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JURISDICTION

CMIS v. WCAB (Guillen) (2006) 71 CCC 274 (writ denied)

Jurisdiction–Petitions to Reopen–New and Further Disability–WCAB held that applicant, who received stipulated award of PD for her 7/19/95 specific back injury claim and attempted to amend her claim to include additional body parts more than five years after date of injury, was not barred by statutes of limitations in Labor Code §§ 5405(a), 5410, and 5804, when 4/12/99 report of applicant’s psychologist, detailing applicant’s new complaints and served on all parties within statutory period, was treated as petition to reopen for new and further disability, because psychologist’s report, coupled with other medical reports issued within statutory period, provided defendant with full knowledge of applicant’s potential claims for injury to additional body parts.

In the Matter of John H. Hoffman, Jr. (2006) 71 CCC 609

Disciplined Former Attorneys–Appearance Before WCAB–WCAB, in significant panel decision, held that both 8 Cal. Code Reg. § 10779 and State Bar Act preclude any non-reinstated former attorney who has been disbarred or suspended by Supreme Court (for reasons other than nonpayment of State Bar fees), been placed on involuntary inactive status by State Bar, or resigned with disciplinary proceedings pending against him or her from appearing as representative of any party before WCAB (at least if that former attorney has not received permission under 8 Cal. Code Reg. § 10779), that this preclusion against appearing as representative of any “party” extends to appearing on behalf of *any* litigant, including but not limited to lien claimants, and that this preclusion against “appearing as a representative” in WCAB proceedings extends to any activity that would constitute practice of law, when WCAB found that former attorney, who had resigned from State Bar with disciplinary proceedings pending against him was representing lien claimants before WCAB and had not petitioned WCAB for permission to do so.

CIGA v. WCAB (Loville) (2006) 71 CCC 632 (writ denied)

WCAB Jurisdiction–WCAB held that it had no jurisdiction over St. Louis Rams with respect to applicant/professional football player’s CT to his head, neck, spine, hips, both arms, and both legs during period of 8/16/99 through 8/16/2000, when applicant did not sign player’s contract with Rams in California, did not reside in California, and did not play football in California, and fact that applicant’s period of employment was uninterrupted from 5/2/97, date he signed player’s contract in California with Denver Broncos, until he stopped playing for Rams, did not subject Rams to WCAB jurisdiction.

Denny's Inc. v. WCAB (Kakudo) (2006) 71 CCC 831 (writ denied)

TD–Jurisdiction–Statute of Limitations–WCAB held that it had jurisdiction to award applicant TD for period 11/16/2003 and continuing, more than five years after applicant's 10/13/95 industrial injuries to his neck, teeth, gums, and psyche, even though applicant was not continuously temporarily disabled from date of injury, when applicant had received prior award of continuing TD and medical care that had never been legally terminated, and there had never been finding or award of PD.

Enoch v. WCAB (2006) 71 CCC 904

WCAB Jurisdiction–Appeals from RU–Court of Appeal denied applicant's petition for writ of review and upheld WCAB decision that it had jurisdiction to decide defendant's timely appeal of determination of RU that applicant was QIW entitled to VR benefits, even though defendant, in violation of 8 CCR § 10955, had failed to serve copy of appeal on RU and had listed wrong case number on its appeal, when Court of Appeal found that "trivial" errors in defendant's appeal could not divest WCAB of jurisdiction, especially when there was no showing of prejudice to any party or to WCAB.

Sullivan v. WCAB (2006) 71 CCC 1065

WCAB Jurisdiction–Tribal Sovereign Immunity–Waiver–Court of Appeal, denying applicant's petition for writ of review, held that WCAB had no jurisdiction over applicant's Labor Code § 132a discrimination claim because defendant Indian tribe had not clearly, expressly, and unequivocally waived its tribal sovereign immunity with respect to applicant, who worked as surveillance agent at tribe's casino, when Court of Appeal found that tribe, in its compact with state of California allowing it to operate casino, had waived its sovereign immunity with respect to only its "gaming operation," that tribe's gaming operation casino was separate entity from tribe's government, that each employee worked for one or other, but not both, and that applicant worked for tribal government, not gaming operation casino.

Doody v. WCAB (2006) 71 CCC 1219

WCAB Jurisdiction–Final Orders–Res Judicata–Court of Appeal, annulling WCAB decision that awarded CIGA credit for overpayment of attendant care benefits, held WCAB lacked jurisdiction to consider issue, when issue had been decided by WCAB against CIGA in first petition for reconsideration in this case, CIGA did not seek judicial review of that decision, which had then become final decision entitled to res judicata effect, WCAB expressly affirmed finality of that decision in deciding second petition for reconsideration, and WCAB exceeded its jurisdiction in revisiting issue on merits when presented in third petition for reconsideration.

Domino's Pizza v. WCAB (Kerr) (2006) 71 CCC 1387

Applications for Adjudication–Venue–Court of Appeal annulled WCAB denial of defendant insurer's petition to remove case filed in San Luis Obispo County to Santa Barbara County and remanded to WCAB with directions to grant defendant insurer's petition, when Court of Appeal found that Labor Code § 5501.5(a) mandated that applicant's claim be filed in county where applicant resides, where injury allegedly occurred, or where applicant's attorney has principal place of business, all of which were in Santa Barbara County, and that WCAB could not rely on discretion granted to it by Labor Code § 5501.6 to change venue because no party had sought change of venue pursuant to that statute and there was no basis for relying on it in present case.

County of Mariposa v. WCAB (Johnson) (2006) 71 CCC 1499

CT–SOL–Court of Appeal held that defendant failed to prove with substantial evidence that applicant suffered compensable disability that triggered commencement of limitations period, pursuant to Labor Code § 5412, prior to applicant's resignation, when court found that, although applicant began to suffer symptoms as early as 2002, he had never claimed disability as consequence of these symptoms until he resigned and timely filed this claim for workers' comp benefits five weeks later.

State Compensation Insurance Fund v. WCAB (Sandhagen) and Sandhagen v. WCAB (2006) 71 CCC 1541

Judicial Review–Final Orders–Court of Appeal held that WCAB's holding that defendant's failure to meet UR deadlines specified in Labor Code § 4610(g)(1) prevented defendant from using UR process and rendered untimely UR reports inadmissible was final order subject to judicial review via petition for writ of error, in that WCAB's decision was one that settled issue critical to claim for benefits, and fact that WCAB also remanded case to WCJ for further proceedings consistent with WCAB opinion did not affect finality of WCAB's holding on effects of untimely UR

Gomez, Vincente v. WCAB (2006) 71 CCC 1721

WCAB's Continuing Jurisdiction–Petitions to Reopen–New and Further Disability–Court of Appeal, denying applicant's petition for writ of review, held that, when applicant timely filed petition to reopen within five years after date of injury but claimed benefits for TTD that commenced more than five years after date of injury, WCAB correctly held that it did not have jurisdiction to award TTD commencing more than five years after injury, when Court of Appeal found that Labor Code § 4656 did not authorize initiation of TTD benefits once five years had lapsed, and that, in order to invoke WCAB's continuing jurisdiction under Labor Code § 5410, evidence of new and further disability must exist within five-year period, but in present case substantial evidence supported WCAB's finding that applicant's new and further disability, for which applicant was seeking TTD, did not exist until approximately five years 10 months after date of injury

INJURY AOE/COE

City of Stockton v. WCAB (Jenneiahn) (2006) 71 CCC 5

Injury AOE/COE–Off-Duty Recreational Activity–Court of Appeal, annulling WCAB decision and applying Labor Code § 3600(a)(9), held that police officer who injured his leg while off duty, playing in pickup game of basketball at private facility, was not entitled to workers’ comp benefits because injury arose out of voluntary participation in off-duty recreational activity not constituting part of officer’s work-related duties and not reasonable expectancy of, or expressly or impliedly required by, officer’s employment, when Court of Appeal found that evidence did not support finding that officer subjectively believed that his employer expected him to engage in occasional pickup game of basketball, and that, even if there were evidence of officer’s subjective belief, that belief would not have been objectively reasonable.

Carrasco v. WCAB (2006) 71 CCC 56 (writ denied)

Psychiatric Injury–Good Faith Personnel Actions–WCAB relied on report of defense psychiatric evaluator and applied multi-level analysis set forth in *Tolda v. Pitney Bowes, Inc.* To find that applicant’s psychiatric injury during period ending 3/25/2002 was substantially caused by defendant’s lawful, non-discriminatory, good faith personnel actions and was, therefore, not compensable under Labor Code § 3208.3(h), despite conflicting opinion of applicant’s treating psychiatrist and applicant’s testimony that his injury was predominantly caused by work stress that predated defendant’s personnel actions.

Kellner v. WCAB (2006) 71 CCC 75 (writ denied)

Injury AOE/COE–Hepatitis C–Pre-existing Conditions–WCAB held that substantial evidence supported finding that applicant did not sustain injury AOE/COE in form of Hepatitis C on 4/30/96 or during cumulative trauma period ending 5/30/96 while working as prison cook/supervisor, based on opinion of defense QME that applicant has pre-employment Hepatitis C and that disease was not aggravated by his employment (contrary to opinions from applicant’s QME).

Evidence–Admissibility–WCAB found that medical opinions of three pathologists solicited and relied on by defense QME existed and were admissible under 8 CCR § 10606 and Labor Code § 5703, when pathologists’ opinions were discussed in QME’s report, which was admitted into evidence and was in record.

Stauffer v. WCAB (2006) 71 CCC 95 (writ denied)

Injury AOE/COE–WCAB, rescinding WCJ’s FA&O, held applicant did not prove by preponderance of evidence under Labor Code § 3202.5 that he sustained cumulative trauma back injury during period from 4/2003 through 11/24/2003 while working for defendant as clerk, when WCAB found no support in applicant’s testimony or medical opinions for WCJ’s finding of

injury AOE/COE.

Stavropoulos v. WCAB (2006) 71 CCC 99 (writ denied)

Injury AOE/COE–Burden of Proof–Exposure to Toxic Chemicals–WCAB found that report of applicant’s QME indicating that decedent’s exposure to toxic chemicals while on duty as peace officer combined with effects of his cigarette smoking to aggravate or accelerate his lung cancer did not constitute sufficient evidence to support finding of industrial injury, because examiner did not identify any toxic chemicals to which decedent was exposed, based on his opinion on inaccurate history, relied on irrelevant medical studies, and did not base his findings on fact.

Super Mercado Mexico v. WCAB (Nunez) (2006) 71 CCC 103 (writ denied)

Injury AOE/COE–Assaults by Third Parties–WCAB found that applicant/store clerk sustained injury AOE/COE as a result of gunshot wound received in parking lot of his employer’s store, while attempting to apprehend thieves who had robbed independent check cashing business located inside store; WCAB inferred from facts that applicant’s spur-of-moment decision to apprehend robbers was based on his belief that it was in defendant’s best interests and was to defendant’s benefit.

Tumas v. WCAB; Securitas Services v. WCAB (Tumas) (2006) 71 CCC 107 (writ denied)

Injury AOE/COE–Off-Duty Recreational Activity–WCAB held applicant’s injury 10/11/2003 at steak fry barbecue was not injury AOE/COE because injury occurred during off-duty voluntary social event/recreational activity and was barred under Labor Code § 3600(a)(9) because, although applicant had subjective belief that defendant employer required him to attend, his subjective belief was not objectively reasonable, when WCAB found defendant did not organize or sponsor event, attendees had to pay to attend, there was no record of who attended, and only evidence of benefit to employer was applicant’s testimony that it benefitted employer to have employees socialize with each other.

Injury AOE/COE–Affirmative Defenses–Intoxication–WCAB held defendants did not meet burden of proving Labor Code § 3600(a)(4) affirmative defense that applicant’s 10/11/2003 was barred because it was substantially caused by applicant’s intoxication, when WCAB found applicant was injured when he fell from cliff during steak fry for security officers, including former peace officers, no one witnessed applicant’s fall off cliff, no one present at steak fry testified that applicant was intoxicated enough for his intoxication to cause his fall, edge of cliff was hidden by vegetation, and defense QME who gave opinion that applicant’s intoxication caused his injury did not have adequate history because he overstated applicant’s blood alcohol level.

Santa Rosa School District v. WCAB (Hagle) (2006) 71 CCC 305 (writ denied)

Injury AOE/COE–Going and Coming Rule–Special Mission Exception–WCAB held that applicant’s injury on 5/18/2004 was injury AOE/COE, based on special mission exception to going and coming rule, when WCAB found applicant worked as research assistant for defendant school district, applicant went to buy instructional materials with express permission from principal, she left to do this at 11:20 A.M., before her unpaid lunch break which usually began at 12:00 noon, she went to commercial development where instructional materials were located, was told to come back later to get materials, walked to thrift store in same commercial development, on way out of thrift store at 11:45 a.m. she tripped and fell and fractured her right hip, WCAB found she was on special mission for her employer (to buy instructional materials), she was paid at time of injury (until noon that day), deviation to walk through thrift store was minor deviation and was not sufficient to take injury out of special mission exception, and she had not yet completed her special mission when injured.

Trojan Battery Co., Inc. v. WCAB (Garcia) (2006) 71 CCC 308 (writ denied)

Injury AOE/COE–WCAB relied on medical report and deposition testimony of independent medical examiner to find that applicant sustained injury AOE/COE in form of leukemia during period 11/97 through 8/31/2001, when independent medical examiner took extensive medical history from applicant in which applicant stated that he was exposed to chemicals, including benzene, during his employment and established causal connection between benzene exposure and applicant’s leukemia.

Arciga v. WCAB (2006) 71 CCC 406 (writ denied)

Post-Termination Claims–WCAB held applicant’s claim for CT injury AOE/COE from 1/5/2004 through 1/12/2004 to both upper extremities and hands was barred by Labor Code § 3600(a)(10) as post-termination claim, when applicant worked for defendant intermittently for several years as seasonal farm worker, applicant began working for defendant again on 1/5/2004, defendant terminated applicant on 1/12/2004 for failure to meet quotas for pruning vines, applicant sought medical attention on 1/14/2004 from her private physician, and applicant notified defendant of her injury on 1/21/2004 and at that time requested that defendant provide medical treatment.

Post-Termination Claims–Exceptions–WCAB held that exception of Labor Code § 3600(a)(10)(A) did not apply to defeat Labor Code § 3600(a)(10) bar to post-termination claim, when WCAB found that applicant’s testimony indicated that she developed symptoms in her hands within days after beginning work on 1/5/2004, she did not know of any other reason for her symptoms at that time, she knew her condition was work related, she knew she had to report industrial injuries to defendant, and she knew she was entitled to medical treatment for industrial injuries, so that, for purpose of determining date of injury under Labor Code § 5412 and determining whether Labor Code § 3600(a)(10)(A) exception applied (to determine whether date of knowledge of, and therefore end date of, CT was after date of termination), applicant knew industrial nature of her symptoms before date of termination, making date of injury before date of

termination.

Post-Termination Claims–Exceptions–WCAB held Labor Code § 3600(a)(10)(D) exception to claim being barred as post-termination claim did not apply because there was no evidence that defendant had knowledge of applicant’s claimed injury until she reported it on 1/21/2004, after termination on 1/12/2004, and pre-termination general statements from applicant to defendant’s foreman about symptoms were not sufficient to notify defendant that applicant thought symptoms were work related or that she was claiming industrial injury.

Germanetti v. WCAB (2006) 71 CCC 421 (writ denied)

Psychiatric Injuries–Good Faith Personnel Actions–WCAB held that applicant sustained injury AOE/COE to psyche for period ending 9/16/2002, but that injury was barred under Labor Code § 3208.3(h) because injury was substantially caused by defendant’s good faith personnel actions, when applicant claimed injury from harassment by supervisor, specifically that supervisor inappropriately questioned applicant in meetings and gave him poor performance evaluations, and WCAB found that supervisor’s actions were undertaken to track status of projects and to manage defendant’s business and that actions were personnel actions within meaning of Labor Code § 3208.3(g), citing *Larch v. Contra Costa County*.

Satloff v. WCAB (2006) 71 CCC 452 (writ denied)

Injury AOE/COE–WCAB held that applicant did not sustain claimed CT industrial injury AOE/COE from 7/1/98 through 6/30/99, when applicant physician/pediatric anesthesiologist worked for defendant hospital, applicant claimed headaches and neck pain from stress of administering anesthesiology to newborns and from his supervising surgeon, applicant obtained narcotics from defendant’s hospital without defendant’s consent and became addicted to narcotics, and applicant claimed industrial injury from addiction, and WCAB found that there was no substantial medical evidence of injury AOE/COE in form of headaches and neck pain, especially in light of medical evidence of pre-existing spine and shoulder complaints following earlier automobile accident, that applicant’s use of defendant’s narcotics was unauthorized, and that applicant did not prove that job stress caused headaches and neck pain that in turn caused him to engage in unauthorized use of defendant’s property (narcotics).

Citadel Broadcasting v. WCAB (Nelson) (2006) 71 CCC 517 (writ denied)

Injury AOE/COE–Going and Coming Rule–WCAB held that applicant, who sustained injuries to his back, neck, arms, legs, and in form of headaches in automobile accident on 8/2/2004 while driving from his home to mandatory weekly company sales meeting, was not barred from recovering compensation under “going and coming” rule, when applicant established that he could not have performed his sales job without his own vehicle, no company vehicle was available for his use, and his employer expected him to provide vehicle for its benefit, and defendant provided no evidence that applicant could perform his duties without his car.

First Bank & Trust v. WCAB (Ziegler) (2006) 71 CCC 533 (writ denied)

Psychiatric Injuries–Good Faith Personnel Actions–WCAB held that applicant’s psychiatric claim was not barred by Labor Code § 3208.3(h), when applicant’s testimony and opinion of her treating therapist constituted substantial evidence to prove that applicant’s psychiatric injury was caused by cumulative stress in her employment and not by her change in job position, and evidence indicated that applicant’s change in job position was agreed on by herself and defendant, and was not adverse to, but rather benefitted, applicant.

CIGA v. WCAB (Fernandez) (2006) 71 CCC 629 (writ denied)

Psychiatric Injuries–Six-Month Employment Rule–WCAB held that applicant’s claim for psychiatric injury, sustained as compensable consequence of his 10/25/99 left shoulder, neck, and back injury, was not barred by six-month employment rule in Labor Code § 3208.3(d), when applicant’s specific orthopedic injury occurred before applicant had completed six months of work for defendant, applicant returned to work for brief period after orthopedic injury, and applicant’s total work for defendant, both before and after orthopedic injury, extended more than six months, as required by clear and unambiguous wording of Labor Code § 3208.3(d).

Los Angeles County Metropolitan Transit Authority v. WCAB (Hicks) (2006) 71 CCC 641 (writ denied)

Injury AOE/COE–Initial Physical Aggressor–WCAB held that applicant/bus driver’s injury claim was not barred under Labor Code § 3600(a)(7), when it determined that applicant’s action consisting of blocking bus to prevent passenger from exiting was not action that would put reasonable person in fear of bodily harm, and that applicant was not initial physical aggressor in altercation during which he was injured.

Zenith Insurance Co. v. WCAB (Ellis) (2006) 71 CCC 658 (writ denied)

Injury AOE/COE–WCAB held that applicant’s injury on 11/5/2003 was injury AOE/COE, when applicant attended birthday party of co-worker in defendant employer’s lunchroom on defendant’s premises, applicant gave co-worker celebratory hug and single spank on buttocks, and five days later, on 11/5/2003, co-worker’s fiancé assaulted and injured applicant in employee parking lot after co-worker pointed applicant out to him, and WCAB found that defendant conceded that injury occurred in course of employment and injury arose out of employment because (1) if spank led to injury, injury would have been compensable because it occurred on employer’s premises, (2) spank led to assault and connection of assault to applicant’s employment was not “so remote that it [could not] be said to arise therefrom,” (3) grievance leading to assault was work-related, and (4) encounter between applicant and co-worker’s fiancé in parking lot was chance encounter.

California Insurance Guarantee Association v. WCAB (Norwood) (2006) 71 CCC 804 (writ denied)

Psychiatric Injuries–Six Month Employment Rule–WCAB held that applicant’s claim of compensable consequence injury AOE/COE to psyche was not barred by Labor Code § 3208.3(d) requirement of six months of employment for injuries to psyche, when applicant began working for defendant employer 10/23/95, sustained admitted back and leg injury 1/11/96, returned to work with defendant employer after injury until at least 8/96, and WCAB found that applicant sustained injury to psyche as claimed and that claim was not barred, when it interpreted Labor Code § 3208.3(d) as requiring six months total employment, not six months employment prior to date of initial physical industrial injury, and found that applicant worked for defendant employer for at least nine months total.

County of Alameda v. WCAB (Kan) (2006) 71 CCC 827 (writ denied)

Psychiatric Injuries–Good Faith Personnel Actions–WCAB panel majority reversed WCJ’s decision and found that applicant’s claims for psychiatric injuries stemming from counseling sessions on 10/25/2002 and 2/9/2004 by defendant’s human resources manager and applicant’s supervisor, during which applicant’s behavior was criticized, were not barred under Labor Code § 3208.3 because counseling on these occasions did not constitute “personnel actions” since they did not involve discipline or threat of discipline.

Ho v. WCAB (2006) 71 CCC 846 (writ denied)

Employment Relationship–WCAB held that applicant did not sustain injury AOE/COE on 12/7/2002 because he was not employee of defendant on that day, when WCAB found that applicant and defendant contracted for applicant to work for defendant on temporary assignment for third party in Georgia, that defendant reimbursed mileage expenses for trip to Georgia only, not for return trip to California, that contract excluded liability for contingencies not specified in contract, that applicant notified defense witness that assignment was ending before his last day of work, that his last day of work was 12/6/2002, that contract specified that when assignment ended employment relationship also ended, and that applicant’s injury from motor vehicle accident while driving his own car between Georgia and his residence in California occurred after completion of assignment and during trip home and was not injury AOE/COE.

Injury AOE/COE–Going and Coming Rule–WCAB held that applicant’s injury during trip home was barred by going and coming rule and applicant did not prove that any of three claimed exceptions to going and coming rule (special mission, commercial traveler, or employer-paid transportation) applied.

New Jersey Nets v. WCAB (Theus) (2006) 71 CCC 859 (writ denied)

Cumulative Trauma–Date of Injury–WCAB found that applicant/professional basketball player who played in NBA from 7/78 to 9/91 sustained industrial injuries to his spine and joints during

cumulative period ending in 9/91, and that defendant New Jersey Nets was liable for applicant's injuries pursuant to Labor Code § 5500.5, when evidence showed that applicant's disability and "date of injury" was on last day applicant played for defendant.

Benyamino v. WCAB (2006) 71 CCC 899

Injury AOE/COE—Medical Evidence—Court of Appeal, denying petition for writ of review, upheld WCAB decision that applicant had failed to prove by preponderance of evidence that any nonspecific cumulative trauma injury she sustained to hands and wrists was causally connected to her employment as home care worker to her parents, when Court of Appeal found that parties submitted issue of whether applicant's injuries were industrial on reports of parties' QMEs, that applicant's QME opined that applicant suffered from nonspecific cumulative trauma problem from general daily activities and use of hands and was able to continue her usual and customary work, that defendant's QME diagnosed applicant as having carpal tunnel syndrome but did not believe it was related to, was caused by, or arose out of her work because general use of wrists and hands, as required in applicant's work, would not cause carpal tunnel syndrome, and that, with this medical evidence, applicant had failed to carry burden of proving work-related injury.

Aylworth v. WCAB (2006) 71 CCC 948 (writ denied)

Injury AOE/COE—Going and Coming Rule—Special Missions—WCAB found that applicant/deputy sheriff who sustained injuries in car accident on 6/19/2004 was barred from recovering comp under going and coming rule, when injuries occurred while applicant was driving home from union meeting held after his shift ended, and there was no showing that union meeting constituted special mission since meeting was neither substantially connected to applicant's employment nor materially benefitted applicant's employer, based on evidence presented.

Carra v. WCAB (2006) 71 CCC 952 (writ denied)

Injury AOE/COE—Off-Duty Recreational Activities—WCAB held applicant/police officer did not sustain compensable industrial injury on 3/13/2003 under standard set forth in *Ezzy v. Workers' Comp. Appeals Bd.* and was precluded from recovering benefits pursuant to Labor Code § 3600(a)(9), when WCAB found that applicant city police officer was injured while participating in ski tournament as part of fire and police officer Olympics, that applicant participated as individual, that applicant testified he felt participation would help further his career, that applicant felt that defendant encourage participation through performance evaluations and by posting placards and photographs about Olympics on police department wall, that applicant admitted there was no pressure from defendant to participate or implication of adverse consequences for failure to participate, that Olympics was not organized or scheduled by defendant or any other police department, that defendant did not pay for equipment, clothes, or lodging, that participation was for applicant's own recreation and self-promotion, and that, based on Labor Code § 3600(a)(9), applicant did not have subjective belief that his participation in these Olympics was requirement of his employment, and that, even if applicant had such

subjective belief, such belief was not objectively reasonable under circumstances.

Sunstone Hotel Properties, Inc. v. WCAB (Mendez) (2006) 71 CCC 977 (writ denied)

Injury AOE/COE–WCAB found substantial medical evidence to support finding that decedent’s 8/26/2003 stroke and subsequent death on 11/29/2003 were compensable and did not result from his non-industrial renal cell carcinoma, when stroke immediately followed heated work-related argument, there was no medical evidence at time of original stroke that cancer had spread to decedent’s brain, re-bleed in applicant’s brain just prior to his death occurred at original work-related stroke site, and, although CAT scans and MRIs showed tumors in applicant’s brain, there were no tumors at site of re-bleed, and there was insufficient evidence to show that non-industrial tumors in decedent’s brain were cause of re-bleed or death.

Krause v. WCAB (2006) 71 CCC 1032

Psychiatric Injury–Actual Events of Employment–Evidence–Court of Appeal, denying applicant’s petition for writ of review, held that applicant, who claimed psychiatric injury as compensable consequence of admitted industrial orthopedic injury, presented no credible medical evidence that actual employment events predominantly caused injury to her psyche, when Court of Appeal agreed with WCAB that applicant’s testimony was not credible when she testified that none of events that occurred in applicant’s life around time of applicant’s industrial orthopedic injury caused her stress, including applicant’s experience of event she thought was heart attack, her son’s suffering seizure disorder, her brother’s death from diabetes, one of her daughters undergoing surgery for brain tumor, her grandfather’s death by self-starvation, her termination from subsequent employment while on disability, and her ex-husband’s holding knife to her throat.

Sonoma State University v. WCAB (Hunton) (2006) 71 CCC 1059

Psychiatric Injury–Actual Events of Employment–Court of Appeal, annulling WCAB award of benefits, held that applicant’s psychiatric injury satisfies standard for compensability set forth in Labor Code § 3208.3(b)(1) only if it is proven that events of employment were predominant as to all causes combined of psychiatric disability taken as whole, when Court of Appeal found that legislative history of statute indicated that WCAB’s award of benefits, even though AME found that applicant’s overall psychiatric injury was only 35-percent industrially caused by stated that one of three separate diagnoses was caused exclusively by industrial factors, was contrary to legislature’s intention.

Uribe v. WCAB (2006) 71 CCC 1070

Injury AOE/COE–Going and Coming Rule–Special Risk Exception–Court of Appeal, annulling WCAB’s order and remanding case to WCAB for further proceedings, held that applicant had satisfied burden of proof that his injury arose out of and in course of employment, in that applicant had established both prongs of special risk exception to going and coming rule, i.e., (1)

but for employment, applicant would not have been at location where injury occurred, and (2) risk to applicant was distinctive from that of public generally, when Court of Appeal found that applicant testified that, upon arriving at restaurant where he worked as cook and assistant manager, he parked his Cadillac Escalade on street where he could see car from inside restaurant, that at approximately 11:00 p.m. he counted money, bagged it, and placed it inside restaurant refrigerator, that counting and bagging can be seen from street, that when he went to his car he was carrying bag that looked similar to moneybag, that two men approached and one shot him in right arm just as he got into his car, that applicant's testimony was substantial evidence to support reasonable inference that attackers were attempting to steal bag applicant was carrying, and that evidence was not susceptible to WCAB's inference that applicant may have been victim of car jacking with no causal connection to his employment.

