WORKERS' COMPENSATION

CALIFORNIA LAWYERS ASSOCIATION

presents

2023 Spring Education Conference

MCLE: 6 Hours

Legal Specialization: 6 Hours in Workers' Compensation Specialization

Case Law Update

Saturday, May 20, 2023

10:50 a.m. – 11:50 a.m.

Speakers:

Chief Judge Paige Levy

Mark Kahn, Retired Judge, Arbitrator

Conference Reference Materials

CASE LAW UPDATE 2023

The opinions expressed herein are not the opinions of the State of California, the Department of Industrial Relations, the Workers' Compensation Appeals Board, the Division of Workers' Compensation, or other judges. They are the opinions of the presenter only. Each case is different and must be evaluated on its own merits.

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COURT OF APPEAL DECISIONS

1. AOE/COE

Zenith Insurance Company v. Workers' Compensation Appeals Board (Alex) (Court of Appeal, unpublished) 87 C.C.C. 973

Applicant was injured while working as a security guard at a bus terminal. The applicant was assaulted by a man after applicant asked him for his ticket. The applicant was injured when he fell chasing the assailant. The carrier denied injury AOE/COE alleging applicant left his post in violation of his employer's express instructions not to leave his post or chase anyone and his conduct was an unauthorized departure from the course of his employment. A workers' compensation judge found that applicant sustained his injuries in the course of his employment and was entitled to benefits. The judge concluded that applicant was performing his job as a security guard in furtherance of Greyhound's business when he was injured, noting that the performance of a duty in an unauthorized manner did not take the employee outside the scope of employment even if the employee's misconduct was serious and willful. The Workers' Compensation Appeals Board (WCAB) denied Zenith's petition for reconsideration. Defendant filed a petition for writ of review.

The court stated that it is well settled that an employer may limit the scope of an employee's duties so that if the employee steps outside that scope, the employee is not acting within the scope of employment. But courts distinguish between an act performed entirely outside the scope of employment and an act done within the scope in a forbidden manner. Injury incurred during the former type of conduct is not compensable. The latter type of conduct does not take the employee outside the course of his or her employment to foreclose an award of benefits.

The court determined that substantial evidence supported the board's conclusion that applicant sustained an injury arising out of and in the course of his employment. The posted orders for the Greyhound terminal where applicant worked provided that guards must remain at their checkpoint. But guards were also required to "preserve order," control the access of all entering the terminal, "ensure a safe and secure Greyhound facility," "respond to issues that require . . . attention," and direct persons who caused a disturbance to leave the property. Applicant testified he was required to monitor the front and back doors of the terminal as well as outside those doors. Applicant was not disciplined for his actions. Testimony supported the finding that applicant was performing his job as a security guard when he was injured.

The court held that applicant performing his duties of employment in violation of the employer's instructions or rules did not take him out of the course of the employment. They further held that the board did not err in considering whether applicant's conduct at the time of the injury conferred a benefit on the employer. The petition for writ of review was denied and the board was upheld.

WRIT DENIED CASES

2. AME

Dzambik v. Ishaan Enterprise, Inc. (W/D) 87 C.C.C. 773

On October 22, 2020, applicant sent an email to defendant proposing to use Michael Kasman, M.D. as an agreed medical evaluator (AME) in neurology. The next day, defendant replied: "Here is the list. Let me know any you would agree to. Otherwise, we could simply stipulate to a second panel in Neurology. As I understand Wayne Anderson is not serving as a QME anymore." Applicant responded, "shalom?" On October 29, 2020, defendant replied: "I have authority for Dr. Shalom as an AME in neurology." Applicant responded with one word: "Great."

The next day, applicant sent an email to defendant: "Regarding Shalom upon further research we would not be agreeable for his services as an AME." Defendant replied: "Per the labor code you cannot rescind an AME agreement once made."

On April 26, 2021, the parties tried and submitted the sole issue of whether the AME agreement could be enforced. Defendant argued that applicant could not unilaterally withdraw from the agreement because Labor Code § 4062.2(f) provides that a QME panel shall not be requested "on any issue that has been agreed to be submitted to or has been submitted to an agreed medical evaluator unless the agreement has been canceled by mutual written consent."

Applicant argued that any party can unilaterally withdraw from an AME agreement prior to the evaluation, citing the appeals board noteworthy panel decision in *Yarbrough v. S. Glazer's Wine & Spirits* (2017) 83 C.C.C. 425 (panel decision).

The WCJ issued a findings and order, finding that the agreement to use Dr. Shalom as an AME in neurology was unenforceable, citing the *Yarbrough* panel decision. Defendant filed for reconsideration.

