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JURISDICTION

K-Mart Corporation v. WCAB (Martinez) (2007) 72 CCC 135 (writ denied)

Stipulations—WCAB applied principles set forth in *County of Sacramento v. WCAB (Weatherall)* to find that applicant's 1/7/2004 claim for death benefits stemming from death of his wife on 12/1/2003 was not barred under Labor Code § 5405, when parties stipulated that decedent suffered industrial injuries on 7/19/97 and 6/29/2000, applicant claimed that death of his wife resulted from 6/29/2000 injury, and WCAB found that stipulation as to dates of injury was binding despite evidence that there was only one industrial injury occurring on 7/19/97, and that 6/29/2000 injury was not separate industrial injury but rather compensable consequence of earlier injury

Portland Trailblazers v. WCAB (Whatley) (2007) 72 CCC 154 (writ denied)

CT—Labor Code § 5500.5—WCAB held that applicant sustained CT injury from 1983 through 1998 during his career as professional basketball player for different teams and found liability against Atlanta Hawks/TIG Insurance Co under Labor Code § 5500.5, when applicant played for Hawks during 1993/1994 and 1994/1995 seasons, WCAB had jurisdiction over Hawks, since there were sufficient contacts with California, WCAB had no jurisdiction over teams applicant played for during 1995/1996, 1996/1997, or 1997/1998 seasons, and Hawks was last team on which applicant played for which there was available insurance coverage

City of Los Angeles v. WCAB (Warren) (2007) 72 CCC 244 (writ denied)

WCAB's Continuing Jurisdiction—Reservation of Jurisdiction—WCAB held that there was no substantial medical evidence in record to determine whether applicant's hairy cell leukemia was insidious progressive disease for purpose of retaining jurisdiction over PD more than five years after injury pursuant to *General Foundry Service v. WCAB (Jackson)*, when WCAB found good cause to develop record on issue of whether hairy cell leukemia was insidious progressive disease under *Jackson* and remanded matter to WCJ to hold further proceedings on this issue

Agredano v. WCAB (2007) 72 CCC 381

WCAB Procedures—Due Process—Court of Appeal, denying applicant's petition for writ of review, held that applicant was not denied due process by failure of WCAB to consider evidence of psychological injury, when court found that applicant was not pursuing claim of psychological injury but was seeking only additional TD for her hand injury and medical treatment for that injury.

Expedited Hearings—Due Process—P&S—Court of Appeal, denying applicant's petition

for writ of review, held that applicant was not denied due process when at expedited hearing WCJ found applicant's injured hand to be P&S, when issue at hearing was applicant's entitlement to additional TD, which is issue listed in Labor Code § 5502(b) as suitable for adjudication at expedited hearing, and finding regarding applicant's P&S status was incidental to adjudication of this issue

Expedited Hearings—Due Process—Timeliness—Court of Appeal, denying applicant's petition for writ of review, held that applicant was not denied due process by fact that expedited hearing did not occur within 30 days of applicant's filing of declaration of readiness to proceed, as required by Labor Code § 5502(b), when court found that failure to adhere to statutory time requirements did not result in delay or deprivation of benefits for applicant

Duran v. WCAB (2007) 72 CCC 488 (writ denied)

WCAB Jurisdiction—Petitions to Reopen—New and Further Disability—WCAB reversed WCJ and held that, under Labor Code § 5410, it had not jurisdiction to award TD more than five years after date of applicant's injury, when applicant book binder sustained injury AOE/COE to spine and psyche on 8/7/2000, received stipulated award on 4/25/2005, and filed petition to reopen for new and further disability on 7/6/2005 (within five years of date of injury), applicant's new TD period began on 11/11/2005 (more than five years after date of injury), and five-year limitation period of Labor Code § 5410 barred further TD arising more than five years after date of injury regardless of whether petition to reopen was timely filed

Anadite, Inc v. WCAB (Aceves) (2007) 72 CCC 648 (writ denied)

WCAB's Continuing Jurisdiction—WCAB held that five-year statute of limitations of Labor Code § 5804 did not bar enforcement of applicant's medical treatment awards, that it had jurisdiction to enforce awards more than five years after date of injury, and that change of administrator constituted enforcement of award, not alteration of award

Medeiros v. WCAB (2007) 72 CCC 857 (writ denied)

WCAB Powers—Constitutionality of Statutes—WCAB, as administrative agency, has not authority to determine constitutional validity of statutes under Cal. Const., art. III, § 3.5

Rialto Concrete Products, Inc v. WCAB (Oltman) (2007) 72 CCC 861 (writ denied)

