board en banc opinion) has upheld the validity of the 2005 permanent disability rating schedule, holding that the employee had not met his burden of proving the schedule invalid. [See Ch. 7, Important Note.]

Permanent Disability; Apportionment; Petitions to Reopen; Retroactive Application of SB 899. The Appeals Board en banc in *Vargas v. Atascadero State Hospital* (2006) 71 Cal. Comp. Cases 500 (Appeals Board en banc opinion) has held that the apportionment provisions of SB 899 apply to the issue of increased permanent disability alleged in any petition to reopen that was pending at the time of SB 899's enactment, April 19, 2004, regardless of the date of injury. [See Ch. 7, § 7.44[1].]

WCAB En Banc Decisions; WCAB's Power to Rescind; Change in Membership of WCAB. The Appeals Board en banc in *Baglione v. Hertz Car Sales* (2007) 72 Cal. Comp. Cases 444 (Appeals Board en banc opinion) and *Pendergrass v. Duggan Plumbing* (2007) 72 Cal. Comp. Cases 456 (Appeals Board en banc opinion) has held that no statute, rule, or case law precluded the Board en banc from revisiting and reversing a prior Board en banc decision, and that a change in membership of the Board since the prior en banc decision now being revisited does not affect the Board's ability to reconsider the prior en banc decision. [See Ch. 19, § 19.23.]

Temporary Disability; Maximum Duration of Payments. The Appeals Board en banc in *Hawkins v. Amberwood Products* (2007) 72 Cal. Comp. Cases 807, (Appeals Board en banc opinion) has held that the Labor Code Sec. 4656(c)(1) allowable period of payments, 104 compensable weeks within two years from the "date of commencement of temporary disability payment," begins on the date when temporary disability is first paid, not on the date when temporary disability indemnity is first owed. [See Ch. 6, § 6.12.]

Medical Treatment; Spinal Surgery; Disputes; Procedure. The Appeals Board in *Brasher v. Nationwide Studio Fund* (2006) 71 Cal. Comp. Cases 1282 (Appeals Board Significant Panel decision) has clarified the procedures for resolving disputes regarding a treating physician's recommendation for spinal surgery, including the responsibilities of the DWC's Medical Unit. [See Ch. 4, § 4.26[3][c][iv]; Ch. 15, § 15.04[3][b][i].]

Medical Treatment; Disputes; Qualified Medical Evaluator Panels. The Appeals Board in *Romero v. Costco Wholesale* (2007) 72 Cal. Comp. Cases 824 (Appeals Board Significant Panel decision) has held that, for the purposes of Labor Code Secs. 4062.1(e) and 4062.2(e), an employee has "received" a comprehensive medical-legal evaluation only when the employee attends and participates in a medical evaluator's examination. [See Ch. 15, § 15.04[3][a].]

Disqualification of WCJ; Appearance of Bias Against Attorney. The Appeals Board in *Robbins v. Sharp Healthcare* (2006) 71 Cal. Comp. Cases 1291 (Appeals Board Significant Panel decision) has held that bias or the appearance of bias solely

against an attorney or a law firm, as opposed to bias against a party whom that attorney or law firm represents, may be ground for disqualification of the WCJ. [See Ch. 1, § 1.09[3].]

Medical Examinations; Represented Employees. The Appeals Board in *Ward v. City of Desert Hot Springs* (2006) 71 Cal. Comp. Cases 1313 (Appeals Board Significant Panel decision) has held that, for claimed industrial injuries occurring on or after January 1, 2005, in which the employee is represented by an attorney, disputes regarding compensability of the alleged industrial injury must be resolved, pursuant to Labor Code Sec. 4060(c), by the procedure provided in Labor Code Sec. 4062.2. [See Ch. 15, § 15.04[3][a].]

Medical Liens; Outpatient Surgery Centers; Burden of Proof. The Appeals Board in *Stokes v. Patton State Hospital* (2007) 72 Cal. Comp. Cases 996 (Appeals Board Significant Panel decision) has held that it could not determine from the record whether the lien claimant was claiming that it was merely a properly accredited "outpatient setting" where surgeries were performed, as allowed by Health & Safety Code Sec. 1248(c) and Business & Professions Code Sec. 2285, such that a fictitious-name permit from the California Medical Board was not required, or it was claiming that it provided medical treatment as a "clinic," within the definition of Health & Safety Code Secs. 1200 and 1204(b)(1), such that it was required to possess both a license and a fictitious-name permit from the Medical Board. [See Ch. 17, § 17.22[1].]

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.*

Vocational Rehabilitation Maintenance Allowance; Credit. The court of appeal in *Gamble v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1015 (court of appeal unpublished opinion) has held that an employer is not entitled to a credit against VRMA owed to an employee for wages the employee earned from another employer. [See Ch. 21, § 21.04[3].]

Vocational Rehabilitation; Vocational Rehabilitation Maintenance Allowance. The court of appeal in *Paramount Farms v. W.C.A.B. (Garcia de Velasquez)* (2006) 71 Cal. Comp. Cases 1406 (court of appeal unpublished opinion) has held that an employer's attempt to change qualified rehabilitation representatives after the parties had agreed to one caused a delay in making vocational rehabilitation maintenance allowance payments that entitled the employee to receive increased vocational rehabilitation maintenance allowance payments. [See Ch. 21, § 21.04[3].]

Vocational Rehabilitation; Statute of Limitations. The court of appeal in *Fresno Unified School District v. W.C.A.B. (Butcher)* (2006) 71 Cal. Comp. Cases 1391 (court of appeal unpublished opinion) has held that an employee's claim for vocational rehabilitation benefits, made more than five years after the date of injury, was timely, when the employee filed a petition to reopen for new and further disability, seeking an increase in permanent disability benefits, within the five-year limitations period of Labor Code Sec. 5410, then, nearly 14 months later, and nearly six years after the date of injury, amended the petition to reopen by adding a claim for vocational rehabilitation benefits. [See Ch. 21, § 21.10[2].]

Vocational Rehabilitation; Reinstatement of Services; Statute of Limitations.

The court of appeal in *Gomez v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1714 (court of appeal unpublished opinion) has held that the Appeals Board lacked jurisdiction to award reinstatement of vocational rehabilitation services, when the employee elected to interrupt her vocational rehabilitation services, then never sought to reinstate those services within the five-year statute of limitations period of Labor Code Sec. 5410, but rather inquired, within that period, only about obtaining settlement of those services. [See Ch. 21, § 21.10[2].]

Psychiatric Injury; Actual Events of Employment; Evidence. The court of appeal in *Krause v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1032 (court of appeal unpublished opinion) has held that an employee, who claimed a psychiatric injury as a compensable consequence of an admitted industrial orthopedic injury, presented no credible medical evidence that actual employment events predominantly caused an injury to her psyche, when the court found that her testimony was not credible when she testified that none of the events that occurred in her life around the time of her industrial orthopedic injury caused her stress. [See Ch. 10, § 10.24[3].]

Psychiatric Injury; Sudden and Extraordinary Employment Condition. The court of appeal in *Matea v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1522 (court of appeal unpublished opinion) has held that lumber falling from its rack into the aisle and onto an employee's leg was such an uncommon, unusual, and totally unexpected event that it would naturally be expected to cause psychic disturbances even in a diligent and honest employee, making the psychiatric injury compensable even though the employee had worked for the employer for fewer than six months. [See Ch. 10, § 10.24[2].]

Psychiatric Injury; Sudden and Extraordinary Employment Condition. The court of appeal in *Puga v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 195 (court of appeal unpublished opinion) has held that an employee's claim for psychiatric injury was not compensable because the employee, injured when she fell off a ladder while engaged in her regular and routine employment activities of installing and repairing ceiling fans in a chicken house, had not worked for the employer for at least six months and the employee's alleged psychiatric injury was not caused by an extraordinary employment condition. [See Ch. 10, § 10.24[2].]