The WCAB majority held that applicant was bound by an agreement to use an AME in neurology, even though the applicant's attorney attempted to withdraw from the agreement one day after it was reached.

The majority explained that pursuant to Labor Code § 4062.2(f), an agreement to an AME may be canceled only by mutual written consent, and that the applicant could not unilaterally withdraw from the agreement.

The majority disagreed with *Yarbrough* to the extent it suggests a party may unilaterally withdraw from an AME agreement because an evaluation has not yet taken place with the agreed upon physician.

The dissenting commissioner agreed with the analysis in Yarbrough. Applicant filed a petition for writ of review which was denied.

3. Service

Volt Information Sciences, Inc. v. Workers' Compensation Appeals Board (W/D) 87 C.C.C. 778

After trial, the judge issued a decision awarding the applicant 30% permanent disability after apportionment to both a cumulative trauma and specific injury. Both applicant and defendant filed a petition for reconsideration. The WCJ recommended that applicant's petition be denied and defendants granted. The WCAB adopted and incorporated the judge's report and recommendation on reconsideration and returned the matter to the trial level. The WCJ subsequently issued an amended findings and award. The document was served on applicant, her counsel, and defense counsel at their addresses of record in California, and to the claims administrator at its mailing address in Iowa. Applicant filed a petition for reconsideration on the Monday after the 25th day after the decision was served by mail. The judge recommended that the petition be denied as it was filed untimely.

The WCAB granted reconsideration and reversed the judge's decision. They held that applicant's petition for reconsideration filed within 30 days (20 days plus 10 days for mailing) of the WCJ's issuance of decision was timely filed, when the WCAB found that the applicant and her attorney received service of the decision within California, defendant was served at an address outside of California, and that to observe due process for all parties, Regulation 10605 (extending 20-day timeframe for filing documents by 10 days for out of state addresses) should be construed to extend time to file for all parties being served.

Defendant filed a petition for writ of review which was denied.

4. QME

County of Fresno v. Workers' Compensation Appeals Board (W/D) 87 C.C.C. 415

Applicant alleged that she suffered an injury to her cervical spine, hands, left shoulder, thoracic spine, headaches, sleep dysfunction, TMJ, constipation and palpitations.

On July 9, 2020, applicant's attorney sent a letter to defendant requesting a comprehensive medical-legal evaluation to determine the compensability of applicant's injury pursuant to Labor Code §§ 4060 and 4062.2.

Applicant's attorney used the letter to trigger the qualified medical evaluator (QME) panel selection process and on July 24, 2020, requested a QME panel in pain management.

The medical unit issued a panel. On July 30, 2020, defendant denied applicant's claim for workers' compensation benefits.

Defendant objected to the QME panel, asserting the panel was invalid because applicant sent the triggering letter before the claim was disputed. Defendant, at the time the letter was sent, had not issued a delay or denial letter. Defendant was still investigating the claim and was within the 90-day period.

The matter proceeded to expedited hearing and the WCJ concluded the letter was sufficient to trigger the selection process and the panel was validly issued.

Defendant filed a petition for removal based on the fact there was no dispute as defendant had not issued a denial or delay letter and the 90-day period in which to investigate the claim had not passed. Therefore, issuing the panel resulted in significant prejudice or irreparable harm.

The WCAB, treating the petition as one seeking reconsideration, denied the petition. WCAB explained that Labor Code § 4060 permits a medical-legal evaluation to determine compensability at any time after the filing of the claim form. Labor Code § 4062.2(b) requires the party requesting a medical evaluation pursuant to Labor Code §4060 to wait until the first working day that is at least 10 days after the date of mailing of a request for a medical evaluation. Accounting for an additional five days for mailing, the requesting party may request a panel on the 15th day from the mailing date of the evaluation request.

The WCAB noted in this case applicant sent defendant a letter requesting an evaluation and waited 10 days plus five days for mailing before requesting the panel.

Defendant contended there must be a dispute regarding whether the claim is compensable for an injured worker to initiate the QME panel selection process and that no dispute existed at the time of applicant's letter because the claim had not yet been accepted or denied.

The WCAB found that the contention conflicted with the express language of the applicable statutes and cited prior panel decisions supporting that the applicant may trigger the panel process during the delay period. The WCAB indicated that case law supports that a represented employee does not have to wait for a denial of claim or even a delay notice before requesting a QME panel to address the issue of compensability. The WCAB indicated that based on the en banc opinion in *Mendoza v. Huntington Hospital* (75 C.C.C. 634) which held that Labor Code §§ 4060 and 4062.2 read together establish that either party may request a QME panel at any time, the panel was valid.