WCJs—Disqualification—Bias—WCAB treated defendant's petition for removal as petition for disqualification under Labor Code § 5311 and held that defendant failed to allege sufficient grounds to disqualify WCJ from presiding over proceedings, when defendant had alleged that campaign sign was located in front of applicant's attorney's offices supporting WCJ for election to superior court, which created an appearance of

judicial impropriety, but evidence indicated that applicant's law firm was one of 10 tenants located in building where campaign sign was placed, that no member of applicant's attorney's law firm placed sign in that location, that sign was one of several campaign signs, including those of other political candidates seeking other political offices, and that there was no indication that applicant's law firm was involved in WCJ's political campaign or placed sign to gain WCJ's favor, or that WCJ was even aware of sign's existence

Monument Car Parts v. WCAB (Teach) (2007) 72 CCC 1021 (writ denied)

Attorneys' Fees—WCAB ordered defendant to pay applicant's attorney's fees under Labor Code § 4064(c), when applicant claimed injury AOE/COE on 4/3/2004, parties filed C&R while applicant was unrepresented, C&R contained provision that "filing of this document is the filing of an application on behalf of the employee," WCAB did not approve C&R but instead suspended action on C&R pending receipt of further information, WCAB later allowed applicant to withdraw from C&R, applicant obtained counsel, both parties obtained QMEs, WCAB found that defendant did not advise applicant of his right to panel QME, did not offer adequate settlement, did not respond to WCJ's request for documents, and did not appear at scheduled MSC, and that applicant's attorney provided valuable services, and WCAB construed filing C&R here to be filing application for adjudication of claim, based on terms of C&R itself, 8 CCR § 10878, and WCAB panel decision in *Robinson v. Hawthorne Machinery Corp.*

Pizza Hut v. WCAB (Babayants) (2007) 72 CCC 1025 (writ denied)

WCAB Jurisdiction—WCAB held that it retained jurisdiction over applicant's claim for 4/21/2000 back injury, and was not deprived of jurisdiction due to running of five-year statutory period, when defendant accepted injury and provided benefits until 2/23/2001, applicant submitted Application for Adjudication of Claim as well as other documents to WCAB by mail on 3/14/2002, with service on all parties, defendant submitted Application for Adjudication of Claim and other documents to WCAB on 5/4/2004, with service on all parties, matter proceeded to conference on 3/29/2005, with applicant present, and, although documents submitted to WCAB were not date stamped/conformed by WCAB and matter was not assigned case number, WCAB found that Application was timely filed because failure to conform documents was due to clerical error, documents were presumed to be served since they were place in U.S. mail with proof of service 3/29/2005 conference served to toll five-year statute of limitations for purpose of retaining jurisdiction, and rule of liberal construction applied so as not to deprive applicant of benefits due to WCAB's clerical error

Vierra v. WCAB (2007) 72 CCC 1128

Attorney's Fees—Effect of SB 899—Court of Appeal, affirming WCAB order denying reconsideration of WCJ's finding that written attorney's fee agreement between applicant and his attorney was not binding, held that legislature, in Labor Code § 4906,

has spoken clearly and decisively that attorney's fees in workers' comp cases cannot exceed amount that is "reasonable" and that WCAB is final arbiter of reasonableness in all cases, when Court of Appeal found that fee agreement in present case stated that SB 899 reduced PD benefits, that law firm could no longer afford to offer representation under WCAB attorney's fee guidelines, that agreement was attempt to draft around current policies under Labor Code § 4906, "which are believed to be outdated," and that parties, therefore, "agree that the fee will be set at \$225 per hour to be paid out of permanent disability or 12% of the permanent disability award whichever is less," that agreement purports to override WCAB's authority by guaranteeing that attorney will receive fees according to specified formula at outset of case, prior to and irrespective of any subsequent determination of reasonableness by WCAB, that, to extent agreement purports to "draft around" Labor Code § 4906 by depriving WCAB of its statutory authority to fix attorney fees, it conflicts with state law is not enforceable, and that, after services have been rendered, WCJ may approve, increase, or reduce fees provided for in agreement, taking into consideration factors listed in Labor Code § 4906(d), 8 CCR § 10775, and WCAB Policy and Procedure Manual

County of Orange v. WCAB (Ortega) (2007) 72 CCC 1291 (writ denied)

Attorney's Fees—Commutation—WCAB held that attorney's fee awarded in case in which applicant/firefighter was 100-percent PD due to lung cancer sustained during period 10/26/83 through 10/12/2001 was correctly commuted, based on published life expectancy tables pursuant to 8 CCR § 10169 and 10169.1 rather than actual life expectancy, despite terminal nature of applicant's condition