Psychiatric Injury; Good-Faith Personnel Actions. The Appeals Board in County of *Contra Costa v. W.C.A.B. (Aliotti-Sceary)* (2006) 71 Cal. Comp. Cases 1857 (writ denied) has held that an employee's claim of psychiatric injury was not barred by the employee's transfer to a new department, which the Board found to be a good-faith personnel action, when the evidence indicated that the injury was predominantly caused by the employee's being forced to work with a difficult and abusive co-worker. [See Ch. 10, § 10.24[5].]

Mandatory Settlement Conference; Discovery. The court of appeal in *Simas v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1056 (court of appeal unpublished opinion) has held that the WCJ properly took the case off calendar at the mandatory settlement conference and ordered additional discovery for further development of the record. [See Ch. 16, § 16.04[2].]

Mandatory Settlement Conference; Discovery. The court of appeal in *Shank v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1735 (court of appeal unpublished opinion) has held that the Appeals Board's basis for

excluding an untimely medical report was supported by both law and substantial evidence, when the employee, on the date of the mandatory settlement conference, had obtained an appointment for a medical-legal examination on a date two weeks later, when the Board found that the medical-legal examination could have been discovered by exercise of due diligence prior to the mandatory settlement conference. [See Ch. 16, § 16.04[2].]

Mandatory Settlement Conference; Discovery. The court of appeal in *Savemart Stores, Inc. v. W.C.A.B. (Oneto)* (2006) 71 Cal. Comp. Cases 1727 (court of appeal unpublished opinion) has held that the Appeals Board properly excluded from evidence, pursuant to Labor Code Sec. 5502(e)(3), a surveillance video tape obtained by the employer following trial, when the employer's petition for writ of review presented no argument or explanation as to why a similar video tape could not have been discovered by exercise of due diligence prior to the mandatory settlement conference. [See Ch. 16, § 16.04[2].]

WCAB Jurisdiction; Tribal Sovereign Immunity; Waiver. The court of appeal in *Sullivan v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1065 (court of appeal unpublished opinion) has held that the Appeals Board had no jurisdiction over an employee's Labor Code Sec. 132a discrimination claim because the employer Indian tribe had not clearly, expressly, and unequivocally waived its tribal sovereign immunity with respect to the employee, who worked as a surveillance agent at the tribe's casino. [See Ch. 13, § 13.08[3].]

WCAB Jurisdiction; Final Orders; Res Judicata. The court of appeal in *Doody v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1219 (court of appeal unpublished opinion), annulling an Appeals Board decision that awarded CIGA a credit for overpayment of attendant care benefits, held that the Board lacked jurisdiction to consider the issue, which had been decided by the Board against CIGA in the first petition for reconsideration in the case, and CIGA had not sought judicial review of that decision, which had then become a final decision entitled to res judicata effect. [See Ch. 19, § 19.23.]

Injury AOE/COE; Going and Coming Rule; Special Risk Exception. The court of appeal in *Uribe v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1070 (court of appeal unpublished opinion) has held that an employee satisfied the burden of proof that his injury arose out of and in the course of employment, in that he established both prongs of the special risk exception to the going and coming rule, i.e., (1) but for his employment, the employee would not have been at the location where the injury occurred, and (2) the risk to the employee was distinctive from the risk to the public generally. [See Ch. 10, § 10.15[1].]

Injury AOE/COE; Substantial Medical Evidence. The court of appeal in *Hess v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1225 (court of appeal unpublished opinion) has held that the opinion of the employer's qualified medical evaluator constituted substantial evidence in support of the Appeals Board's decision that the employee was 31-percent disabled, despite opinions of the employee's treating physician and qualified medical evaluator that supported a significantly higher level of permanent disability. [See Ch. 16, § 16.51[2].]

Injury AOE/COE; Third Party Actions; Credit. The court of appeal in *Medina v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1535 (court of appeal unpublished opinion) has held that an injury sustained by an employee, who tripped and fell while

walking to her car on a ramp at the apartment complex where her employer had directed and paid her to live, was not industrial, thereby entitling her employer's workers' compensation insurer to credit in the amount of the employee's net recovery in her third-party action against the apartment complex owner. [See Ch. 10, § 10.19[1].]

Injury AOE/COE; Medical Evidence. The court of appeal in *Jordan v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1512 (court of appeal unpublished opinion) has held that an employee failed to prove that his injury arose out of and occurred in the course of his employment, when the opinions of the employee's and the employer's QMEs were that the employee offered no evidence to support his claim that his pre-existing asthmatic condition had been aggravated by exposure to Aspergillus fungi during his employment as a building inspector. [See Ch. 10, § 10.32[3].]

Injury AOE/COE; Time to File Claim; Notice to Employer. The court of appeal in *Arciga v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 1 (court of appeal unpublished opinion) has annulled an Appeals Board decision that had ruled an employee's claim untimely when filed more than 30 days after the date of injury and remanded the case for the Board to consider whether the employer had inquiry notice of a possible industrial injury to the employee's hands, pursuant to Labor Code Sec. 5402, when the employee, after several days of pruning her employer's grape vines, had told her supervisors that her hands were so painful and blistered that she could not sleep. [See Ch. 14, § 14.01[1], [3].]

Injury AOE/COE; Substantial Evidence. The court of appeal in *Elmore v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 8 (court of appeal unpublished opinion) has held that an employee's testimony lacked credibility and that the employer's human resources manager's testimony was more convincing, when the court found that the employee, following an alleged industrial injury, had reported pain to the employer's human resources manager and had told her that the pain was from an old Vietnam injury. [See Ch. 10, § 10.32[3].]

Injury AOE/COE; Post-Termination Claims. The court of appeal in *Chavez v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 307 (court of appeal unpublished opinion) has held that the trier of fact could reasonably conclude that the employee, employed as a ranch foreman, did not establish by a preponderance of the evidence, as required by Labor Code Sec. 3600(a)(10)(A), that the employer had notice of his claimed injury prior to his receipt of notice of his layoff. [See Ch. 10, § 10.02[1].]

Injury AOE/COE; Going and Coming Rule. The court of appeal in *Lamers v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 599 (court of appeal unpublished opinion) has held that a decedent's fatal automobile accident did not arise out of and occur in the course of employment, and that the decedent's wife was barred by the going and coming rule from collecting survivor benefits, when the court found that the fact that the decedent was working as a part-time security guard did not place him within any exception to the going and coming rule. [See Ch. 10, § 10.16[2].]

Injury AOE/COE; Substantial Evidence. The court of appeal in *City of Turlock v. W.C.A.B. (STK09 YYZZZ)* (2007) 72 Cal. Comp. Cases 931 (court of appeal unpublished opinion) has held that substantial evidence supported the Appeals Board's finding of a causal connection

between a sewage worker's employment and his contraction of hepatitis C. [See Ch. 10, § 10.32[3].]

Injury AOE/COE; Going and Coming Rule; Special Mission. The court of appeal in *Rash v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 614 (court of appeal unpublished opinion) has held that an employee/sheriff's deputy was injured AOE/COE in a traffic accident while returning from a college horseshoeing course to prepare his privately-owned horse for mounted duty. [See Ch. 10, § 10.17[2].]

Petitions to Reopen; Good Cause. The court of appeal in *Walker v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1077 (court of appeal unpublished opinion) has held that the Appeals Board's denial of an employee's petition to reopen for industrial back injury was not based on substantial evidence and that the petition should have been granted. [See Ch. 14, § 14.08[4].]