Petition for writ of review was denied.

5. Medical treatment

Onruang v. UCLA (W/D) 87 C.C.C. 675

Applicant claimed injury to the neck, upper extremities, mid-back, low back, eyes, face, headaches and psyche on October 26, 2016, while employed as a registered nurse by UCLA. Defendant accepted the neck injury as compensable.

The applicant had neck surgery, and her treating physician reported that she was unable to drive and needed assistance with activities of daily living.

The defendant issued a utilization review (UR) denial that noted the request for transportation was outside the scope of UR. Independent medical review (IMR) also issued a determination

that the request for unknown transportation was not medical treatment and could not be reviewed. It was recommended that the request for transportation should be non-certified. The MTUS did not address transportation, therefore alternate guidelines were referenced.

Applicant filed a request for IMR of the December 21, 2019 UR decision. In its February 12, 2020 response, the Administrative Director stated in pertinent part:

> IMR is available only to resolve disputes regarding the medical necessity of a recommended treatment. The dispute must be resolved by the parties prior to the initiation of the IMR procedure as referenced in California Code of Regulations, title 8, section 9792.10.3(a) and (d). The request for Unknown transportation to include assistant is not a medical treatment to cure or relieve from the effects of an industrial injury and cannot be reviewed under the IMR standards of necessity. The request for IMR of the Unknown transportation to include assistant is denied as it is ineligible for review.

The matter proceeded to an expedited hearing on December 10, 2020. The issues at trial were identified as: "1. Need for second panel in psychiatry under California Code of Regulations section 31.7. 2. Need for transportation to attend to activities of daily living."

The WCJ issued the resulting findings and order wherein he found that he had jurisdiction to determine the need for transportation to facilitate applicant's ability to perform ADLs. He further found that applicant was in need of transportation to facilitate her ability to perform ADLs. Good cause for an additional QME panel in psychiatry was found and an order for this panel issued as part of the findings and order. This second finding was not challenged on reconsideration.

On reconsideration, the WCAB found that both UR and IMR declined to address the recommendation for treatment. Therefore, the WCAB had jurisdiction to determine whether it must be provided on an industrial basis. The appeals board retains the authority to determine medical treatment controversies not subject to IMR.

The WCAB stated that the California Supreme Court has held that expenses for transportation for medical treatment appointments are ancillary to medical treatment benefits under Labor Code § 4600. *Avalon Bay Foods v. WCAB (Moore)* (1998) 63 C.C.C. 902. Although applicant may receive non-medical transportation as part of her benefits under § 4600, she must show entitlement to transportation as reasonable and necessary based on substantial medical evidence. The MTUS does not address transportation and the Official Disability Guidelines defer determination of this issue to agreement amongst the parties. Whether non-medical transportation for applicant is medically reasonable and necessary must be evaluated based on the particular facts of this case.

The WCAB found that the evidence showed that applicant had long reported an inability to drive due to the symptoms from her industrial injury and that her physicians had deemed her

incapable of driving safely. Applicant had met her burden of showing that she required transportation to facilitate her ability to perform ADLs and the WCAB agreed with the findings of the WCJ.

The order issued by the WCJ was affirmed.

6. Apportionment

California Highway Patrol v. Workers' Compensation Appeals Board (Santiago) (W/D) 87 C.C.C. 1011

The WCJ issued a findings, award and order finding that defendant is not entitled to apportionment under Labor Code § 4664(a) as the anti-attribution provision of § 4663(e) prohibits it. Defendant argued that the anti-attribution clause in § 4663(e) does not prohibit apportionment under § 4664(b) because § 4663 governs unadjudicated medical apportionment and § 4664 governs fully adjudicated prior awards. The only issue determined was whether applicant's prior 18% heart trouble award should be subtracted from a current 55% award under Labor Code § 4664 or whether said subtraction is precluded by the anti-attribution language contained in Labor Code § 4663(e) for specified public employees under Labor Code § 3212.

The WCAB held that Labor Code § 4663(e) also prohibits apportionment under § 4664 for those injuries or illnesses listed in § 4663(e).

The WCJ found that Labor Code §§ 4663 and 4664 have long been viewed as a single unified legislative approach to apportionment, and under that approach, apportionment per Labor Code § 4664 also would be precluded by § 4663(e).

In upholding the decision, the WCAB stated that the legislative history of AB 1368 established a concern that apportionment would result in decreased PD for specified public employees.

The WCAB concluded that the anti-attribution provision in Labor Code § 4663(e) also precluded apportionment under Labor Code § 4664(a)(b).