Koleaseco, Inc v. WCAB (Morgan) (2007) 72 CCC 1302 (writ denied)

WCAB Jurisdiction—Extraterritorial Jurisdiction—WCAB held that California had jurisdiction pursuant to Labor Code § 3600.5(a) over claims asserted by applicants husband and wife truck drivers injured in motor vehicle accident on 12/29/2003, notwithstanding that accident occurred in Illinois while applicants were working for Michigan-based trucking corporation and that employment contracts were signed in Michigan, when evidence indicated that (1) 90 to 95 percent of applicants' runs were to west coast, (2) 80 to 85 percent of these west coast runs were to California, (3) at time of accident applicants spent more time driving in California than in Michigan, (4) defendant had clients located in California, (5) at time of accident applicants were returning from run to California, (6) applicants resided in California during their employment with defendant, and (7) applicants parked their trailer and stored defendant's furniture blankets at their California residence between runs

Nubla v. WCAB (2007) 72 CCC 1308 (writ denied)

Injury AOE/COE—Injuries En Route To or From Medical Appointments—WCAB held that it had no jurisdiction under Labor Code § 5410 or 5804 to award inter vivos indemnity benefits to applicant's estate or to find new and separate date of injury for

compensable consequence injury sustained by applicant while traveling home from industrially-related medical appointment on 12/20/2001, more than 32 years after her 4/6/69 industrial back and psyche injuries

County of San Bernardino v. WCAB (Schroeder) (2007) 72 CCC 1365

CT Injury–Date of Injury–SOL–Court of Appeal, annulling WCAB order, held that applicant’s claim for CT injury was barred by SOL, when court found that last day applicant worked for defendant was 11/7/99, that applicant’s claim was filed in 5/2002, that nothing in record showed that defendant had knowledge or notice of facts from which it could or should have recognized that applicant sustained CT injury AOE/COE or that his condition might have arisen out of employment, that applicant’s testimony indicated that he believed that his ongoing back problems were industrially caused, and that defendant had demonstrated valid SOL defense against claim filed 2 ½ years after last date of exposure

Judicial Review–WCAB Decisions–Petition to Reopen–Court of Appeal held that it was inappropriate for it to review issues regarding applicant’s petition to reopen, when court found that WCAB had failed to comply with Labor Code § 5908.5, requiring it to state evidence relied upon and specify in detail reasons for decision, when court found that WCJ’s Report did not directly address this issue and that WCAB’s decision merely adopted and incorporated that report

Gallegos v. WCAB (2007) 72 CCC 1396 (writ denied)

Jurisdiction–Remittitur from Court of Appeal–Upon remittitur from Court of Appeal, WCAB held that it had no jurisdiction, as “inferior court,” to impose Labor Code § 5814 penalty for delayed payment of PD award after Court of Appeal had order WCAB to rescind WCJ’s imposition of penalty, despite applicant’s contentions that WCAB could conduct further hearings, receive additional evidence on alternative theories for imposing penalty, and award penalties based on alternative theories not considered by Court of Appeal

Med-1 Medical Center, Inc v. WCAB (Alberdin); Unique Healthcare Management, Inc v. WCAB (Alberdin) (2007) 72 CCC 1404 (writ denied)

Jurisdiction–Lien Claim Proceedings–WCAB held that WCJ had jurisdiction under Cal. Const. Art. XIV, §, and Labor Code §§ 3600, 3602, and 5304 to make determinations regarding validity of lien claimants’ medical bills and liens, whether medical provider was properly licensed at time medical services were provided, whether consolidation or stay of lien claims was appropriate, and whether restitution or reimbursement was appropriate; WCAB rejected lien claimants’ contentions that WCAB had no jurisdiction over lien claims in this case because of alleged lack of authority to interpret contract between management company and medical corporation and to determine validity of corporate documents issued by California Medical Board and California Secretary of

State

Clark v. WCAB (2007) 72 CCC 1471

Petitions for Writ of Review–Court of Appeal Jurisdiction–Court of Appeal, denying pro per applicant’s petition, held that court lacked jurisdiction to review claim, when applicant had filed multiple previous petitions, and was advised that further filings lacking legal grounds for review will result in award of attorney’s fees, costs, or sanctions against applicant in favor of defendant

Briggs v. WCAB (2007) 72 CCC 1647 (writ denied)

WCAB Jurisdiction–New and Further Disability–Petitions to Reopen–WCAB held that it had no jurisdiction under Labor Code § 5410 to award TD for period of new and further TD commencing more than five years after applicant’s 8/5/98 back injury, notwithstanding that incident causing new and further TD occurred within five-year period and that applicant filed timely petition to reopen for new and further disability within five-year period