Petitions to Reopen; New and Further Disability; Compensable Consequence. The court of appeal in *Valley Behavioral Health Network v. W.C.A,B. (Cherry)* (2006) 71 Cal. Comp. Cases 1774 (court of appeal unpublished opinion) has held that substantial evidence supported the Appeals Board's award of prior and future medical treatment for an employee's right upper extremity and shoulder as a compensable consequence of the original injury to right wrist. [See Ch. 14, § 14.05.]

Petitions to Reopen; Good Cause. The court of appeal in *Wal-Mart Stores, Inc. v. W.C.A.B. (Collier)* (2007) 72 Cal. Comp. Cases 210 (court of appeal unpublished opinion) has held that an employer made no showing of good cause to reopen a prior stipulated award, when the employer failed to explain why its proffered evidence was unavailable prior to entering into that stipulated award. [See Ch. 14, § 14.08[4].]

Penalties; Labor Code Sec. 4650. The court of appeal in *Zimarik v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1111 (court of appeal unpublished opinion) in dicta has recommended that the Appeals Board reconsider its analysis in *Leinon v. Fisherman's Grotto* (2004) 69 Cal. Comp. Cases 995 (Appeals Board en banc opinion), noting that it is difficult to square *Leinon* with the self-executing nature of Labor Code Sec. 4650 penalties. [See Ch. 11, § 11.11[1].]

Permanent Disability; Apportionment; Burden of Proof; Compromise and Release. The court of appeal in *Oswalt v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1243 (court of appeal unpublished opinion) has followed *Pasquotto v. Hayward Lumber* (2006) 71 Cal. Comp. Cases 223 (Appeals Board en banc opinion) and held that an employer did not meet its burden of proving the existence of a prior award of permanent disability in order to establish Labor Code Sec. 4664(b)'s conclusive presumption because the only evidence in the record of resolution of the employee's 1997 claim for an ankle injury was the employee's testimony that he settled that case in compromise and release, and the Appeals Board in Pasquotto ruled that an order approving compromise and release is not, without more, a "prior award of permanent disability" within the meaning of Labor Code Sec. 4664(b). [See Ch. 7, § 7.44[1].]

Permanent Disability; Apportionment. The court of appeal in *Fresno Unified School District v. W.C.A.B. (Stephens)* (2006) 71 Cal. Comp. Cases 1505 (court of appeal unpublished opinion) has held that, when a QME testified on deposition that it would be speculative for him to conclude that part of an employee's back injury was caused by aging, there were no grounds for apportioning that injury to nonindustrial factors. [See Ch. 14, § 14.05.]

Permanent Disability; Medical Treatment; Utilization Review. The court of appeal in *Lithia Motors Support Services v. W.C.A.B. (Locke)* (2006) 71 Cal. Comp. Cases 1517 (court of appeal unpublished opinion) has held that substantial evidence supported the Appeals Board's finding that surgery performed on an employee was both approved by the employer's insurer and reasonably required to cure or relieve the employee from the effects of his industrial injury, so that the employer was liable for the employee's increased level of permanent disability that resulted from the surgery, despite the employer's later attempts to rescind the approval of the surgery. [See Ch. 4, § 4.26[3][c][iii].]

Permanent Disability; Apportionment. The court of appeal in *Sierra Bible Church v. W.C.A.B. (Clink)* (2007) 72 Cal. Comp. Cases 20 (court of appeal unpublished opinion) has upheld the Appeals Board's award to an employee of 77-percent permanent disability, without apportionment, based on the AME's initial medical reporting. [See Ch. 7, § 7.45[4].]

Permanent Disability; Retroactive Application of 2005 Permanent Disability Rating Schedule. The court of appeal in *Trader Joe's Co. v. W.C.A.B. (Evets)* (2007) 72 Cal. Comp. Cases 204 (court of appeal unpublished opinion) has held that the 2005 Schedule for Rating Permanent Disability applied, when there had been no treating physician's report prior to 1/1/2005 indicating the existence of permanent disability, and the WCJ's observation that the employee's injuries were of a type described in the AMA *Guides* did not indicate that the employee's injuries were necessarily permanent. [See Ch. 7, Important Note.]

Permanent Disability; Apportionment; Substantial Evidence. The court of appeal in *Linam v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 332 (court of appeal unpublished opinion) has held that an employee was 88-percent permanently disabled, not 100-percent permanently disabled as opined by a vocational rehabilitation counselor, when the court found that the WCAB did not rely on the vocational rehabilitation counselor, and that the employee conceded that permanent disability of 88 percent was supported by substantial medical evidence in the form of medical reports. [See Ch. 7, § 7.45[4].]

Permanent Disability; Apportionment; Substantial Evidence. The court of appeal in *Marsh v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 336 (court of appeal unpublished opinion) has held that a finding that 50 percent of the employee's permanent disability was caused by nonindustrial factors was supported by substantial evidence, when the agreed medical examiner's opinion apportioning the employee's disability was supported by sufficient reasons as to how and why his disability was 50-percent caused by osteopenia. [See Ch. 7, § 7.45[4].]

Medical Treatment; Further Medical Treatment; Apportionment. The court of appeal in *County of Stanislaus v. W.C.A.B. (Credille)* (2006) 71 Cal. Comp. Cases 1381 (court of appeal unpublished opinion) has held that medical treatment, unlike permanent disability, cannot be apportioned to nonindustrial factors, and that, once it has been established that an industrial injury contributed to the need for medical treatment, Labor Code Sec. 4600 required that the employer provide the treatment. [See Ch. 4, § 4.04[5].]

Medical Treatment; Spinal Surgery; Second Opinion. The court of appeal in *Sacramento County Office of Education v. W.C.A.B. (Burnett)* (2007) 72 Cal. Comp. Cases 954 (court of appeal unpublished

opinion) has held that the employer was not liable for the costs of the employee's self-procured spinal surgery, when that surgery occurred before resolution of the second-opinion process. [See Ch. 15, § 15.04[3][b][i].]

Medical Treatment; Spinal Surgery; Second Opinion. The court of appeal in *Sacramento County Office of Education v. W.C.A.B. (Burnett)* (2007) 72 Cal. Comp. Cases 954 (court of appeal unpublished opinion) has held that the employee was not entitled to proceed with spinal surgery on the grounds that the employer did not timely initiate the required Appeals Board proceedings after the second-opinion physician issued a contrary opinion, when the parties had agreed to abide by the determination of the second opinion, so that the employer was relieved of this obligation. [See Ch. 15, § 15.04[3][b][ii][G].]

Applications for Adjudication; Venue. The court of appeal in *Domino's Pizza v. W.C.A.B. (Kerr)* (2006) 71 Cal. Comp. Cases 1387 (court of appeal unpublished opinion) has held that Labor Code Sec. 5501.5(a) mandated that the employee's claim be filed in the county where the employee resides, where the injury allegedly occurred, or where the employee's attorney has his or her principal place of business. [See Ch. 15, § 15.06[4].]

WCAB Decisions; Sufficiency of Decisions. The court of appeal in *Paramount Farms v. W.C.A.B. (Lopez)* (2006) 71 Cal. Comp. Cases 1397 (court of appeal unpublished opinion), remanding the case to the Appeals Board, has held that the Board did not sufficiently state the evidence relied upon and specify in detail the reasons for its decision to enable the court to determine for which of the claimed 103 interpreting services the Board had ordered the employer to pay. [See Ch. 19, § 19.20[5].]

Cumulative Trauma; Statute of Limitations. The court of appeal in *County of Mariposa v. W.C.A.B. (Johnson)* (2006) 71 Cal. Comp. Cases 1499 (court of appeal unpublished opinion) has held that an employer failed to prove with substantial evidence that its employee suffered a compensable disability that triggered the commencement of the statute of limitations period, pursuant to Labor Code Sec. 5412, prior to the employee's resignation. [See Ch. 14, § 14.13[1].]