Labor Code § 4663 (e) provides that subdivisions (a), (b), and (c) do not apply to injuries or illnesses covered under sections 3212, 3212.1, 3212.2, 3212.3, 3212.4, 3212.5, 3212.6, 3212.7, 3212.8, 3212.85, 3212.9, 3212.10, 3212.11, 3212.12, 3213, and 3213.2.

7. Rating

County of Sonoma/Health Services Department v. Workers' Compensation Appeals Board (W/D) 88 C.C.C. 309

The applicant suffered an industrial injury to his right foot and ankle.

The AME found a 50% whole person impairment for gait derangement and routine use of crutches and a leg brace.

The physician apportioned 50% of the disability to applicant's pre-existing need for a leg brace due to cerebral palsy.

The physician later clarified that applicant's residual functional capacity was, at most, sedentary post-injury with all restrictions being exclusively the result of his industrial injury and stated that applicant would be fully functional if he only needed the leg brace as he did prior to his injury.

The vocational expert for the applicant found the applicant was not amenable to vocational rehabilitation solely because of the industrial injury. He opined that the applicant was precluded from any employment in the open labor market and 100% of his earning capacity because of the injury, even after considering the 15% nonindustrial apportionment.

The defense vocational expert concluded the applicant was amenable to vocational rehabilitation and at some capacity able to compete in the open labor market. The expert made this determination after considering the work restrictions imposed by the physicians. The defense expert apportioned all of applicant's permanent disability to his industrial injury.

The WCJ issued a decision that the 54% PD rating had been rebutted and the injury caused 100% permanent disability consistent with the opinions of the AME and the vocational expert for the applicant.

Defendant filed a petition for reconsideration.

The WCJ issued a report and recommended reconsideration be denied.

The WCJ reasoned that while the scheduled PD rating is presumptively correct, the rating can be rebutted by showing the injured worker is not amenable to vocational rehabilitation due to the industrial injury and for that reason the workers DFEC is greater than reflected in the scheduled rating. (LC 4660 (c), *Ogilvie* (76 CCC 624), and *Dahl* (80 CCC 1119).

In this case the WCJ relied on the vocational expert of the applicant to determine applicant was not amenable to vocational rehabilitation and that the medical work restrictions imposed by the AME precluded full-time employment.

The WCJ went on to state that although defendant alleged that the finding of 100% permanent disability was improper given the apportionment of 50% to non-industrial factors by the AME, the WCJ found that the reporting of the vocational expert constituted substantial vocational evidence showing that applicant's permanent total disability resulted entirely from his industrial injury and therefore there was no basis for apportionment.

The WCJ noted that the limitations from the industrial injury prevented the applicant from being employed. While there was a 15% non-industrial effect, it was noted that the applicant was able to successfully be employed prior to his industrial injury. His non-industrial condition did not affect his ability to perform his job with the employer.

The WCJ then stated a vocational expert is not required to blindly adopt and apply the apportionment opinion of the AME. A vocational expert is not guilty of ignoring a medical opinion simply because it is not followed. As is here, it is only required that the vocational expert include the injured employee's medical history, including the injuries and conditions and residuals thereof, and the reason behind the vocational opinion.

Based on the record, the WCJ determined there is substantial evidence to support a finding that applicant is 100% permanently disabled without apportionment.

Reconsideration was denied and the WCAB adopted and incorporated the WCJ's report.

The writ of review was denied. The court stated that because the county had not shown that the board's decision contravenes the rule of *Acme Steel v. WCAB* (annulling non-apportioned hundred-percent permanent disability award where employee's loss of hearing could not be attributed solely to the current industrial injury), the petition was denied.

BOARD PANEL DECISIONS

8. Statute of Limitations

Muniozguren v. Sancon Engineering, Inc. (BPD) 2022 Cal. Wrk. Comp. P.D. LEXIS 210

An application for adjudication was served upon Sancon Engineering, Inc. and alleged a May 22, 2017 specific injury. On May 21, 2018, applicant filed and served an application for award for employer's serious and willful misconduct. This application listed "Sancon Engineering Inc." as the defendant in the caption. Sancon Engineering, Inc. was also listed in the proof of service. However, paragraph 2 of the body of the application states, "Defendant, WAREHOUSE SERVICES, INC. and DOES 1 Through 50, is and was at all times herein mentioned a corporation duly organized and existing and licensed to do business and doing business in the State of California." Sancon Engineering, Inc. was not listed in the body of the application.