Price v. WCAB (2007) 72 CCC 1687 (writ denied)

Statute of Limitations–Cumulative Injuries–WCAB held that applicant’s claim for cumulative injury to her left foot and ankle through 8/96 was barred by one-year statute of limitation set forth in Labor Code § 5405 and that statute of limitations was not tolled due to defendant’s failure to provide applicant with a claim form, when applicant obtained knowledge of her cumulative injury on 3/27/2003 upon receipt of AME’s report describing injury but did not file application for adjudication of claim until 4/28/2005, applicant’s awareness of limitation period was inferred because he was represented by counsel when he received medical report describing cumulative injury, and WCAB found that important factor for tolling statute of limitations is not whether employer provides employee with notice of limitation period, but rather when employee obtains knowledge of limitation period

INJURY AOE/COE

Arciga v. WCAB (2007) 72 CCC 1

Injury AOE/COE—Time to File Claim—Notice to Employer—Court of Appeal, annulling WCAB decision, held that, by 1/7/2004, defendant had inquiry notice of possible industrial injury to applicant's hands, pursuant to Labor Code § 5402, when applicant, after several days of pruning defendant's grape vines, told supervisors that her hands were so painful and blistered that she could not sleep, but defendant did not provide applicant with immediate medical care or give her appropriate workers' comp forms to file claim, so that fact that applicant filed claim on 4/21/2004, after 30-day limit set forth in Labor Code § 5400, did not bar claim, when Court of Appeal found that, when work causes pain so severe that one cannot sleep, it should be deemed disabling for purposes of workers' comp

CT—Date of Injury—Post-Termination Claims—Court of Appeal held that WCAB should determine whether, pursuant to Labor Code § 5412, applicant knew or should have known that she had sustained CT injury before defendant terminated her from work, when Court of Appeal found that fact that applicant's hands hurt over course of several days of pruning did not necessarily lead to conclusion that she was aware of or should have known that she was suffering from CT injury, so that fact that applicant filed claim on 4/21/2004, after 30-day limit set forth in Labor Code § 5400 would not bar claim

Elmore v. WCAB (2007) 72 CCC 8

Injury AOE/COE—Substantial Evidence—Court of Appeal, denying applicant's petition for writ of review, affirmed WCAB's denial of reconsideration after WCJ had specifically noted that applicant's testimony lacked credibility and that defendant's human resources manager's testimony was more convincing, when Court of Appeal found that applicant, following alleged industrial injury, had reported pain to defendant's human resources manager and had told her that pain was from old Vietnam injury, that WCAB expressly agreed with WCJ's credibility determinations and did not find credible applicant's claim on reconsideration that, as result of his alleged industrial injury, he was unable to remember facts surrounding incident, and that Court of Appeal was bound by WCAB's credibility determinations

Puga v. WCAB (2007) 72 CCC 195

Psychiatric Injury—Sudden and Extraordinary Employment Condition—Court of Appeal, denying applicant's petition for writ of review, affirmed WCAB's holding that applicant's claim for psychiatric injury was not compensable because applicant had not worked for employer for at least six months and applicant's alleged psychiatric injury was not caused by extraordinary employment condition, when Court of Appeal found that applicant was injured, after working for employer for approximately two months, when

she fell off ladder on 6/2/99 while engaged in her regular and routine employment activities of installing and repairing ceiling fans in chicken house, with Court of Appeal relying on *Wal-Mart Stores Inc v. WCAB (Garcia)* and distinguishing present case from *Matea v. WCAB*

CIGA v. WCAB (Foster) (2007) 72 CCC 233 (writ denied)

CT Injury–CIGA–WCAB held that QME’s opinion constituted substantial evidence to support finding that applicant hotel cook/dishwasher sustained CT injury AOE/COE to her low back from 1/1/2001 through 11/12/2001, during which period Legion Insurance had liability, but did not sustain CT injury AOE/COE during period 1/1/2000 through 12/31/2000, during which period Liberty Mutual had coverage, despite contrary opinion of AME, when QME found that applicant’s increased job duties following 9/11/2001 caused her pre-existing spondylolisthesis to “flower” into syndrome

Chavez v. WCAB (2007) 72 CCC 307

Injury AOE/COE–Post-Termination Claims–Court of Appeal, denying applicant’s petition for writ of review, held that trier of fact could reasonably conclude that applicant, employed as ranch foreman by defendant, did not establish by preponderance of evidence, as required by Labor Code § 3600(a)(10)(A), that employer had notice of his claimed injury prior to his receipt of notice of layoff, when Court of Appeal found that applicant’s claim that he had timely notified fellow foreman of his injury and fellow foreman’s testimony were inconsistent and incredible, and that applicant’s claim that he had timely notified defendant’s office manager of his injury was contradicted by office manager’s testimony.