Harris Rebar, Inc. v. WCAB (Xijun) (2006) 71 CCC 1159

Employment Relationships–WCAB reversed WCJ and held that applicant/union employee who sustained back injury on 5/8/2002 while attending week-long apprentice training session was “in the employ” of defendant within meaning of Labor Code § 3368 and was not “unemployed” while attending training session, when record indicated that he was employee of defendant under Labor Code §§ 3351 and 3357 even though he was not compensated for his attendance at training session, since he rendered service to defendant as apprentice ironworker continuously from date of his hire until date he started apprentice training sessions and had reasonable expectation of continued employment with defendant at time he was injured.

Injury AOE/COE–Educational Activities–WCAB reversed WCJ and relied on *C.L. Pharris Sand & Gravel, Inc. V. WCAB (Lindsey)* to find that applicant's back injury sustained while he was attending unpaid week-long apprentice training session arose out of and occurred in course of his employment with defendant, when applicant's attendance at training session was reasonable expectancy of his employment, training sessions were designed to improve applicant's skills as ironworker, applicant's attendance at training session benefitted both applicant and defendant, and applicant's injury was causally related to his employment.

Pacific Lumber Co. v. WCAB (Liening) (2006) 71 CCC 1179 (writ denied)

Injury AOE/COE–Suicide–Irresistible Impulse–WCAB upheld WCJ's finding that applicant was not barred under Labor Code § 3600(a)(6) from recovering compensation for her husband's death by suicide on 4/12/2003 following industrial back injury, when decedent shot himself without warning while driving home from visiting friend with applicant, decedent left not suicide note, there was no indication that decedent was suffering from mental illness at time of his death, and evidence indicated that suicide was not result of willful deliberation, but was rather “hasty and impetuous act” and compensable consequence of his back injury.

Hess v. WCAB (2006) 71 CCC 1225

Injury AOE/COE–Substantial Medical Evidence–Court of Appeal, denying applicant’s petition for writ of review, held that opinion of defendant’s QME constituted substantial evidence in support of WCAB’s decision that applicant was 31-percent disabled, despite opinions of applicant’s treating physician and QME that supported significantly higher level of PD, when it is well-settled that relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence, and that difference of medical opinion does not make WCAB’s award illogical, unreasonable, improbable, or inequitable.

Pettigrew v. WCAB (2006) 71 CCC 1248

Injury AOE/COE–Court of Appeal held that substantial evidence supported WCAB’s decision that applicant was not injured AOE/COE when, on his way to work as correctional officer for Calif. Dept. Of Corrections, applicant stopped to render aid at accident scene and was injured when oncoming car struck truck involved in original accident and truck struck applicant, when applicant had no peace officer status outside grounds of prison where he worked, that applicant was not on duty at time of injury, and that there was no evidence that applicant was paid for stopping to help at accident scene.

Cedars-Sinai Medical Center v. WCAB (Canavarro) (2006) 71 CCC 1444 (writ denied)

Injury AOE/COE–Cardiovascular Injury–Compensable Consequence Psychiatric Injury–WCAB upheld WCJ’s finding that applicant/security officer sustained industrial injuries to his cardiovascular system and, as consequence, to his psyche during period 9/2001 through 7/12/2003, when opinion of applicant’s QME that job stress contributed to applicant’s single episode of paroxysmal tachycardia constituted substantial evidence to justify finding of industrial cardiac injury, despite conflicting opinion of defendant’s QME, and both applicant’s and defendant’s QMEs agreed that applicant’s depression and anxiety were predominantly caused by his cardiac condition.

Injury AOE/COE–Substantial Evidence–Duty to Develop Record–WCAB reversed WCJ’s finding that applicant’s admitted 9/18/2002 back injury resulted in PD and ordered further development of medical record on this issue, when WCJ’s finding was based on opinion of applicant’s QME, who was internist, and WCAB found that evaluator may have lacked expertise to render opinion on applicant’s orthopedic injuries, that her reports lacked foundation for her opinions, and that WCJ rejected conclusion of defendant’s orthopedic evaluator that applicant’s back injury caused no work preclusion

Fresno Unified School District v. WCAB (Stephens) (2006) 71 CCC 1505

Injury AOE/COE–Petition to Reopen–New and Further Disability–Substantial Evidence–Court of Appeal, denying defendant’s petition for writ of review, held that WCAB’s findings that applicant sustained industrial injuries to her internal/cardiovascular system and low back, as

claimed in her petition to reopen, were supported by substantial evidence, when court found that report of AME constituted substantial evidence that internal/cardiovascular system injury was industrial, and that at least two physicians reported that applicant injured her low back as compensable consequence of original industrial injury to left knee, which constituted substantial evidence

Jordan v. WCAB (2006) 71 CCC 1512

Injury AOE/COE–Medical Evidence–Court of Appeal, denying applicant’s petition for writ of review, held that WCAB’s decision that applicant failed to prove that his injury arose out of and occurred in course of his employment was supported by medical evidence, when Court of Appeal found that WCAB properly relied on opinions of applicant’s and defendant’s QMEs that applicant offered no evidence to support claim that his pre-existing asthmatic condition had been aggravated by exposure to *Aspergillus* fungi during his employment by defendant as building inspector, and that QMEs reported that these fungi were present everywhere in region where applicant worked, and that WCAB properly disregarded applicant’s treating physician’s opinion that applicant’s employment was cause of his aggravated condition when that opinion was based on assumption, not on evidence.

Mattea v. WCAB (2006) 71 CCC 1522

Psychiatric Injury–Sudden and Extraordinary Employment Condition–Court of Appeal, annulling WCAB decision, held that applicant met his burden of establishing that he suffered psychiatric injury as compensable consequence of physical injury as result of sudden and extraordinary employment condition, as required by Labor Code § 3208.3(d), making psychiatric injury compensable even though it occurred during first six months of employment, when Court of Appeal found that lumber falling into aisle and onto employee’s leg was such uncommon, unusual, and totally unexpected event that it would naturally be expected to cause psychic disturbances even in diligent and honest employee

Medina v. WCAB (2006) 71 CCC 1535

Injury AOE/COE–Third Party Actions–Credit–Court of Appeal, denying applicant’s entire net recovery against third party/apartment complex owner, and that injury was not industrial when applicant tripped and fell while walking to her car on ramp at apartment complex where defendant directed and paid her to live, when Court of Appeal found that fact that defendant provided applicant with place to live did not mean that defendant’s duty to provide safe workplace included duty to make apartment complex safe, and that defendant did not negligently fail to provide safe workplace.

Bushell v. WCAB (2006) 71 CCC 1591 (writ denied)

Injury AOE/COE–Firefighters–Infertility–WCAB held that applicant/firefighter failed to prove that he sustained industrial injury to his reproductive system in form of infertility during

cumulative period ending 1/17/2003 due to benzene exposure, when there was no evidence that applicant suffered disability or loss of earnings as result of alleged injury, applicant's trial testimony did not adequately describe his exposure to benzene and was insufficient to establish proximate causation, opinion of applicant's QME that applicant's abnormal sperm morphology and motility were caused by work exposures was found to be speculative since he did not explain nature or length of exposures, and reports of two defense medical evaluators indicating that there was no basis to connect benzene exposure to applicant's form of infertility were found to be well-reasoned and most persuasive

St. Paul Travelers Insurance v WCAB (Schleifstein) (2006) 71 CCC 1624 (writ denied)

Injury AOE/COE—Going and Coming Rule—Dual Purpose Exception—WCAB held that applicant's claim stemming from burn injuries sustained on 8/6/2005 was, pursuant to dual purpose exception, not barred by "going and coming" rule, when injuries occurred while applicant was performing two-day assignment for defendant that included picking up pool product, calcium hypochlorite, from two of defendant's store locations and transporting it in his private vehicle to store location where he worked, during course of transporting chemical applicant intended to perform various errands including stopping at DMV to inquire about registering his new car and cashing check in order to obtain cash to refuel his car before proceeding to work, while driving to complete his errands applicant threw lit cigarette butt out of his car sunroof that blew back into car and ignited chemical he was carrying, causing his injuries, and WCAB found that defendant expected applicant to have properly registered his car to complete his job duties and that errands applicant was performing at time of his injury benefitted defendant as well as applicant

Injury AOE/COE—Going and Coming Rule—Special Mission Exception—WCAB held that applicant's claim for burn injuries, was, pursuant to special mission exception, not barred by "going and coming" rule, when injuries occurred while applicant was completing two-day assignment at defendant's request that included picking up and transporting calcium hypochlorite from two of defendant's store locations to store where applicant worked, and WCAB found that errands applicant intended to perform at time he was injured did not constitute material or substantial deviation from his mission

Injury AOE/COE—Going and Coming Rule—Special Risk Exception—WCAB held that applicant's claim for burn injuries was, pursuant to special risk/zone of danger exception, not barred by "going and coming" rule, when injuries occurred when chemical applicant was transporting at defendant's request was ignited by applicant's cigarette butt, and WCAB found that applicant would not have been in his car loaded with chemical but for his employment, and that chemical was hazardous and created risk distinctive in nature or quantitatively greater than risks common to general public

Bayanjargal v. WCAB (2006) 71 CCC 1829 (writ denied)

Psychiatric Injuries–Six-Month Employment Rule–Sudden and Extraordinary Employment Condition–WCAB reversed WCJ’s decision and held that applicant/roofer was barred by Labor Code § 3208.3(d) from recovering compensation for psychiatric injury allegedly occurring as consequence of his 5/28/2003 back and right knee injuries, when applicant was employed for less than six months at time of his orthopedic injuries, and WCAB found that neither fall from roof that led to applicant’s orthopedic injuries nor consequential psychiatric injuries were “extraordinary” employment events so as to preclude application of Labor Code § 3208.3(d)

County of Contra Costa v. WCAB (Aliotti-Scearcy) (2006) 71 CCC 1857 (writ denied)

Psychiatric Injury–Good-Faith Personnel Actions–WCAB applied analysis in *Rolda v. Pitney Bowes, Inc* to hold that applicant/social worker’s claim of psychiatric injury ending 2/18/2003 was not barred by Labor Code § 3208.3(h), when psychiatric injury was caused in part by applicant’s transfer to new department, which WCAB found to be good-faith personnel action, but when evidence indicated that injury was predominantly caused by applicant’s being forced to work with difficult and abusive co-worker

Institute for Hand & Microsurgery, The v. WCAB (Gutierrez) (2006) 71 CCC 1857 (writ denied)

Injury AOE/COE–Injuries En route to Doctor’s Appointment–WCAB held that 2/6/2001 burn injuries sustained by applicant that occurred when applicant stopped for gas at 9:15 a.m., allegedly en route to a 2:00 p.m. medical appointment related to her prior industrial injuries, were not compensable consequence of her industrial injuries, when burn injuries occurred almost five hours before her scheduled medical appointment, evidence showed that applicant lived approximately 35 miles from doctor’s office, and, although applicant had to pick up x-rays on her way to medical appointment, it was not realistic to allow five hours for trip\

PRESUMPTIONS/PUBLIC EMPLOYEES

City of Los Angeles v. WCAB (Barrett) (2006) 71 CCC 61 (writ denied)

Presumption of Industrial Causation–Cancer–Firefighters–WCAB found that death of retired firefighter from colon cancer on 1/28/99 after 25 years of employment with defendant was presumed compensable under Labor Code § 3212.1, when there was sufficient evidence to establish that decedent was exposed to known carcinogens during his employment, and defendant failed to rebut presumption by showing that there was no reasonable link between exposure and cancer.

Statute of Limitations–WCAB found that Death Without Dependents Unit (DWD) was not barred by one-year statute of limitations from filing claim for benefits arising out of retired firefighter’s death on 1/28/99 from colon cancer more than one year after date of death, when DWD was not timely notified of firefighter’s death as required under Labor Code § 4706.5(f). Statute of Limitations–WCAB found that lien claimant was not barred from filing lien application more than one year after firefighter’s death on 1/28/99, when Labor Code § 5303 allowed lien claimants to file liens at any time after application was filed, as long as WCAB retained jurisdiction, that DWD was timely applicant, and that at time application was filed there was no limitation on action under Labor Code § 4903.5.

Gomez v. WCAB (2006) 71 CCC 66 (writ denied)

Presumption of Industrial Causation–Cancer–Peace Officers–WCAB declined to apply Labor Code § 3212.1 presumption of industrial causation to applicant/peace officer’s claim of industrially related cancer during period 10/28/89 through 11/7/2000, when applicant failed to carry his burden of proving that he was exposed to know carcinogen during his employment, as required by Labor Code § 3212.1, to trigger application of presumption, and neither report of AME nor report of applicant’s QME constituted substantial evidence to support finding of exposure.

Stavropoulos v. WCAB (2006) 71 CCC 99 (writ denied)

Presumption of Industrial Causation–Cancer–Peace Officers–WCAB found that Labor Code § 3212.1 cancer presumption was not triggered, when applicant failed to establish that her husband/peace officer was exposed to know carcinogen while on duty, as required under *Faust v. City of San Diego* in order for presumption to attach.

Injury AOE/COE–Burden of Proof–Exposure to Toxic Chemicals–WCAB found that report of applicant’s QME indicating that decedent’s exposure to toxic chemicals while on duty as peace officer combined with effects of his cigarette smoking to aggravate or accelerate his lung cancer did not constitute sufficient evidence to support finding of industrial injury, because examiner did not identify any toxic chemicals to which decedent was exposed, based on his opinion on inaccurate history, relied on irrelevant medical studies, and did not base his findings on fact.

City of Oceanside v. WCAB (Woodall) (2006) 71 CCC 255 (writ denied)

Public Employees–Salary in Lieu of Benefits–Peace Officer–WCAB, relying on decision in *City of Martinez v. WCAB (Bonito)* and Government Code § 21164, held that applicant/police officer, who suffered industrial injury to his right knee on 7/2/2002 and to his neck, back, left shoulder, and left knee on 4/17/2003, was entitled to salary continuation benefits under Labor Code § 4850, when applicant objected to defendant’s recommendation to PERS that he retire due to his disability and there was no showing that applicant had retired from his employment, and WCAB found that applicant was not P&S within meaning of Government Code § 21164 and was participating in VR.

City of San Leandro v. WCAB (Waltman) (2006) 71 CCC 262 (writ denied)

Presumption of Industrial Causation–Heart Trouble–Peace Officers–WCAB held that applicant/police officer who suffered heart attack on 11/15/2001 was entitled to presumption of compensable injury under Labor Code § 3212.5, when manifestation of heart trouble occurred within 60 months of applicant’s retirement from his eight-year employment period with defendant, prior to working for defendant applicant worked as police officer with another police department for 20 years, and WCAB found that “requisite service” under Labor Code § 3212.5 meant entire period of police officer’s injurious employment, even if employment was with more than one police department, as long as employment resulted in cumulative injury. Presumption of Industrial Causation–Heart Trouble–Peace Officers–WCAB found that medical opinions indicating applicant had pre-existing non-industrial risk factors for heart disease did not rebut Labor Code § 3212.5 presumption of compensability, since Labor Code § 3212.5 prohibited attributing heart trouble to pre-existing causes.

Cumulative Injuries–Labor Code § 5500.5–WCAB held that applicant/police officer, who retired from his employment with defendant/police department on 12/24/98, worked for different police department from 5/99 to 6/2001, suffered heart attack on 11/15/2001, and alleged industrial injury, was permitted to proceed against defendant under Labor Code § 5500.5, when there was no evidence that applicant’s employment during period 5/99 to 6/2001 was injurious.

City of Oceanside v. WCAB (Gambino) (2006) 71 CCC 524 (writ denied)

Salary in Lieu of Disability Benefits–Police Officers–WCAB relied on decision in *City of Martinez v. WCAB (Bonito)*, and held that applicant/police officer who suffered injury to his right knee during period 9/20/89 through 12/11/2002 was entitled to leave-of-absence benefits pursuant to Labor Code § 4850 in lieu of TD or VR benefits, when there was no finding by WCAB under Government Code § 21164 that applicant’s condition was P&S, applicant was participating in VR services, and applicant did not consent to his service-connected disability retirement for which defendant was advancing retirement benefits.

WCAB Jurisdiction–Public Employees’ Retirement System–Salary in Lieu of Disability Benefits–WCAB held that it had jurisdiction to award applicant/police officer leave-of-absence

benefits pursuant to Labor Code § 4850, when WCAB had made no finding under Government Code § 21164 that applicant's right knee injury was P&S, applicant was participating in VR benefits, and applicant's disability retirement was involuntary.

Penalties—Delay in Payment of Salary in Lieu of Disability Benefits—WCAB awarded applicant 10-percent penalty under Labor Code § 4650 and 25-percent penalty under Labor Code § 5814, less Labor Code § 4650 penalty, when it found that defendant's termination of Labor Code § 4850 leave-of-absence benefits and commencement of disability retirement benefits was unreasonable because WCAB had not found applicant's condition P&S pursuant to Government Code § 21164, applicant was participating in VR, and applicant did not consent to service-connected disability retirement.

Kelly v. County of Los Angeles (2006) 71 CCC 934

Public Employees—Post-Injury Reinstatements—Court of Appeal, reversing judgment of trial court and following *Stephens v. County of Tulare*, held that county employee had not been “dismissed” for disability within meaning of Gov Code § 31725 since county employer evinced no intent to sever employment relationship, so that employee had no right to reinstatement with back pay following retirement board's final decision denying her application for service-connected disability retirement, when Court of Appeal found that employer advised employee that it currently had no available position to accommodate her work restrictions imposed following her industrial injury, placed employee on unpaid industrial-injury leave, but offered employee VR (including VRMA) to train employee for another position.

City of Anaheim v. WCAB (Najmulski) (2006) 71 CCC 957 (writ denied)

Presumption of Industrial Causation—Heart Trouble—Peace Officers—WCAB found that Labor Code § 3212.5 presumption that police officer's heart trouble was compensable industrial injury applied, when WCAB found that applicant police officer worked for city as patrol officer and community policing officer during period 6/23/2002 through 6/23/2003, applicant developed hypertension and post-partum cardiomyopathy, form of heart trouble, which manifested itself during and after applicant's employment with defendant, WCAB was persuaded by report of applicant's qualified medical evaluator that peri-partum cardiomyopathy was mysterious illness whose exact etiology was unknown by that applicant's condition could be related to her employment with defendant, and WCAB found that defendant could not show that sole cause of applicant's hypertension and cardiomyopathy was applicant's pregnancy.

Presumption of Industrial Causation—Heart Trouble—Peace Officers—Rebuttal—WCAB held that Labor Code § 3212.5 presumption was not rebutted by opinions on causation from defense qualified medical evaluator attributing applicant's cardiomyopathy to pregnancy, because record showed that etiology of post-partum cardiomyopathy was unknown, so defendant could not show that applicant's pregnancy was sole cause of her cardiomyopathy.

City of Oakland v. WCAB (Harger) (2006) 71 CCC 1319 (writ denied)

Salary in Lieu of Disability–Multiple Industrial Injuries–WCAB found that applicant/firefighter, who suffered TD as result of cumulative industrial injury to his right shoulder during period ending 6/24/2004, was entitled to one year of full salary benefits for this injury, pursuant to Labor Code § 4850, notwithstanding that applicant had received full salary benefits in connection with prior industrial injuries; WCAB found that Labor Code § 4850 entitled qualified workers to one year of full salary per injury, not per lifetime.

City of Buenaventura v. WCAB (Deck) (2006) 71 CCC 1322 (writ denied)

Presumption of Industrial Causation–Heart Trouble–Police Officers–Apportionment–Anti-attribution Clause–WCAB held that Labor Code § 3212.5 non-attribution clause precluded apportionment under Labor Code § 4663 of applicant/police officer's PD resulting from injury to his cardiovascular system on 12/1/96 and during period from 7/72 through 12/1/96, despite IME's opinion that portion of applicant's disability was caused by pre-existing hypertensive disease, when evaluator found that applicant's industrial heart trouble would have cause disability even absent pre-existing factors.

City & County of SF v. WCAB (Smith) (2006) 71 CCC 1595 (writ denied)

Presumption of Industrial Causation–Heart Trouble–Firefighters–WCAB held that Labor Code §§ 4663 and 4664 apportionment of applicant/firefighter's PD stemming from industrial heart injury during cumulative period ending in 2001 was precluded by anti-attribution clause in Labor Code § 3212, notwithstanding AME's opinion that 50 percent of applicant's PD was caused by pre-existing non-industrial factors, and that amendment of Labor Code § 4664 and addition of Labor Code § 4664 by SB 899 did not nullify anti-attribution clauses in presumption statutes applicable to specified public employees

INSURANCE

Atlantic Mutual Insurance Co v. WCAB (Brewer) (2006) 71 CCC 244 (writ denied)

Insurance Coverage–Estoppel–WCAB held that insurance carrier who did not have coverage on 5/22/98, date of applicant’s industrial back and neck injuries, was estopped to deny coverage, when carrier’s attorney made several appearances before wCAB and stipulated that it had coverage on date of injury, stipulations were set forth in MSC statement and subsequently recorded in minutes by WCJ, WCJ relied on those stipulations to issue finding of fact regarding coverage and issue award against carrier; and finding of fact became final after period in which to seek reconsideration elapsed.

WCAB Jurisdiction–Statute of Limitations–WCAB held that it had not jurisdiction to set aside findings of fact regarding insurance coverage under Labor Code §5804, when findings of act became final more than five years after date of injury and insurance carrier’s request that findings of fact be set aside was made more than five years after date of injury.

Clark v. WCAB (Lien) (2006) 71 CCC 270 (writ denied)

Insurance–Notice of Cancellation–WCAB held that insurer sent valid and timely notice of cancellation of employer’s workers’ comp insurance policy under Insurance Code §§ 676.8 and 677.4, CCP § 1013, and insurance contract between employer and insurer, with 1/24/97 letter from insurer to employer cancelling policy for non-payment of premium, and that employer was uninsured on date of applicant’s injury (5/27/97).

Waiver–Insurance–Cancellation–WCAB held that employer did not prove that insurer waived claim that employer’s workers’ comp insurance policy was cancelled, when WCAB found that all requests for payment made by insurer after insurer’s notice of cancellation were for periods during which coverage was actually provided and for which payment had not been made.

Faeth v. WCAB (Gault) (2006) 71 CCC 355

Arbitration–Timeliness of Decision–Court of Appeal, denying petition for writ of review, held that, despite Labor Code § 5277(a)’s requirement that arbitrator serve F&A on all parties within 30 days of submission of case for decision, in present case F&O issued six months after parties’ submission of additional written arguments was timely, when arbitrator issued minutes of hearing, summary of evidence, F&O, and opinion on decision together, and minutes of hearing stated that parties would submit additional briefing and arbitrator would prepare minutes of hearing, at which time matter would stand submitted, and Court of Appeal, while agreeing with petitioner that logic of arbitrator bypassed 30-day statutory mandate to issue decision after matter was submitted, found that petitioner had waived error by failing to raise it before arbitrator while waiting six months for minutes of hearing, and that petitioner had not shown that result might have been different had arbitrator timely issued decision or that delay alone prejudiced petitioner in any way.

Insurance–Cancellation–Burden of Proof–Court of Appeal held that insurer complied with notice requirements of Insurance Code § 676.8(b), (c), regarding cancellation, and that nothing in WCAB’s opinion indicated improper shifting of burden of proof onto petitioner to prove that insurer had not canceled policy.

Insurance–Cancellation–Substantial Evidence–Court of Appeal held that record supported finding of WCAB that insurer effectively cancelled petitioner’s policy, when record included three separate notices of cancellation from insurer to petitioner, at least two of which included proof of mailing indicating that notice was received by U.S. postal service on specified dates.

Berkeley Forge & Tool v. WCAB (Rokony) (2006) 71 CCC 415 (writ denied)

Insurance–Fraud–WCAB held that Insurance Code § 1871.5 did not bar applicant from receiving further workers’ comp benefits, when applicant suffered industrial injury on 11/4/94 and received some workers’ comp benefits, defendant investigated potential insurance fraud related to applicant’s statements to physicians about hi condition and video taped applicant’s activities, matter was criminally prosecuted, and in criminal action applicant pled nolo contendere to violation of Penal Code §§ 664 and 487, and WCAB found that further workers’ comp benefits would be barred under Insurance Code § 1871.5 only if applicant was convicted of violation of Insurance Code § 1871.4 or Penal Code § 550, not violation of other statutes, according to express terms of Insurance Code § 1871.5.

Barka v. WCAB (2006) 71 CCC 800 (writ denied)

Insurance Coverage–Exclusions–Corporate Officers and Directors–WCAB found that applicant/service station owner and president was not covered “employee” under Labor Code §§ 3351(c) and 4154(b) and that his workers’ comp claim stemming from 11/13/2003 injury to his right upper extremity was barred pursuant to officers and directors exclusion clause that applicant had executed at time his business’s workers’ comp insurance policy was issued, despite fact that, prior to his injury, applicant had began working at his service station as mechanic and had added himself to business’s payroll; WCAB found that mere fact that applicant added himself to his business’s payroll as a mechanic was insufficient to trigger coverage under policy, when applicant did not inform insurance carrier to remove exclusion so he would be covered and made no attempt to ascertain what was required to obtain coverage for himself.

L & S Air Conditioning and Heating v. WCAB (Silva) (2006) 71 CCC 1174 (writ denied)

Insurance Coverage–Entities Covered–WCAB held insurer did not insure defendant on date of applicant’s industrial injury on 1/8/2004 in California, when WCAB found (1) defendant consisted of two entities, California doing-business-as-company and Nevada limited liability corporation, (2) on date of alleged injury applicant was employed by Nevada LLC, (3) on date of injury insurer insured Nevada LLC but not California dba, (4) on date of injury insurer did not insure Nevada LLC for injuries to California residents that occurred within California, and (5) insurer was not estopped from denying coverage because all elements of estoppel were not

proven.

Insurance Coverage–Agency–WCAB held insurance brokers here were acting as agents of both defendant entities but not as agents of insurer

R.Y.L., Inc. v. WCAB (Sibaja) (2006) 71 CCC 1185 (writ denied)

Coverage–Agency Relationships–Estoppel–WCAB held that defendant was not covered by workers' comp insurance on 8/20/2001, date of applicant's injury, when defendant attempted in good faith to obtain coverage through insurance broker, broker engaged in fraudulent acts and never procured coverage on defendant's behalf, there was no direct or indirect agency relationship between broker and insurance carrier that would give broker actual or ostensible authority to bind carrier to coverage, and, despite fact that defendant was innocent party in broker's fraudulent insurance scheme, WCAB found no basis for estoppel or any other legal basis on which to bind carrier to coverage.

Uninsured Employers Benefits Trust Fund v. WCAB (Fisher) (2006) 71 CCC 1193 (writ denied)

UEBTF–Reimbursement of Benefits Paid by Insurance Carrier–WCAB held that it had equitable authority to order UEBTF to reimburse insurance carrier for benefits mistakenly paid to applicant with 1/14/2001 hand injury and was not precluded by Labor Code § 3716(b) from ordering reimbursement, when insurance carrier paid benefits based on its erroneous belief that it insured employer for workers' comp, employer was actually uninsured at time of applicant's injury, and WCAB found that UEBTF was liable for payment of benefits to applicant on behalf of uninsured employer.

Sincere Oriental Food Corp. V. WCAB (Ortega) (2006) 71 CCC 1343 (writ denied)

Insurance Coverage–Agency Relationships–Estoppel–WCAB affirmed arbitrator's decision and found that carrier's cancellation of employer's workers' comp insurance policy for non-payment of premiums was effective, and that carrier had no coverage on date of applicant's injury, when employer obtained insurance through broker pursuant to broker's agreement expressly providing that broker was not agent of carrier, broker failed to make timely premium payments on employer's behalf, which resulted in cancellation of policy by carrier, cancellation notice was sent to incorrect address and was not received by employer, and WCAB found that broker acted as employer's agent and had no agency relationship with carrier, and that carrier was not estopped to deny coverage.