On November 24, 2021, applicant filed an amended application for award for employer's serious and willful misconduct. The only change was substituting "SANCON ENGINEERING, INC." for "WAREHOUSE SERVICES, INC." in paragraph 2. Along with the amended application, applicant's counsel filed an application explaining that in preparing the original application, he utilized a template but failed to change the name of the defendant in paragraph 2.

Labor Code § 5407 states:

> The period within which may be commenced proceedings for the collection of compensation on the ground of serious and willful misconduct of the employer, under provisions of Section 4553, is as follows:

> Twelve months from the date of injury. This period shall not be extended by payment of compensation, agreement therefore, or the filing of application for compensation benefits under other provisions of this division.

The workers' compensation judge found the petition for serious and willful misconduct to be timely. Defendant filed for reconsideration. On reconsideration, defendant argued that applicant's original application was filed within the limitations period, but the amended petition was not. Defendant contended that the statute of limitations bars the claim for serious and willful misconduct benefits.

The WCAB found that the applicant's petition for serious and willful misconduct was timely filed, however the petition misidentified the employer. Paragraph 2 of the original application misidentified the defendant, however, the defendant was correctly identified in the caption. The allegations in the body of the original application are made against "defendant" or "defendants" rather than Warehouse Services, Inc. Thus, even without amendment, they held that the original application (which listed Sancon Engineering, Inc. as the defendant in the caption) was timely and properly apprised defendant of the proceedings against it. They found that the later amended application related back to the date of the filing of the original application for statute of limitations purposes.

They cited *Canifax v. Hercules Powder, Inc.* (1965) 237 Cal.App.2d 44, 58, 46 Cal. Rptr. 552, where the court wrote, "Where full notice is given and a reasonably prudent person would realize that he is the party intended to be named as the defendant, the court will treat the mistake as harmless misnomer in order to promote substantive rights." Amendment of a pleading to name the correct party is said to relate back to the date of the original pleading for statute of limitations purposes.

The petition for reconsideration was denied.

9. Coverage

Gharakhanian v. Cool Air Supply (BPD) 87 C.C.C. 813

Applicant was injured in Fullerton, California while employed by Cool Air Supply on May 14, 2012. Ullico Casualty Company insured the employer on that date and provided benefits in this case. Ullico became insolvent and CIGA took over administration of applicant's claim. Zurich also provided workers' compensation coverage for Cool Air Supply on May 14, 2012. The Zurich policy did not include language limiting coverage to a particular job site.

Zurich claimed that it did not provide coverage for applicant's injury because its coverage was limited to a specific construction site, Citrus Continuation High School. The arbitrator inferred from the fact that Cool Air Supply had two workers' compensation policies and from the fact that Zurich's policy referenced another policy that the Cool Air Supply policy was a "wrap up" policy limited to a specific construction site. The arbitrator found that the Zurich policy was limiting and did not cover applicant's claims.

On reconsideration, the WCAB cited Insurance Code § 11660. A standard workers' compensation policy without any limiting endorsements covers all employees of the employer. The WCAB cited *Travelers Property Casualty Co. v. Workers' Comp. Appeals Bd. (Mastache)* 84 C.C.C. 883 where the Court of Appeal reversed the appeals board and found that because there was a valid limiting and restricting endorsement on an insurance policy issued to the applicant's special employer, the policy did not provide "other insurance."

In this case, the insurance contract did not include language limiting the policy. Zurich asked the court to infer that the policy must have been limited because employers do not generally have two policies. Zurich also provided some evidence the Zurich's Cool Air Supply policy was part of a wrap up policy for a particular school construction project.

A wrap up policy is typically limited in time and scope to the particular project. The Insurance Commissioner has approved limiting and restricting endorsements that may be used to limit coverage to a particular project or job site. The WCAB found that if this policy was part of a wrap up, the policy should have been limited to a specific job site. However, Zurich presented no evidence that the policy was limited. The WCAB held that without an approved limiting and restricting endorsement, they were compelled to find that the policy is unlimited.

The WCAB overturned the decision of the arbitrator and found that Zurich was "other insurance" due to Ullico's insolvency.

10. Rating

Green v. A-Para Transit Corp.(BPD) 2022 Cal. Wrk. Comp. P.D. LEXIS 224

Applicant, while employed as a supervising bus route driver sustained injury arising out of and in the course of employment on the date of injury of January 19, 2013 to the neck, back, and upper extremity, and on the date of injury of July 8, 2014 to the left knee while employed by A-Para Transit Corporation.

The WCAB upheld a WCJ's decision that an applicant was entitled to an award of 100% PD for one injury and 40% PD for another.