Injury AOE/COE–Post-Termination Claims–Prejudice to Employer–Court of Appeal, denying applicant’s petition for writ of review, held that Labor Code § 5403, providing that applicant’s failure to give notice of injury within 30 days or giving of defective or inaccurate notice is not bar to recovery of benefits if it is found that defendant was not misled or prejudiced by applicant’s defective actions, is separate from issue of whether injury claim was filed subsequent to applicant’s notice of termination or layoff, when Court of Appeal found that legislature did not include requirement that employer make affirmative showing of prejudice for defense provided by Labor Code § 3600(a)(10) to apply

City of Chino v. WCAB (Alvo) (2007) 72 CCC 362 (writ denied)

Injury AOE/COE–Recreational Activities–WCAB applied two-prong test set forth in *Ezzy v. WCAB* and held that applicant/police officer, who sustained injury to his left knee on 4/26/2005, while participating in soccer game sponsored by defendant, was not barred by Labor Code § 3600(a)(9) from receiving compensation, when applicant’s credible testimony indicated that he subjectively believed his participation was a

reasonable expectancy of employment and his belief was objectively reasonable, given that (1) applicant was receiving his regular pay at time of injury, (2) applicant was allowed to play during working hours and did not have to request time off, (3) event was sponsored by defendant, (4) applicant learned of event through defendant's e-mail and by verbal communication, (5) applicant's entire team consisted of police department employees, (6) applicant signed up for event on sign-up sheet located at police department, which was only means to sign up, (7) applicant's supervisor gave him permission to leave, and (8) applicant used police vehicle to go to event

CIGA v. WCAB (Tejera) (2007) 72 CCC 482 (writ denied)

Injury to Psyche—Sudden and Extraordinary Employment Conditions—WCAB held that applicant sustained injury AOE/COE to psyche on 9/21/99, in addition to admitted injury AOE/COE to multiple other body parts on that date, and that injury to psyche was not barred under Labor Code § 3208.3(d), when WCAB relied on applicant's credible testimony that he was driving truck and trailer on date of injury, lost control on wet highway, trailer jack-knifed, and was thrown to passenger side of truck and then out passenger side door, steering wheel came loose in his hands, applicant saw trailer coming toward him, and trailer almost ran over his feet, and WCAB found that motor vehicle accidents generally were not extraordinary events but that circumstances here were sufficient to be interpreted as "extraordinary" within meaning of Labor Code § 3208.3(d) and that, even though applicant admittedly had not worked for employer for six months, "sudden and extraordinary employment condition" exception of Labor Code § 3208.3(d) applied

San Diego Gas & Electric v. WCAB (Williams) (2007) 72 CCC 501 (writ denied)

Cumulative Trauma—Date of Injury—WCAB held that applicant, who suffered cumulative back and neck injury from performing heavy work, had date of injury under Labor Code § 5412 of 8/25/2003, when he first suffered disability, even though applicant had not performed heavy work in his last years of employment with the defendant; WCAB found that Labor Code § 5500.5 does not establish length of time frame for cumulative trauma, but only for period of liability

SGL Carbon v. WCAB (Pace) (2007) 72 CCC 515 (writ denied)

Injury AOE/COE—Medical Evidence—Substantial Evidence—WCAB held that treating physician's report constituted substantial evidence to support finding that applicant's right shoulder industrial injury caused his need for repeat rotator cuff surgery, when report specifically stated that re-tear in applicant's rotator cuff tendon was due to failure of original repair following that injury, not result of new injury

IMC Chemical, Inc v. WCAB (Smith) (2007) 72 CCC 591

Injury AOE/COE—Substantial Evidence—Court of Appeal, denying defendant’s petition for writ of review, held that substantial evidence supported WCAB’s finding that applicant sustained injuries to his skin, lungs, neurological, and other bodily systems while employed by defendant as consequence of exposure to PCBs, chlorinated pesticides, arsenic, other dioxin-like chemicals, and other contaminants, when Court of Appeal found no basis for disagreeing with WCAB’s reliance on reports of two physicians, which WCAB characterized as “the most complete and persuasive,” as substantial medical evidence, and Court of Appeal noted that defendant, who was in best position to refute any claims of chemical exposure, never introduced evidence of what chemicals may or may not have been present at facility where applicant worked