Hedy Holmes Staffing Company v. WCAB (Anderson) (2006) 71 CCC 1868 (writ denied)

Insurance Coverage–Notice of Non-Renewal–WCAB held that insurance carrier providing workers' comp insurance coverage pursuant to policy with term 11/1/2000 through 11/1/2001 did not have coverage on 11/19/2001 or 12/5/2001, dates of applicant's injuries, when carrier sent

notice of non-renewal dated 9/28/2001 by overnight mail and by fax, and arbitrator held that notice was timely to effectuate non-renewal by policy's 11/1/2001 expiration date under Insurance Code § 11664(c) and CCP § 1013(c), which together require 32 days notice of non-renewal

Insurance Coverage–Notice of Non-Renewal–Basis for Non-Renewal–WCAB held that carrier's stated reason for non-renewal of insurance policy, "underwriting reasons," complied with requirements of Insurance Code § 11664 so as to render notice of non-renewal adequate

Insurance Coverage–Estoppel–WCAB held that insurance carrier was not estopped to deny coverage, based on certificates of insurance issued by its insurance broker, after it had timely and adequately issued notice of non-renewal, when certificates were fraudulently issued by broker after carrier had terminated its relationship with broker, policy number on certificates did not match number on policy issued by insurer, and there was no showing that employer reasonably relied on certificates to assume that coverage existed

EMPLOYMENT RELATIONSHIP

Le Scher Construction v. WCAB (Vega) (2006) 71 CCC 294 (writ denied)

Employment Relationships–Employees–WCAB held that applicant who sustained industrial injuries to his right lower extremity, left upper extremity, and head on 1/30/2001, while working on construction site, was employee under Labor Code § 2750.5 and Bus & Prof Code §§ 7026 and 7026.1 of defendant who owned site and operated as general contractor, notwithstanding applicant’s failure to provide documentary evidence of employment relationship, when applicant’s testimony and that of co-worker showed that applicant was paid by defendant in cash or by personal checks through co-worker and defendant did not have valid contractor’s license. PD–Rating–WCAB relied on medical report of applicant’s treating physician to award applicant 56-percent PD for 1/30/2001 injuries to his right lower extremity, left upper extremity, and head, despite conflicting report of defense QME indicating that applicant had no objective work restrictions, when WCAB found treating physician’s report to be more persuasive.

California State Automobile Association Inter-Insurance Bureau v. WCAB (Hestehauge) (2006) 71 CCC 347

Employment Relationships–Residential Employees–Court of Appeal, annulling WCAB decision in *Hestehauge v. Charkins*, held that worker injured while painting house was not residential employee of homeowners within Labor Code §§ 3351(d) and 3352(h), which are only relevant statutes for defining “employee” under facts of present case, when Court of Appeal found that Labor Code § 3715(b), relied on by WCAB, was inapplicable to present case, since statute applied to only uninsured homeowners, whereas homeowners in present case were insured.

Merry Maids v. WCAB (Fuentes Arvizo) (2006) 71 CCC 646 (writ denied)

Employment Relationships–Joint Employment–WCAB held that applicant’s working as housekeepers for Merry Maids of Sonoma (franchisee), a franchise of Merry Maids, LP (franchisor), were jointly employed by both franchisee and franchisor, and that franchisee and franchisor were jointly and severally liable for workers’ comp benefits awarded to applicants under Labor Code § 3357 and *S.G. Borello & Sons, Inc. V. Department of Industrial Relations*, despite language in franchise agreement stating that franchisee operated as independent contractor, when evidence indicated that on dates of alleged injuries (1) franchisee and its individual owners were illegally uninsured for workers’ comp in breach of franchise agreement, (2) pursuant to franchise agreement, franchisor received seven percent of weekly gross sales made by franchisee, (3) applicants rendered services to franchisor while also rendering services to franchisee, and such services were integral part of franchisor’s business, and (4) franchisor had knowledge that franchisee was illegally uninsured for workers’ comp and had the right to either terminate franchise agreement or obtain workers’ comp on behalf of its franchisee.

Employment Relationships–Joint and Several Liability–Successors in Interest–WCAB held that

franchisor and franchisee were jointly and severally liable for applicants' injuries under "successor in interest" theory, when (1) franchisor took over business enterprise of franchisee with notice of pending workers' comp claims, (2) there was substantial continuity between business enterprise of franchisee and that of franchisor, (3) franchisor was provided with notice of WCAB proceedings and opportunity to contest liability, and (4) franchisor had knowledge that it franchisee was illegally uninsured for workers' comp on behalf of its franchisee.

Evidence–Admissibility–WCAB found that WCJ was justified in admitting deposition testimony of franchisee owner, when owner was not present at trial and securing his attendance appeared to be beyond jurisdiction of WCAB.

Facundo v. WCAB (2006) 71 CCC 834 (writ denied)

Employment Relationship–Real Estate Salespersons–WCAB held that applicant real estate salesperson/broker was not employee of defendant as matter of law, that employment relationships in real estate cases should be analyzed on case-by-case basis, and that, in this case, applicant was independent contractor on 7/19/2002, based on WCAB's consideration of factors from *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, including contract between parties that stated that applicant was independent contractor, lack of showing that defendant controlled mode and manner of sales, payment method (commission), skill level required, limitations on defendant's ability to terminate applicant, and fact that defendant provided office but applicant paid administrative costs, including workers' comp insurance and telephone charges.

Ho v. WCAB (2006) 71 CCC 846 (writ denied)

Employment Relationship–WCAB held that applicant did not sustain injury AOE/COE on 12/7/2002 because he was not employee of defendant on that day, when WCAB found that applicant and defendant contracted for applicant to work for defendant on temporary assignment for third party in Georgia, that defendant reimbursed mileage expenses for trip to Georgia only, not for return trip to California, that contract excluded liability for contingencies not specified in contract, that applicant notified defense witness that assignment was ending before his last day of work, that his last day of work was 12/6/2002, that contract specified that when assignment ended employment relationship also ended, and that applicant's injury from motor vehicle accident while driving his own car between Georgia and his residence in California occurred after completion of assignment and during trip home and was not injury AOE/COE.

Injury AOE/COE–Going and Coming Rule–WCAB held that applicant's injury during trip home was barred by going and coming rule and applicant did not prove that any of three claimed exceptions to going and coming rule (special mission, commercial traveler, or employer-paid transportation) applied.

Mendoza v. Brodeur (2006) 71 CCC 1135

Civil Actions–Employment Relationship–Summary Judgment–Court of Appeal, reversing trial court’s dismissal of plaintiff’s action following order granting defendant’s motion for summary judgment, held that plaintiff was employee of defendant pursuant to Labor Code § 2750.5, which operated to allow plaintiff’s tort action, despite fact that plaintiff, by virtue of Labor Code § 3352(h), was not employee of defendant for workers’ comp purposes, when Court of Appeal found that plaintiff was not licensed roofing contractor, and was not, therefore, independent contractor, and that in summary judgment proceedings defendant had not shifted evidentiary burden to plaintiff, so that it was premature for trial court to have required plaintiff to come forward with evidence to show triable issue of fact.

Harris Rebar, Inc. v. WCAB (Xijun) (2006) 71 CCC 1159

Employment Relationships–WCAB reversed WCJ and held that applicant/union employee who sustained back injury on 5/8/2002 while attending week-long apprentice training session was “in the employ” of defendant within meaning of Labor Code § 3368 and was not “unemployed” while attending training session, when record indicated that he was employee of defendant under Labor Code §§ 3351 and 3357 even though he was not compensated for his attendance at training session, since he rendered service to defendant as apprentice ironworker continuously from date of his hire until date he started apprentice training sessions and had reasonable expectation of continued employment with defendant at time he was injured.

Injury AOE/COE–Educational Activities–WCAB reversed WCJ and relied on *C.L. Pharris Sand & Gravel, Inc. V. WCAB (Lindsey)* to find that applicant’s back injury sustained while he was attending unpaid week-long apprentice training session arose out of and occurred in course of his employment with defendant, when applicant’s attendance at training session was reasonable expectancy of his employment, training sessions were designed to improve applicant’s skills as ironworker, applicant’s attendance at training session benefitted both applicant and defendant, and applicant’s injury was causally related to his employment.

JKH Enterprises, Inc v. Department of Industrial Relations/State of California (2006) 71 CCC 1257

Employment Relationships–Independent Contractors–Court of Appeal, affirming trial court’s order denying plaintiff’s petition for writ of mandate, held that substantial evidence supported determination by DIR that drivers for plaintiff courier service were functioning as employees rather than as true independent contractors, when question of hiree’s status must be considered in light of history and remedial and social purposes of Workers’ Compensation Act, which are (1) to ensure that cost of industrial injuries will be part of cost of goods rather than burden on society, (2) to guarantee prompt, limited compensation for employee’s work injuries, regardless of fault, as inevitable cost of production, (3) to spur increased industrial safety, and (4) in return, to insulate employer from tort liability for employees’ injuries, and Court of Appeal followed *S.G. Borello & Sons, Inc v. Department of Industrial Relations* in finding that functions performed by

drivers (pick-up and delivery of papers and packages and driving in between) did not require high degree of skill, that functions constituted integral heart of plaintiff's courier service business, that, by obtaining clients in need of service and providing workers to conduct it, plaintiff retained all "necessary" control over operation as whole, and that these circumstances were enough to find employment relationship for purposes of Workers' Compensation Act, even in absence of plaintiff's exercise of control over details of work and with plaintiff being more concerned with results of work rather than means of its accomplishment

Employment Relationships–Standard of Review–Substantial Evidence–Court of Appeal held that trial court applied correct standard of judicial review of determination by DIR that drivers for plaintiff courier service were functioning as employees, namely, substantial evidence standard rather than independent judgment, when continued operation of business in manner that violates applicable regulatory scheme governing all employers is not fundamental vested right or one that was legitimately acquired.

L & R Construction v. WCAB (Evans) (2006) 71 CCC 1331 (writ denied)

Employment Relationships–Presumption of Employment–WCAB applied Labor Code § 3357 presumption of employment to find that applicant was employee of uninsured and unlicensed roofing subcontractor on 5/19/2000, date of his injury, when applicant showed that he was working on job for subcontractor at time of injury, that he had ongoing interim working relationship with subcontractor, and that he was paid for his work on day of his injury, and subcontractor's testimony that applicant had been terminated prior to his injury was insufficient to rebut presumption, given WCJ's finding that subcontractor's testimony lacked credibility.

Employment Relationships–Unlicensed Subcontractors–WCAB applied Labor Code § 2750.5 presumption of employee status to find that employee of uninsured and unlicensed subcontractor, injured while performing services for general contractor, was employee of general contractor for purposes of workers' comp liability.

Employment Relationships–Employees–Estoppel–WCAB declined to apply equitable doctrine of estoppel to deny applicant recovery of workers' comp benefits from general contractor, when uninsured and unlicensed subcontractor for which applicant worked made misrepresentations to general contractor that it had valid contractor's license, and WCAB found that applicant could not be estopped from asserting that he was employee of general contractor under Labor Code § 2750.5 based on misrepresentations of another party.

Rea v. WCAB (Rindon) (2006) 71 CCC 1453 (writ denied)

Employment Relationships–Partnerships–WCAB held that applicant who sustained injuries AOE/COE was employee of illegally uninsured defendant and not partner in defendant's tree trimming business, when parties had no partnership license as required by Bus & Prof Code § 7026.1(b), no business cards or stationary indicating they were partnership, no partnership bank accounts, no equal sharing of profits and losses, no filing of partnership tax return, and no formal

partnership dissolution, and WCAB found that defendant did not meet its burden to rebut presumption set forth in Labor Code § 3357 that applicant was an employee

Sandoval v. WCAB (2006) 71 CCC 1462 (writ denied)

Employment Relationships–Independent Contractors–WCAB held that applicant was independent contractor while working as truck driver for defendant on 11/23/2004, when evidence indicated that applicant owned his truck and paid for his own licenses, gasoline, maintenance, and vehicle insurance, that applicant signed independent contractor agreement with defendant, under which he agreed to pay for all costs of operating his truck and to carry and pay for his own workers’ compensation and unemployment insurance, that applicant determined method, means, and manner of delivery and pickup, that applicant was paid per load by weight and distance, according to schedule, not on hourly basis, that any drug tests performed on applicant or inspections done were paid for by applicant, and that applicant paid for his own occupational accident and liability insurance at group rate, and WCAB found that, when weighing all factors, applicant exercised substantial control over his work so as to support finding of independent contractor status

Skyspares Parts, Inc v. WCAB (Henry) (2006) 71 CCC 1465 (writ denied)

Employment Relationships–Employees–WCAB held that applicant, who sustained injury to his right lower extremity on 4/18/2004, was employee of defendant, not independent contractor, under factors set forth in *S.G. Borello & Sons, Inc v. Dept. of Industrial Relations*, when evidence indicated that defendant retained substantial control over applicant’s work, that applicant’s work could be performed either by independent contractor or employee, that there was no special skill necessary to perform applicant’s work, that Unemployment Insurance Appeals Board (UIAB) had found applicant to be an employee when applicant appealed his denial of benefits, that work applicant performed was part of defendant’s regular business, that defendant provided workplace and tools necessary for applicant to perform his work, that defendant paid applicant on hourly basis rather than by lump sum, and that applicant showed that parties believed they were creating employee-employer relationship at time of hire

Krausz v. WCAB (Fahey) (2006) 71 CCC 1606 (writ denied)

Employment Relationships–Independent Contractors–WCAB applied factors set forth in *S.G. Borello & Sons, Inc v. Dept. of Industrial Relations* to find that defendant/event designer met burden of proving that it hired defendant/set builder and installer (set builder) as independent contractor, not employee, to build and install set pieces for a child’s “underwater world” theme party, when (1) set builder negotiated flat bid/budget price for his portion of “event,” not payment for time he worked, (2) job was short term, about one week in duration, (3) job relationship between even designer and set builder was temporary in nature, (4) set builder was able to hire as many employees as he needed for job, (5) set builder decided what to pay his workers, (6) WCJ reasonably inferred that set builder had opportunity for profit or loss on job, depending on how much he paid his workers, how many workers he hired, and how many hours he needed to rent set building facility, (7) set builder provided most tools for building set pieces, (8) set builder

provided work location during entire set piece construction phase of project, (9) set builder possessed special skills to perform his job, and (10) set builder was free to do other jobs while working on even designer's job and, in fact, was employed full time elsewhere while working on project

Employment Relationships–Employees–WCAB applied factors set forth in *S.G. Borello & Sons, Inc v. Dept. of Industrial Relations* to hold that applicant, who sustained industrial injury on 6/5/2003 while working for defendant/set builder and installer (set builder) building and installing set pieces for child's "underwater world" theme party, was set builder's employee, not independent contractor, when (1) applicant was told by set builder when and where to show up for work, (2) applicant provided minimal tools of his own, and most tools were provided through set builder, (3) applicant followed work instructions provided by set builder, (4) applicant was paid hourly rate set by set builder, not lump sum, (5) applicant had no possibility of losing money on job, (6) applicant had no authority to hire additional workers, (7) applicant possessed no special skill that set builder himself did not possess, and (8) set builder had right to control manner and means of accomplishing desired result

WCAB's Duty to Develop Record–Employment Relationships–Licensing Requirements–WCAB held that it did not have duty to further develop record on issue of whether applicant was required to have contractor's license to perform work building and installing temporary set pieces for child's theme party, when there was substantial evidence in record to support finding that, pursuant to Business & Professions Code §7045, no license was required to perform this work

Farmers Insurance Group v. WCAB (Bell; Berry) (2006) 71 CCC 1694

Employment Relationships–Home Care Services–Court of Appeal, annulling and reversing WCAB's decision, held that trust fund's second insurer, rather than its first insurer, was liable for any workers' comp benefits that might become payable to applicant/home-care givers for claimed CT injuries for entire period of employment, when Court of Appeal found that services provided by applicants/home-care givers to their quadriplegic brother included duties that were, in words of Labor Code § 3351(d), "personal and not in the course of the trade, business, profession, or occupation of the owner or occupant" of residential dwelling (n this case, residence purchased by trust, which also paid for nursing, housekeeping, and other services rendered by applicants), that applicants' services were not on behalf of business of trust fund that employed applicants and that was established to furnish care for brother, so that policy provision of trust fund's second insurer that excluded coverage "arising out of the business pursuits of an insured" was inapplicable

An Independent Home Support Service, Inc v. Superior Court of San Diego County (2006) 71 CCC 1779

Employment Relationships–Domestic Workers Referral Agencies–Court of Appeal held that, by complying with Civil Code § 1812.5095(b)(1)-(9), referral agency that provided domestic workers to individuals and entities was deemed not to be employer, for purposes of workers' comp, of domestic workers it referred, when Court of Appeal found that, if compliance with that statute did

not remove agency from category of “employer” for workers’ comp purposes, there would be no rational reason why legislature would require in Civil Code § 1812.5095(d) that agency give notice to domestic workers it will refer that they are not eligible for workers’ comp benefits through agency if agency complies with Civil Code § 1812.5095(b)(1)-(9) and require in Civil Code § 1812.5095(f) that agency give notice to person seeking domestic worker that agency is not employer of domestic worker referred by agency and that person seeking domestic worker may have employer responsibilities, including workers’ comp, and that items listed in Civil Code § 1812.5095(b)(1)-(9) that agency must comply with to be deemed not employer of domestic worker are same type of factors that would compel finding that company or individual was not employer of worker for workers’ comp purposes under common-law tests

Jobbagy v. WCAB (2006) 71 CCC 1882 (writ denied)

Employment Relationships–Independent Contractor–WCAB held that applicant Superior Court interpreter was independent contractor on date of injury, 4/25/94, considering factors set out in *S.G. Borello & Sons, Inc v. Dept. of Industrial Relations*, when applicant was hired to provide one-half day of Spanish interpreting services on date of injury, and WCAB found that (1) employer did not have detailed control in part because applicant controlled her own schedule and defendant provided only locations for waiting for assignments and working, (2) applicant’s work as certified interpreter was distinct occupation or business from that of defendant’s, (3) applicant regularly worked for various judicial districts, including defendant’s, with daily renewable contracts with defendant for full-or half-days of service, (4) defendant paid applicant twice per month for number of days worked, (5) applicant’s services were required by federal law and were thus part of defendant’s regular business, and (6) parties here believed that applicant was independent contractor and signed contract so indicating

CIGA

CIGA v. WCAB (White); CIGA v. WCAB (Torres) (2006) 71 CCC 139

CIGA–Covered Claims–Court of Appeal, following *CIGA v. WCAB (Karaiskos)*, and annulling WCAB decision, held that EDD lien for temporary unemployment compensation disability benefits paid to disabled workers was obligation to State of California because EDD was department of State of California, so that its lien claim was not, pursuant to Insurance Code § 1063.1(c)(4), “covered claim” that CIGA was required to pay, and that it made no difference whether lien was litigated after settlement agreement, as in *Karaiskos*, or litigated along with injured worker’s other claims, as in present case.

Hernandez v. WCAB (2006) 71 CCC 369

CIGA–Covered Claims–Penalties–Court of Appeal, denying applicant’s petition for writ of review, held that CIGA was not liable for Labor Code § 5814 penalties assessed against insolvent insurer’s pre-liquidation delays, when Court of Appeal found that amendment to Insurance Code § 1063.1(c)(8), effective 1/1/2004, in which legislature excluded Labor Code § 5814 penalties from definition of covered claims for which CIGA was liable, applied to penalty assessments issued by WCJ in present case before 1/1/2004 that were not final on that date because Appeals Board was still reviewing them on reconsideration.

County of Riverside v. WCAB (Cannell) (2006) 71 CCC 530 (writ denied)

CIGA–Other Insurance–Self-insurance–General-Special Employment Relationships–WCAB held that CIGA, on behalf of applicant’s general employer, was relieved of liability and entitled to reimbursement for compensation paid to applicant from injuries to her bilateral feet, back, right hip, and psyche while working for permissibly self-insured special employer on 4/1/97, when if found that Insurance Code § 11663 did not apply, that special employer’s self-insurance constituted “other insurance” under Insurance Code § 1063.1(c)(9), Labor Code § 3211, and *Dennys, Inc. v. WCAB (Bachman)*, and that self-insured special employer was liable for benefits.

Miceli v. Jacuzzi, Inc. (2006) 71 CCC 599 (en banc)

CIGA–Covered Claims–WCAB en banc, following return of case by court of appeal after that court’s decision in *General Casualty Insurance v. WCAB*, which reversed *Miceli v. Jacuzzi, Inc.*, rescinded that previous decision reversed by court of appeal, held that special employer’s insurance was not “other insurance” within meaning of Insurance Code § 1063.1(c)(9), and ordered that petition by CIGA to be dismissed be denied and that CIGA remain party to case, that general employer’s request for dismissal from all cases covered by 5/14/2002 order consolidating cases and staying proceedings be denied, that 5/14/2002 order consolidating cases and staying proceedings be rescinded, and that joint request by general employer and CIGA for new order consolidating and staying cases be denied, when WCAB found that, because of court of appeal’s reversal of WCAB’s previous en banc decision and Supreme Court’s decertification for

publication of court of appeal's opinion, neither decision is citable authority that may be relied on in any other case, including all cases covered by 5/14/2002 consolidation and stay order (with narrow exceptions when court of appeal opinion is relevant under doctrines of law of case, res judicata, or collateral estoppel), that 5/14/2002 consolidation and stay order was intended to apply only during pendency of appellate proceedings in present case, which are now over, that rescission of consolidation and stay order means that each case previously covered by it must now be individually addressed on its own particular facts, that general employer cannot be dismissed from each of consolidated cases because consolidation order no longer applies and there is no authority to support dismissal since court of appeal opinion was decertified for publication, and that new consolidation order would be inappropriate since each case must be evaluated on its own facts.

California Insurance Guarantee Association v. WCAB (Norwood) (2006) 71 CCC 804 (writ denied)

Petitions for Reconsideration–Time to File–WCAB held petition for reconsideration was timely filed, when petition's declarations, executed under penalty of perjury, stated that neither carrier nor claims adjuster received F&A from WCAB's district office, F&A indicated that service was accomplished on 10/5/2005, but also indicated that WCJ did not sign F&A until 10/6/2005, and proper filing and service of F&A would not have been possible on 10/5/2005.

Psychiatric Injuries–Six Month Employment Rule–WCAB held that applicant's claim of compensable consequence injury AOE/COE to psyche was not barred by Labor Code § 3208.3(d) requirement of six months of employment for injuries to psyche, when applicant began working for defendant employer 10/23/95, sustained admitted back and leg injury 1/11/96, returned to work with defendant employer after injury until at least 8/96, and WCAB found that applicant sustained injury to psyche as claimed and that claim was not barred, when it interpreted Labor Code § 3208.3(d) as requiring six months total employment, not six months employment prior to date of initial physical industrial injury, and found that applicant worked for defendant employer for at least nine months total.

CIGA–Covered Claims–Employment Development Department Liens–WCAB deferred EDD lien claim for reimbursement from employer's insolvent workers' comp insurer for temporary unemployment compensation disability benefits paid to disabled worker, pending decision of court of appeal in *Viveros v. North Ranch Country Club* as to whether claim was "covered claim" pursuant to Insurance Code § 1063.1(c)(4) and thus, whether lien was required to be paid by CIGA.

State Compensation Insurance Fund v. WCAB (Martinez) (2006) 71 CCC 973 (writ denied)

CIGA–Other Insurance–Successive Injuries–WCAB applied Ins C § 1063.2(b) and *California Ins. Guarantee Assn. v. WCAB (Weitzman)* to hold that CIGA was entitled to reimbursement from solvent carrier of joint and several benefits, without apportionment, stemming from combined effects of applicant's 2/6/99 spinal injury and her CT injury ending 11/1/2001 to same body part; WCAB ordered that solvent carrier administer future benefits to which applicant was entitled,

because solvent carrier constituted “other insurance” to pay for future benefits.

California Insurance Guarantee Association v. WCAB (Badenhop) (2006) 71 CCC 1150 (writ denied)

CIGA–Covered Claims–LHWCA–WCAB held that CIGA was obligated to reimburse defendant for medical benefits paid to applicant as result of his 8/5/93 back injury, when applicant was eligible for benefits under both federal LHWCA and Calif. workers’ comp system, applicant elected to proceed and was awarded PD benefits pursuant to LHWCA, defendant was liable for medical benefits that were covered under insolvent carrier’s Calif. workers’ comp policy, and defendant paid applicant medical benefits out-of-pocket after carrier became insolvent, then filed claim against CIGA for reimbursement under Calif. workers’ comp policy, and WCAB found that defendant’s claim for reimbursement was not excluded from being “covered claim” under Insurance Code § 1063.1

WCAB Jurisdiction–Coverage Disputes–WCAB held that it had jurisdiction under Labor Code § 5300(a) to determine defendant’s right to reimbursement from CIGA for medical benefits paid to applicant, when applicant was awarded PD benefits pursuant to LHWCA insurance policy, medical benefits were covered under Calif. workers’ comp policy and were paid by defendant after carrier became insolvent, and defendant filed claim for reimbursement from CIGA pursuant to Calif. workers’ comp policy.

Parkwoods Community Association v. California Insurance Guarantee Association (2006) 71 CCC 1275

CIGA–Covered Claims–Other Insurance–Court of Appeal, reversing trial court judgement, held that defendant CIGA was not liable to pay claim of plaintiff community association because, pursuant to Insurance Code § 1063.1(c)(9)(I), other insurance was available to claimant in form of developer and general contractor’s excess insurance coverage, when prior construction defects action brought by community association against developer, general contractor, and various subcontractors, latter of which had been insured by carrier that became insolvent, requiring CIGA to defend subcontractors, was resolved by settlement in which developer and general contractor paid community association amount that exhausted their primary commercial general liability coverage and included contribution from their excess insurance carrier that did not exhaust excess insurance limits, present action was instituted to hold CIGA liable for amount equal to unexhausted excess policy limits, parties to present action stipulated that developer, general contractor, and CIGA’s insureds were jointly and severally liable to community association, and, therefore, unexhausted excess policy limits constituted “other insurance” so that present claim against CIGA was not “covered claim” for which CIGA was liable

Allianz Insurance Co v. California Insurance Guarantee Association (2006) 71 CCC 1437 (writ denied)

CIGA–Covered Claims–WCAB held that first insurer’s request for reimbursement from CIGA was not “covered claim” under Ins Code § 1063.1(c)(5) or (c)(9)(ii) and that CIGA was, therefore, not liable for reimbursement, when applicant sustained cumulative trauma AOE/COE for period ending 10/20/99 while working for defendant/employer insured by second insurer, now represented in liquidation by CIGA, first insurer insured employer during earlier time period when there was no injurious exposure, first insurer provided benefits to applicant to avoid potential penalties and filed petition for reimbursement from second insurer/CIGA, and WCAB found that claims for reimbursement from insurer co-defendants were not covered claims.