The applicant claimed an injury January 13, 2013, to the back, neck and upper extremities, and an injury July 8, 2014, to the left knee.

Based on the QME and applicant's vocational evaluator for the 2013 injury, the WCAB concluded that he was unable to return to the labor market.

Then, based on the QME report for the 2014 injury, the WCAB concluded that the injury resulted in 40% PD.

The WCAB explained that the disability for the 2014 injury was for the left knee and did not overlap with the disability for the 2013 injury.

The WCAB added that apportionment under Labor Code § 4664(c) was not applicable because the dates of injury involved distinct regions of the body, there was no automatic overlap of disability, and it was possible to have separate awards.

11. Discovery

Jones v. Russo Brothers Transportation 2022 (BPD) 88 C.C.C. 154

The WCAB, granting removal, rescinded WCJ's order denying eight petitions filed by defendant seeking to quash various subpoenas duces tecum directed by applicant to third parties, because defendant failed to include meet and confer declarations in support of its petitions pursuant to Code of Civil Procedure § 2025.410(c).

The WCAB returned the matter to the trial level for further proceedings. The WCAB identified multiple issues involving application of the Code of Civil Procedure to workers' compensation discovery procedures that were not addressed in the record and required further analysis.

The WCAB noted that the workers' compensation system and civil courts have different rules for discovery and document filing, and it is unclear how these differences should be reconciled with respect to meet and confer requirements.

While WCAB believed that best practice for a party filing a motion to quash subpoena is to comply with meet and confer requirements in Code of Civil Procedure § 2025.410(c), the WCAB declined to find compliance mandatory on this record and concluded that upon return to the trial level the WCJ must effectuate the appropriate balance between public policy favoring liberality of pretrial discovery and specific policy applicable to workers' compensation cases for expeditious, inexpensive, and unencumbered adjudication, and that to allow adequate analysis, the record required further development to address the interaction between Labor Code § 5710 (provisions governing workers' compensation depositions), civil rules of discovery set forth in Code of Civil Procedure § 2016.010 et seq., and relevant workers' compensation regulations, including 8 Cal. Code Reg. § 10640, which provides authority for issuance of subpoenas under the Code of Civil Procedure.

12. Injury

Rios v. Hummer (BPD) 2022 Cal. Wrk. Comp. P.D. LEXIS 242

Applicant sustained an accepted specific injury to his low back, left hip, right ribs, and right clavicle on July 3, 2015. Applicant later alleged heart and lung/pulmonary injuries either as a direct specific injury and/or as a compensable consequence. Those conditions were subsequently evaluated by a consulting pulmonologist, Narendra Malani, M.D., in November 2018, who among other things, diagnosed dyspnea, unspecified type, daytime hypersomnolence, with strongly suspected obstructive sleep apnea (OSA), GERD, and obesity, with a reported weight gain of 30 pounds in the past year. Applicant testified at trial that he

had breathing problems directly after the injury which worsened over time as he gained additional weight. Applicant was overweight at the time of injury.

The doctors determined that because of the applicant's decreased physical activity due to the accepted and physically limiting orthopedic injuries, those injuries contributed, at least in part, to his significant weight gain after the injury, thereby resulting in compensable consequence injuries to his pulmonary system and heart. Applicant was already overweight at the time of his injury. However, and as the QME testified at his deposition, and consistent with the applicant's trial testimony, he did not have any breathing and/or pulmonary issues prior to his injury. The QME further testified that the weight gain was a contributing cause of his breathing/pulmonary/heart symptoms because they reduced his ability to be physically active.

The WCAB held that the applicant's significant weight gain after his orthopedic injuries resulted in compensable consequence injuries to his pulmonary system and heart.

The WCAB added that although there might be significant other factors that caused or contributed to the applicant's weight gain, those go to the issue of apportionment of permanent disability related to the pulmonary and heart injuries, and not to injury AOE/COE.

13. Attorneys

Sevillan v. Kore 1 Inc. (BPD) 87 C.C.C. 941

Applicant sustained injury arising out of and in the course of employment to the head, neck, and upper back, and claimed to have sustained injury to the brain, eyes, right shoulder, psyche, and in the form of nausea, headaches and insomnia on June 1, 2018. Jacob Chodakiewitz, the applicant's treating doctor, requested treatment in the form of an outpatient rehabilitation program for balance and pain management. This request was sent to the defense attorney and not to the claims administrator. The RFA was dated December 2, 2021. UR received the RFA on February 14, 2022, and issued a denial on February 21, 2022. After trial on the denial of medical treatment the judge determined that the WCJ had jurisdiction to address the PTP's request for treatment in the form of an outpatient rehabilitation program for balance and pain management because the UR determination denying the request was untimely; and there is substantial evidence to support the request for the outpatient rehabilitation program in order to cure or relieve the effects of applicant's industrial injury.