Lamers v. WCAB (2007) 72 CCC 599

Injury AOE/COE—Going and Coming Rule—Court of Appeal, denying applicant’s petition for writ of review, held that decedent’s fatal automobile accident did not arise out of and occur in course of employment, and that applicant, decedent’s wife, was barred by going and coming rule from collecting survivor benefits, when Court of Appeal found that fact that decedent was working as part-time security guard, who was required, from day to day, to go to various locations for his work, who knew in advance when and where he would work on any given day, and who was not required to drive his personal car to work as condition of employment, did not place him within any exception to going and coming rule

Leprino Foods v. WCAB (Owens) 72 CCC 605

Presumption of Compensability—Court of Appeal, denying defendant’s petition for writ of review, held that WCAB did not engage in fatal error or deny defendant’s due process rights by considering and applying, sua sponte, 90-day presumption of compensability under Labor Code § 5402(d), when Court of Appeal found that statutory presumption may be considered at any time, including, as in present case, after matter was submitted for trial.

Stipulations—CT Injury—Date of Injury—Court of Appeal held that WCAB did not engage in fatal error or deny defendant’s due process rights by finding date of injury other than date listed in stipulations made by parties, when Court of Appeal found that WCAB had found that CT date of injury stipulated to by parties was included within time period of CT found by WCAB, so that there was no difference between stipulation of parties and WCAB finding

Post-Termination Claims—Specific Injury—Court of Appeal held that applicant’s claim for specific injury was not barred as post-termination claim, when it found that testimony of applicant and his supervisor that applicant informed supervisor of his claim prior to applicant’s termination by defendant constituted substantial evidence

Post-Termination Claims—CT Injury—Court of Appeal held that applicant’s claim for CT

injury was not barred as post-termination claim, when it found that defendant never demonstrated that applicant knew or reasonably should have known that his foot pain was causally connected to his employment before he was terminated by defendant

Rash v. WCAB (2007) 72 CCC 614

Injury AOE/COE—Going and Coming Rule—Special Mission—Court of Appeal, annulling WCAB’s order denying reconsideration of WCJ’s finding that applicant/sheriff’s deputy was not injured AOE/COE, held that applicant’s injuries sustained in traffic accident while returning from college horseshoeing course to prepare his privately-owned horse for mounted duty were injuries AOE/COE, when Court of Appeal found that applicant, as member of sheriff’s horse-mounted unit, was required to privately own, care for, train, and transport horse certified for mounted duty so that horse would be available for service 24 hours per day, seven days per week, that applicant enrolled in horse shoeing course at college 35 miles from his residence, that applicant, upon being asked on Monday to perform mounted duties at rodeo on following Saturday and Sunday, discovered that his horse was missing horseshoe and took his horse to class on Wednesday to replace horseshoe, that applicant was injured on way home from class, and that this trip constituted special mission that benefitted defendant

Los Olivos Motors v. WCAB (Agergaard) (2007) 72 CCC 680 (writ denied)

CT—Date of Injury—WCAB rescinded WCJ’s finding regarding date of injury for applicant’s CT to her back and found that applicant sustained CT through 1/28/2004, her last date of employment with defendant, when applicant sustained no wage loss until 1/28/2004, as required under Labor Code § 5412 to establish disability, and applicant’s testimony and medical evidence, although conflicting, supported finding that applicant’s physical duties were more demanding before defendant’s business switched ownership on 5/14/2002 but that her work after that date was also injurious

Redgwick Construction v. WCAB (Thomas) (2007) 72 CCC 711 (writ denied)

Presumption of Compensability—Failure to Timely Deny Claim—WCAB held that presumption of compensability set forth in Labor Code § 5402 was applicable to applicant’s claim for left shoulder and mouth injuries, when defendant failed to deny claim within requisite 90-day period, and that defendant did not exercise due diligence in obtaining evidence to rebut presumption, thereby precluding consideration of evidence

Injury AOE/COE—Going and Coming Rule—Personal Errands—WCAB held that applicant/construction foreman’s claim for injuries, sustained to his left shoulder and mouth when he was hit by car on his way back to work after taking 10-minute off-site break to get haircut, was not barred by “going and coming” rule, when WCAB found that applicant’s 10-minute break was minor deviation and benefitted defendant in its relations with other local businesses, i.e., barbershop, adversely affected by defendant’s

construction projects

Travelers Indemnity Co. Of Illinois v. WCAB (Lopez) (2007) 72 CCC 740 (writ denied)

Injury AOE/COE—WCAB held that applicant sustained CT injury AOE/COE to both knees and back from 1/29/2002 through 7/8/2002, based on opinions from AME

Volt Information Sciences v. WCAB (Bath) (2007) 72 CCC 743 (writ denied)

Injury AOE/COE—WCAB held that applicant sustained injury AOE/COE to her upper back, neck, right dominant shoulder, and psyche on 12/7/2001, based on stipulations of parties, when applicant worked for temporary agency/general employer and was assigned to work with special employer, finished shift with special employer, attempted to start her car in special employer's parking lot, reversed brake and accelerator pedals, and struck and killed co-worker, WCAB found injury was in course of employment and applicant's nolo contendere plea to vehicular manslaughter did not take case out of course of employment and situation was analogous to performing duty in unauthorized manner, which would be compensable.