Cumulative Trauma; Date of Injury; Post-Termination Claims. The court of appeal in *Arciga v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 1 (court of appeal unpublished opinion) has held that the fact that the employee's hands hurt over the course of several days of pruning the employer's grape vines, immediately prior to her being terminated from employment, did not necessarily lead to the conclusion that she was aware of or should have known that she was suffering from a cumulative trauma injury, in which case the fact that the employee filed her claim after the 30-day limit set forth in Labor Code Sec. 5400, would not bar the claim. [See Ch. 14, § 14.13[1].]

Petitions for Writ of Review; California Rules of Court. The court of appeal in *Fresno Unified School District v. W.C.A.B. (Stephens)* (2006) 71 Cal. Comp. Cases 1505 (court of appeal unpublished opinion) has held that the provisions of California Rules of Court, Rule 8.204(d), regarding page limits for attachments to briefs, do not apply to petitions for writs of error. [See Ch. 20, § 20.07[5].]

California Insurance Guarantee Association; Covered Claims. The court of appeal in *California Ins. Guarantee Assn. v. W.C.A.B. (Gutierrez)* (2006) 71 Cal. Comp. Cases 1661 (court of appeal unpub-

lished opinion) has held that CIGA was not required to pay the lien claim of the University of California, Davis Medical Center, because the lien claimant was an agency of the State of California. [See Ch. 3, § 3.34[3].]

Employment Relationships; Home Care Services. The court of appeal in *Farmers Insurance Group of Companies v. W.C.A.B. (Bell, Berry)* (2006) 71 Cal. Comp. Cases 1694 (court of appeal unpublished opinion) has held that claims by two home-care givers for cumulative trauma injuries arising from their employment by a trust created for the purpose of paying for the care needed by their quadriplegic brother were not precluded by the policy provision of the trust fund's workers' compensation insurer that excluded coverage "arising out of the business pursuits of an insured." [See Ch. 2, § 2.16[1].]

Statute of Limitations; Tolling of Statute; Cumulative Trauma Injury. The court of appeal in *Federal Express v. W.C.A.B. (Uhlik)* (2006) 71 Cal. Comp. Cases 1703 (court of appeal unpublished opinion) has held that a claim for workers' compensation benefits, alleging cumulative trauma injury, filed almost three years after the employee's last day of work was timely when the employee first learned of the industrial nature of her injury only five months before filing her claim. [See Ch. 14, § 14.13[1].]

WCAB's Continuing Jurisdiction; Petitions to Reopen; New and Further Disability. The court of appeal in *Gomez v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1721 (court of appeal unpublished opinion) has held that, when the employee timely filed a petition to reopen within five years after the date of injury but claimed benefits for temporary total disability that commenced more than five years after the date of injury, the WCAB did not have jurisdiction. [See Ch. 14, § 14.06[3].]

Attorney's Fees; Labor Code § 5801. The court of appeal in *Savemart Stores, Inc. v. W.C.A.B. (Oneto)* (2006) 71 Cal. Comp. Cases 1727 (court of appeal unpublished opinion) has held that there was no reasonable basis for an employer's petition for writ of review, when the court found that the employer's argument that the Appeals Board acted in excess of its powers by not allowing into evidence a post-trial surveillance video tape unreasonably ignored the well-established confines of Labor Code Sec. 5502(e)(3), and that the employer failed to proffer a good-faith argument as to why the video tapes were not timely procured. [See Ch. 17, § 17.16[6]; Ch. 20, § 20.41[2].]

Petitions for Reconsideration; Time to File; Place to File. The court of appeal in *Scott Pontiac GMC v. W.C.A.B. (Olsen)* (2007) 72 Cal. Comp. Cases 346 (court of appeal unpublished opinion) has held that the Appeals Board should deem an employer's petition for reconsideration as timely filed on its own motion, pursuant to Labor Code Sec. 5911, when a messenger service, on the last day to make a timely filing, incorrectly filed the petition in the San Francisco District Office of the Department of Workers' Compensation, located on the first floor of the same building in which the Appeals Board is located on the ninth floor, where the petition should have been filed, but where it was not received until seven days after the filing deadline. [See Ch. 19, § 19.05.]

WCAB Procedures; Due Process. The court of appeal in *Agredano v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 381 (court of appeal unpublished opinion) has held that an employee was not denied due process by the failure of the Appeals Board to consider

evidence of psychological injury, when the employee had stated in her declaration of readiness to proceed that the issues were temporary disability and medical treatment arising from an orthopedic injury to her hand, including the need to provide psychological treatment in order to cure or relieve from the effects of the hand injury, and that she was not pursuing a claim of psychological injury. [See Ch. 15, § 15.42[1].]

Expedited Hearings; Due Process; Permanent and Stationary. The court of appeal in *Agredano v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 381 (court of appeal unpublished opinion) has held that an employee was not denied due process when, at an expedited hearing, the WCJ found the employee's injured hand to be permanent and stationary, when the issue at the hearing was the employee's entitlement to additional temporary disability, and the finding regarding the employee's permanent and stationary status was incidental to adjudication of this issue. [See Ch. 16, § 16.04[3].]

Expedited Hearings; Due Process; Timeliness. The court of appeal in *Agredano v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 381 (court of appeal unpublished opinion) has held that an employee was not denied due process by the failure of the expedited hearing to take place, or by the failure of the decision to issue, within 30 days of the employee's filing of a declaration of readiness to proceed, as required by Labor Code Sec. 5502(b), because the failure to adhere to the statutory time requirements did not result in delay or deprivation of benefits for the employee. [See Ch. 16, § 16.04[3].]

Serious and Willful Misconduct by Employer. The court of appeal in *Elk Grove Unified School District v. W.C.A.B. (Stroth)* (2007) 72 Cal. Comp. Cases 399 (court of appeal unpublished opinion) has held that the element of "serious and willful misconduct" by the employer, deliberately failing to take corrective action, was not present, when the employer knew of the existing danger to the employee's safety and knew that the probable consequences of its continuance would involve injury to the employee, but had made repeated attempts to take corrective action, attempts that were thwarted by a third party, and was in the process of making another such attempt when the employee was injured. [See Ch. 11, § 11.14[2].]

Compromise and Release; Petition to Reopen; Good Cause. The court of appeal in *Phillips v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 406 (court of appeal unpublished opinion) has found good cause to reopen a pro per employee's case, pursuant to Labor Code Sec. 5803, that had been settled by compromise and release, when the court held that the circumstances surrounding the settlement contributed to a misunderstanding by the employee regarding his disputed earnings or rate of temporary disability indemnity and that his misunderstanding and mistake or inadvertence were excusable. [See Ch. 14, § 14.08[3]; Ch. 18, § 18.11[1].]

Death Benefits; Suicide; Irresistible Impulse. The court of appeal in *Toshi v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 420 (court of appeal unpublished opinion) has held that substantial evidence, in light of the entire record, supported the Appeals Board's finding that decedent's suicide was not the product of an irresistible impulse and, thus, not compensable. [See Ch. 9, § 9.04[5]; Ch. 10, § 10.05.]

Presumption of Compensability. The court of appeal in *Leprino Foods v. W.C.A.B. (Owens)* (2007) 72 Cal. Comp. Cases 605 (court of appeal unpublished

opinion) has held that the Appeals Board did not engage in a fatal error or deny the employer's due process rights by considering and applying, sua sponte, the 90-day presumption of compensability under Labor Code Sec. 5402(d) after the matter was submitted for trial. [See Ch. 10, § 10.01[2].]