Defendant filed for reconsideration and alleged the following: "(1) service of Dr. Chodakiewitz's December 2, 2021 request for treatment was defective; (2) the request was not submitted to the claims administrator; applicant's attorney's emailing of the request to defendant's attorney cannot serve as a substitute for proper service; and (3) defendant acted with reasonable diligence in responding to the request after receiving it."

The WCAB held that it had jurisdiction to determine the medical necessity of a physician's request for an outpatient rehabilitation program because the defendant's UR determination was untimely.

Although the request for authorization was not transmitted to the claims adjuster, the WCAB found that the defense attorney did not act with reasonable diligence after receiving it.

The WCAB explained that the duty to conduct a good-faith investigation under CCR 10109 required the defense attorney to transmit a copy of the RFA to the adjuster within a reasonable time after he or she received it.

It was unclear when the adjuster received it.

Because the defense attorney did not submit the report to the adjuster (or UR provider) or otherwise take affirmative steps to investigate the treatment for approximately two and a half months after receiving it, the WCAB concluded that the UR determination was untimely. It also concluded that the request for treatment was supported by substantial medical evidence.

14. Employer's rights

Saavedra v. Michael Sullivan Associates, LLP (BPD) 2023 Cal. Wrk. Comp. P.D. LEXIS 12

The WCJ dismissed the employer law firm as a party pursuant to Labor Code § 3755. The WCJ indicated that the employer was not entitled to conduct discovery separate and apart from discovery conducted by its insurer. And denied the employer's request to depose the applicant.

On reconsideration, the employer argued that they should not be dismissed under § 3755 and they should be allowed to attend and participate in applicant's deposition, even though its insurer was represented by an attorney. They further argued that there was no evidence that the carried had served a "notice of assumption of liability" upon applicant or the court, and in fact issued a denial letter stating that it refused to assume liability for applicant's claim.

The WCAB explained that dismissal pursuant to Labor Code § 3755 does not require the filing of a formal, explicit document establishing that the insurer has assumed and agreed to pay any compensation to the claimant.

The WCAB explained that per Labor Code §§ 3757 and 3759, an employer may be dismissed if it's established to the WCAB's satisfaction that the insurer has assumed liability for any potential compensation.

The WCAB found that the record showed that the insurer was joined in proceedings as a defendant and retained legal counsel to conduct the workers' compensation defense, and that it constituted sufficient evidence that the insurer assumed liability under Labor Code §§ 3757 and 3759.

The WCAB dismissed the employer from the proceedings and allowed the applicant to continue her workers' compensation claim solely against the insurer.

The WCAB added that the employer was not precluded from attending and participating in discovery, including any deposition conducted by the insurer and its attorney.

15. Commutation

Suh v. Metropolitan State Hospital (BPD) 2022 Cal. Wrk. Comp. P.D. LEXIS 220

In an approved stipulated award dated February 7, 2017, the parties stipulated that on March 15, 2013 and during the period January 1, 2002 through March 15, 2013, applicant sustained industrial injury to his psyche, neurological and neurocognitive systems, hypertension, stroke, and platelet disorder, causing permanent disability of 85%, indemnity for which was payable beginning March 14, 2015 at the weekly rate of $290.00 until the sum of $195,242.50 would be paid (less credit for any such payments made), followed by a life pension "per Labor Code and case law." In the stipulations, applicant's attorney requested and was awarded a fee of $41,648.15 based on "permanent disability $195,242.50 x 15% [equals] $29,286.37 off far end of award and present value of life pension of $82,411.91 x 15% [equals] $12,361.78 utilizing the uniform reduction method off side of life pension payments."

Applicant later filed a petition for commutation dated March 8, 2017, to which defendant objected. After an expedited hearing the WCJ ordered "commutation of applicant's permanent disability award herein . . . in the sum of $34,577.81, from the far end of the permanent disability award, payable within 20 days." There was no mention of the life pension in the WCJ's commutation order. Defendant sought reconsideration of the order, which was denied.

Applicant subsequently filed a petition to reopen alleging worsening of his condition. Thereafter the parties stipulated that applicant was 92% disabled.

In the new stipulation the parties also incorporated an addendum that commuted all permanent disability indemnity (excluding the life pension) due under the award of 92%. The addendum provided that "(1) within 30 days, defendant shall pay applicant $73,805.07...in a lump sum, which reflects the [difference between] sums paid under the prior 2/7/17 stipulation (85% PD) and the parties current [stipulation] (@92% PD)." They further stipulated that "all residual PD payments shall be commuted/paid...in one lump sum of [$73,805.07] excluding life pension benefits [...]."