Blue Cross of California v. WCAB (Gorgi) (2006) 71 CCC 1587 (writ denied)

CIGA–Other Insurance–WCAB held that group health insurance provided to applicant by lien claimant constituted “insurance,” that lien claimant was “health care service provider” and “insurer,” and that lien claim was not “covered claim” within meaning of Insurance Code § 1063.1(c)(5), so that CIGA, on behalf of employer’s insolvent insurer, was not liable for medical treatment paid for by lien claimant for applicant’s two industrial injuries

CIGA–Other Insurance–C&R–WCAB held that its approval of C&R between CIGA and applicant without first determining whether CIGA was liable for lien claimant’s lien for applicant’s medical treatment did not violate lien claimant’s due process rights

Farmers Insurance Group of Companies v. WCAB (Vargas) 71 CCC 1602 (writ denied)

CIGA–Covered Claims–Other Insurance–WCAB held that CIGA had no obligation to reimburse solvent carrier for disability and medical benefits paid to applicant for which carrier was ultimately found to have no liability and for which CIGA was entirely obligated to pay, when WCAB found that carrier’s claim for reimbursement was not “covered claim” because of Insurance Code § 1063.1(c)(5) and (c)(9)(ii) and decision in *CIGA v. WCAB (Hooten)*

CIGA v. WCAB (Gutierrez) (2006) 71 CCC 1661

CIGA–Covered Claims–Court of Appeal, annulling WCAB decision, held that CIGA was not required to pay lien claim of UC, David Med Ctr., because lien claimant was agency of State of Calif., and Insurance Code § 1063.1(c)(4) excludes from category of “covered claim” any obligation to any state or federal government

CIGA v. WCAB (Hernandez) (2006) 71 CCC 1832 (writ denied)

CIGA–Other Insurance–Successive Injuries–WCAB reversed arbitrator’s finding and held that CIGA was entitled to reimbursement from solvent insurer only for sum equal to solvent insurer’s proportionate share of liability for applicant’s successive left knee injuries and not for total

amount paid by CIGA for TD, VRMA, and medical expenses, when there was no joint and several liability between CIGA and solvent insurer, and WCAB found that there was no “other insurance” under Insurance Code § 1063.1(c)(9)(I) during CIGA’s period of liability

Hewko v. WCAB (Nuss) (2006) 71 CCC 1872 (writ denied)

CIGA–Interest–WCAB held that CIGA was not liable for acts of insolvent insurer before date CIGA was appointed to represent insurer, specifically that CIGA was not liable for WCAB’s previous interest award against Fremont Compensation Insurance due to Fremont’s handling of lien claim when applicant was injured at work on 8/17/93, employer was insured by Fremont, Fremont was liquidated and CIGA appointed on 7/2/2003, at time of liquidation order there was no final WCAB order related to liens, petitioner filed lien for medical treatment for applicant’s industrial injury, and in 5/24/2004 award WCAB ordered Fremont to pay lien, penalties on lien, and interest on lien from date of award and continuing until lien was paid

IVAC Corp v. WCAB (Coronado) (2006) 71 CCC 1878

CIGA–Administering Awards–WCAB held that it had authority to appoint solvent carrier as administrator of applicant’s award and relieve CIGA as administrator more than five years after applicant’s dates of injury, when applicant sustained industrial injuries on 1/3/05, 4/8/96, and during period 6/10/94 through 1/95, applicant’s claims were resolved by stipulated award dated 10/29/97, which divided liability 75 percent to now-insolvent carrier and 25 percent to solvent carrier, no-insolvent carrier administered benefits until its insolvency, at which time CIGA took over administration of its claims, and CIGA subsequently requested order relieving it as administrator

MEDICAL TREATMENT AND LEGAL EXPENSES

Providence St. Joseph Medical Center v. WCAB (Gharabaghi) (2006) 71 CCC 82 (writ denied)

Medical Treatment–ACOEM Guidelines–Presumptions–WCAB held that applicant was entitled to further medical treatment for his 10/2001 admitted back injury, including, but not limited to, two-level artificial disc replacement surgery, when applicant received conservative treatment, later had failed surgery, and continued to have symptoms, AME recommended two-level artificial disc replacement surgery, this type of surgery was eventually approved by FDA, defendant's UR physician recommended against this surgery, based on that physician's understanding of ACOEM Guidelines, and WCAB found that AME's opinions were persuasive, were corroborated by FDA studies on success of artificial disc replacements, and rebutted ACOEM Guidelines.

Glaxo Smith Kline v. WCAB (Batterman) (2006) 71 CCC 283 (writ denied)

Medical Treatment–ACOEM Guidelines–WCAB held that applicant was entitled to medical treatment for her 8/20/2002 industrial injury to her bilateral hands and thoracic region in form of thoracic outlet syndrome, and that medical treatment was to specifically include first right rib resection recommended by applicant's treating physician, when WCAB found that treatment of thoracic outlet syndrome met requirements of Labor Code § 4604.5(e), that thoracic outlet syndrome was mentioned in ACOEM Guidelines, that ACOEM Guidelines recommended conservative treatment, exercises, and testing before surgery, all of which occurred in applicant's case, that ACOEM Guidelines did not clearly approve or disapprove specific treatments for thoracic outlet syndrome, that applicant's injury was covered under ACOEM Guidelines, and that, to extent ACOEM Guidelines were applicable, treatment procedure recommended by applicant's treating physician was consistent with ACOEM Guidelines.

Barr v. WCAB (2006) 71 CCC 411 (writ denied)

Medical Treatment–Post-Utilization Review Procedure–Represented Employee–WCAB held that represented applicant/highway patrol officer, who was awarded further medical treatment after his 8/7/99 industrially-related heart attack and was subsequently prescribed cholesterol-reducing medication by his treating physician, was required to follow post-utilization review dispute resolution procedures set forth in Labor Code §§ 4062 and 4610 and *Willette v. Au Electric Corp.*, when defendant denied liability for cholesterol medication, based on reports of utilization review physician; WCAB rescinded WCJ's order that defendant authorize cholesterol medication and award of Labor Code § 5813 sanctions and returned matter to trial level for compliance with proper statutory procedures.

Fischer v. WCAB (2006) 71 CCC 718 (writ denied)

Medical Treatment–Attendant Care–Stipulated Awards–WCAB found that applicant, who was rendered quadriplegic by 10/23/79 neck and spinal cord injury, was entitled to annual attendant care increases beginning on 5/26/82, but not retroactively from 2/1/81, when applicant received 5/26/81 stipulated award of lifetime PTD indemnity and medical treatment, including attendant care, with provision for annual increases in attendant care compensation according to prevailing inflation rate, and stipulated award provided only for prospective annual increases in attendant care compensation.

Jennings v. WCAB (2006) 71 CCC 424 (writ denied)

Medical Treatment–Post-Utilization Review Procedure–Represented Employee–WCAB held that represented applicant/highway patrol officer, who was awarded further medical treatment for his industrially-related heart/cardiovascular condition during cumulative period ending 10/5/99 and was subsequently prescribed cholesterol-reducing medication by his treating physician, was required to follow post-utilization review dispute resolution procedures set forth in Labor Code §§ 4062 and 4610 and *Willette v. Au Electric Corp.*, when defendant denied liability for cholesterol medication, based on reports of utilization review physician; WCAB rescinded WCJ's order that defendant authorize cholesterol medication and ward of Labor Code § 5813 sanctions and returned matter to trial level for compliance with proper statutory procedures.

Lafond v. WCAB (2006) 71 CCC 427 (writ denied)

Medical Treatment–Post-Utilization Review Procedure–Represented Employee–WCAB held that represented applicant/highway patrol officer, who was awarded further medical treatment for his industrially-related heart/cardiovascular condition during cumulative period ending 3/14/99 and was subsequently prescribed cholesterol-reducing medication by his treating physician, was required to follow post-utilization review dispute resolution procedures set forth in Labor Code §§ 4062 and 4610 and *Willette v. Au Electric Corp.*, when defendant denied liability for cholesterol medication, based on reports of utilization review physician; WCAB rescinded WCJ's order that defendant authorize cholesterol medication and ward of Labor Code § 5813 sanctions and returned matter to trial level for compliance with proper statutory procedures.

Simone v. WCAB (2006) 71 CCC 455 (writ denied)

Medical Treatment–Post-Utilization Review Procedure–Represented Employee–WCAB held that represented applicant/highway patrol officer, who was awarded further medical treatment for his industrially-related heart/cardiovascular condition during cumulative period ending 7/11/2001 and was subsequently prescribed cholesterol-reducing medication by his treating physician, was required to follow post-utilization review dispute resolution procedures set forth in Labor Code §§ 4062 and 4610 and *Willette v. Au Electric Corp.*, when defendant denied liability for cholesterol medication, based on reports of utilization review physician; WCAB rescinded WCJ's order that defendant authorize cholesterol medication and ward of Labor Code § 5813 sanctions and

returned matter to trial level for compliance with proper statutory procedures.

Wolochuk v. WCAB (2006) 71 CCC 458 (writ denied)

Medical Treatment–Post-Utilization Review Procedure–Represented Employee–WCAB held that represented applicant/highway patrol officer, who was awarded further medical treatment for his industrially-related heart/cardiovascular condition during cumulative period ending 10/5/2001 and was subsequently prescribed cholesterol-reducing medication by his treating physician, was required to follow post-utilization review dispute resolution procedures set forth in Labor Code §§ 4062 and 4610 and *Willette v. Au Electric Corp.*, when defendant denied liability for cholesterol medication, based on reports of utilization review physician; WCAB rescinded WCJ’s order that defendant authorize cholesterol medication and ward of Labor Code § 5813 sanctions and returned matter to trial level for compliance with proper statutory procedures.

Zenith Insurance Co. v. WCAB (Moreira) (2006) 71 CCC 661 (writ denied)

Medical Treatment–Utilization Review–ACOEM Guidelines–WCAB relied on recommendation of applicant’s treating physician to find that applicant, who suffered low back injury on 8/3/2004, was entitled to further medical treatment, including discogram, myelogram, CT scan, and preoperative psychological evaluation to cure or relieve from effects of his injury, when opinions of utilization review physician and defendant’s QME, indicating that applicant was not entitled to requested treatment, did not constitute substantial evidence, nor did ACOEM Guidelines preclude treatment; WCAB concluded that, even if ACOEM Guidelines were construed to discourage treatment requested by applicant, opinion of applicant’s treating physician was sufficient to overcome Labor Code § 4604.5 presumption of correctness afforded to ACOEM Guidelines.

Sierra Pacific Industries v. WCAB (Chatham) (2006) 71 CCC 714

Medical Treatment–ACOEM Guidelines–Retroactive Application of SB 899–Court of Appeal, annulling WCAB decision and remanding case for further proceedings, held that § 47 of SB 899, providing that amendment, addition, or repeal of any law made by SB 899 applied prospectively from date of SB 899's enactment (4/19/2004), regardless of date of injury, meant that ACOEM Guidelines, which became basis for determining medical treatment reasonably required to cure or relieve injured worker from effects of his or her injury via amendment of Labor Code § 4060 enacted by SB 899, applied to determine reasonable medical treatment in all cases in which no such determination had been made as of 4/19/2004, when Court of Appeal found that medical treatment in present case was completed almost two months before enactment of SB 899 but that no determination of reasonableness of that treatment was made until 5/2005 when WCJ found, per stipulation of parties, that value of disputed chiropractic services was \$6,430 and that ACOEM Guidelines were not applicable to case, following which WCAB denied reconsideration.

Laier v. WCAB (2006) 71 CCC 856 (writ denied)

Medical Treatment–Treating Physicians–Medical Provider Networks–WCAB held that Labor Code § 4601 did not entitle applicant, who sustained industrial neck injury on 6/11/2002, to choose treating physician outside defendant’s medical provider network (MPN), when defendant had approved MPN with available treating physicians from which applicant could choose.

AT&T v. WCAB (Bigel) (2006) 71 CCC 1146 (writ denied)

Medical Treatment–ACOEM Guidelines–WCAB held that opinion of applicant’s QME indicating that applicant was in need of myofascial pain release therapy and acupuncture to relieve effects of his 12/7/2000 and 2/13/2002 spinal injuries was sufficient to rebut Labor Code § 4604.5(c) presumption of correctness of ACOEM Guidelines on issue of extent and scope of medical treatment and to support award of additional medical treatment at variance with Guidelines, when applicant’s injuries caused 52 ½ percent PD and need for further medical treatment.

Redlands Insurance Co. v. WCAB (Craig) (2006) 71 CCC 1189

Treating Physicians–Medical Provider Networks–Serious Chronic Conditions–WCAB held that applicant who sustained industrial back injury on 6/7/2004 was entitled to delay transfer of his medical treatment to physician within defendant’s medical provider network and continue treating with his primary treating physician outside network, when primary treating physician’s reports established that applicant suffered serious chronic condition as defined under 8 CCR § 9767.9(e)(2) and defendant did not present substantial medical evidence to rebut this determination; WCAB found that primary treating physicians’s failure to issue determination regarding applicant’s condition within 20 days from date determination was requested pursuant to 8 CCR § 9767.9(g) did not automatically entitle defendant to transfer care to network.

Brasher v. Nationwide Studio Fund (2006) 71 CCC 1282 (Significant Panel Decision)

Medical Treatment–Spinal Surgery–Disputes–Procedure–WCAB, in significant panel decision reversing decision of WCJ, held that defendant, in response to treating physician’s recommendation for spinal surgery, has options of (1) authorizing surgery, (2) objecting to surgery pursuant to Labor Code § 4062(b) by filing DWC Form 233 within 10 days of receipt of treating physician’s recommendation, (3) submitting recommendation to utilization review, or (4) pursuing both options (2) and (3), either simultaneously or by filing objection after utilization review denial, meeting time lines for each process, that, if defendant denies surgery pursuant to its utilization review, applicant must object within 10 days of receipt of defendant’s denial, and that dispute will then be resolved under second opinion procedures in Labor Code § 4062(b), when WCAB found that DWC Medical Unit erred when it returned defendant’s DWC Form 233 objection on grounds that utilization review had to be completed and treating physician had to appeal utilization review’s denial of request, that Medical Unit’s responsibilities under Labor Code § 4062(b) commenced with defendant’s initial objection, and that there was no legal basis for delaying second opinion process until applicant appealed utilization review denial.

Ward v. City of Desert Hot Springs (2006) 71 CCC 1313 (Significant Panel Decision)

Medical Examinations—Represented Employees—WCAB, in significant panel decision, held that, for claimed industrial injuries occurring on or after 1/1/2005, in which worker is represented by attorney, disputes regarding compensability of alleged industrial injury must be resolved, pursuant to Labor Code § 4060(c), by procedure provided in Labor Code § 4062.2, that evaluation regarding compensability may not be obtained pursuant to Labor Code § 4064(d), and that, if report is so obtained, it is not admissible, when WCAB found that, prior to its amendment by SB 899, former Labor Code § 4060(c) allowed any party to obtain additional medical reports at their own expense, that this provision was deleted by SB 899 and replaced with current procedure requiring, in cases involving represented employee, that medical evaluation to determine compensability be obtained only by procedure provided in Labor Code § 4062.2, that Labor Code § 4064(d) was not amended by SB 899, that irreconcilable conflict existed between Labor Code § 4064(d), on one hand, and Labor Code § 4060 and 4062.2, on other hand, and that latter statutes prevail because more recently amended and enacted.

County of Stanislaus v. WCAB (Credille) (2006) 71 CCC 1381

Medical Treatment—Further Medical Treatment—Substantial Evidence—Court of Appeal denied defendant's petition for writ of review and held that substantial evidence, consisting of 1997 award for future medical treatment and reporting of two physicians, supported WCAB's decision that applicant was entitled to leg braces on industrial basis, when court found that 1997 award for CT injury to applicant's back, lower extremities, and left shoulder consisted of one-percent PD, after apportioning out vast majority of applicant's disability to her polio, which had necessitated her wearing leg braces since age of four, and further medical treatment reasonably required to cure or relieve from effects of industrial injury, that defendant provided periodic adjustments to applicant's leg braces for nine years after 1997 award, that in 6/2005 applicant's treating physician recommended that her braces be refitted and replaced, that employer disagreed based on medical reporting of one physician, that medical treatment, unlike PD, cannot be apportioned to nonindustrial factors, that once it has been established that industrial injury contributed to need for medical treatment, Labor Code § 4600 required that defendant provide treatment, that opinion of applicant's treating physician was that applicant's braces needed to be replaced, and that opinion of physician who had been applicant's treating physician at time of 1997 award was that applicant's increased knee pain was secondary to natural progression of her industrial and nonindustrial conditions.

Knight v. United Parcel Service (2006) 71 CCC 1423 (en banc decision)

Medical Treatment—MPNs—Notice—WCAB en banc held that defendant was liable for medical treatment self-procured by applicant because defendant neglected or refused to provide reasonable medical treatment by failing to provide required notice to applicant of his rights under MPN, when WCAB en banc found that defendant failed to fulfill requirement that applicant be notified in writing about use of MPN prior to its implementation and at time of injury, that applicant was never notified if treatment had or had not been initiated in MPN, that applicant was never notified

that MPN physician had or had not been designated as primary treating physician, that applicant was never provided notice of his right to be treated by MPN physician of his choice after first visit, and that applicant was never notified of his right to dispute MPN diagnosis and to obtain second and third opinions.

County of Santa Barbara v. WCAB (Rucker) (2006) 71 CCC 1449 (writ denied)

Medical Treatment–Compensable Consequence Injuries–WCAB held that applicant, who sustained admitted industrial back injuries during period 5/10/82 through 10/16/92 and on 3/31/89, was entitled to medical treatment for liver condition, hepatic encephalopathy, and fracture of his right arm, as well as 24-hour home health care pursuant to stipulated award, when substantial medical evidence indicated that high doses of pain medication applicant was taking for his industrial orthopedic injury contributed to his liver disorder and resulting need for home health care, and that effects of medication combined with his other conditions caused him to fall and fracture right arm

Lithia Motors Support Services v. WCAB (Locke) (2006) 71 CCC 1517

PD–Medical Treatment–UR–Court of Appeal, denying defendant’s petition for writ of review, held that substantial evidence supported WCAB’s finding that surgery performed on applicant was both approved by defendant’s insurer and reasonably required to cure or relieve applicant from effects of his industrial injury, so that defendant was liable for applicant’s increased level of PD that resulted from surgery, when Court of Appeal found that defendant’s insurer’s UR nurse certified applicant’s surgery almost two months after AME had issued report concluding that applicant was not candidate for surgery, that AME’s report was communicated to applicant’s counsel prior to surgery but not communicated to applicant or applicant’s surgeon until after surgery was performed, and that defendant’s attempt to rescind approval of surgery was unimpressive after reasonableness of procedure had already passed defendant’s insurer’s own UR process

State Compensation Insurance Fund v. WCAB (Sandhagen) and Sandhagen v. WCAB (2006) 71 CCC 1541

Medical Treatment–UR–Untimely Reports–Court of Appeal held that WCAB acted within its authority in prohibiting use of report generated by untimely UR process in subsequent proceedings challenging treatment decision, when Court of Appeal found that to permit consideration of untimely reports would be inimical to core purpose of Workers’ Compensation Act to provide prompt compensation to injured workers and prompt resolution of disputes; Court of Appeal also held that Labor Code § 5703(a)’s limitation of admissible physician reports to those of attending or examining physicians provided additional support for inadmissibility of untimely UR reports

Medical Treatment–UR–Court of Appeal held that defendant had discretion to undertake or not to undertake UR with respect to any particular proposed medical treatment, when Court of Appeal found that language of Labor Code § 4610 did not impose requirement that UR be used in every

case

Medical Treatment–Objections to Medical Determination–Court of Appeal held that both employers and employees may utilize provisions of Labor Code § 4062 in objecting to treating physician’s medical determination, noting that language of first sentence of statute clearly so indicates.

County of Yuba v. WCAB (Sager) (2006) 71 CCC 1598 (writ denied)

Medical Treatment–Apportionment–C&R–WCAB found that Labor Code § 5005 principle of reducing defendant’s liability for proportion of liability represented by settling defendant in single cumulative injury case did not apply in cases of successive cumulative injuries, and that WCJ erred in applying Labor Code § 5005 to apportion medical treatment award by percentage as between applicant’s 7/26/85 and 1/27/94 specific injuries, and cumulative injury that had previously been settled by way of C&R

County of Sonoma v. WCAB (Duckett) (2006) 71 CCC 1860 (writ denied)

Medical Treatment–Nursing Services–WCAB held that applicant was entitled to reimbursement for in-home nursing services provided by his mother, even though applicant did not pay for services and no lien was filed, when applicant’s treating physician prescribed home care nursing services and evidence indicated that services were medically reasonable and necessary

AME/QME PROCEDURES

Cortez v. WCAB (2006) 71 CCC 155

Qualified Medical Examinations–Procedures–Injuries Prior to January 1, 2005–Court of Appeal, for reasons set forth in *Nunez v. WCAB*, held that medical evaluation and reporting procedure of pre-SB 899 Labor Code § 4062 applied to represented cases with date of injury prior to January 1, 2005, that Labor Code § 4050 may not be utilized to circumvent medical evaluation and reporting procedure of pre-SB 899 Labor Code § 4062, and that Labor Code § 5701 should not be utilized to order medical evaluation that appears to violate pre-SB 899 Labor Code § 4062 and may generate report that is inadmissible at trial.

Nunez v. WCAB (2006) 71 CCC 161

Qualified Medical Examinations–Procedures–Injuries Prior to January 1, 2005–Court of Appeal, affirming WCAB’s decision, held that pre-SB 899 version of either Labor Code § 4061 or 4062 applied when medical evaluation of represented applicant was required to resolve dispute arising out of injury occurring before January 1, 2005, when Court of Appeal found that plain language of post-SB 899 Labor Code § 4062.2 limited its applicability to injuries occurring on or after January 1, 2005, that it would be illogical to allow vacuum in which defendant would have no right to have medical evaluation performed, that WCAB correctly relied on *Simi v. Sav-Max Foods, Inc.*, in which WCAB had held that defendant had right to compel medical evaluation of applicant for 2002 admitted injury pursuant to pre-SB 899 version of Labor Code § 4062, and that this conclusion was consistent with Section 47 of SB 899, which stated that SB 899 applied prospectively from date of SB 899’s enactment, regardless of date of injury, unless otherwise specified, and SB 899’s Labor Code § 4062.2 did otherwise specify in confining its applicability to injuries occurring on or after January 1, 2005.

Trojan Battery Co., Inc. v. WCAB (Garcia) (2006) 71 CCC 308 (writ denied)

Independent Medical Examiners–Time to Object–WCAB held that defendant did not timely object to reports and deposition testimony of independent medical examiner, when objection was made at time reports and testimony were admitted into evidence, which was more than 23 months after WCJ issued order appointing independent medical examiner, and defendant did not file petition for reconsideration or removal of WCJ’s order.

Larios v. WCAB (2006) 71 CCC 430 (writ denied)

Qualified Medical Evaluations–Injuries Prior to January 1, 2005–WCAB relied on its en banc decision in *Simi v. Sav-Max Foods, Inc.*, to find that procedures for obtaining medical examinations set forth in Labor Code §§ 4060 and 4062.2, as amended by SB 899, did not apply to applicant, who alleged specific injury to her back on 11/7/2003 and cumulative in form of stress, crying spells, and restricted work, ending on 11/10/2003, since SB 899 amendments apply only to injuries occurring on or after January 1, 2005.

Petitions for Removal–WCAB denied applicant’s Petition for Removal from WCJ’s Order compelling her attendance at medical evaluations set by defendant, despite defendant’s failure to notify applicant’s attorney of its intention to obtain order, when notice to applicant was not required and applicant did not show irreparable injury or prejudice by defendant’s failure to provide notice.

Petitions for Reconsideration–Final Orders–WCAB dismissed applicant’s Petition for Reconsideration of WCJ’s Order compelling her attendance at medical evaluations set by defendant, on basis that WCJ’s Order was interlocutory discovery order and not final order within meaning of Labor Code § 5900.

Power Dodge of Valencia v. WCAB (Gonzalez) (2006) 71 CCC 967 (writ denied)

Medical-Legal Procedure–Spinal Surgery–Objections to Treating Physician’s Determination–WCAB held that defendant was liable for medical treatment costs related to spinal surgery that applicant underwent on 8/7/2004 at recommendation of his treating physician and for TTD benefits stemming from applicant’s 5/31/2002 industrial back injury, when defendant improperly failed to comply with spinal surgery second opinion provisions of Labor Code § 4062(b) and 8 CCR § 9722.1 and, instead, obtained second opinion from QME after objecting to treating physician’s spinal surgery recommendation and failing to reach agreement with applicant on use of AME.

Ward v. City of Desert Hot Springs (2006) 71 CCC 1313 (Significant Panel Decision)

Medical Examinations–Represented Employees–WCAB, in significant panel decision, held that, for claimed industrial injuries occurring on or after 1/1/2005, in which worker is represented by attorney, disputes regarding compensability of alleged industrial injury must be resolved, pursuant to Labor Code § 4060(c), by procedure provided in Labor Code § 4062.2, that evaluation regarding compensability may not be obtained pursuant to Labor Code § 4064(d), and that, if report is so obtained, it is not admissible, when WCAB found that, prior to its amendment by SB 899, former Labor Code § 4060(c) allowed any party to obtain additional medical reports at their own expense, that this provision was deleted by SB 899 and replaced with current procedure requiring, in cases involving represented employee, that medical evaluation to determine compensability be obtained only by procedure provided in Labor Code § 4062.2, that Labor Code § 4064(d) was not amended by SB 899, that irreconcilable conflict existed between Labor Code § 4064(d), on one hand, and Labor Code § 4060 and 4062.2, on other hand, and that latter statutes prevail because more recently amended and enacted.

County of Santa Barbara v. WCAB (Rucker) (2006) 71 CCC 1449 (writ denied)

Medical-Legal Procedure–Change of QME–Admissibility of QME’s Reports–WCAB found that reports of defendant’s QME were inadmissible, when defendant had changed QMEs to evaluate applicant’s psychiatric condition without showing that original evaluator was unavailable and without good cause.

Gateway Chevrolet v. WCAB (Welch) (2006) 71 CCC 1864 (writ denied)

Medical-Legal Procedure–Spinal Surgery–Prospective Application of SB 899–WCAB held that Labor Code § 4062(b), setting forth procedure for resolving spinal surgery disputes, applied prospectively to resolve dispute over applicant’s entitlement to spinal surgery for 5/21/97 injury to his back and legs, when defendant failed to authorize spinal surgery as recommended by applicant’s treating physician

Medical-Legal Procedure–Spinal Surgery–Second Opinion Physicians–WCAB found that physician chosen by parties to resolve dispute over applicant’s need for spinal surgery was second opinion physician under Labor Code § 4062(b), as enacted by SF 899, rather than AME under pre-SB 899 Labor Code § 4062, and that his recommendation, in report dated 10/3/2005, that applicant undergo spinal surgery constituted substantial evidence upon which to find defendant liable to provide surgery

Medical-Legal Procedure–Spinal Surgery–Second Opinion Physicians–Right to Cross-Examine–WCAB found that defendant did not, prior to expedited hearing, have right to cross-examine second opinion physician with regard to his opinion on applicant’s need for spinal surgery under Labor Code § 4062(b), when Labor Code § 4062(b) did not mention whether defendant has right to cross-examine second opinion physicians if surgery is recommended, and, in balancing rights to parties with interest of expeditious determination regarding applicant’s right to surgery, there was insufficient basis to allow cross-examination

TEMPORARY DISABILITY

Lee v. WCAB (2006) 71 CCC 434 (writ denied)

TTD–WCAB held applicant was TTD from 7/6/2003 through 11/3/2003 as result of applicant's admitted 8/25/99 industrial low back injury, when applicant psychiatric QME indicated applicant was not yet P&S but had at no time been precluded from doing his work on purely psychiatric basis, and applicant's orthopedic physician indicated applicant became P&S 11/4/2003.

Parsec, Inc. v. WCAB (Blazer) (2006) 71 CCC 651 (writ denied)

TTD–P&S Status–WCAB held that applicant, who suffered 6/2/99 low back injury and was denied authorization by defendant for IDET procedure recommended by his treating physician and QME, was temporarily disabled from date treating physician requested authorization for IDET to date and continuing, despite fact that all reporting physicians declared applicant to be permanent and stationary, when WCAB found that applicant needed to undergo IDET procedure to reach maximum medical improvement.

Denny's Inc. v. WCAB (Kakudo) (2006) 71 CCC 831 (writ denied)

TD–Jurisdiction–Statute of Limitations–WCAB held that it had jurisdiction to award applicant TD for period 11/16/2003 and continuing, more than five years after applicant's 10/13/95 industrial injuries to his neck, teeth, gums, and psyche, even though applicant was not continuously temporarily disabled from date of injury, when applicant had received prior award of continuing TD and medical care that had never been legally terminated, and there had never been finding or award of PD.

Zarzosa v. WCAB (2006) 71 CCC 981 (writ denied)

TD–Medical Treatment for Non-Industrial Condition–WCAB held that applicant who sustained admitted back injury during period 11/7/2002 to 11/8/2002, after only several days of employment with defendant, was not entitled to TTD indemnity for periods of medical treatment for non-industrial psychiatric treatment necessary to cure or relieve from effects of her industrial back injury, when back injury was found to be P&S.