Medical-Legal Procedure; Spinal Surgery; American College of Occupational and Environmental Medicine Guidelines. The court of appeal in *Laing v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 767 (court of appeal unpublished opinion) has held that Ch. 12 of the ACOEM Guidelines expressly concerns "[r]ecommendations on assessing and treating adults with potentially work-related back problems (i.e., activity limitations due to symptoms in the low back of less than three months duration)," so that the Appeals Board erred in applying the ACOEM Guidelines' presumptive correctness on the scope of medical treatment to an employee's industrial injury of the low back that was approximately 20 years old. [See Ch. 4, § 4.26[3][b].]

Medical-Legal Procedure; Spinal Surgery; Second Opinions. The court of appeal in *Laing v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 767 (court of appeal unpublished opinion) has held that the Appeals Board was required to remand the case for compliance with the second opinion procedures mandated by Labor Code Sec 4062(b), which required the Administrative Director to randomly select an orthopedic surgeon or a neurosurgeon for preparation of a second opinion report when, as here, the parties were unable to reach agreement on the selection of an AME. [See Ch. 15, § 15.04[3][b][i].]

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.*

Credit; Liens Subject to Credit. The Appeals Board in *Trustees Collection Service v. W.C.A.B. (Lyon)* (1997) 62 Cal. Comp. Cases 997 (writ denied) has held that the language of Labor Code Sec. 3858, to the effect that "the employer shall be relieved from the obligation to pay further compensation to or on behalf of the employee . . . up to the entire amount" of the employee's net recovery from a third-party settlement, was not limited to expenses incurred by the employer subsequent to the third-party settlement, but included expenses incurred prior to that settlement. [See Ch. 12, § 12.08[1].]

Medical Treatment; American College of Occupational and Environmental Medicine Guidelines. The Appeals Board in *AT&T v. W.C.A.B. (Bigel)* (2006) 71 Cal. Comp. Cases 1146 (writ denied) has held that the opinion of an employee's QME indicating that the employee was in need of myofascial pain release therapy and acupuncture to relieve him of the effects of his spinal injuries was sufficient to rebut the Labor Code Sec. 4604.5(c) presumption of correctness of the ACOEM Guidelines on the issue of the extent and scope of medical treatment and to support an award of additional medical treatment at variance with the Guidelines. [See Ch. 4, § 4.26[3][b].]

Medical Treatment; Compensable Consequence Injuries. The Appeals Board in *Salveson v. W.C.A.B. (Coble)* (2006) 71 Cal. Comp. Cases 1457 (writ denied) has held that an employee, who sustained admitted industrial back injuries, was entitled to medical treatment for a liver condition, hepatic encephalopathy, and a fracture of his right arm, as well as 24-hour home health care pursuant to a stipulated

award, when substantial medical evidence indicated that the high doses of pain medication he was taking for his industrial orthopedic injury contributed to his liver disorder and his resulting need for home health care, and that the effects of the medication combined with his other conditions to cause him to fall and fracture his right arm. [See Ch. 10, § 10.31[2].]

Medical Treatment; ACOEM Guidelines. The Appeals Board in *Lake Tahoe Unified School District v. W.C.A.B. (Kelly)* (2006) 72 Cal. Comp. Cases 138 (writ denied) has held that an employee with 1996 industrial neck and back injuries was entitled to chiropractic treatment under Chapter 6 of ACOEM Guidelines even though the treatments did not cure her condition, but temporarily relieved her pain and restored her functional capacity. [See Ch. 4, § 4.26[3][b].]

Medical Treatment; American College of Occupational and Environmental Medicine Guidelines. The Appeals Board in *Glagola Construction Co. v. W.C.A.B. (Larios)* (2007) 72 Cal. Comp. Cases 1016 (writ denied) has awarded an employee further medical treatment to cure or relieve the effects of his December 2004 injury AOE/COE to his low back and spine, when the Board found that the suggested surgery was either outside the ACOEM Guidelines or, alternatively, within Chapter 6 of the Guidelines, which states that treatment to increase function in chronic pain patients is appropriate. [See Ch. 4, § 4.26[3][b].]

California Insurance Guarantee Association; Covered Claims; Longshore and Harbor Workers' Compensation Act. The Appeals Board in *California Insurance Guarantee Association v. W.C.A.B. (Badenhop)* (2006) 71 Cal. Comp. Cases 1150 (writ denied) has held that CIGA was required to reimburse an employer who, following the insolvency of the insurer that had covered the employer's liability for California workers' compensation claims and its liability for Longshore and Harbor Workers' Compensation Act claims, had paid an injured employee's medical treatment expenses pursuant to the LHWCA policy, under which the employee, who could have proceeded under either policy, had elected to proceed, then filed a claim for reimbursement against CIGA pursuant to the California workers' compensation policy. [See Ch. 3, § 3.34[3].]

California Insurance Guarantee Association; Covered Claims. The Appeals Board in *Allianz Insurance Co. v. W.C.A.B. (Hernandez)* (2006) 71 Cal. Comp. Cases 1437 (writ denied) has held that an insurer's request for reimbursement from CIGA was not a "covered claim" when that insurer had insured the employer during a time period prior to the time period during which the employee suffered a cumulative trauma injury but provided benefits to the employee to avoid potential penalties and filed a petition for reimbursement from the insolvent insurer, which had coverage during the period of the employee's injury, and CIGA. [See Ch. 3, § 3.34[3].]

California Insurance Guarantee Association; Other Insurance. The Appeals Board in *Blue Cross of California v. W.C.A.B. (Gorgi)* (2006) 71 Cal. Comp. Cases 1587 (writ denied) has held that an employer's group health plan, which paid for an injured employee's medical treatment, then filed a lien against CIGA, was a "health care service provider" and an "insurer," and that the lien claim was not a "covered claim" within the meaning of Insurance Code Sec. 1063.1(c)(5). [See Ch. 3, § 3.34[3].]

California Insurance Guarantee Association; Change of Administrators. The

Appeals Board in *Krause's Custom Crafted Furniture v. W.C.A.B. (Khodavandi)* (2007) 72 Cal. Comp. Cases 262 (writ denied) has granted CIGA's petition for a change of administrators, even though the petition was filed more than five years after the employee's date of injury, holding that a change of the administration of an award was a "ministerial function," which did not amount to altering, amending, or rescinding the award, so that Labor Code Sec. 5804 did not bar the request. [See Ch. 14, § 14.06[1].]

California Insurance Guarantee Association; Reimbursement; Other Insurance. The Appeals Board in *San Diego County Water Authority v. W.C.A.B. (Curtis)* (2007) 72 Cal. Comp. Cases 275 (writ denied) has held that a permissibly self-insured employer was precluded by Insurance Code Sec. 1063.1(c)(5) and (c)(9)(ii) from seeking reimbursement from CIGA for medical treatment/surgery expenses the employer had paid on behalf of an employee with 1991 and 1996 spine injuries, despite the fact that the expenses were related to the 1996 injury only and that CIGA had assumed liability for benefits stemming from that injury. [See Ch. 3, § 3.34[3].]

California Insurance Guarantee Association; Change of Administrators; Other Insurance. The Appeals Board in *Anadite, Inc. v. W.C.A.B. (Aceves)* (2007) 72 Cal. Comp. Cases 648 (writ denied) has held that a formal appointment of administrator was not a prerequisite to a change of administrators. [See Ch. 3, § 3.34[3].]

California Insurance Guarantee Association; Covered Claims; Employment Development Department Liens. The Appeals Board in *California Ins. Guarantee Assn. v. W.C.A.B. (Faris)* (2007) 72 Cal. Comp. Cases 1008 (writ denied) has held that CIGA was liable to an employee for temporary disability indemnity for the period 3/26/2000 through 4/16/2001, less credit to CIGA for $8,173.88 paid to EDD in settlement of its $25,000 lien for benefits paid to the employee during the period 4/2/2000 through 4/1/2001, when the Appeals Board found that CIGA was bound by its stipulation to the period of the employee's temporary disability that it entered into with knowledge of the prior settlement of the EDD lien. [See Ch. 3, § 3.34[3]; Ch. 6, § 6.21[1].]