United States Fire Insurance Co v. WCAB (Love) (2007) 72 CCC 865 (writ denied)

Injury AOE/COE—WCAB's Authority to Decide Issue—WCAB held it had authority at expedited hearing to decide issue of injury AOE/COE to applicant's thoracic spine, when applicant was struck by motor vehicle on 8/25/2005, causing admitted low back injury AOE/COE, WCAB found issues parties submitted for decision at expedited hearing included issue of whether applicant also injured thoracic spine on 8/25/2005, WCAB could, therefore, properly decide issue of injury AOE/COE to additional body part, and 8 CCR § 10420 also supported deciding this issue

Injury AOE/COE—WCAB held applicant sustained injury AOE/COE to low back, and as compensable consequence to thoracic spine (compression fractures at L1 and T12), based on substantial medical evidence opinions from two applicant's medical evaluators and defense medical evaluator

United States Fire Insurance Co v. WCAB (Urzua) (2007) 72 CCC 869 (writ denied)

Injury AOE/COE—Post-Termination Claims—WCAB held that applicant's claims for injuries to his left shoulder, back, and neck filed after he left his employment were not barred under Labor Code § 3600(a)(10), when evidence indicated that applicant was not terminated but rather voluntarily left his job either because he did not want to commute to new location where he was being transferred or because of his pain from his injuries, and there was no evidence that applicant was aware of his pending termination

City of Turlock v. WCAB (STK09 YYZZZ) (2007) 72 CCC 931

Injury AOE/COE—Substantial Evidence—Court of Appeal denied defendant’s petition for writ of review and held that substantial evidence supported WCAB’s finding of causal connection between sewage worker’s employment and his contraction of hepatitis C, when Court of Appeal found that applicant’s un rebutted testimony was that he often worked while standing in raw sewage that included human feces and often skinned or cut himself while so working, that opinion of applicant’s QME was that it was well known that hepatitis C virus was present in human feces, that, although defendant’s QME opined that applicant’s injury was not industrial and that there was no medical literature proving that hepatitis C was associated with type of risks found in sewage workers, one study attached to his report concluded that sewer workers may be at increased risk of contracting hepatitis C, and that defendant’s QME offered no alternative explanation for applicant’s contraction of hepatitis C

Ralphs Grocery Co v. WCAB (Romano) (2007) 72 CCC 1028 (writ denied)

Injury AOE/COE—Compensable Consequence Injuries—WCAB held that reports of applicant’s QME, coupled with medical records, constituted substantial evidence to support finding that applicant’s blood-borne methicillin-resistant *Staphylococcus aureus* (MRSA) was compensable consequence of his 12/20/2003 left shoulder injury and caused injury to his cardiovascular and cardiopulmonary systems, neck, and cervical and thoracic spine, with resulting paralysis, when applicant underwent left shoulder surgery on 8/29/2005, applicant began to have shoulder pain and stiffness as well as flu-like symptoms after surgery, applicant was hospitalized on 11/7/2005 and diagnosed with blood-borne MRSA that affected various internal and orthopedic systems, applicant’s QME and treating physicians opined that MRSA was most likely due to shoulder surgery, and WCAB did not find opinion of defense QME to be persuasive

California Insurance Guarantee Association v. WCAB (Mills) (2007) 72 CCC 1146 (writ denied)

Psychiatric Injuries—Six-Month Employment Rule—WCAB distinguished *Wal-Mart Stores, Inc v. WCAB (Garcia)* and held that applicant’s claim for 2/12/2001 psychiatric injury was not barred by six-month employment requirement set forth in Labor Code § 3208.3(d), notwithstanding that applicant was unable to work for consecutive two-week period during her six months of employment due to non-industrial pancreatitis, when WCAB found that allowing applicant’s psychiatric claim would not defeat legislative purpose behind Labor Code § 3208.3(d) because applicant substantially complied with six-month employment requirement by working for all but two weeks