Signature Fruit v. WCAB (Ochoa) (2006) 71 CCC 1044

TD–Seasonal Workers–Court of Appeal, annulling WCAB decision, held that, pursuant to Labor Code § 4653, TD during seasonal employee's in-season period of regular employment is payable based on two-thirds of employee's in-season average weekly earnings, but seasonal employee was not entitled to TD during off-season when parties stipulated that employee did not have any off-season earnings, when Court of Appeal found that TD is intended as substitute for injured employee's lost wages, so that it would be illogical to award employee TD as wage replacement when it is undisputed that there otherwise would be no wage to replace.

Ashley v. WCAB (2006) 71 CCC 1143 (writ denied)

TTD–Credit–WCAB held defendant was entitled to credit for TTD benefits it overpaid after applicant’s P&S date for 6/27/2003 industrial injury, when applicant received award for ongoing TTD benefits, on 3/16/2005 defendant filed petition to terminate TTD benefits as of applicant’s P&S date, parties stipulated that applicant’s P&S date was 1/25/2005, and WCAB found that 8 CCR § 10462 did not automatically require 10 days of TTD payments after date of filing petition to terminate TTD but instead granted discretion to WCAB, and presumption of Labor Code § 4651.1 that TTD continued for 10 days after filing of petition to terminate was rebutted by parties’ stipulation to P&S date.

Hernandez v. WCAB (2006) 71 CCC 1165 (writ denied)

TTD–WCAB held applicant was entitled to TTD ending on P&S date given by applicant’s QME (3/22/2005), for applicant’s 5/7/2003 industrial injury to both knees, and fact that applicant needed further medical treatment, including bilateral knee surgery, was not sufficient by itself to conclude he was TTD in period after P&S date when he had not undergone suggested surgery.

Manpower Temporary Services v. WCAB (Rodriguez) (2006) 71 CCC 1614 (writ denied)

TD–Termination of Employment–WCAB held that applicant with 2/4/2005 right ankle injury was entitled to TD benefits for period following his termination from modified duty, when defendant had not given applicant prior reprimands or warnings before terminating him and failed to prove that termination was for “good cause”

TD–Rate–Earnings–WCAB held that applicant was entitled to TD benefits for period following his termination from modified duty based on his modified work earnings, rather than on his pre-injury earnings, because, absent his termination, applicant would have been performing work whose rate reflected his actual loss of earnings.

Signature Fruit Co. v. WCAB (Bedoy) (2006) 71 CCC 1752

TD–Seasonal Workers–Court of Appeal, annulling WCAB’s order granting TTD benefits to seasonal worker during her regular period of unemployment when she admittedly removed herself from labor market during her off-season, followed same Court of Appeal’s decision in *Signature Fruit Co v. WCAB (Ochoa)* to hold that, when employee does not have any off-season earnings and does not compete in open labor market during portion of year, employee is not entitled to TD payments during that season

Signature Fruit Co v. WCAB (Jacobo) (2006) 71 CCC 1755

TD–Seasonal Workers–Court of Appeal, annulling WCAB’s order granting TD benefits to seasonal workers during her regular period of unemployment when she admittedly removed herself from labor market during her off-season, followed same Court of Appeal’s decision in

Signature Fruit Co v. WCAB (Ochoa), to hold that, when employee does not have any off-season earnings and does not compete in open labor market during portion of year, employee is not entitled to TD payments during that season

CIGA v. WCAB (Lobos) (2006) 71 CCC 1835 (writ denied)

TD—Credit—WCAB denied defendant CIGA’s request to take credit for TTD overpayment against penalty previously assessed in 9/9/2002 award, when WCAB found no evidence on why defendant overpaid TTD, no evidence that applicant misled defendant, any error in making overpayment was defendant’s, and defendant did not properly challenge applicant’s entitlement to TTD in disputed period

City of San Rafael v. WCAB (Jones) (2006) 71 CCC 1848 (writ denied)

TD—Period of Disability—WCAB held that opinion of applicant’s QME coupled with applicant’s credible trial testimony, indicating that applicant/firefighter who suffered industrially-related colon cancer on cumulative basis through 12/29/2000 was unable to work from 3/12/2002 due to his cancer and treatment, supported finding that applicant was TTD from 3/12/2002 and continuing

PERMANENT DISABILITY

Aldworth Company/Keystone Freight v. WCAB (Lawrence) (2006) 71 CCC 1

PD–Apportionment–Retroactive Application of SB899–Court of Appeal, annulling WCAB decision that had relied on its en banc decision in *Scheftner v. Rio Linda School District*, held that SB 899's apportionment provisions applied to present case, which was pending and not yet final on SB 899's 4/19/2004 effective date, with Court of Appeal citing *Marsh v. WCAB*, *Kleeman v. WCAB*, and *Rio Linda School District v. WCAB (Scheftner)*.

Sharp Grossmont Hospital v. WCAB (Powell) (2006) 71 CCC 85 (writ denied)

PD–WCAB found that applicant was PTD, when reports of applicant's treating physician, coupled with applicant's credible testimony and opinion of VR counselor indicating that applicant was unable to compete in open labor market and was unemployable due to her back pain, urinary incontinency, and unpredictable bowel function, constituted substantial evidence to support that finding.

PD–Apportionment–Pre-existing Disability–WCAB held that defendant failed to meet its burden of proving apportionment under Labor Code § 4663 of applicant's PTD to non-industrial causation, when QME's opinion offered by defendant was conclusory, contradictory, and without basis.

Zenith Insurance Co. v. WCAB (Marquez) (2006) 71 CCC 118

PD–Successive Injuries–WCAB relied on applicant's credible testimony and report of QME to find that applicant's 9/17/2002 right knee injury constituted separate specific industrial injury, and not compensable consequence of her original 9/21/99 injury to her knees hands, and back, and that two injuries became P&S at same time, entitling applicant to combined PD award and creating joint and several liability between insurers having coverage on dates of injury.

Pasquotto v. Hayward Lumber (2006) 71 CCC 223 (en banc decision)

PD–Apportionment–C&R–WCAB held en banc that order approving C&R, without more, is not “prior award of permanent disability” within meaning of Labor Code § 4664(b).

PD–Apportionment–C&R–WCAB held en banc that, when there is no “prior award of permanent disability” within meaning of Labor Code § 4664(b), medical reports and other evidence relating to prior industrial injury that was settled by C&R still may be relevant in determining whether any PD found after subsequent industrial injury was caused by “other factors” under Labor Code § 4663.

PD–Apportionment–C&R–WCAB held en banc that concept of medical rehabilitation from prior industrial disability remained viable under Labor Code § 4663, although, even if injured employee

had medically rehabilitated from prior industrial disability, this did not necessarily preclude prior injury from being “other factor” causing employee’s subsequent disability.

California Water Service v. WCAB (Pizzurro) (2006) 71 CCC 251 (writ denied)

PD–Apportionment–WCAB relied on opinion of AME to award applicant 49-percent PD as result of industrial injuries to his knees and his neck during period 1/24/72 through 10/11/2000, during period 10/8/2001 to 10/9/2001, and on 3/11/2002, and found no basis for apportionment of disability to non-industrial causation under *Escobedo v. Marshalls*, when AME attributed 75 percent of applicant’s neck pathology to natural aging process and 25 percent to industrial injuries, but failed to attribute any specific percentage of PD to non-industrial factors.

Coca Cola Bottling Co. v. WCAB (Saucedo) (2006) 71 CCC 279 (writ denied)

PD–Apportionment–WCAB held that AME’s report adequately addressed apportionment under Labor Code §§ 4663 and 4664, as enacted by SB 899, when AME found that applicant’s CT during period 1976 through 6/11/2001 was responsible for 100 percent of his left and right wrist disabilities and that his 6/11/2001 injury was responsible for 100 percent of his lower back and left ankle disabilities; WCAB held that well-reasoned reports of AME, coupled with evaluator’s deposition testimony and applicant’s credible testimony, constituted substantial evidence to support PD award of 83 percent, without apportionment to degenerative disc disease.

Landmark Education v. WCAB (Anbender) (2006) 71 CCC 288 (writ denied)

PD–Apportionment–Chronic Fatigue Syndrome–WCAB applied pre-SB 899 Labor Code § 4660 and relied on opinion of applicant’s physician consultant and applicant’s testimony to find that applicant’s 7/20/90 industrial injury from food poisoning, which resulted in chronic fatigue syndrome, caused 100-percent PD without apportionment, when applicant became employed in his own business after his injury but this work did not contribute to extent of his PD and fact that he made significant earnings through this work did not preclude finding of PTD.

University of the Pacific v. WCAB (Hern) (2006) 71 CCC 312 (writ denied)

PD–Apportionment–WCAB applied principles set forth in *Wilkinson v. WCAB*, and relied on opinion of applicant’s QME, applicant’s credible testimony, and rating specialist’s recommended rating, to award applicant 90-percent PD for 7/21/99 specific injury to right upper extremity and CT to back and knees through 5/31/2003 with credit to defendant against new PD award for money previously paid pursuant to prior stipulated award of 24 ½ percent PD for 7/21/99 upper extremity injury, when there was good cause to reopen applicant’s prior PD stipulated award for new and further disability, and prior disability combined with disability resulting from applicant’s subsequent cumulative injuries to cause 90-percent PD.

Welcher v. WCAB (2006) 71 CCC 315 (writ denied)

PD–Apportionment–WCAB awarded applicant eight-percent PPD for cumulative trauma industrial right leg injury through period ending 3/22/2001 (with compensable consequence injuries to right hip and back), after apportionment, when WCAB relied on *Nabors v. Piedmont Lumber & Mill Co.* And found that applicant’s overall PD was 71 percent, based on opinions from AME, and that applicant had received 62.5-percent PPD stipulated award for 1990 industrial right lower and right upper extremity injury while employed by different employer, and WCAB subtracted 62.5 percent from 71 percent and rounded result to eight percent.

Leung v. WCAB (2006) 71 CCC 437 (writ denied)

PD–Apportionment–WCAB held that AME’s apportionment of 75 percent of applicant’s overall 43-percent PD to his 6/6/2001 industrial back injury and 25 percent to asymptomatic pre-existing degenerative disc disease, constituted substantial evidence to support award of 32-percent PD, after apportionment, pursuant to Labor Code § 4663, when AME fully explained his opinion on apportionment, identified underlying factors to be degenerative disc and joint disease, applied apportionment requirements to his findings, and complied with standards set forth in *Escobedo v. Marshalls*.

Madayag v. WCAB (2006) 71 CCC 441 (writ denied)

PD–Apportionment–Opinion of AME that 40 percent of overall 46-percent PD caused by applicant’s 11/27/2001 back injury should be apportioned to his pre-existing, non-industrial degenerative disc disease constituted substantial evidence to support WCAB’s finding of apportionment under Labor Code § 4663, when examiner stated in medical reports and deposition testimony that applicant would not have had extent of PD he had following his industrial injury, if not for his pre-existing pathology, and WCAB found that examiner adequately explained rationale for his opinion as to apportionment, applied correct legal principles, and did not speculate as to causation.

PD–Apportionment–Apportionment to Pathology–WCAB held that, under *Escobedo v. Marshalls*, it was not improper to apply Labor Code § 4663 to apportion 40 percent of applicant’s overall PD caused by 11/27/2001 industrial back injury to pre-existing, non-industrial pathology.

Constitutionality of Statutes–WCAB held that it had no jurisdiction to determine whether Labor Code § 4663, allowing apportionment of PD to non-industrial pathology was unconstitutional.

Vargas v. Atascadero State Hospital (2006) 71 CCC 500 (en banc)

PD–Apportionment–Retroactive Application of SB 899– WCAB en banc, denying applicant’s petition for removal, held that SB 899 apportionment statutes applied to issue of increased PD alleged in petition to reopen, filed pursuant to Labor Code §§ 5803, 5804, 5410, that was pending on 4/19/2004, date of SB 899’s enactment, when WCAB found that applicant had received award of PD on 1/21/98 and had filed timely petition to reopen, alleging increased PD, which was pending on 4/19/204, and that, in accordance with *Marsh v. WCAB*, SB 899 must be applied to all cases not final on date of its enactment, regardless of date of injury.

PD–Apportionment–Retroactive Application of SB 899–WCAB en banc, denying applicant’s petition for removal, held that, consistent with § 47 of SB 899, which provided that SB 899 did not constitute good cause to reopen or rescind, alter, or amend any existing order, decision, or award of WCAB, SB 899 apportionment statutes could not be used to revisit or recalculate level of PD, or presence or absence of apportionment, determined under final order issued before 4/19/2004, when WCAB followed *Kleeman v. WCAB*, in noting that, so long as present case involved no attempted use of SB 899 apportionment statutes to effect reimbursement of previously awarded compensation, application of SB 899 apportionment statutes was not precluded.

PD–Apportionment–Retroactive Application of SB 899–WCAB en banc, denying applicant’s petition for removal, held that, in applying SB 899 apportionment statutes to issue of increased PD, issue must be determined without reference to how, or if, apportionment was determined in original award.

Biller v. WCAB (2006) 71 CCC 513 (writ denied)

PD–Rating–SB 899–WCAB held that post-SB 899 PDRS, effective 1/1/2005 pursuant to Labor Code § 4660, was applicable in rating applicant’s PD resulting from 7/29/2003 low back injury, when applicant was evaluated for PD on 12/23/2004 and found to be P&S at that time, but evaluation was not signed or filed until after 1/20/2005.

Petitions for Writ of Review–Court of Appeal denied petition for writ of review because petitioner failed to include copy of WCJ’s Report and Recommendation on Petition for Reconsideration and also failed to include one page of order to be reviewed, in violation of CRC, rule 57(a)(1).

Kaiser Foundation Hospitals v. WCAB (Dragomir-Tremoureaux) (2006) 71 CCC 538 (writ denied)

PD–Apportionment–WCAB held that applicant who sustained injuries to her upper extremities on 7/24/98 and cumulatively through 10/30/2000, which caused her to lose use of both hands, was conclusively presumed to have sustained 100-percent PD pursuant to Labor Code § 4662(b), and that conclusive presumption of total PD precluded apportionment of disability to prior award

under Labor Code § 4664(b); WCAB held that, since applicant's PD for loss of use of both hands was conclusively presumed to be total under Labor Code § 4662(b), her lifetime accumulation of awards for upper extremity region of body may exceed 100 percent under Labor Code § 4664(c)(1)

Martinez v. WCAB (2006) 71 CCC 542 (writ denied)

PD–Apportionment–WCAB found that opinion of applicant's treating orthopedist apportioning 20 percent of applicant's overall 69-percent PD to pre-existing degenerative disk disease and osteoarthritis and 80 percent to her 11/5/99 back and hip injuries, constituted substantial evidence to support finding of 55-percent PD pursuant to *Escobedo v. Marshalls*, when orthopedist adequately set forth reasons for, and explained his finding on, apportionment.

Albertson's v. WCAB (2006) 71 CCC 624 (writ denied)

PD–Apportionment–WCAB held that applicant's industrial injuries to her left minor upper extremity, right major elbow, wrists, psyche, and fibromyalgia on 2/24/99, and during cumulative periods 2/24/99 through 3/30/99 and 3/18/99 through 3/30/99, caused 100-percent PD, without apportionment to other factors pursuant to Labor Code §§ 4663 and 4664, when substantial medical evidence supported finding of 100-percent PD and defendant did not meet its burden of proving apportionment under *Escobedo v. Marshalls*

Evidence–Weight of Evidence–Credibility Determinations–WCAB found applicant's testimony regarding her fibromyalgia and its debilitating effects to be credible, despite minor inconsistencies between her trial testimony and her deposition testimony.

Gallo Sales Co. v. WCAB (Lauritson) (2006) 71 CCC 635 (writ denied)

PD–Apportionment–WCAB held that applicant's 8/4/2004 industrial low back injury resulted in 21-percent PD, without apportionment to non-industrial pathology, despite treating physicians' report indicting that 50 percent of applicant's disability was caused by pre-existing spondylolisthesis, when WCAB found that physician's report did not constitute substantial evidence to support finding of apportionment under *Escobedo v. Marshalls* because physician did not explain how or why applicant's pre-existing condition contributed to her disability.

Nabors v. WCAB (2006) 71 CCC 704

PD–Apportionment–Court of Appeal, annulling WCAB opinion and decision after reconsideration and returning case to WCAB with directions to reverse WCJ's order and recalculate amount of applicant's PD benefits in accordance with Court of Appeal's opinion, following *E & J Gallo Winery v. WCAB (Dykes)* to hold that applicant who sustained multiple disabling injuries while working for same employer was entitled to compensation for total disability above any percentage of PD previously awarded, meaning that correct formula for apportioning awards in this situation required calculating most recent without regard to whether

previous award existed, then subtracting dollar amount of previous award from dollar amount of subsequent award, so that “Formula C,” rejected in *Fuentes v. WCAB*, was now, following SB 899, correct formula, and Court of Appeal held that fact that in *Dykes* defendant/employer was self-insured at times of both injuries whereas defendant/employer in present case was insured by different insurers at times of applicant’s two injuries made no difference.

Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn (2006) 71 CCC 783 (en banc)

PD–Retroactive Application of Post-SB 899 PD Rating Schedule–WCAB en banc, rescinding WCJ’s conclusions of law and finding of fact, held that Labor Code § 4660(d), as amended by SB 899, requires that PD rating schedule adopted by Administrative Director effective 1/1/2005 be applied to injuries arising on or after that date and that same schedule is applicable to pending cases in which injury occurred before that date if there has been either no comprehensive medical-legal report or no report by treating physician indicating existence of PD, or if employer is not required to provide notice required by Labor Code § 4061 to injured worker, when WCAB en banc found no inconsistency between second and third sentences of Labor Code § 4660(d) that could be resolved only by viewing third sentence as moot, as WCJ had done, and noted that language of second sentence has been part of Labor Code § 4660 since 1951 and that third sentence was specifically crafted for 1/1/2005 rating schedule, and WCAB en banc remanded case to WCJ to make determination as to whether any exception in third sentence was applicable to make applicant’s cumulative trauma injury ending 11/18/2002 subject to rating under pre-SB 899 rating schedule.

City of Calexico v. WCAB (Valdez) (2006) 71 CCC 817 (writ denied)

PD–Hepatitis C–WCAB’s Reservation of Jurisdiction–WCAB held that, under *General Foundry Service v. WCAB (Jackson)*, it was not precluded by Labor Code § 5804 or by doctors’ findings that applicant’s condition was P&S from reserving jurisdiction over issue of PD resulting from applicant’s hepatitis C virus, when hepatitis C is insidious, progressive disease not subject to traditional definition of term “permanent and stationary,” medical evidence indicated that, although applicant’s condition had remained stationary for several months, it would likely deteriorate over time, and WCAB’s award of 32-percent PD was only interim or temporary determination of applicant’s ultimate PD

Reconsideration–Contents of WCAB’s Decision on Reconsideration–Court of Appeal found that WCAB’s decision denying reconsideration did not violate Labor Code § 5908.5 for failure to address arguments raised by defendant, when WCAB adopted and incorporated WCJ’s report that adequately addressed issues raised.

City of San Buenaventura v. WCAB (Schulte) (2006) 71 CCC 823 (writ denied)

PD–Credit–WCAB held that defendant was not entitled to credit against applicant’s 5/26/2004 award of lifetime PTD for PPD paid to applicant pursuant to prior stipulated award, based on its findings that PPD indemnity was distinctly different benefit from lifetime award of PTD and that applicant was entitled to receive full benefit of each award.

Golden Gate Bridge, Highway & Transportation District v. WCAB (Rodriguez) (2006) 71 CCC 838 (writ denied)

PD–Apportionment–WCAB followed *E & J Gallo Winery v. WCAB (Dykes)* to hold that applicant, who sustained multiple disabling injuries while working for same employer, was entitled to compensation for PPD in excess of compensation for PPD awarded for previous injuries, and that proper procedure for apportioning awards in this situation required calculating most recent award without regard to whether previous award existed, then subtracting dollar amount of previous award from dollar amount of most recent award, so that “Formula C,” rejected in *Fuentes v. WCAB*, was now, following SB 899, correct formula, when WCAB found that applicant’s disability from most recent injury rated 37-percent PPD and that applicant’s disability in stipulated award from earlier industrial injuries with same permissibly self-insured employer was 17-percent PPD, and WCAB apportioned entire previous 17-percent award, computing current award by subtracting dollar amount, \$9,320, awarded for earlier injuries, from dollar amount, \$29,750, awarded for most recent injury, resulting in current PPD award, after apportionment, of \$20,420.

Gonzalez v. WCAB (2006) 71 CCC 842 (writ denied)

PD–Rating–Application of Post-SB 899 PD Rating Schedule–WCAB held that post-SB 899 PD rating schedule, effective 1/1/2005, applied to rate PD resulting from applicant’s 8/16/2003 low back injury, pursuant to language in Labor Code §§ 4658(d) and 4660(d), and SB 899 § 47.

Brodie v. WCAB (2006) 1007

PD–Apportionment–Court of Appeal, annulling WCAB order that had denied reconsideration of WCJ’s apportionment of applicant’s PD pursuant to *Nabors v. Piedmont Lumber & Mill Co.*, followed apportionment formula applied in *E & J Gallo Winery v. WCAB (Dykes)* and *Nabors v. WCAB*, which reversed *Nabors v. Piedmont Lumber & Mill Co.*, but Court of Appeal applied formula differently by converting overall current disability into its monetary equivalent and from that figure subtracting current dollar value of percent of prior disability.

Welcher v. WCAB; Strong v. WCAB; Lopez v. WCAB; Williams v. WCAB (2006) 71 CCC 1087

PD–Apportionment–Court of Appeal affirmed WCAB’s apportionment decision in four cases consolidated on appeal, which had relied on *Nabors v. Piedmont Lumber & Mill Co.*, and Court of

Appeal declined to follow apportionment formula applied in *E & J Gallo Winery v. WCAB (Dykes)* and *Nabors v. WCAB*, which (after WCAB had rendered decisions in present cases) reversed *Nabors v. Piedmont Lumber & Mill Co.*, when Court of Appeal found that SB 899's repeal of Labor Code §§ 4663 and 4750 and enactments of new Labor Code §§ 4663 and 4664 neither clearly expressed nor necessarily implied intent to abandon "Formula A" established by Supreme Court in *Fuentes v. WCAB*, leading Court of Appeal to conclude that WCAB applied proper method for apportioning permanent disability in each of present cases.

PD–Apportionment–Overlapping Disabilities–Court of Appeal held that changes in Labor Code made by SB 899 did not change rule that employee is not entitled to be compensated for PD resulting from new industrial injury to extent that this PD is overlapped by prior PD, even when prior PD involves and/or includes different regions of body.

City & County of San Francisco v. WCAB (Gebresilassie) (2006) 71 CCC 1154 (writ denied)

PD–PTD–Vocational Feasibility–WCAB held that AME's opinion that applicant's 3/16/2000, 6/16/2001, and 12/3/2001 back injuries rendered him unable to compete in open labor market constituted substantial evidence to support finding that applicant was permanently totally disabled as result of all three injuries, despite absence of evidence from VR expert on issue of vocational feasibility, when AME's opinion was supported by applicant's subjective complaints as well as AME's objective findings, it was appropriate for evaluator to determine applicant's medical feasibility for VR, and WCJ had jurisdiction to adopt evaluator's findings as prerequisite for determining vocational feasibility.

Kopping v. WCAB (2006) 71 CCC 1229

PD–Apportionment–Presumption–Court of Appeal held that WCAB correctly determined that, pursuant to Labor Code § 4664(b), applicant was not entitled to prove that he was medically rehabilitated from prior PD when he sustained subsequent industrial injury, when legislature intended statute's presumption to be conclusive, not rebuttable, notwithstanding second sentence in statute, which states that this presumption affects burden of proof.

PD–Apportionment–Overlap–Burden of Proof–Court of Appeal, annulling decision of WCAB, held that WCAB incorrectly determined that applicant had burden of disproving overlap between current PD and previous disability in order to establish his claim to PD benefits, when defendant, while able to rely, pursuant to Labor Code § 4664(b), on conclusive presumption that applicant's PD that was subject of prior award exists at time of subsequent industrial injury, nonetheless had burden of proving overlap in order to establish its right to apportionment of applicant's PD.

Oswalt v. WCAB (2006) 71 CCC 1243

PD–Apportionment–Burden of Proof–C&R–Court of Appeal, annulling WCAB order denying reconsideration of applicant's claim for PD, regarding which WCAB confessed error, held that there was not substantial evidence in record to support WCAB's conclusion that conclusive

presumption in Labor Code § 4664(b) barred applicant's claim for PD benefits for his low back injury suffered in 10/2001, when, pursuant to *Strong v. City and County of San Francisco*, defendant bears burden of proving existence of prior award of PD in order to establish statute's conclusive presumption, that defendant did not meet its burden because only evidence in record of resolution of applicant's 1997 claim for ankle injury was applicant's testimony that he settled that case in c&R, and that this evidence was not persuasive because in *Pasquotto v. Hayward Lumber* WCAB ruled that order approving C&R is not, without more, "prior award of permanent disability" within meaning of Labor Code § 4664(b)

County of Santa Barbara v. WCAB (Rucker) (2006) 71 CCC 1449 (writ denied)

PD–Rating–WCAB found that applicant's 9/16/99 industrial back, knee, and psyche injuries, and cumulative trauma to her hands, wrists, back, knees, and psyche ending on 10/7/99, resulted in 97-percent PD, after apportionment for non-industrial factors related to her knees and back, when, despite conflicting medical opinions, substantial evidence in record supported finding.

PD–Apportionment–WCAB found that applicant's treating physician adequately addressed apportionment of applicant's psychiatric disability under post-SB 899 Labor Code § 4663 and concluded that all of her disability was work related; WCAB did not apportion applicant's psychiatric injury between her 9/16/99 date of injury and her cumulative trauma ending 10/7/99, when treating physician made no such apportionment and both of applicant's injuries occurred while she was working for the same self-insured employer.

Waste Management v. WCAB (De La Pena) (2006) 71 CCC 1469 (writ denied)

PD–Apportionment–WCAB held that report of applicant's treating physician indicating that applicant's PD "is a result of the work-related injury" and "apportionment is not indicated in this case" satisfied requirements of *Escobedo v. Marshalls* and Labor Code § 4663 and, coupled with report of defense QME indicating no apportionment, supported finding that applicant's 10/8/2002 knee injuries caused 48-percent PD, with no basis for apportionment; WCAB found that, despite evidence that applicant suffered from preexisting degenerative knee condition, defendant failed to act diligently in obtaining further medical evidence on issue of apportionment and thus failed to meet its burden of showing that any part of applicant's disability was caused by "other factors"

Yellow Transportation, Inc. v. WCAB (Huls) (2006) 71 CCC 1473 (writ denied)

PD–Apportionment–WCAB held that AME's opinion on apportionment of PD resulting from applicant's cumulative trauma ending on 6/29/2000 did not meet requirements set forth in *Escobedo v. Marshalls* and did not constitute substantial evidence to justify finding of apportionment, when WCAB found that evaluator 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

PD–P&S Status–WCAB held that applicant became P&S with regard to his cumulative injuries on 6/4/2003, when WCAB relied on opinion of applicant’s treating internist, which opinion it found to be supported by applicant’s testimony and by objective MRI findings and thus more persuasive than contrary medical evidence in record, including AME’s opinion

Fresno Unified School District v. WCAB (Stephens) (2006) 71 CCC 1505

PD–Apportionment–Court of Appeal held that, when panel QME testified on deposition that it would be speculative for him to conclude that part of applicant’s back injury was caused by aging, there were no grounds for apportioning applicant’s back injury to nonindustrial factors, despite panel QME’s original report stating that 50 percent of applicant’s low back disability was from normal aging, since WCAB was not bound to follow original report.

Litten v. WCAB (2006) 71 CCC 1611 (writ denied)

PD–Rating–2005 PD Rating Schedule–WCAB held that applicant’s PD should be rated using 2005 PD rating schedule for 6/9/2004 industrial injury, based on Labor Code § 4660, that none of exceptions in Labor Code § 4660(d) applied, that treating physician’s 12/27/2004 report did not provide exception under Labor Code § 4660(d) because report did not indicate existence of PD, and that treating physician’s 1/6/2005 report indicating that applicant had reached P&S status and that applicant’s condition was “roughly the same” did not convert 12/27/2004 report into one “indicating the presence of permanent disability.”