Temporary Total Disability; Permanent and Stationary. The Appeals Board in *Hernandez v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1165 (writ denied) has held that an employee was entitled to temporary total disability ending on the permanent and stationary date given by the employee's qualified medical evaluator, for the employee's industrial injury to both knees, and the fact that the employee needed further medical treatment, including bilateral knee surgery, was not sufficient by itself to conclude that he was temporarily totally disabled during the period after the permanent and stationary date when he had not undergone the suggested surgery. [See Ch. 7, § 7.38.]

Temporary Disability; Rate; Earnings. The Appeals Board in *Manpower Temporary Services v. W.C.A.B. (Rodriguez)* (2006) 71 Cal. Comp. Cases 1614 (writ denied) has held that an employee was entitled to temporary disability benefits for the period following his termination from modified duty based on his modified work earnings, rather than on his pre-injury earnings. [See Ch. 5, § 5.01[1].]

Temporary Disability; Petition to Terminate Benefits. The Appeals Board in *The Brickman Group v. W.C.A.B. (Martinez)* (2007) 72 Cal. Comp. Cases 357

(writ denied) has held that Labor Code Sec. 3370, which prohibits payment of temporary disability benefits to an inmate of a state penal or correctional institution, was in applicable because the employee here was incarcerated in a county jail. [See Ch. 2, § 2.22[6].]

Temporary Disability; Limitations on Payments; Industrial Disability Leave. The Appeals Board in *Salmon v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 1042 (writ denied) has held that payments for industrial disability leave, defined by Government Code Sec. 19870(a) to mean temporary disability as defined in the workers' compensation law, were included in the time limitations for temporary disability payments in Labor Code Sec. 4656(c)(1). [See Ch. 6, § 6.23[1].]

Temporary Total Disability. The Appeals Board in *McCray v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 493 (writ denied) has held that an employee was not entitled to temporary total disability from February 2006 and continuing, for a July 1995 admitted right knee and lumbar spine injury AOE/COE, when the employee needed a total knee replacement on an industrial basis, and the evidence indicated that the employee was unlikely ever to lose the necessary 125 to 150 pounds before undergoing this surgery. [See Ch. 6, § 6.13[2].]

Treating Physicians; Medical Provider Networks; Serious Chronic Conditions. The Appeals Board in *Redlands Insurance Co. v. W.C.A.B. (Craig)* (2006) 71 Cal. Comp. Cases 1189 (writ denied) has held that an employee who sustained an industrial back injury was entitled to delay transfer of his medical treatment to a physician within his employer's insurer's medical provider network and continue treating with his primary treating physician outside the network, when the primary treating physician's reports established that the employee suffered a serious chronic condition, as defined in Admin. Dir. Rule 9767.9(e)(2). [See Ch. 4, § 4.18[8[c].]

Uninsured Employers Benefits Trust Fund; Reimbursement of Benefits Paid by Insurance Carrier. The Appeals Board in *Uninsured Employers Benefits Trust Fund v. W.C.A.B. (Fisher)* (2006) 71 Cal. Comp. Cases 1193 (writ denied) has held that it had equitable authority to order the Fund to reimburse an insurance carrier for benefits mistakenly paid to an injured employee. [See Ch. 3, § 3.20[2].]

Salary in Lieu of Disability; Multiple Industrial Injuries. The Appeals Board in *City of Oakland v. W.C.A.B. (Harger)* (2006) 71 Cal. Comp. Cases 1319 (writ denied) has held that Labor Code Sec. 4850 entitles qualified workers to one year of full salary per injury, not per lifetime. [See Ch. 6, § 6.23[7].]

Employment Relationships; Presumption of Employment. The Appeals Board in *L & R Construction v. W.C.A.B. (Evans)* (2006) 71 Cal. Comp. Cases 1331 (writ denied) has applied the Labor Code Sec. 3357 presumption of employment to find that an injured worker was an employee of an uninsured and unlicensed roofing subcontractor on the date of his injury, when the subcontractor's testimony that the worker had been terminated prior to his injury was insufficient to rebut the presumption. [See Ch. 2, § 2.23[1].]

Employment Relationships; Independent Contractor. The Appeals Board in *Jobbagy v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1882 (writ denied) has held that an interpreter who frequently worked in the superior courts was an independent contractor, not an employee of the court. [See Ch. 2, § 2.26[1].]

Employment Status; Residential Em-

ployees; Homeowners' Insurance Policies. The Appeals Board in *Allstate Insurance Co. v. W.C.A.B. (Diaz)* (2006) 72 Cal. Comp. Cases 113 (writ denied) has held that a worker was an employee of a residential property owner on the date he was injured in a fall from the roof of a garage/storage unit that he was building on the property owner's property and that the homeowner's insurance policy provided workers' compensation coverage for the worker's injury. [See Ch. 2, § 2.16[3].]

Compromise and Release; Setting Aside. The Appeals Board in *Mackill v. W.C.A.B.* (2006) 71 Cal. Comp. Cases 1336 (writ denied) has held that case law decided subsequent to the date on which it approved a compromise and release was not grounds to set aside that compromise and release, when the Board found that the parties knew or should have known of the uncertainty of the case law on how to calculate apportionment of permanent partial disability at the time the compromise and release agreement was reached. [See Ch. 18, § 18.11[1].]

Insurance Coverage; Agency Relationships; Estoppel. The Appeals Board in *Sincere Oriental Food Corp. v. W.C.A.B. (Ortega)* (2006) 71 Cal. Comp. Cases 1343 (writ denied) has held that a carrier's cancellation of an employer's workers' compensation insurance policy for nonpayment of premiums was effective and that the carrier had no coverage on the date of an employee's injury, when the employer had obtained insurance through a broker, pursuant to a broker's agreement expressly providing that the broker was not an agent of the carrier, and the broker failed to make timely premium payments on the employer's behalf. [See Ch. 3, § 3.25[2].]

Permanent Disability; Apportionment. The Appeals Board in *Waste Management, ACE USA v. W.C.A.B. (De La Pena)* (2006) 71 Cal. Comp. Cases 1469 (writ denied) has held that a report of the employee's treating physician indicating that the employee's permanent disability "is a result of the work-related injury" and "apportionment is not indicated in this case" satisfied the requirements of *Escobedo v. Marshalls.* [See Ch. 7, § 7.44[2].]

Permanent Disability; Apportionment. The Appeals Board in *Yellow Transportation, Inc. v. W.C.A.B. (Huls)* (2006) 71 Cal. Comp. Cases 1473 (writ denied) has held that an AME's opinion on apportionment of permanent disability did not meet the requirements set forth in *Escobedo v. Marshalls* and did not constitute substantial evidence to justify a finding of apportionment, since the AME provided no basis for his apportionment, he relied on cervical x-rays that contradicted MRI findings, and his opinion was speculative and not based on reasonable medical probability. [See Ch. 7, § 7.44[2].]

Permanent Disability; Apportionment. The Appeals Board in *Fry's Electronics, Inc. v. W.C.A.B. (Daryabeghi-Moghadam)* (2006) 72 Cal. Comp. Cases 131 (writ denied) has held that the opinion of the employer's QME apportioning 25 percent of the employee's overall permanent disability from orthopedic injuries to a pre-existing condition did not constitute sufficient evidence to support a finding of apportionment, when the QME failed to explain how the pre-existing condition caused disability or how he had determined an apportionment of 25 percent. [See Ch. 7, § 7.44[2].]