A dispute subsequently arose over payment of the stipulation and the matter proceeded to trial on the following issues: "1. The commencement of life pension following commutation of PD. 2. Enforcement of terms of January 8, 2020 Stipulation with Request for Award."

The WCJ found and ordered that applicant's "life pension shall not be accelerated by the commutation of permanent disability nor the lump sum payment of permanent disability." Applicant filed for reconsideration.

The panel majority held that when the parties stipulated to commute all permanent disability benefits for a 92% award, excluding life pension benefits, the applicant's life pension was accelerated and immediately began following payment of the agreed commutation of permanent disability indemnity.

The majority explained that Labor Code § 4659(a) requires the payment of a life pension "after payment for the maximum number of weeks specified in Section 4658 has been made." The WCAB found that the language did not mention any exception for permanent disability indemnity payments made pursuant to an order of commutation.

The majority explained that the better practice would have been to withhold approval of the stipulated commutation until the parties specified how payment of the life pension was to be handled.

The WCAB concluded that the defendant should bear the consequences of its interpretation of Labor Code § 4659(a).

The dissenting commissioner believed that there was no basis to accelerate the applicant's life pension because the approved commutation order included no such agreement.

Paige Levy is the Chief Judge for the Division of Workers' Compensation. Before this appointment, she was a Workers' Compensation Judge (2005) and Presiding Judge (2012) at the Marina Del Rey district office. She was Chair of the Workers' Compensation State Bar Executive Committee for the 2013-2014 term and served on the committee for 5 years. Over the past eighteen years, she has spoken on numerous topics, including the application of the AMA Guides, case law update, utilization review, WCAB policy and procedure, ethics, specialization exam prep, liens, and litigation tips for attorneys. She is a regular presenter for the Division of Workers' Compensation case law update and the women's panel. Judge Levy was the 2013 California Applicants' Attorneys Association (CAAA) Judge of the Year, the 2012 WorkCompCentral Magna Comp Laude Award Winner, a 2014 DWC Employee of the Year recipient, the State Bar Workers' Compensation Section Judge of the Year in 2016, and the LatinoComp Judge of the Year in 2019. The Judge was the project manager for the DWC/WCAB Policy and Procedural Manual. She became a certified workers' compensation specialist in 2000. Before taking the bench, Paige was the managing partner of Levy & Associates. She received her undergraduate degree in pre-law from San Diego State University, and her JD degree from Whittier Law School in 1994, where she graduated with honors.

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PRESENT EMPLOYMENT

Law Offices of Altman & Blitstein in Encino as an Arbitrator, Mediator and Attorney at Law from September 4, 2012 to present.

Editor LexisNexis California Workers Compensation 2009 to present.

RETIRED

Retired on June 3, 2012 as Associate Chief Judge and worked as a consultant to DWC until August 31, 2012.

PAST EMPLOYMENT

Associate Chief Judge, Division of Workers', State of California, 10-94 to 8-31-2012.

Chief Judge, Division of Worker's Compensation, State of California, June 1991-10-94.

Presiding Workers' Compensation Judge, Division of Workers' Compensation, State of California. Van Nuys Branch Office. October 1988 to June 1991

Workers' Compensation Judge, Division of Workers' Compensation, State of California, 1981 to October l988.

Associate Attorney with the State Compensation Insurance Fund, State of California, Los Angeles, California. Practice of Workers' Compensation litigation on behalf of Defendants. February l978 to April 1981.

PAST TEACHING POSITIONS

Adjunct Associate Professor of Law, Southwestern University School of Law, Los Angeles California, August l988 to 2001.

Instructor in Workers' Compensation, Pasadena City College, Pasadena, California. February 1989 to 1994, part time.

EDUCATION

Bachelor's Degree in Political Science from California State University, Northridge, California.

Jurist Doctor Degree in Law from Southwestern University School of Law, Los Angeles, California.

PROFESSIONAL ORGANIZATIONS

California State Bar admitted 1975.
State Bar executive Committee on Workers Compensation, 1989-1993.

LECTURER

Lecturer for various groups and associations including California Continuing Education of the Bar, Source Seminars, California Applicants Attorney Association, California Defense Attorney Association, and Workers Compensation Central.

AWARDS

Two time California Judge of the year as chosen by the Workers Compensation section of the State Bar.

California Judge of the year as chosen by the Mexican American Bar Association.