Davis v. WCAB; Torres v. WCAB (2006) 71 CCC 1669

PD–Apportionment–Court of Appeal held that, when legislature enacts statute, legislature is presumed not to have intended to overthrow long-established principles of law unless such intention was clearly expressed or necessarily implied, and that plain language of Labor Code §§ 4663 and 4664 reflected legislative intent to retain “Formula A” established by Supreme Court in *Fuentes v. WCAB*, when Court of Appeal found that legislative history of SB 899 revealed legislature’s intent to reduce workers’ comp costs for employers and that it was inconceivable that legislature intended to abandon “Formula A” in favor of either “Formula B” or “Formula C” of *Fuentes* because to do so would be inconsistent with goal of SB 899, that California public policy, unchanged by Sb 899, encouraging employment of disabled persons, will be furthered by use of only “Formula A,” and that Labor Code § 3202’s requirement that workers’ comp statutes be liberally construed in favor of injured workers cannot supplant intent of legislature as expressed in particular statutes such as Labor Code §§ 4663 and 4664

E.L. Yeager Construction v. WCAB (Gatten) (2006) 71 CCC 1687

PD–Apportionment–Substantial Evidence–Court of Appeal annulled WCAB’s order that found no basis for apportionment since WCAB rejected opinion of IME, which apportioned 20 percent of applicant’s disability to chronic degenerative disease of his lumbar spine, on grounds that opinion was not supported by substantial evidence, when Court of Appeal found that, to be

substantial evidence on issue of approximate percentage of PD due to direct results of injury and approximate percentage of PD due to other factors, medical opinion must be framed in terms of reasonable medical probability, must not be speculative, must be based on pertinent facts and on adequate examination and history, and must set forth reasoning in support of its conclusions, and that IME's opinion on apportionment was based on MRI and x-rays, which clearly showed degenerative disc disease at almost every level of applicant's lower spine, and on fact that applicant had minor back problems prior to industrial injury, and IME state in deposition that his apportionment was based on reasonable medical probability

George Reed, Inc. V. WCAB (Faulkner) (2006) 71 CCC 1708

PD–Rating–Substantial Evidence–Court of Appeal, denying defendant's petition for writ of review, held that WCAB's finding that applicant was 66-percent permanently disabled was supported by substantial evidence, when Court of Appeal found that WCAB properly relied on opinion of applicant's QME that was based on complete and accurate history of applicant, including applicant's history of chiropractic treatment, that defendant's suggestion that applicant's post-injury job as construction elevator operator and his recreational activity of driving four-wheel "quad" all terrain vehicle exceeded applicant's QME's work preclusions was supported by no evidence, that applicant credibly testified as to light and sedentary nature of both activities, and that WCJ's comments regarding his personal experience riding quad vehicles were in nature of calling on his own personal experiences and observations in assessing credibility of testimony and in making determination, which WCJs are permitted to do

Savemart Stores, Inc. V. WCAB (Oneto) (2006) 71 CCC 1727

PTD–Substantial Evidence–Court of Appeal held that WCAB's finding that applicant was PTD was supported by substantial evidence, based on opinion of applicant's QME and applicant's trial testimony, which WCJ found consistent with QME's report, and contrary to report of defendant's QME, which WCJ found to be less persuasive because it failed to address weight-bearing factors by simply stating that there was limitation to light work, a blanket restriction that failed to adequately address restrictions for person with failed back surgery, constant pain, and radiculopathy

PTD–Rating–Court of Appeal upheld WCAB's award of 100-percent PTD, based on rater's 100-percent rating that was consistent with WCJ's rating instructions, which were in turn consistent with applicant's QME report

Shevchuk v. WCAB (2006) 71 CC 1741

PD–Rating–Court of Appeal held that substantial evidence supported WCAB's conclusion that applicant's PD level was 73 percent, not 100 percent as applicant contended, based on opinions of AME and independent vocational evaluator

PD–Apportionment–Overlap–Court of Appeal upheld WCAB’s finding that applicant’s impairments from prior industrial injury to leg and current low back industrial injury were similar in kind, and thus, subject to overlap, based on *Strong v. City & County of San Francisco* in which WCAB ruled that Labor Code § 4664 required apportionment of disabilities involving different body regions unless applicant disproved overlap, i.e., applicant demonstrated that prior PD and current PD affected different abilities to compete and earn, which applicant here had not done

PD–Apportionment–Court of Appeal, annulling WCAB’s decision and following *E & J Gallo Winery v. WCAB (Dykes)*, held that “Formula C,” rejected by Supreme Court in *Fuentes v. WCAB*, was correct method of calculating applicant’s PD benefits

Costa v. Hardy Diagnostic (2006) 71 CCC 1797 (en banc)

WCAB’s Duty to Develop Record–WCAB en banc held that, pursuant to Labor Code § 5701 and 5906, WCAB had authority and duty to develop record when necessary to accomplish substantial justice by obtaining additional evidence, including medical evidence, at any time during proceedings, and that in present case further development of record was justified by fact that issues concerning validity of 2005 PD rating schedule and whether rating under that schedule may be rebutted were ones of first impression affecting large numbers of worker’s comp cases in California, and issue of whether 1997 or 2005 PD rating schedule applied was unsettled at time of proceedings in this case

PD–2005 PD Rating Schedule–Validity of Schedule–WCAB en banc held that applicant had not met his burden of proving 2005 PD rating schedule invalid, when it found that applicant had not shown that actions of administrative director in adopting that schedule were arbitrary, capricious, or not reasonably necessary to effectuate purpose of, or inconsistent with, Labor Code § 4660

PD–2005 PD Rating Schedule–Ratings–Rebuttal Evidence–Costs–WCAB en banc held that Labor Code § 4660, as amended by SB 899, allowed parties to present rebuttal evidence to PD rating under 2005 PD rating schedule and that costs of such rebuttal evidence may be allowable, when it found that legislature did not alter statutory language that schedule “shall be prima facie evidence of the percentage of PD to be attributed to each injury covered by the schedule,” and that such language allowed for introduction of rebuttal evidence to such ratings; WCAB en banc held that applicant’s VR consultant witness, whose testimony did not rebut applicant’s PD rating, was nonetheless entitled to be reimbursed by defendant’s insurer for reasonable costs associated with her testimony

PD–Retroactive Application of 2005 PD Rating Schedule–WCAB en banc held that, pursuant to *Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn*, 2005 PD rating schedule applied to applicant’s pre-1/1/2005 injury, when applicant had not alleged any exception in Labor Code § 4660(d) that pertained in present case

Aldi v. WCAB (2006) 71 CCC 1822 (writ denied)

PD–Retroactive Application of 2005 Schedule for Rating Permanent Disability–WCAB en banc, rescinding WCJ’s conclusions of law and finding of fact, held that Labor Code § 4660(d), as amended by SB 899, requires that PD rating schedule adopted by AD effective 1/1/2005 be applied to injuries arising on or after that date and that same schedule is applicable to pending cases in which injury occurred before that date if there has been either no comprehensive medical-legal report or no report by treating physician indicating existence of permanent disability, or if employer is not required to provide notice required by Labor Code § 4061 to injured worker, when WCAB en banc found no inconsistency between second and third sentences of Labor Code § 4660(d) that could be resolved by only viewing third sentence as moot, as WCJ had done, and noted that language of second sentence has been part of Labor Code § 4660 since 1951 and that third sentence was specifically crafted for 1/1/2005 rating schedule, and WCAB en banc remanded case to WCJ to make determination as to whether any exception in third sentence was applicable to make applicant’s cumulative trauma injury ending 11/18/2002 subject to rating under 1997 rating schedule

Attia v. WCAB (2006) 71 CCC 1825 (writ denied)

PPD–Rating–WCAB awarded applicant 89-percent PPD for two industrial injuries (CT injury from 11/99 through 4/24/2000 and specific injury on 4/24/2000) to multiple body parts, based on opinions from three AMEs (especially AME in rheumatology), DEU rating, and cross-examination of DEU rater

PPD–Rating–WCAB held that applicant was not entitled to 100-percent PTD, based on opinions from three AMEs (in rheumatology, orthopedics, and psychiatry), and WCAB also considered testimony from VR counselor that applicant had diminished future earning capacity because of industrial injury, but WCAB did not find that testimony dispositive on issue of extent of applicant’s PPD

PPD–Rating–Multi-Disabilities Table–WCAB based its 89-percent PPD rating on opinions from three AMEs and DEU rater, when DEU rater used multiple disability table, and WCAB held that multiple disability table was not repealed by SB 899 and applied here because of applicant’s dates of injury, opinions from three AMEs, and WCAB’s finding that SB 899 did not change need to avoid pyramiding of PD awards as pyramiding was defined in 1997 rating schedule

Chevron U.S.A. Inc v. WCAB (Lee) (2006) 71 CCC 1845 (writ denied)

PD–Apportionment–WCAB applied principles set forth in *E & J Gallo Winery v. WCAB (Dykes)* to calculate apportionment of applicant’s PD under Labor Code §§ 4663 and 4664, when applicant sustained two successive injuries to same body part while working for same self-insured employer, applicant’s overall level of PD after later injury rated to 77 percent, worth \$112,585, and WCAB found that defendant was entitled to take credit of \$11,280 from this amount for applicant’s prior 20-percent PD award

City of Vacaville v. WCAB (Lee) (2006) 71 CCC 1853 (writ denied)

PD–Rating–1997 Schedule for Rating PD–WCAB held that 1997 schedule for rating PD applied to rate PD resulting from applicant’s 5/4/2004 knee injury, when 12/30/2004 report by applicant’s treating physician, stating that applicant “will indeed have permanent disability from his injury but that will not be determined until he is permanent and stationary which would be anywhere from 2-4 months from now,” constituted report by treating physician indicating existence of PD for purposes of Labor Code § 4660(d) and application of 1997 rating schedule

County of Sonoma v. WCAB (Duckett) (2006) 71 CCC 1860 (writ denied)

PD–Apportionment–WCAB applied principles set forth in *E & J Gallo Winery v WCAB (Dykes)* to calculate apportionment of applicant’s PD under Labor Code § 4664, when applicant sustained two successive injuries while working for same self-insured employer, right knee injury on 6/19/90 and left knee injury on 10/29/2001, applicant had received PD award for his 6/19/90 injury, and WCAB subtracted monies awarded for 6/19/90 injury from PD awarded for 10/29/2001 in determining applicant’s PD recovery

Volt Services Group v. WCAB (Sanchez) (2006) 71 CCC 1890 (writ denied)

PD–Rating–1997 Schedule for Rating Permanent Disabilities–WCAB held that 1997 Schedule for Rating Permanent Disabilities applied under Labor Code § 4660(d) to rate PD resulting from applicant’s 8/10/2004 low back, when 11/8/2004 report by applicant’s treating physician, stating that physician “anticipate[d] that the patient will have permanent residuals,” constituted report by treating physician indicating existence of PD under Labor Code § 4660(d) for purposes of applying 1997 rating schedule

DEATH BENEFITS

Riley v. WCAB (2006) 71 CCC 1340 (writ denied)

Death Benefits–Dependents–WCAB held that deceased employee’s granddaughter was not totally dependent on decedent at time of his injury and death on 5/14/2004, within meaning of Labor Code § 4703.5, when WCAB found that infant granddaughter lived with decedent, decedent’s spouse, and infant’s mother and father at time of injury/death and that her mother and father partially contributed toward her support; WCAB held granddaughter was partial dependent of decedent.

Death Benefits–Presumptions–Minor’s Total Dependency–WCAB held that deceased employee’s granddaughter was not entitled to Labor Code § 3501(a) presumption that minor was totally dependent on decedent at time of injury/death because decedent was not infant granddaughter’s parent and was not acting as her parent for purpose of that statute.

Six Flags, Inc v. WCAB (Rackchamroon) (2006) 71 CCC 1759

Death Benefits–Decedent’s Estate–Court of Appeal, granting insurer’s petition for writ of review, annulled WCAB’s award of death benefits to deceased worker’s estate and held that Labor Code § 4702(a)(6)(B), which provided that, when worker without dependents suffered fatal injury AOE/COE, employer must pay \$250,000 to deceased worker’s estate as workers’ comp death benefit, was unconstitutional because constitutional enabling provision, Cal Const., art XIV, § 4, did not identify estates as class of beneficiaries entitled to workers’ comp death benefits, when Court of Appeal found that enabling provision identified only three classes of beneficiaries of workers’ comp benefits, workers, dependents, and State of California, that Supreme Court had declared two prior statutes unconstitutional when statutes went beyond constitutional enabling provision, that drafters of enabling provision did not intend to include estates within definition of dependents, that under present law estates were not dependents, that policy underlying workers’ comp scheme of compensating injured workers and those dependent on them supported conclusion that Labor Code § 4702(a)(6)(B) was unconstitutional, and that legislative history supported same conclusion

VOCATIONAL DISABILITY

Meiers v. WCAB (2006) 71 CCC 79 (writ denied)

VRMA–WCAB held that applicant firefighter was not entitled to retroactive VRMA for period after effective date of his disability retirement under PERS, based on *Ritchie v. WCAB* and that *Ritchie* (involving police officer) was still controlling for injuries prior to 1/1/2004, that RU determination that defendant was liable for retroactive VRMA during disputed period imposed illegal liability on defendant and was void, and that defendant's failure to appeal RU determination did not mean applicant was entitled to VRMA in disputed period.

VRMA–Attorney's Fees–WCAB rescinded WCJ's award of Labor Code § 5814.5 attorney's fees that WCJ based on VRMA awarded to applicant, when WCAB rescinded underlying VRMA award, found that request for accompanying attorney's fees was therefore moot, and dismissed request for accompanying fees.

The May Department Stores Co. v. WCAB (Schwartz) (2006) 71 CCC 302 (writ denied)

VRMA–WCAB held that, for applicant's CT injury AOE/COE ending 9/98, award of retroactive VRMA should begin on date of request for VR services, 3/31/99, even though applicant's QIW status had not been adjudicated at that time, when applicant was ultimately determined to be QIW.

Average Weekly Earnings–WCAB held royalties/residuals were not part of applicant's earnings under Labor Code § 4453, when WCAB found that applicant received royalties/residuals for acting/stunt work done in period of time before date of injury and before beginning retroactive VRMA.

VRMA–Rates–WCAB held that SB 899 did not affect rate at which applicant was entitled to receive VR benefits.

Gamble v. WCAB (2006) 71 CCC 1015

VRMA–Credit–Court of Appeal, annulling WCAB decision, held that defendant was not entitled to credit against VRMA owed to applicant for wages applicant earned from another employer, when Court of Appeal found that VRMA was established by Labor Code § 139.5(d) as two-thirds of employee's average weekly earnings on date of injury, was not intended to replace lost earnings, and thus did not contemplate wage credit for employers.

Vulcan Materials Co. v. WCAB (Raihala) (2006) 71 CCC 1346 (writ denied)

VR–Retroactive VRMA–Applicable Law–WCAB held that QIW with 5/27/99 injuries to his neck, right shoulder, and upper extremities was entitled to VRMA at rate of \$772.05 per week

pursuant to former Labor Code § 4642 from time he reached P&S status, when applicant had been on TD for more than 365 days, defendant failed to notify him of his right to VR as required by former Labor Code §§ 4636(c) and 4637, and, even though former VR statutes were repealed by AB 227 and SB 899, they still apply to pre-1/1/2004 injuries under new Labor Code § 139.5 and based on rationale in *Godinez v. Buffets, Inc.*

VR–VRMA–Rate–WCAB found that applicant was entitled to VRMA at delay rate of \$772.05 per week from 2/1/2002 to present pursuant to former Labor Code § 4642, when defendant failed to advise applicant of his right to VR after more than 365 days of TD, and WCAB found that defendant was liable for more than one year of maintenance allowance at delay rate under new version of Labor Code § 139.5(c).

Fresno Unified School District v. WCAB (Butcher) (2006) 71 CCC 1391

VR–Statute of Limitations–Court of Appeal denied defendant’s petition for writ of review and held that applicant’s claim for VR benefits, made more than five years from her 8/30/96 injury, was timely, when Court of appeal found that applicant filed petition to reopen for new and further disability on 5/17/2001, which was timely filed pursuant to five-year limitations period of Labor Code § 5410, that present case was governed by *Youngblood v. WCAB* and *Sanchez v. WCAB*, which held that former Labor Code § 5405.5 (applicable here because in force at time of applicant’s injury), providing that employee could request VR benefits within one year from date of last finding of PD, extended five-year-from-date-of-injury limitations period of Labor Code § 5410, and that in present case, because there had not yet been last finding of PD, one-year limitations period of former Labor Code § 5405.5 had not even begun to toll.

Paramount Farms v. WCAB (Velasquez) (2006) 71 CCC 1406

VR–VRMA–Court of Appeal, denying defendant’s petition for writ of review, held that defendant was liable for increased VRMA payments because it was at fault for delaying VR services, when Court of Appeal found that applicant and defendant selected QRR, applicant subsequently elected to interrupt VR, almost two years later applicant advised defendant that she wished to continue VR, defendant advised applicant that, during intervening two years, it had developed problematic relationship with QRR “on multiple other cases” and requested that parties agree to different QRR, that parties did not so agree, that defendant then requesting that RU appoint I’VE, and that, because applicant was under no obligation to agree to another QRR after having agreed to original one, these actions by defendant caused delay in making VRMA payments.

Gomez, Maria v. WCAB (2006) 71 CCC 1714

VR–Reinstatement of Services–Statute of Limitations–Court of Appeal, denying applicant’s petition for writ of review, upheld WCAB’s decision that it lacked jurisdiction to award reinstatement of VR services, when Court of Appeal found that applicant, who incurred admitted industrial injury on 8/2/2000, and who elected to interrupt her VR services on 9/2/2003, never sought to reinstate those services within five-year statute of limitations period of Labor Code §

5410, but rather inquired, within that period, only about obtaining settlement of those services

PENALTIES

McCarthy v. WCAB (2006) 71 CCC 16

Penalties–Delay in Payment of Benefits–Retroactive Application of SB 899–Court of Appeal, affirming WCAB decision, held that SB 899 version of Labor Code § 5814 applied to unreasonable delays or refusals to pay compensation that occurred prior to June 1, 2004, operative date of statute, as occurred in present case, when Court of Appeal followed *Abney v. Aera Energy* and *Green v. WCAB*

Hallford v. WCAB (2006) 71 CCC 69 (writ denied)

Discrimination–Labor Code § 132a–WCAB held that applicant, who was terminated from his employment while TD as result of 5/6/99 industrial injuries to his face, mouth, psyche, neck, shoulder, back, chest, and in form of scars and headaches, failed to meet his burden of establishing prima facie case of discrimination under Labor Code § 132a, when he did not allege or present evidence that his termination resulted from his industrial injuries, but rather attributed his termination to his union activity.

Valley Heights, Inc. V. WCAB (Chavez) (2006) 71 CCC 112 (writ denied)

Discrimination–Labor Code § 132a–WCAB held that defendant discriminated against applicant in violation of Labor Code § 132a when it terminated applicant on 6/13/2001, when WCAB found that applicant sustained industrial injury on 1/2/2001, returned to light duty, and then returned to full duty, that applicant’s treating physician took her off work for additional period of TD, that defendant had received treating physician’s certification of new period of TD by time of applicant’s termination, and that defendant terminated applicant for no valid reason, and WCAB found that testimony from defense witnesses was not credible on issues of timing and explanation for termination.

Finely v. WCAB (2006) 71 CCC 361

Penalties–Delay in Payment of Benefits–Stipulations–Court of Appeal, annulling WCAB decision, held that WCAB erred in not enforcing its 1988 award of penalties for delay in payment of TD and medical treatment benefits following 1990 stipulation in which applicant agreed to accept lump sum for his penalty claims for delay in payment of such benefits “to date,” when Court of Appeal found that, at time of 1988 award of penalty “in the amount of 10 percent of medical treatment and temporary disability in this case,” Labor Code § 5814 provided that, in even o unreasonable delay in payment of award, “the full amount of the order, decision or award shall be increased by 10 percent,” that unambiguous language of 1990 stipulation demonstrated that parties intended lump-sum payment to settle only those penalties owed to applicant at that time, that applicant received additional medical treatment and disability after 1990 stipulation, and that these post-stipulation benefits were part of entire amount ultimately awarded, making them subject to 1988 award of penalty.

WCAB's Continuing Jurisdiction--Reopening of Awards--New and Further Disability--Court of Appeal held that WCAB correctly determined that its jurisdiction to reopen case to consider additional TD was defeated by five-year statute of limitations in Labor Code §§ 5410 and 5804, that 1990 stipulation purporting to reserve WCAB jurisdiction in contravention of these statutes was void, and that applicant's orthopedic injury was not insidious, progressive injury for purposes of WCAB's authority to reserve jurisdiction beyond five-year limit.

San Diego Transit v. WCAB (Calloway) (2006) 71 CCC 445 (writ denied)

Discrimination--Labor Code § 132a--WCAB held that defendant violated Labor Code § 132a by refusing to return applicant to her bus driver position from 9/2003 until 12/2003 after she was released to return to work by her primary treating physician (in three reports), another treating physician, and AME, and there was no contrary medical opinion recommending that applicant stay off work.

Discrimination--Labor Code § 132a--WCAB held that applicant made prima facie case of Labor Code § 132a discrimination by showing that (1) defendant deviated from its usual procedures in returning injured workers to their positions, in that defendant's usual procedures were to allow return to work with physician's release-to-work note, and (2) disparate treatment was result of applicant's industrial injuries.

Discrimination--Labor Code § 132a--Business Necessity Defense--WCAB held that defendant did not meet burden of showing business necessity defense, when defendant contended it had concerns about applicant's ability to return to work with prescribed brace, defendant did not communicate concerns to applicant or to any treating or evaluating physician, WCAB did not find defendant's risk manager or claims adjuster totally credible and found their rationales for not returning applicant to work were after-the-fact justification for defendant's actions, and WCAB did not agree with defendant's contention that it could unilaterally decide if particular physician's report was substantial evidence on issue of applicant's ability to return to work.

City of Oceanside v. WCAB (Gambino) (2006) 71 CCC 524 (writ denied)

Salary in Lieu of Disability Benefits--Police Officers--WCAB relied on decision in *City of Martinez v. WCAB (Bonito)*, and held that applicant/police officer who suffered injury to his right knee during period 9/20/89 through 12/11/2002 was entitled to leave-of-absence benefits pursuant to Labor Code § 4850 in lieu of TD or VR benefits, when there was no finding by WCAB under Government Code § 21164 that applicant's condition was P&S, applicant was participating in VR services, and applicant did not consent to his service-connected disability retirement for which defendant was advancing retirement benefits.

WCAB Jurisdiction--Public Employees' Retirement System--Salary in Lieu of Disability Benefits--WCAB held that it had jurisdiction to award applicant/police officer leave-of-absence benefits pursuant to Labor Code § 4850, when WCAB had made no finding under Government Code § 21164 that applicant's right knee injury was P&S, applicant was participating in VR

benefits, and applicant's disability retirement was involuntary.

Penalties—Delay in Payment of Salary in Lieu of Disability Benefits—WCAB awarded applicant 10-percent penalty under Labor Code § 4650 and 25-percent penalty under Labor Code § 5814, less Labor Code § 4650 penalty, when it found that defendant's termination of Labor Code § 4850 leave-of-absence benefits and commencement of disability retirement benefits was unreasonable because WCAB had not found applicant's condition P&S pursuant to Government Code § 21164, applicant was participating in VR, and applicant did not consent to service-connected disability retirement.

All Tune & Lube v. WCAB (Derboghossian) (2006) 71 CCC 795 (writ denied)

Penalties—Delay in Payment of Compensation—Multiple Penalties—WCAB held that its imposition of multiple Labor Code § 5814 penalties against defendant, totaling in excess of \$10,000, for defendant's delayed payment of home health care and nursing services provided by applicant's wife, transportation costs, costs of computer and scanner, physical therapy costs, and seeing-eye dog, did not violate \$10,000 cap on penalties under SB 899 amendments to Labor Code § 5814, when penalties attached to separate and distinct acts of delayed payment and were awarded against different species of benefits.

Penalties—Delayed Payment of Benefits—Home Health Care and Nursing Services—WCAB held that defendant was liable for payment under Labor Code § 5814 for its failure to pay for in-home health care and nursing services provided by applicant's wife, when such care was found to be reasonably and medically necessary and defendant unilaterally stopped payment in violation of WCAB's order.

Penalties—Delay in Payment of Compensation—Physical Therapy—WCAB held that it was justified in imposing Labor Code § 5814 penalty for defendant's non-payment of physical therapy costs, when non-payment was without basis and resulted in discontinuation of treatment, which caused applicant's condition to deteriorate.

Penalties—Delay in Payment of Compensation—Transportation Costs—WCAB held that it was justified in awarding Labor Code § 5814 penalty for defendant's failure to pay transportation costs pursuant to WCAB's order and instead provided alternative transportation, when there was no showing that alternative transportation was reasonable and necessary, and defendant unilaterally stopped paying transportation costs without WCAB's approval and without providing evidence that alternative transportation was suitable.

Penalties—Self-imposed Penalty—WCAB held that its order that defendant was required to reimburse applicant for costs associated with Zone diet and pay self-imposed penalty under Labor Code § 4603.2, was not contrary to provisions of Labor Code § 5814(e).

Sanctions—WCAB held that it was justified in imposing sanctions under Labor Code § 5813 for defendant's failure to comply with WCAB's order to provide applicant within 20 days with

computer printout of benefits paid, when defendant did not provide printout until approximately one year after order was issued, and printout provided inadequate explanation of benefits.

Roadway Express v. WCAB (McCormick) (2006) 71 CCC 864 (writ denied)

Discrimination–Labor Code § 132a–Federal Presumption–Collective Bargaining Agreement–WCAB held that applicant/truck driver’s Labor Code § 132a claim was not preempted by federal Labor Management Relations Act and that WCAB had jurisdiction to adjudicate claim despite defendant’s assertion that adjudication of claim necessitated interpretation of collective bargaining agreement, which expressly prohibited truck drivers from performing their usual work if they had any restrictions due to work-related injury, even if restriction could be reasonably accommodated, when WCAB found that it was unnecessary to interpret terms of collective bargaining agreement that allowed discrimination against employees with work-related injuries contrary to state law, that applicant’s rights under Labor Code § 132a existed independently of collective bargaining agreement, and that neither defendant nor union had power to exempt its actions from state law based on collective bargaining agreement.

Discrimination–Labor Code § 132a–WCAB found that defendant’s refusal to return applicant to his usual and customary work as truck driver following his 7/18/2001 shoulder injury constituted discrimination under Labor Code § 132a, when applicant was medically released to return to work with only restriction that he required use of power steering truck, defendant’s refusal to return applicant to work was based, in part, on terms of collective bargaining agreement that were contrary to state law, defendant could have reasonably accommodated applicant’s work restriction by providing him with power steering truck, and evidence indicated that defendant selectively accommodated certain disabled employees who required accommodation to return to work but declined to accommodate applicant.

Discrimination–Labor Code § 132a–Business Realities–WCAB found that defendant failed to establish that its refusal to return applicant to his usual work as truck driver following his 7/18/2001 industrial shoulder injury was justified by realities of doing business, when evidence indicated that applicant’s work restriction requiring him to use power steering truck could have been accommodated without unreasonable inconvenience or effort by defendant and that defendant provided same accommodation to other drivers who were working under medically required power steering restrictions.

Discrimination–Labor Code § 132a–Wage Loss–WCAB awarded applicant lost wages, including overtime, and benefits pursuant to Labor Code § 132a, when it found that (1) applicant proved his lost wages were due to defendant’s failure to return him to his usual work as truck driver, forcing him to mitigate his damages by taking modified work for lower pay, and (2) applicant proved he would have earned overtime during period he was not allowed to return to work as driver, by showing that his usual work included significant overtime.