Permanent Disability; Retroactive Application of 2005 Permanent Disability Rating Schedule. The Appeals Board in *Escutia v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 254 (writ denied) has held that a report from the employee's treating physi-

cian stating that he was sending the report to "indicate the existence of permanent disability" and checking off boxes indicating that the employee was not yet permanent and stationary but would have permanent disability, did not constitute substantial evidence indicating the existence of permanent disability and, therefore, was insufficient under Labor Code Sec. 4660(d) to require application of the 1997 Schedule for Rating Permanent Disabilities. [See Ch. 7, Important Note.]

Permanent Disability; 2005 Permanent Disability Rating Schedule. The Appeals Board in *Alvarado-Salas v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 350 (writ denied) has held that *Aldi. v. Carr, McClellan, Ingersoll, Thompson & Horn* was binding precedent on Board and WCJs. [See Ch. 7, Important Note.]

Permanent Disability; Application of 1997 Schedule for Rating Permanent Disabilities. The Appeals Board in *Zurich American Insurance v. W.C.A.B. (Nunes)* (2007) 72 Cal. Comp. Cases 368 (writ denied) has held that a 2004 treating physician's report, indicating that the employee had a herniated disc, radiculopathy, and footdrop, and needed to use a cane, was sufficient to show the existence of permanent disability and require application of the 1997 Schedule for Rating Permanent Disabilities. [See Ch. 7, Important Note.]

Permanent Disability; Application of 1997 Schedule for Rating Permanent Disabilities. The Appeals Board in *Eskaton Properties, Inc. v. W.C.A.B. (Ongsarte)* (2007) 72 Cal. Comp. Cases 662 (writ denied) has held that a treating physician's December 20, 2004, report, declaring the employee permanent and stationary and setting forth factors of permanent disability, gave rise to the employer's duty to provide the Labor Code Sec. 4061 notice, and neither the AME's subsequent determination that the employee did not become permanent and stationary until 2006 nor the parties' 2005 stipulation that the employee was temporarily disabled from December 29, 2004, negated that duty. [See Ch. 7, Important Note.]

Permanent Disability; Application of 1997 Schedule for Rating Permanent Disabilities. The Appeals Board in *Tokio Marine and Fire Insurance Co. v. W.C.A.B. (Burnside)* (2007) 72 Cal. Comp. Cases 731 (writ denied) has held that the 1997 Schedule for Rating Permanent Disabilities applied to rate an employee's permanent disability stemming from injuries in 2002 and during a period from 1991 through 2003, when the Board found that form RU-90 prepared by the employee's treating physician on July 1, 2004, stating that the employee was a qualified injured worker entitled to vocational rehabilitation constituted a report from the employee's treating physician indicating the existence of permanent disability. [See Ch. 7, Important Note.]

Permanent Disability; Applicability of 1997 Schedule for Rating Permanent Disabilities. The Appeals Board in *Xerox Corp., Inc. v. W.C.A.B. (Blair)* (2007) 72 Cal. Comp. Cases 1044 (writ denied) has held that the 1997 schedule for rating permanent disabilities applied, pursuant to Labor Code Sec. 4660(d), to rate the permanent disability resulting from an industrial injury to the employee's cervical spine and right upper extremity during 2003, when the treating physician indicated the existence of permanent disability in a 10/5/2004 report by reporting that after the employee's surgery her cervical spine lacked flexion and extension, the employee had temporary total disability for over one year and was, therefore, assumed to be a qualified injured worker, i.e., permanently

disabled, and the employee was released to return to work prior to 1/1/2005, triggering the employer's duty to give Labor Code Sec. 4061 notice to the employee. [See Ch. 7, Important Note.]

Injury AOE/COE; Going and Coming Rule; Dual Purpose Exception. The Appeals Board in *St. Paul Travelers, Inc. v. W.C.A.B. (Schleifstein)* (2006) 71 Cal. Comp. Cases 1624 (writ denied) has held that an employee's claim stemming from burn injuries was, pursuant to the dual purpose exception, not barred by the "going and coming" rule, when those injuries occurred while the employee was performing a two-day assignment for his employer that included picking up a pool product, calcium hypochlorite, from two of the employer's store locations and transporting it in his private vehicle to the store location where he worked. [See Ch. 10, § 10.16[2].]

Injury AOE/COE; Going and Coming Rule; Special Mission Exception. The Appeals Board in *St. Paul Travelers, Inc. v. W.C.A.B. (Schleifstein)* (2006) 71 Cal. Comp. Cases 1624 (writ denied) has held that an employee's claim for burn injuries was, pursuant to the special mission exception, not barred by the "going and coming" rule, when the injuries occurred while the employee was completing a two-day assignment at his employer's request that included picking up and transporting calcium hypochlorite from two of the employer's store locations to the store where the employee worked. [See Ch. 10, § 10.17[1].]

Injury AOE/COE; Going and Coming Rule; Combined Personal and Business Activities. The Appeals Board in *Redgwick Construction v. W.C.A.B. (Thomas)* (2007) 72 Cal. Comp. Cases 711 (writ denied) has held that the employee/construction foreman's claim for injuries, sustained to his left shoulder and mouth when he was hit by a car on his way back to work after taking a 10-minute off-site break to get a haircut, was not barred by the "going and coming" rule, when the Board found that the employee's break was a minor deviation and benefitted the employer. [See Ch. 10, § 10.17[1].]

Injury AOE/COE; Post-Termination Claims. The Appeals Board in *United States Fire Insurance Co. v. W.C.A.B. (Urzua)* (2007) 72 Cal. Comp. Cases 869 (writ denied) has held that an employee's claims for injuries to his left shoulder, back, and neck filed after he left his employment were not barred under Labor Code Sec. 3600(a)(10), when the evidence indicated that the employee was not terminated but rather voluntarily left his job. [See Ch. 10, § 10.02[2].]

Penalties; Delay in Payment of Medical Treatment. The Appeals Board in *California Insurance Guarantee Association v. W.C.A.B. (Lobos)* (2006) 71 Cal. Comp. Cases 1835 (writ denied) and Lobos v. W.C.A.B. (2006) 71 Cal. Comp. Cases 1887 (writ denied) has held that CIGA unreasonably delayed providing or authorizing surgery for a worker's industrial carpal tunnel condition and awarded a penalty pursuant to Labor Code § 5814, as amended by SB 899. [See Ch. 3, § 3.34[3].]

Penalties; Delay in Payment of Benefits; Retroactive Application of SB 899; Due Process. The Appeals Board in *Mackey v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 365 (writ denied) has held that applying Labor Code Sec. 5814, as amended by SB 899, effective 6/1/2004, to calculate the penalties owing to an employee who filed his seventh penalty petition on 1/23/2001 was not a violation of the employee's due process rights, even though the penalty issue was originally scheduled for trial on 8/6/2001, prior to the amend-

ment of Labor Code Sec. 5814, but was ordered off calendar by the WCJ for purposes of judicial economy and not heard until 4/24/2006. [See Ch. 11, § 11.11[2].]

Medical-Legal Procedure; Spinal Surgery; Prospective Application of SB 899. The Appeals Board in *Gateway Chevrolet/GM Motors v. W.C.A.B. (Welch)* (2006) 71 Cal. Comp. Cases 1864 (writ denied) has held that Labor Code Sec. 4062(b), setting forth the procedure for resolving spinal surgery disputes, applied to resolve the dispute over an employee's entitlement to spinal surgery for a 1997 injury, since SB 899, which enacted that statute, specifically states that it is to apply prospectively from the date of enactment, regardless of the date of injury. [See Ch. 15, § 15.04[3][b][i].]