New United Motors Manufacturing, Inc. v. WCAB (Gallegos) (2006) 71 CCC 1037

Penalties–Delay in Payment of PD Benefits–Court of Appeal, vacating WCAB order denying reconsideration and returning matter to WCAB with directions to grant reconsideration and to reverse its order imposing 25-percent penalty against defendant pursuant to Labor Code § 5814(a), held that Labor Code § 5814(b) allows defendant to avoid such penalty, if potential violation of Labor Code § 5814 is discovered by defendant prior to claim for penalty by applicant, and if defendant, within 90 days of date of discovery, pays self-imposed penalty in amount of 10 percent of amount of payment unreasonably delayed or refused (along with amount of payment delayed or refused), as defendant had done here, and that fact that applicant discovered potential violation of Labor Code § 5814 before defendant did is immaterial.

Penalties–Delay in Payment of PD Benefits–Attorney’s Fees–Court of Appeal held that, because record did not reveal amount of attorney’s fees, if any, that applicant incurred in enforcing payment of unreasonably delayed benefits, it could not decide whether WCAB’s award of attorney’s fees pursuant to Labor Code § 5814.5 was proper, and Court of Appeal remanded to WCAB to reconsider issue.

Zimarik v. WCAB (2006) 71 CCC 1111

Penalties–Labor Code § 4650–Court of Appeal, granting applicant’s petition for writ of review in part and annulling WCAB award in part, returned case to WCAB with instructions to direct WCJ to calculate and award Labor Code § 4650 penalties, when WCAB conceded before Court of Appeal that defendant was liable for penalty under Labor Code § 4650(d) and that WCAB had erred with respect to this issue, and Court of Appeal in dicta recommended that WCAB reconsider its analysis in *Leinon v. Fisherman’s Grotto*, noting that it was difficult to square *Leinon* with self-executing nature of Labor Code § 4650 penalties.

Khan v. WCAB (2006) 71 CCC 1168 (writ denied)

Penalties–Delay in Payment of Attorney’s Fees Award–WCAB affirmed WCJ’s holding that defendant unreasonably delayed paying attorney’s fees portion of C&R award and affirmed award of Labor Code § 5814 penalty, when C&R was approved 11/17/2003 for applicant’s 12/20/2000 industrial injury, C&R allowed 20 days for payment, defendant sent attorney’s fee portion of C&R to wrong address, defendant promptly corrected error when check was returned by postal service, and attorney received fee on 12/22/2003; WCAB reversed WCJ’s award of 25 percent Labor Code § 5814 penalty, finding that delay here was not intended and was not product of bad faith and that, in exercising its discretion, more reasonable award under circumstances here was 10 percent of delayed amount, payable to applicant.

Penalties–Attorney’s Fees–WCAB reversed WCJ and held that Labor Code § 5814.5 did not apply to dates of injury before effective date of that statute, 1/1/2003, when applicant’s date of injury was 12/20/2000.

Johns v. WCAB (Stephenson) (2006) 71 CCC 1327 (writ denied)

Attorneys–Sanctions–WCAB imposed \$1,000 sanction under Labor Code § 5813 on defense attorney for making willful false and material misrepresentation in petition for removal and supporting declaration that defense law firm had not received notice of MSC, when WCAB found that misrepresentation was bad faith or frivolous litigation tactic and that attorney did not correct misrepresentation.

Blanpea v. WCAB (2006) 71 CCC 1441 (writ denied)

Sanctions–WCAB imposed Labor Code § 5813 sanctions in amount of \$2,250 against represented applicant, when applicant filed two petitions for reconsideration contesting defendant’s entitlement under approved C&R for PD advances, WCAB denied first petition, and WCAB found dispute should have ended since credit issue had already been litigated and decided.

Sanctions–Attorney’s Fees and Costs–Court of Appeal remanded matter to WCAB, following denial and dismissal of represented applicant’s petition for writ of review, for award of sanctions or costs against applicant and award of attorney’s fees, when Court of Appeal found that applicant’s petition for writ of review was frivolously filed.

County of Santa Barbara v. WCAB (Rucker) (2006) 71 CCC 1449 (writ denied)

Penalties–Delay in Payment of Medical Treatment Benefits–WCAB imposed Labor Code § 5814 penalty for defendant’s unilateral termination of payments made pursuant to stipulated award under which defendant agreed to pay applicant’s wife \$1,000 per month for home health care services she provided, to continue “until further development,” when WCAB found that defendant’s reliance on QME’s report and failure to seek WCAB order of termination was unreasonable, given that applicant’s medical condition and need for home health care had not changed since date of stipulated award.

Roadway Express v. WCAB (Bryant) (2006) 71 CCC 1618 (writ denied)

Discrimination–Labor Code § 132a–WCAB held that defendant violated Labor Code § 132a by terminating applicant who sustained admitted back injury on 2/27/2003, when applicant had returned to full duty after injury and was performing job duties without difficulty, applicant’s treating physicians and defense QME opined that applicant had lifting restrictions but that he could continue working full duty, and defendant’s risk manager terminated applicant without knowledge of lifting requirements of applicant’s job and without medical evidence indicating that there was risk of re-injury or that applicant was unable to perform his job duties

Discrimination–Labor Code § 132a–Federal Pre-emption–WCAB held that applicant was not required to file grievance under federal Labor Relations Management Act or exhaust remedies in other forums before filing Labor Code § 132a claim

Savemart Stores, Inc. V. WCAB (Oneto) (2006) 71 CCC 1727

Attorney's Fees—Labor Code § 5801—Court of Appeal held that there was no reasonable basis for defendant's petition for writ of review, when Court of Appeal found that defendant's argument that WCAB acted in excess of its powers by not allowing into evidence post-trial surveillance video tape unreasonably ignored well-established confines of Labor Code § 5502(e)(3), that defendant failed to proffer good-faith argument as to why video tapes were not timely procured, and that defendant's contentions concerning level of PD were conclusory and lacked both legal and evidentiary support

CIGA v. WCAB (Lobos) (2006) 71 CCC 1835 (writ denied)

Penalties—Delay in Payment of Medical Treatment—WCAB held that defendant CIGA unreasonably delayed providing or authorizing surgery for applicant's industrial carpal tunnel condition and awarded penalty on this medical treatment, under Labor Code § 5814 as amended by SB 899 and effective 6/1/2004

Cervantes v. WCAB (2006) 71 CCC 1841 (writ denied)

Discrimination—Labor Code § 132a—WCAB held defendant did not discriminate against applicant in violation of Labor Code § 132a by failing to reinstate applicant when his primary treating physician released him to return to full duty, when WCAB found that applicant sustained back injuries AOE/COE in 1993 and 2002, his treating physician released him to return to unrestricted customary duties as petroleum products truck driver in 4/21/2004 report, in 8/31/2004 deposition same treating physician indicated applicant had some restrictions, defense QME indicated applicant could return to work if defendant could accommodate some restrictions, and defendant's reliance on defense QME's report and treating physician's deposition testimony were reasonable support for denying reinstatement to applicant's usual and customary job duties

City of San Rafael v. WCAB (Jones) (2006) 71 CCC 1848 (writ denied)

Penalties—Delay in Payment of Compensation—WCAB held that defendant's delay of 73 days to request applicant to provide documentation of self-procured medical treatment after date of final order to reimburse applicant for such treatment was unreasonable per se, and awarded 25-percent penalty under Labor Code § 5814 against total sum of unpaid medical expenses

Penalties—Delay in Payment of Compensation—WCAB held that defendant unreasonably failed to provide applicant with TTD indemnity and awarded 25-percent penalty under Labor Code § 5814 against entire period of TTD awarded, when, even if defendant believed applicant was not entitled to disability on TTD basis, there was no evidence showing that defendant had good-faith belief that no TD benefits whatsoever were due to applicant

Lobos v. WCAB (2006) 71 CCC 1887 (writ denied)

Penalties–Delaying in Payment of Medical Treatment–WCAB held that penalty for CIGA’s delay in authorizing or providing medical treatment for applicant’s carpal tunnel syndrom should be calculated under Labor Code § 5814 as amended by SB 899 and effective 6/1/2004

Penalties–Delay in Payment of Medical Treatment–WCAB held that defendant did not unreasonably delay paying medical treatment by delay in paying four of applicant’s treating physicians, when WCAB applied Labor Code § 5814(e) and found that applicant did not show that defendant did not authorize treatment by these physicians and only dispute was over bills from these physicians

TIME LIMITATIONS

City of Los Angeles v. WCAB (Barrett) (2006) 71 CCC 61 (writ denied)

Presumption of Industrial Causation–Cancer–Firefighters–WCAB found that death of retired firefighter from colon cancer on 1/28/99 after 25 years of employment with defendant was presumed compensable under Labor Code § 3212.1, when there was sufficient evidence to establish that decedent was exposed to known carcinogens during his employment, and defendant failed to rebut presumption by showing that there was no reasonable link between exposure and cancer.

Statute of Limitations–WCAB found that Death Without Dependents Unit (DWD) was not barred by one-year statute of limitations from filing claim for benefits arising out of retired firefighter’s death on 1/28/99 from colon cancer more than one year after date of death, when DWD was not timely notified of firefighter’s death as required under Labor Code § 4706.5(f).

Statute of Limitations–WCAB found that lien claimant was not barred from filing lien application more than one year after firefighter’s death on 1/28/99, when Labor Code § 5303 allowed lien claimants to file liens at any time after application was filed, as long as WCAB retained jurisdiction, that DWD was timely applicant, and that at time application was filed there was no limitation on action under Labor Code § 4903.5.

Sierra Optical v. WCAB (Pimienta) 71 CCC 92 (writ denied)

Petitions for Contribution–Time to File–WCAB held first insurer’s petition for contribution from second insurer was not timely filed, when WCAB found it issued interim award 6/14/2000, first insurer had one year from 6/14/2000 to file petition for contribution under Labor Code § 5500.5(e) and did not do so, there was some confusion over date of injury applicant was claiming, but first insurer frequently contended date of applicant’s injury was cumulative trauma period ending 7/29/98 (period that included coverage by second insurer), and first insurer had duty to timely investigate employer’s workers’ comp coverage and join potential contributing insurers.

Atlantic Mutual Insurance Co v. WCAB (Brewer) (2006) 71 CCC 244 (writ denied)

Insurance Coverage–Estoppel–WCAB held that insurance carrier who did not have coverage on 5/22/98, date of applicant’s industrial back and neck injuries, was estopped to deny coverage, when carrier’s attorney made several appearances before WCAB and stipulated that it had coverage on date of injury, stipulations were set forth in MSC statement and subsequently recorded in minutes by WCJ, WCJ relied on those stipulations to issue finding of fact regarding coverage and issue award against carrier; and finding of fact became final after period in which to seek reconsideration elapsed.

WCAB Jurisdiction–Statute of Limitations–WCAB held that it had not jurisdiction to set aside findings of fact regarding insurance coverage under Labor Code §5804, when findings of act

became final more than five years after date of injury and insurance carrier's request that findings of fact be set aside was made more than five years after date of injury.

LSG Sky Chefs v. WCAB (Naranjo) (2006) 71 CCC 298 (writ denied)

Petitions for Reconsideration–Time to File–Tolling–WCAB held that time for lien claimant to file petition for reconsideration of F&A was tolled because of WCAB's defective service of findings and award, when WCAB initially served F&A on 4/5/2005, but envelope was returned because it did not have sufficient postage, and WCAB re-served F&A on 4/12/2005, making lien claimant's petition for reconsideration filed on 5/5/2005 timely filed, and that service of findings and award on lien claimant by defendant's employee earlier than 4/12/2005 was not effective because WCAB was required to serve F&A itself and could not delegate service of findings and awards to parties under 8 CCR § 10500.

Liens–Self-Procured Medical Treatment–Notice of Injury to Employer–WCAB found that evidence in medical record indicating that applicant suffered stress and episode of chest pain at work was insufficient to prove that applicant knew of industrial nature of his heart condition, and WCAB awarded lien claimant/medical provider reimbursement of its lien for periods of self-procured medical treatment rendered to applicant prior to time he became aware of industrial causation and first notified defendant of his industrial injury by filing claim.

First Bank & Trust v. WCAB (Ziegler) (2006) 71 CCC 533 (writ denied)

Evidence–Admissibility–WCAB found that P&S report fo therapist who treated applicant, who sustained cumulative trauma injury to her psyche, head, neck, back, shoulders, and in form of headaches during period 2/11/2000 to 7/25/2003, was admissible at trial despite fact that report was not disclosed at MSC pursuant to Labor Code § 5502(e)(3), when parties agreed to allow further discovery after MSC and applicant's delayed disclosure of report did not prejudice defendant.

Statute of Limitations–Cumulative Trauma–WCAB held that applicant's claims of injury to her psyche, head, neck, back, shoulders, and in form of headaches during period 2/11/2000 to 7/25/2003 was not barred by Labor Code § 5405 statute of limitations, when applicant testified that she first knew her employment was causing disability when advised by her treating physician within one year of filing her claim.

Psychiatric Injuries–Good Faith Personnel Actions–WCAB held that applicant's psychiatric claim was not barred by Labor Code § 3208.3(h), when applicant's testimony and opinion of her treating therapist constituted substantial evidence to prove that applicant's psychiatric injury was caused by cumulative stress in her employment and not by her change in job position, and evidence indicated that applicant's change in job position was agreed on by herself and defendant, and was not adverse to, but rather benefitted, applicant.

MCM Construction v. WCAB (Lyman) (2006) 71 CCC 546 (writ denied)

Statute of Limitations–VR–WCAB held that applicant who sustained injury to his low back and spine on 9/5/98 timely requested VR services under Labor Code § 5405.5 within one year of F&A, and that repeal of Labor Code § 5405.5, effective 1/1/2004, did not operate retroactively to bar applicant’s entitlement to seek VR benefits.

Young v. WCAB (2006) 71 CCC 1350 (writ denied)

Petitions to Reopen–Statute of Limitations–Estoppel–WCAB reversed WCJ’s finding and held that applicant with 9/26/97 shoulder injury was barred by five-year statute of limitations set forth in Labor Code § 5410 from filing petition to reopen for new and further disability on 8/2/2003, and that employer was not estopped from asserting statute of limitations as defense, when evidence showed that applicant had received at least three letters advising her of need to file petition to reopen within five years from date of her injury, applicant made no claim or provided no evidence of additional disability within five-year period, five-year statute ran after applicant had returned to work and was no longer receiving benefits, and employer took no action that would lead applicant to believe she did not have to file petition within five years to obtain additional benefits.

Blanpea v. WCAB (2006) 71 CCC 1441 (writ denied)

Petitions for Writ of Review–Time to File Petition–Court of Appeal dismissed applicant’s petition for writ of review as untimely pursuant to Labor Code § 5950 and denied petition on its merits, when petition was not filed within 45 days of WCAB’s order denying reconsideration.

Federal Express v. WCAB (Uhlik) (2006) 71 CCC 1703

Statute of Limitations–Tolling of Statute–Cumulative Trauma Injury–Court of Appeal, denying defendant’s petition for writ of review, held that WCAB’s determination that applicant’s claim was timely filed was supported by substantial evidence, when Court of Appeal found that applicant’s last day of work was 12/26/2001, when applicant complained to supervisor of back pain and felt that she could not perform her duties, that applicant filed claim for workers’ comp benefits on 10/21/2004, that applicant claimed cumulative trauma injury, making date of injury, prior to which statute of limitations was tolled, date on which applicant first suffered from disability and either knew, or in exercise of reasonable diligence should have known, that such disability was caused by employment, that applicant first knew she had sustained industrial back injury on 6/1/2004, via progress report of treating physician, making applicant’s filing of claim timely, and that, alternatively, defendant failed to advise applicant that her injury might be industrial in nature and failed to timely provide her with claim form, thereby tolling statute of limitations.

City of San Rafael v. WCAB (Jones) (2006) 71 CCC 1848 (writ denied)

Petitions for Reconsideration–Time to File Petition–WCAB dismissed applicant’s petition for reconsideration as untimely under Labor Code § 5903, when petition was filed 37 days after WCJ’s decision was filed and served by mail

GATHERING EVIDENCE

Kellner v. WCAB (2006) 71 CCC 75 (writ denied)

Injury AOE/COE–Hepatitis C–Pre-existing Conditions–WCAB held that substantial evidence supported finding that applicant did not sustain injury AOE/COE in form of Hepatitis C on 4/30/96 or during cumulative trauma period ending 5/30/96 while working as prison cook/supervisor, based on opinion of defense QME that applicant has pre-employment Hepatitis C and that disease was not aggravated by his employment (contrary to opinions from applicant’s QME).

Evidence–Admissibility–WCAB found that medical opinions of three pathologists solicited and relied on by defense QME existed and were admissible under 8 CCR § 10606 and Labor Code § 5703, when pathologists’ opinions were discussed in QME’s report, which was admitted into evidence and was in record.

Trojan Battery Co., Inc. v. WCAB (Garcia) (2006) 71 CCC 308 (writ denied)

WCAB’s Duty to Develop Medical Record–WCAB appointed independent medical examiner to evaluate applicant, when neither applicant’s nor defense QME’s opinions constituted sufficient evidence on which WCJ could rely on ruling on issue of injury AOE/COE, opinions of QMEs could not be cured by supplemental reports, and parties were given opportunity to use AME but did not do so.

First Bank & Trust v. WCAB (Ziegler) (2006) 71 CCC 533 (writ denied)

Evidence–Admissibility–WCAB found that P&S report fo therapist who treated applicant, who sustained cumulative trauma injury to her psyche, head, neck, back, shoulders, and in form of headaches during period 2/11/2000 to 7/25/2003, was admissible at trial despite fact that report was not disclosed at MSC pursuant to Labor Code § 5502(e)(3), when parties agreed to allow further discovery after MSC and applicant’s delayed disclosure of report did not prejudice defendant.

Statute of Limitations–Cumulative Trauma–WCAB held that applicant’s claims of injury to her psyche, head, neck, back, shoulders, and in form of headaches during period 2/11/2000 to 7/25/2003 was not barred by Labor Code § 5405 statute of limitations, when applicant testified that she first knew her employment was causing disability when advised by her treating physician within one year of filing her claim.

Psychiatric Injuries–Good Faith Personnel Actions–WCAB held that applicant’s psychiatric claim was not barred by Labor Code § 3208.3(h), when applicant’s testimony and opinion of her treating therapist constituted substantial evidence to prove that applicant’s psychiatric injury was caused by cumulative stress in her employment and not by her change in job position, and evidence

indicated that applicant's change in job position was agreed on by herself and defendant, and was not adverse to, but rather benefitted, applicant.

Albertson's v. WCAB (2006) 71 CCC 624 (writ denied)

PD–Apportionment–WCAB held that applicant's industrial injuries to her left minor upper extremity, right major elbow, wrists, psyche, and fibromyalgia on 2/24/99, and during cumulative periods 2/24/99 through 3/30/99 and 3/18/99 through 3/30/99, caused 100-percent PD, without apportionment to other factors pursuant to Labor Code §§ 4663 and 4664, when substantial medical evidence supported finding of 100-percent PD and defendant did not meet its burden of proving apportionment under *Escobedo v. Marshalls*

Evidence–Weight of Evidence–Credibility Determinations–WCAB found applicant's testimony regarding her fibromyalgia and its debilitating effects to be credible, despite minor inconsistencies between her trial testimony and her deposition testimony.

Merry Maids v. WCAB (Fuentes Arvizo) (2006) 71 CCC 646 (writ denied)

Employment Relationships–Joint Employment–WCAB held that applicant's working as housekeepers for Merry Maids of Sonoma (franchisee), a franchise of Merry Maids, LP (franchisor), were jointly employed by both franchisee and franchisor, and that franchisee and franchisor were jointly and severally liable for workers' comp benefits awarded to applicants under Labor Code § 3357 and *S.G. Borello & Sons, Inc. V. Department of Industrial Relations*, despite language in franchise agreement stating that franchisee operated as independent contractor, when evidence indicated that on dates of alleged injuries (1) franchisee and its individual owners were illegally uninsured for workers' comp in breach of franchise agreement, (2) pursuant to franchise agreement, franchisor received seven percent of weekly gross sales made by franchisee, (3) applicants rendered services to franchisor while also rendering services to franchisee, and such services were integral part of franchisor's business, and (4) franchisor had knowledge that its franchisee was illegally uninsured for workers' comp and had the right to either terminate franchise agreement or obtain workers' comp on behalf of its franchisee.

Employment Relationships–Joint and Several Liability–Successors in Interest–WCAB held that franchisor and franchisee were jointly and severally liable for applicants' injuries under "successor in interest" theory, when (1) franchisor took over business enterprise of franchisee with notice of pending workers' comp claims, (2) there was substantial continuity between business enterprise of franchisee and that of franchisor, (3) franchisor was provided with notice of WCAB proceedings and opportunity to contest liability, and (4) franchisor had knowledge that its franchisee was illegally uninsured for workers' comp on behalf of its franchisee.

Evidence–Admissibility–WCAB found that WCJ was justified in admitting deposition testimony of franchisee owner, when owner was not present at trial and securing his attendance appeared to be beyond jurisdiction of WCAB.

Simas v. WCAB (2006) 71 CCC 1056

MSC–Discovery–Court of Appeal, denying applicant’s petition for writ of review, held that WCJ properly took case off calendar at MSC and ordered additional discovery for further development of record, when Court of Appeal found that WCJ agreed with defendant that existing qualified medical examination was insufficient to support award, that WCJ stated in his report to WCAB that allowing case to proceed to trial with incompletely developed record could result in even greater delay for applicant, and that WCJ explained that delays in this case were caused equally by defense counsel and applicant’s counsel.

City of Buenaventura v. WCAB (Deck) (2006) 71 CCC 1322 (writ denied)

Duty to Develop Record–WCAB found that it did not have duty to remand matter for further development of record to allow IME opportunity to review additional medical records, when evaluator had been assisting parties since 2003, medical records at issue were in evidence since 2002, and, considering due diligence and degree of impact records would have on evaluator’s analysis in light of his deposition testimony, there was no good cause shown to further develop record.

Paramount Farms v. WCAB (Lopez) (2006) 71 CCC 1397

P&S Date–Substantial Evidence–Court of Appeal, affirming WCAB decision, held that applicant’s P&S date, as determined by applicant’s primary treating physician, was supported by substantial evidence, when it found that treating physician’s opinion was based on adequate review of applicant’s medical history and on examinations.

Fresno Unified School District v. WCAB (Stephens) (2006) 71 CCC 1505

WCAB Procedure–Further Development of Record–Court of Appeal held that WCAB was not required to develop record regarding applicant’s need for sheltered work environment because WCAB did not find applicant required sheltered work environment.

Savemart Stores, Inc. V. WCAB (Oneto) (2006) 71 CCC 1727

Discovery–MC–Court of Appeal, denying defendant’s petition for writ of review, held that WCAB properly excluded from evidence, pursuant to Labor Code § 5502(e)(3), surveillance video tape obtained by defendant following trial in this matter, when Court of Appeal found that defendant’s petition presented no argument or explanation as to why similar video tape could not have been discovered by exercise of due diligence prior to MSC, and that WCAB’s power to develop record, pursuant to Labor Code § 5701, could not be used to circumvent clear intent and language of Labor Code § 5502(e)(3)

Shank v. WCAB (2006) 71 CCC 1735

MSC–Close of Discovery–Court of Appeal, denying applicant’s petition for writ of review, held that WCAB’s basis for excluding untimely evidence was supported by both law and substantial evidence, when Court of Appeal found that applicant, on date of MSC, 1/17/2006, had obtained appointment for medical-legal examination on 2/1/2006, that LABOR CODE § 5502(e)(3) provided that evidence not disclosed or obtained after MSC was inadmissible unless proponent could demonstrate that it was not available or could not have been discovered by exercise of due diligence prior to MSC, and that WCAB’s finding that medical-legal examination, schedule by applicant on day of MSC, could have been discovered by exercise of due diligence prior to MSC was well-supported by record

LIEN CLAIMS

LSG Sky Chefs v. WCAB (Naranjo) (2006) 71 CCC 298 (writ denied)

Petitions for Reconsideration–Time to File–Tolling–WCAB held that time for lien claimant to file petition for reconsideration of F&A was tolled because of WCAB’s defective service of findings and award, when WCAB initially served F&A on 4/5/2005, but envelope was returned because it did not have sufficient postage, and WCAB re-served F&A on 4/12/2005, making lien claimant’s petition for reconsideration filed on 5/5/2005 timely filed, and that service of findings and award on lien claimant by defendant’s employee earlier than 4/12/2005 was not effective because WCAB was required to serve F&A itself and could not delegate service of findings and awards to parties under 8 CCR § 10500.

Liens–Self-Procured Medical Treatment–Notice of Injury to Employer–WCAB found that evidence in medical record indicating that applicant suffered stress and episode of chest pain at work was insufficient to prove that applicant knew of industrial nature of his heart condition, and WCAB awarded lien claimant/medical provider reimbursement of its lien for periods of self-procured medical treatment rendered to applicant prior to time he became aware of industrial causation and first notified defendant of his industrial injury by filing claim.

Zenith Insurance Co. v. WCAB (Capi) (2006) 71 CCC 374

Liens–Medical Treatment–Burden of Proof–Court of Appeal, annulling WCAB order that denied reconsideration, and remanding to WCAB, held that WCAB awards to lien claimants, outpatient medical treatment centers, were not supported by substantial evidence, when Court of Appeal found that lien claimants, in order to establish their right to reimbursement, bore initial burden of proving they were properly licensed or accredited, and that they had not carried this burden in present case.

Amini v. WCAB (Portillo) (2006) 71 CCC 510 (writ denied)

Lien Claims–Injury AOE/COE–Burden of Proof–WCAB denied lien claimant’s lien in its entirety, finding lien claimant/medical provider did not sustain burden of proof under Labor Code § 3202.5 and case law to prove injury AOE/COE by preponderance of evidence, when applicant claimed injury AOE/COE on 10/29/2003 to his neck, shoulders, and back, lien claimant provided medical treatment for this injury, applicant and employer resolved case-in-chief by C&R with *Thomas* finding, lien claimant presented medical records from lien claimant and from referring physician, lien claimant did not present testimony from any witnesses, including applicant, defendant presented report from defense medical legal examiner who gave opinion that applicant did not sustain industrial injury, and WCAB found that medical record here was insufficient to establish injury AOE/COE and that applicant did not sustain injury AOE/COE as claimed.

City of Los Angeles v. WCAB (Boney) (2006) 71 CCC 520 (writ denied)

Liens–Medical Treatment–WCAB held that lien claimant who performed surgery on applicant stemming from industrial injury to both hands during period 6/1/98 through 9/7/2001 was entitled to recover full amount of fees charged for surgery under principles set forth in *Kunz v. Patterson Floor Covering*, when defendant failed to produce adequate rebuttal evidence to lien claimant’s bill, and bill, by itself, constituted adequate proof that fee billed was what lien claimant usually accepted for services rendered and was consistent with what other medical providers in same geographical area accepted.

Universal Building Services v. WCAB (Yturbe) (2006) 71 CCC 655 (writ denied)

Liens–Medical Treatment–WCAB awarded lien claimant full payment on its lien for outpatient surgery fees of \$23,795 associated with arthroscopic surgery performed on applicant’s shoulder and \$17,600 for arthroscopic knee surgery related to applicant’s 1/20/2000 industrial injuries, even though it found charges to be unreasonable on their face, because defendant failed to satisfy its burden under *Kunz v. Patterson Floor Coverings, Inc.* to establish that fees were unreasonable, when it provided merely testimony of bill review company, which was irrelevant to issue of what payers and providers do, and comparison “test bills” generated by that company, also irrelevant to issue here.

Beverly Hills Multispecialty Medical Group v. WCAB (Wesley) (2006) 71 CCC 804 (writ denied)

Liens–Medical-Legal Expenses–WCAB dismissed lien claims of lien claimant/medical provider in 333 consolidated cases for medical-legal services allegedly rendered to applicants in approximately 1990, when lien claimant failed to comply with WCAB’s order to produce documentation in support of lien claims, and WCAB had no information to determine compensability of lien claims.

Hewko v. WCAB (Zetina) (2006) 71 CCC 960 (writ denied)

Lien Claims–Notification–WCAB denied in its entirety chiropractor’s lien claim for medical treatment of applicant’s 12/27/2001 spine and lower extremity industrial injury, when WCAB found that lien claimant was required to notify employer of claim and that benefits were being sought and to attach claim form, that service of claim form on employer triggered employer’s duty to investigate claim and decide whether to accept or deny claim within 90 days, that lien claimant did not give proper notice to defendant until 2/3/2005, after lien claimants’ treatment of applicant had been completed, and that one earlier notice was insufficient because lien claimant did not attach applicant’s claim form and because notice was sent to wrong address for employer or carrier.

Paramount Farms v. WCAB (Lopez) (2006) 71 CCC 1397

Liens–C&R–Court of Appeal, affirming WCAB decision, held that defendant was required to reimburse EDD for lien against amounts overpaid to applicant, when it found that defendant was bound by C&R provision pursuant to which defendant agreed to hold applicant harmless from liens.

SETTLEMENT

World Tech International v. WCAB (Patterson) (2006) 71 CCC 115 (writ denied)

C&R–Setting Aside–WCAB found no cause to set aside C&R agreement based on CIGA’s allegation of mutual mistake of fact or excusable neglect, when settlement agreement provided for deduction of \$63,871.78 in PD advances from applicant’s settlement amount, but failed to provide for a \$24,000 deduction for amounts already paid to applicant’s attorney under prior award allowing for deduction of funds from far end of PD award to reimburse applicant’s attorney for \$4,000 advanced to applicant for living expenses and \$20,000 in attorneys’ fees.

Mackill v. WCAB (2006) 71 CCC 1336 (writ denied)

C&Rs–Setting Aside–WCAB held that case law decided subsequent to date it approved c&R was not grounds to set aside C&R under circumstances here, when WCAB approved C&R related to applicant’s three industrial injuries (1992, cumulative ending 1995, and cumulative ending 1999), at time of C&R controlling case law regarding calculation of apportionment of PPD was expressed in *Nabors v. Piedmont Lumber & Mill Co.*, subsequently case law on this issue changed pursuant to *E & J Gallo Winery v. WCAB (Dykes)*, and WCAB found that parties knew or should have known of uncertainty of case law on how to calculate apportionment of PPD at time C&R agreement was reached.

City of San Rafael v. WCAB (Jones) (2006) 71 CCC 1848 (writ denied)

Stipulations–Setting Aside–WCAB found that WCJ’s finding that applicant/firefighter, who sustained industrially-related colon cancer through cumulative period ending 12/29/2000, was entitled to TTD rate of \$666.66 per week, based on average weekly earnings of \$1,000, was not justified, when parties had earlier stipulated that applicant’s earnings at time of his injury were sufficient to warrant TTD at maximum rate, and stipulation was binding on parties absent showing good cause to set aside stipulation, and WCAB remanded matter to WCJ for determination of whether good cause existed to relieve defendant of stipulation and, if so, to determine applicant’s TTD rate based on his post-retirement earning capacity

ARBITRATION

Faeth v. WCAB (Gault) (2006) 71 CCC 355

Arbitration–Timeliness of Decision–Court of Appeal, denying petition for writ of review, held that, despite Labor Code § 5277(a)’s requirement that arbitrator serve F&A on all parties within 30 days of submission of case for decision, in present case F&O issued six months after parties’ submission of additional written arguments was timely, when arbitrator issued minutes of hearing, summary of evidence, F&O, and opinion on decision together, and minutes of hearing stated that parties would submit additional briefing and arbitrator would prepare minutes of hearing, at which time matter would stand submitted, and Court of Appeal, while agreeing with petitioner that logic of arbitrator bypassed 30-day statutory mandate to issue decision after matter was submitted, found that petitioner had waived error by failing to raise it before arbitrator while waiting six months for minutes of hearing, and that petitioner had not shown that result might have been different had arbitrator timely issued decision or that delay alone prejudiced petitioner in any way.

Insurance–Cancellation–Burden of Proof–Court of Appeal held that insurer complied with notice requirements of Insurance Code § 676.8(b), (c), regarding cancellation, and that nothing in WCAB’s opinion indicated improper shifting of burden of proof onto petitioner to prove that insurer had not canceled policy.

Insurance–Cancellation–Substantial Evidence–Court of Appeal held that record supported finding of WCAB that insurer effectively cancelled petitioner’s policy, when record included three separate notices of cancellation from insurer to petitioner, at least two of which included proof of mailing indicating that notice was received by U.S. postal service on specified dates.

DECISIONS, AWARDS AND JUDGMENTS

Save Mart Supermarkets v. WCAB (Hixson) (2006) 71 CCC 171

WCAB Decisions–Sufficiency–Court of Appeal, annulling WCAB’s order denying reconsideration and remanding matter to WCAB, held that it was unable to determine WCAB’s legal basis for extending statute of limitations under either Labor Code § 5400, requiring applicant to notify defendant of injury within 30 days of date of injury, or Labor Code § 5405, requiring applicant to file claim within one year of date of injury, because WCAB had failed to set forth its reasoning in detail, as require by Labor Code § 5908.5, when Court of Appeal found that applicant suffered industrial injury on 5/16/2001 and that parties stipulated that defendant was notified of injury in 12/2002.

Paramount Farms v. WCAB (Lopez) (2006) 71 CCC 1397

WCAB Decisions–Sufficiency of Decisions–Court of Appeal, annulling WCAB decision, held that WCAB did not sufficiently state evidence relied upon and specify in detail reasons for decision, as mandated by Labor Code § 5908.5, when Court of Appeal found that subsection of 8 CCR § 9795.3 apparently relied on by WCAB in awarding payment for interpreting services required narrative medical report prepared and attested to by examining physician for each instance of interpreting services as condition of ordering defendant to pay for such services, and that Court of Appeal was unable to determine for which of claimed 103 interpreting services were for evaluations/treatments that resulted in mandated narrative medical reports, and Court of Appeal remanded case to WCAB to state evidence relied upon and specify in detail interpreting fees that defendant is required to pay.

RECONSIDERATION/REMOVAL

Saiz v. WCAB (2006) 71 CCC 23

WCAB Jurisdiction–Petitions for Reconsideration–Court of Appeal annulled WCAB’s denial of reconsideration by operation of law and WCAB’s order dismissing petition for removal, and remanded matter for further proceedings, when WCAB acknowledged that it had lost jurisdiction to remedy WCJ’s erroneous award of TD due to applicant’s counsel’s error in filing petition for removal instead of petition for reconsideration, followed by WCAB’s inadvertence in failing to timely act on applicant’s petition as one for reconsideration, and Court of Appeal found that WCAB had acted without or in excess of its power, issued unreasonable award, and issued award unsupported by substantial evidence.

Larios v. WCAB (2006) 71 CCC 430 (writ denied)

Qualified Medical Evaluations–Injuries Prior to January 1, 2005–WCAB relied on its en banc decision in *Simi v. Sav-Max Foods, Inc.*, to find that procedures for obtaining medical examinations set forth in Labor Code §§ 4060 and 4062.2, as amended by SB 899, did not apply to applicant, who alleged specific injury to her back on 11/7/2003 and cumulative in form of stress, crying spells, and restricted work, ending on 11/10/2003, since SB 899 amendments apply only to injuries occurring on or after January 1, 2005.

Petitions for Removal–WCAB denied applicant’s Petition for Removal from WCJ’s Order compelling her attendance at medical evaluations set by defendant, despite defendant’s failure to notify applicant’s attorney of its intention to obtain order, when notice to applicant was not required and applicant did not show irreparable injury or prejudice by defendant’s failure to provide notice.

Petitions for Reconsideration–Final Orders–WCAB dismissed applicant’s Petition for Reconsideration of WCJ’s Order compelling her attendance at medical evaluations set by defendant, on basis that WCJ’s Order was interlocutory discovery order and not final order within meaning of Labor Code § 5900.

Jackson v. WCAB (2006) 71 CCC 638 (writ denied)

Petitions for Removal–Discovery Orders–WCAB granted removal from WCJ’s order closing discovery and found that defendant was entitled to discover Social Security psychiatric records pertaining to applicant’s potential psychiatric claim stemming from 4/30/99 low back and knee injuries, even though applicant did not file claim for psychiatric injury, when AME’s report indicated that applicant’s psychiatric condition was relevant in determining extent of her PD and to potential apportionment to other factors under Labor Code § 4663.

Los Angeles County Metropolitan Transit Authority v. WCAB (Hicks) (2006) 71 CCC 641 (writ denied)

Petitions for Reconsideration–Service of Petition–Due Process–WCAB held that defendant was not denied due process by applicant/bus driver’s failure to file proof of service with his petition for reconsideration of WCJ’s finding that he was barred from recovering benefits pursuant to Labor Code § 3600(a)(7) for injuries sustained to his left minor hand and back on 11/7/2002, during altercation in which he blocked passenger from exiting bus, when defendant fully participated in reconsideration proceedings by filing answer addressing issues raised in applicant’s petition, defendant received WCJ’s report, and defendant was not prejudiced by lack of proof of service.

Petitions for Reconsideration–Verification–WCAB found that applicant’s failure to attach verification to his petition for reconsideration was excusable and not grounds for dismissal of petition, since applicant was not represented by counsel and defendant was not prejudiced by lack of verification.

Halladay v. WCAB (2006) 71 CCC 693

Petitions for Writ of Review–Time to File–Court of Appeal denied petition for writ of review not filed within 45-day period following WCAB’s denial of reconsideration, as mandated by Labor Code § 5950, when Court of Appeal noted that statutorily prescribed time limitation has been repeatedly held to be jurisdictional and that fact that pro per petitioner’s letter, which Court of Appeal deemed to be petition for writ of review, was dated within 45-day period following WCAB’s denial of reconsideration did not satisfy Labor Code § 5950, since 45-day window to file petition for writ of review is not extended for mailing under CCP § 1013.

McAuliffe v. WCAB (2006) 71 CCC 696

Petitions for Reconsideration–Contents–Service–Verification–Court of Appeal vacated WCAB’s opinion and order granting reconsideration and decision after reconsideration, with Court of Appeal substituting its own order dismissing defendant’s petition for reconsideration, which was never served on applicant, was unverified, and did not set forth any statutory grounds for reconsideration, when Court of Appeal found that defendant’s failure to comply with Labor Code § 5950’s requirement of service of petition on all parties resulted in applicant’s unawareness of petition until WCJ issued recommendation that petition be denied, depriving applicant of opportunity to respond to petition before WCAB granted reconsideration and rescinded WCJ’s decision, that defendant’s failure to comply with Labor Code § 5902’s requirement that petition be verified provided additional grounds for dismissing petition since WCJ pointed out lack of verification and defendant failed to cure this defect, and that defendant’s failure to set forth in petition any statutory grounds for reconsideration meant that WCAB lacked “good cause” required by Labor Code § 5803 for rescinding or revising award.

California Insurance Guarantee Association v. WCAB (Norwood) (2006) 71 CCC 804 (writ denied)

Petitions for Reconsideration–Time to File–WCAB held petition for reconsideration was timely filed, when petition’s declarations, executed under penalty of perjury, stated that neither carrier nor claims adjuster received F&A from WCAB’s district office, F&A indicated that service was accomplished on 10/5/2005, but also indicated that WCJ did not sign F&A until 10/6/2005, and proper filing and service of F&A would not have been possible on 10/5/2005.

City of Calexico v. WCAB (Valdez) (2006) 71 CCC 817 (writ denied)

PD–Hepatitis C–WCAB’s Reservation of Jurisdiction–WCAB held that, under *General Foundry Service v. WCAB (Jackson)*, it was not precluded by Labor Code § 5804 or by doctors’ findings that applicant’s condition was P&S from reserving jurisdiction over issue of PD resulting from applicant’s hepatitis C virus, when hepatitis C is insidious, progressive disease not subject to traditional definition of term “permanent and stationary,” medical evidence indicated that, although applicant’s condition had remained stationary for several months, it would likely deteriorate over time, and WCAB’s award of 32-percent PD was only interim or temporary determination of applicant’s ultimate PD

Reconsideration–Contents of WCAB’s Decision on Reconsideration–Court of Appeal found that WCAB’s decision denying reconsideration did not violate Labor Code § 5908.5 for failure to address arguments raised by defendant, when WCAB adopted and incorporated WCJ’s report that adequately addressed issues raised.

Walmsley v. WCAB (2006) 71 CCC 872 (writ denied)

Petitions for Removal–WCAB’s Continuing Jurisdiction–Reopening of Awards–Final Decisions–WCAB removed case to itself under Labor Code § 5310 and held that it had no jurisdiction to conduct further proceedings related to applicant’s new or previously raised contentions about previous WCAB final decisions on various subjects (including PD, medical benefits, VR benefits Labor Code § 132a discrimination, reopening 1979 injury case, and tolling statute of limitations, due to old WCAB file being destroyed under 8 CCR § 10758), and WCAB ordered staff of district office of WCAB not to accept further filings from applicant or schedule further proceedings, unless applicant obtained permission from district office presiding WCJ.

Mid-Peninsula Flooring v. WCAB (Hernandez) (2006) 71 CCC 963 (writ denied)

Petitions for Removal–Improper Service of Rating Report–Scope of Proceedings on Remand–WCAB denied carrier’s request for removal, which was based on contention that WCJ had no discretion to conduct further proceedings on merits of case after WCAB rescinded original decision and remanded case for improper service of rating report on defense counsel under Labor Code § 5704 and 8 CCR § 10602, when WCAB found that WCJ had discretion regarding how to

proceed pursuant to WCAB's order on remand and that WCJ's interpretation that he had discretion to conduct further proceedings on merits of case pursuant to WCAB order did not cause significant prejudice or irreparable harm under 8 CCR § 10843.

Robbins v. Sharp Healthcare (2006) 71 CCC 1291 (Significant Panel Decision)

Disqualification of WCJ—Appearance of Bias Against Attorney—WCAB, in significant panel decision granting defendant's petition to disqualify WCJ, held that bias or appearance of bias solely against attorney or law firm, as opposed to bias against party that attorney or law firm represents, may be ground for disqualification of WCJ, when WCAB found that due process requires disqualification of WCJ when there is even appearance of bias, that Code of Judicial Ethics, by which WCJs are bound, requires WCJ to avoid even appearance of impropriety (which is objective test, i.e., whether person aware of facts would reasonably entertain doubt that WCJ would be able to act with impartiality), that commentary to Code of Judicial Ethics, by which WCJs are also bound, requires WCJs and WCAB to consider other sources that may not be directly applicable to WCJs (such as Code of Civil Procedure provisions or Superior Court judges, Cannons applicable to appellate justices, and federal provisions applicable to federal judges) in determining whether disqualification is appropriate, and that these other sources suggest that actual bias against attorney, or even appearance of bias against attorney, may necessitate disqualification.

Disqualification of WCJ—Appearance of Bias Against Attorney—WCAB, in significant panel decision, held that, while there was no actual bias by WCJ in present case, there was appearance of bias sufficient to justify granting defendant's petition to disqualify WCJ, when WCAB found that WCJ in present case had been following policy of blanket recusal in all cases involving attorneys of law firm that represented defendant in present case, that Court Administrator had instructed WCJ to cease such policy, and that WCJ, in acceding to Court Administrator's instructions, could have been motivated, consciously or unconsciously, by desire to protect his position as WCJ, so that person with knowledge of facts might reasonably entertain doubt about WCJ's impartiality.

Disqualification of WCJ—Appearance of Bias Against Attorney—WCAB, in significant panel decision granting defendant's petition to disqualify WCJ, held that, although judge's actual or appearance of bias toward attorney may be grounds for disqualification, not every adverse interaction between judge and attorney is sufficient to warrant disqualification, that bias or prejudice may be established only when judge is so personally embroiled with attorney as to call into question judge's capacity for impartiality, and that under no circumstances may party's unilateral and subjective perception of appearance of bias afford basis for disqualification.

County of Stanislaus v. WCAB (Credille) (2006) 71 CCC 1381

Petitions for Writ of Review—No Reasonable Basis for Petition—Court of Appeal held that there was no reasonable basis for defendant's petition for writ of review, when it found that defendant did not present Court of Appeal with question of law but argued only that WCAB decision was

unsupported by substantial evidence, and that appellate court may conclude that petition for writ of review lacks reasonable basis when defendant contends that award was not supported by substantial evidence and review of evidence shows that award was supported by competent opinion of one physician, although inconsistent with other medical opinions.

Fresno Unified School District v. WCAB (Stephens) (2006) 71 CCC 1505

Petitions for Writ of Review–California Rules of Court–Court of Appeal held that applicant’s contention that defendant’s alleged failure to comply with California Rules of Court, Rule 14(d), page limits for attachments to petition for writ of review constituted additional reason for denying defendant’s petition was misplaced since that rule governed attachments to briefs filed in appeals, not writs.

Attorney’s Fees–Court of Appeal held that award of attorney’s fees to applicant pursuant to Labor Code § 5801 was not appropriate since defendant, although presenting several issues lacking reasonable basis, also presented reasonable premise for questioning WCAB’s finding of compensable injury to internal/cardiovascular system.

SUPPLEMENTAL PROCEEDINGS

California Insurance Guarantee Association v. WCAB (Winters) (2006) 71 CCC 814 (writ denied)

Petitions to Reopen–Adequacy–WCAB relied on *Blanchard v. WCAB* to hold that applicant’s technically deficient but timely filed Petition to Reopen for New and Further Disability, which was not supported by medical evidence in existence within five-year statutory period and did not specify facts on which it relied in compliance with 8 CCR § 10458, was adequate to preserve WCAB’s jurisdiction under Labor Code § 5410, because it gave adequate notice that it was based on alleged increased disability.

Walker v. WCAB (2006) 71 CCC 1077

Petitions to Reopen–Good Cause–Court of Appeal, annulling and reversing WCAB decision, held that WCAB’s denial of applicant’s petition to reopen for industrial back injury was not based on substantial evidence and that petition to reopen should have been granted, when Court of Appeal found that applicant had been awarded PD benefits for internal injury AOE/COE sustained on 2/15/00, that applicant’s back complaints were recorded in medical report on 10/27/99, and that applicant testified credibly and unrebutted, that his complaints to physicians after 2/15/99 injury included back pain, so that WCAB decision that applicant’s back injury was not documented contemporaneous with 2/15/99 injury, and was, thus nonindustrial, was not based on substantial evidence; Court of Appeal found that WCAB’s failure to consider applicant’s back injury constituted good cause to reopen pursuant to Labor Code § 5803.

Valley Behavioral Health Network v. WCAB (Cherry) (2006) 71 CCC 1774

Petition to Reopen–New and Further Disability–Compensable Consequence–Court of Appeal, denying defendant’s petition for writ of review, held that substantial evidence supported WCAB’s award of prior and future medical treatment for applicant’s right upper extremity and shoulder as compensable consequence of original injury to right wrist, when Court of Appeal found that, although applicant was aware of soreness in shoulder prior to original stipulated award for wrist, shoulder caused neither disability nor need for medical treatment until three and a half years after the date of injury, making shoulder fit within definition of new and further disability, and that applicant’s physicians stated that increased shoulder symptoms developed “at least in part” as compensable consequence of original wrist injury, making defendant liable for medical treatment of shoulder

THIRD PARTY ACTIONS

CNA Casualty of California v. WCAB (Kirkeby) (2006) 71 CCC 149

Third Party Actions–C&R–Credits–Court of Appeal, following *Reid*, and annulling WCAB decision, noted that WCAB had equitable power to reallocate proceeds of third-party settlement when injured employee and spouse have colluded in civil case to make bad faith or fraudulent allocation of settlement proceeds in order to defeat employer's third-party credit rights or when employee's spouse has received disproportionate settlement, and Court of Appeal held that evidence in present case convincingly demonstrated that injured employee and his wife structured settlement of their P.I. claims to defeat employer's w/c insurer's credit rights, when settlement paid wife for loss-of-consortium claim, which was not subject to insurer's credit rights, and injured employee received nothing, employee's attorney in civil action had placed \$200,000 settlement value on employee's claim, and wife's loss-of-consortium claim was highly questionable, making it illogical to allocate all settlement proceeds to questionable derivative claim and none to underlying claim upon which it was based.

Kaiser Foundation Hospitals v. WCAB (Needels) (2006) 71 CCC 850 (writ denied)

Third Party Actions–Credit–WCAB held defendant employer was not entitled to credit against applicant's future workers' comp benefits from applicant's third party action settlement, when applicant brought medical malpractice action against medical providers who treated her for 6/13/97 industrial neck injury and settled that malpractice action, with proceeds to applicant and her husband, Labor Code § 3861 generally allowed credit but court of appeal held in *Graham v. Workers' Comp. Appeals Bd.* that Medical Injury Compensation Reform Act of 1975 (Civil Code §§ 3333.1, 3333.2) barred credit to employers from recover in medical malpractice actions if applicant showed settlement was demonstrably reduced to reflect collateral source contributions such as workers' comp benefits, and WCAB found applicant introduced un rebutted testimony of attorneys in medical malpractice case that parties carefully considered all collateral source benefits in arriving at appropriate settlement amount.

Daidone v. City of Glendale (2006) 71 CCC 910

Civil Actions Against Employers–FEHA–Court of Appeal affirmed trial court's denial of applicant's civil action against defendant under FEHA, Gov. Code § 12900 et seq., when Court of Appeal found that applicant had two or three industrial injuries in 1999 while working as electrical line mechanic, applicant returned to modified work with defendant, and substantial evidence supported trial court's findings that (1) defendant reasonable determined applicant's work restrictions, (2) defendant reasonably determined that applicant could not work standby, and (3) defendant reasonably accommodated applicant's disability from his industrial injuries and interacted with applicant in good faith.

Fonseca v. California Guarantee Association (2006) 71 CCC 922

Third-Party Actions–Employer’s Credit for Third-Party Recovery–Employer’s Negligence–In case in which trial court distributed entire proceeds of settlement recovery to employer’s workers’ comp insurer, Court of Appeal held trial court erred in distributing funds before determining whether employer was at fault for applicant’s injuries at work on 6/11/96, and, if so, to what extent, and before determining total damages to which applicant was entitled, when applicant brought third-party civil action against company that manufactured vehicle he was driving while injured on 6/11/96, workers’ comp insurer intervened in same action to collect workers’ comp benefits it paid to applicant for same accident, third party raised defense of employer negligence, and applicant and third party settled third-party action.

Third-Party Actions–Common Fund Distributions–Court of Appeal held trial court erred in distributing entire proceeds from settlement between applicant and third party without first determining involvement of applicant’s attorney and workers’ comp insurers’ attorney in creating settlement fund and such determination was required under Labor Code § 3860 governing distribution of settlement proceeds.

Brackeen v. Burlington Homes (2006) 71 CCC 1115

Civil Actions–Hirer’s Liability–Court of Appeal affirmed summary judgment in hirer’s/general contractor’s favor based on *Privette v. Superior Court* and case law interpreting *Privette* (general contractor generally not liable in tort for injuries to injured employee of subcontractor), when plaintiff was injured on 12/30/2002 while working for electrical subcontractor on electrical portion of general contractor’s construction project to build homes, another subcontractor provided workers’ comp coverage for electrical subcontractor’s employees, plaintiff disqualified himself from workers’ comp coverage because he requested that electrical subcontractor pay him in cash “under the table,” and Court of Appeal held that *Privette* applied to bar plaintiff’s civil negligence suit against general contractor and that workers’ comp was plaintiff’s exclusive remedy, even though plaintiff disqualified himself from workers’ comp coverage.

Civil Actions–Hirer’s Liability–Court of Appeal held general contractor was not liable to plaintiff in tort under any of four theories of direct liability: negligent hiring, negligent performance of retained control, non-delegable duty, or premises liability.

Mendoza v. Brodeur (2006) 71 CCC 1135

Civil Actions–Employment Relationship–Summary Judgment–Court of Appeal, reversing trial court’s dismissal of plaintiff’s action following order granting defendant’s motion for summary judgement, held that plaintiff was employee of defendant pursuant to Labor Code § 2750.5, which operated to allow plaintiff’s tort action, despite fact that plaintiff, by virtue of Labor Code § 3352(h), was not employee of defendant for workers’ comp purposes, when Court of Appeal found that plaintiff was not licensed roofing contractor, and was not, therefore, independent

contractor, and that in summary judgment proceedings defendant had not shifted evidentiary burden to plaintiff, so that it was premature for trial court to have required plaintiff to come forward with evidence to show triable issue of fact.

Bonjour v. Los Angeles Unified School District (2006) 71 CCC 1412

Civil Actions Against Employers–Wrongful Termination–Court of Appeal held applicant’s employer did not constructively terminate applicant, when applicant claimed industrial physical and psychological injuries from working for employer as special education trainee, applicant was intermittently off work for her injuries, employer’s third party workers’ compensation administrator, after receiving opinions on applicant’s disability from physical injuries from AME, sent applicant “notice of potential eligibility for vocational rehabilitation” and checked box indicating that applicant’s employer “does not have any modified or alternate work available within your restrictions,” applicant interpreted notice of potential eligibility as termination and filed civil action against employer for wrongful termination in violation of public policy, and Court of Appeal found notice of potential eligibility for VR was not constructive termination and could not form basis for cause of action for wrongful termination because (1) worker’s comp administrator was not employer’s agent for purpose of terminating applicant’s employment status by implication in form letter, and (2) notice of potential eligibility referred to applicant’s physical disabilities only and did not address her psychological disabilities.

Ravella v. The McGraw-Hill Companies, Inc (2006) 71 CCC 1558

Civil Actions Against Employers–Exclusive Remedy– Court of Appeal affirmed trial court’s holding that exclusive remedy of Workers’ Compensation Act barred plaintiff’s civil action against his employer for intentional infliction of emotional distress, when plaintiff worked for employer for 10 years as computer designer, claimed harassment and campaign to terminate him by supervisor, plaintiff took early retirement, plaintiff filed civil action for wrongful termination based on cause of action for intentional infliction of emotional distress, plaintiff claimed misconduct by supervisor that included discussing intention to terminate plaintiff with others, persuading another supervisor to give plaintiff unfavorable performance review, discussing plaintiff’s performance review in meeting of 12 people, improperly blaming plaintiff for printing problems, and making negative remarks about plaintiff to co-workers and other supervisors, plaintiff contended supervisor’s conduct constituted fabrication, entrapment, and invasion of privacy, jury found in plaintiff’s favor on intentional infliction of emotional distress cause of action, trial court found that evidence plaintiff presented about supervisor’s conduct did not show conduct outside usual employment relationship and granted judgment notwithstanding verdict on same cause of action, and Court of Appeal also found that disputed employer conduct was normal part of employment relationship as described in *Cole v. Fair Oaks Fire Protection Dist.* and that plaintiff’s evidence was insufficient to support finding of employer conduct that was outside employment relationship

Valdez v. Himmelfarb (2006) 71 CCC 1574

Civil Actions–Statute of Limitations–Summary Judgment–Court of Appeal, reversing trial court’s grant of defendants’ motion for summary judgment, held that defendants failed to produce undisputed evidence showing that statute of limitations had run on plaintiff’s personal injury cause of action, when Court of Appeal found that plaintiff’s personal injury action was filed under Labor Code § 2706, that in action under this statute employer’s liability is determined under rules of pleading and proof that differ significantly from those of common-law personal injury action, and that, therefore, this statute creates statutory cause of action for personal injuries subject to three-year statute of limitations in Code of Civil Procedure § 338(a)

Civil Actions–Statute of Limitations–Summary Judgment–Court of Appeal held that, even if former one-year statute of limitations for negligence actions applied to this case, statute was equitably tolled while plaintiff pursued his workers’ comp claim, pursuant to *Elkins v. Derby*

Civil Actions–Sanctions–Court of Appeal held that it would be abuse of discretion for trial court not to reconsider its sanction order upon remand, since Court of Appeal’s reversal of trial court has undermined basis for that order

Civil Actions–Unfair Competition–Pleadings–Court of Appeal, reversing trial court’s judgment on pleadings in favor of defendants on ground that complaint failed to pray for injunctive or restitutionary relief, only two remedies available to private party under unfair competition law, held that failure to pray for proper form of relief is not fatal to complaint, and that on remand trial court should allow plaintiff to amend complaint to request appropriate relief