Medical-Legal Procedure; Utilization Review. The Appeals Board in *City of Hayward v. W.C.A.B. (Rushworth-McKee)* (2007) 72 Cal. Comp. Cases 237 (writ denied) has held that an employer who obtains a utilization review medical report pursuant to Labor Code Sec. 4610, which approves surgery for an employee's injury, is not entitled to obtain a second opinion from a QME pursuant to Labor Code Sec. 4062. [See Ch. 4, § 4.26[3][c][iv]; Ch. 15, § 15.04[3][a].]

Medical-Legal Procedure; Disputed Injuries. The Appeals Board in *Barrett Business Services, Inc. v. W.C.A.B. (Sanchez)* (2007) 72 Cal. Comp. Cases 834 (writ denied) has held that the reports of an employee's treating physician were not rendered inadmissible for the employee's failure to comply with the procedures set forth in Labor Code Secs. 4062.2 and 4062(a) or on the ground that the treating physician was not within the employer's medical provider network, when the Board found that the employer provided no evidence that it had complied with Labor Code Sec. 4062(a). [See Ch. 15, § 15.04[3][a].]

Petitions to Reopen; New and Further Disability; Stipulated Awards. The Appeals Board in *Brown v. W.C.A.B.* (2006) 72 Cal. Comp. Cases 118 (writ denied) has found no good cause to reopen an employee's claim for new and further disability to his neck/cervical spine following the issuance of a stipulated award under which the parties stipulated to industrial low back and shoulder injuries but made no mention of an alleged industrial neck/cervical spine injury, when, prior to the stipulation, the AME had opined that the neck/cervical spine disability was non-industrial. [See Ch. 14, § 14.05.]

Statute of Limitations; Death Benefits. The Appeals Board in *State of California/Department of Corrections and Rehabilitation v. W.C.A.B. (Underwood)* (2006) 72 Cal. Comp. Cases 162 (writ denied) has held that, when a husband retired 6/1/90 and died from cardiac causes 5/21/95, and his widow met with a workers' compensation attorney 8/5/2003, which was her first knowledge that her husband's death was industrial and that she could apply for dependent's death benefits, 8/5/2003 was the date of injury, so that, when the widow's attorney sent a DWC-1 claim form to the employer on 11/9/2003, and filed an application for adjudication of claim on 12/10/2004, both within 240 weeks of the date of injury, they were timely filed under Labor Code Sec. 5406. [See Ch. 9, § 9.21; Ch. 14, § 14.11[3].]

Public Employees; Salary in Lieu of Benefits; Police Officers. The Appeals Board in *City of Oakland v. W.C.A.B. (Aisthorpe)* (2007) 72 Cal. Comp. Cases 249 (writ denied), *City of Long Beach v. W.C.A.B. (Weber)* (2007) 72 Cal. Comp. Cases 837 (writ denied), and *County of*

Sacramento v. W.C.A.B. (Taylor) (2007) 72 Cal. Comp. Cases 854 (writ denied) has held that salary continuation benefits paid under Labor Code Sec. 4850 are not subject to the two-year limitation period for payment of temporary disability indemnity set forth in Labor Code Sec. 4656, as amended by SB 899. [See Ch. 6, § 6.23[1].]

Liens; Medical Treatment; Medi-Cal; Uninsured Employers Benefits Trust Fund. The Appeals Board in *Rancho Los Amigos County Medical Rehabilitation Center v. W.C.A.B. (Wilkerson)* (2007) 72 Cal. Comp. Cases 270 (writ denied) has held that the UEBTF was not liable for reimbursement of a lien filed by a county medical center for treatment rendered to an employee injured while working for an uninsured employer, when Medi-Cal paid for the treatment, the evidence indicated that the county did not fully reimburse Medi-Cal, and, pursuant to Labor Code Sec. 3716(c), the UEBTF was not liable for reimbursement of the county's medical treatment lien since Medi-Cal paid for the treatment. [See Ch. 11, § 11.09[4].]

Injury to Psyche; Sudden and Extraordinary Employment Conditions. The Appeals Board in *California Insurance Guarantee Association v. W.C.A.B. (Tejera)* (2007) 72 Cal. Comp. Cases 482 (writ denied) has held that, although motor vehicle accidents generally are not extraordinary events, the circumstances in the present case were sufficient to be interpreted as "extraordinary" within the meaning of Labor Code Sec. 3208.3(d), so that, even though the employee had not worked for the employer for six months, the "sudden and extraordinary employment condition" exception of Labor Code Sec. 3208.3(d) applied. [See Ch. 10, § 10.24[2].]

WCAB Jurisdiction; Petitions to Reopen; New and Further Disability; Temporary Disability. The Appeals Board in *Duran v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 488 (writ denied) has held that the Board has no jurisdiction to award temporary disability, when the new temporary disability period begins more than five years after the date of injury, regardless of whether the petition to reopen was timely filed. [See Ch. 14 § 14.06[3].]

Costs; Expert Witness Fees. The Appeals Board in *Rea v. W.C.A.B. (Dabanian)* (2007) 72 Cal. Comp. Cases 497 (writ denied) has awarded fees in the amount of $1,260 to a vocational expert, pursuant to Labor Code Sec. 5811, when the vocational expert made himself available to testify on an employee's behalf at a trial regarding the employee's entitlement to Subsequent Injury Benefits Trust Fund benefits. [See Ch. 16, § 16.47.]

Cumulative Trauma; Date of Injury. The Appeals Board in *San Diego Gas & Electric v. W.C.A.B. (Williams)* (2007) 72 Cal. Comp. Cases 501 (writ denied) has held that an employee, who suffered a cumulative back and neck injury from performing heavy work, had a date of injury under Labor Code Sec. 5412 of August 25, 2003, when he first suffered disability, even though he had not performed heavy work during the last several years of his employment prior to this date. [See Ch. 14, § 14.13[1].]

WCAB's Continuing Jurisdiction; Change of Administrators. The Appeals Board in *Anadite, Inc. v. W.C.A.B. (Aceves)* (2007) 72 Cal. Comp. Cases 648 (writ denied) has held that a change of administrator of a medical award constituted enforcement, not alteration, of the award, so that the five-year statute of limitations in Labor Code Sec. 5804 did not bar the action. [See Ch. 14, § 14.06[1].]

Third-Party Settlement Agreements;

Binding Effect. The Appeals Board in *Rodriguez v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 715 (writ denied) has held that paragraphs in an employee's civil settlement agreement with third-party defendants indicating that the employee's employer was not a cause of his injuries and that the issue of employer negligence would not be raised in any subsequent proceeding were binding, even though the agreement was not reviewed or approved by the Board. [See Ch. 12, § 12.12[1].]

Serious and Willful Misconduct by Employer; Reconsideration; Time to Raise Issues; Waiver. The Appeals Board in *Tillery v. W.C.A.B.* (2007) 72 Cal. Comp. Cases 727 (writ denied) has held that an employer did not waive its right to raise issues of whether the employee's increased benefits awarded, pursuant to Labor Code Sec. 4553, for the employer's serious and willful misconduct were subject to limitation under Ferguson v. W.C.A.B. or whether the applicants, sons of the deceased employee, were dependents, personal representatives, or heirs and, therefore, qualified to receive the accrued serious and willful misconduct benefits. [See Ch. 9, § 9.01.]

Attorney's Fees. Pursuant to Labor Code Sec. 4064(c), the Appeals Board in *Monument Car Parts v. W.C.A.B. (Teach)* (2007) 72 Cal. Comp. Cases 1021 (writ denied) has ordered an employer to pay the employee's attorney's fees, when the parties filed a compromise and release while the employee was unrepresented, even though it contained a provision that the "filing of this document is the filing of an application on behalf of the employee." [See Ch. 11, § 11.29; Ch. 15, § 15.04[3][a]; Ch. 17, § 17.16[2].]

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