County of El Dorado v. WCAB (Farrer) (2007) 72 CCC 1149 (writ denied)

Injury AOE/COE—Substantial Evidence—WCAB reversed WCJ’s decision and found that

applicant's testimony, coupled with opinion of applicant's QME, established by preponderance of evidence that applicant's duties at least contributed to her 2/8/2000 cumulative back, neck, and upper extremity injuries, and that QME's failure to adequately address apportionment under Labor Code § 4663 did not defeat validity of his reports as they pertained to whether applicant sustained injury AOE/COE because injury AOE/COE is governed by Labor Code § 3600, not by Labor Code § 4663

Bakersfield City School District v. WCAB (Boyd) (2007) 72 CCC 1191

Injury AOE/COE—Injury in Emergency—Court of Appeal, denying defendant's petition for writ of review, held that applicant suffered injury AOE/COE to his right shoulder while employed as air-conditioning mechanic by defendant school district, when Court of Appeal found that applicant's job duties included traveling between school sites to repair air-conditioning units, that on 8/31/2006 applicant, while traveling in school district vehicle from one school to his next assignment at another school, observed man running from police officer, that applicant became concerned that fleeing man might try to run to one of four schools, all within three blocks of incident, that applicant was injured while trying to stop fleeing man, that applicant was aware that his job description did not include apprehending suspects fleeing from police, but had been told by his supervisors to be aware of suspicious characters and that he could be used in emergency situations to protect children, that no evidence existed in record to reject applicant's testimony as to above facts, that injury sustained by employee acting in response to emergency or other situation, whether classified as rescue, response to emergency, or exercise of common decency, is within course of employment, and that applicant acted reasonably when engaging in minor deviation from course of his employment to assist police, in light of his perception of danger to schools in vicinity, combined with absence of specific employment policy prohibiting his conduct

Muna v. WCAB (2007) 72 CCC 1219

Injury AOE/COE—Presumption of Compensability—Stipulations—Court of Appeal, denying applicant's petition for writ of review, held that WCAB did not amend 8/2004 stipulation in which parties agreed that applicant sustained admitted cumulative trauma injury through 11/24/2002 and defendant reserved right to rebut based on later evidence, when Court of Appeal found that applicant did not specify how WCAB amended stipulation, that defendant did not deny liability for applicant's claim within 90 days after claim was filed, thereby giving rise to Labor Code § 5402(b)'s presumption of compensability, and that "later evidence" referred to in stipulation can mean only Labor Code § 5402(b)'s "evidence discovered subsequent to the 90-day period," not evidence discovered after date of stipulation

Injury AOE/COE—Substantial Evidence—Court of Appeal held that "overwhelming evidence" supported WCAB's decision that applicant did not sustain injury AOE/COE, when Court of Appeal found that applicant's treating physician and both applicant's and defendant's QMEs all agreed that applicant had not sustained injury AOE/COE, that

applicant never presented any medical evidence affirmatively demonstrating that he sustained such injury while employed by defendant, and that defendant met its burden of proof in rebutting presumption of compensability

Foothill-DeAnza College District v. WCAB (Ward) (2007) 72 CCC 1298 (writ denied)

Cumulative Trauma–Date of Injury–WCAB held that there was substantial evidence to support finding that applicant’s date of injury in cumulative trauma claim was 2/11/2004, date her condition became P&S and she first suffered compensable PD, when applicant lost no time from work as result of her injury, applicant’s use of wrist braces prior to becoming P&S did not constitute PD, and WCAB found that any impairment suffered by applicant prior to her P&S date was not compensable

Nubla v. WCAB (2007) 72 CCC 1308 (writ denied)

Injury AOE/COE–Injuries En Route To or From Medical Appointments–WCAB held that it had no jurisdiction under Labor Code § 5410 or 5804 to award inter vivos indemnity benefits to applicant’s estate or to find new and separate date of injury for compensable consequence injury sustained by applicant while traveling home from industrially-related medical appointment on 12/20/2001, more than 32 years after her 4/6/69 industrial back and psyche injuries

County of San Bernardino v. WCAB (Schroeder) (2007) 72 CCC 1365

CT Injury–Date of Injury–SOL–Court of Appeal, annulling WCAB order, held that applicant’s claim for CT injury was barred by SOL, when court found that last day applicant worked for defendant was 11/7/99, that applicant’s claim was filed in 5/2002, that nothing in record showed that defendant had knowledge or notice of facts from which it could or should have recognized that applicant sustained CT injury AOE/COE or that his condition might have arisen out of employment, that applicant’s testimony indicated that he believed that his ongoing back problems were industrially caused, and that defendant had demonstrated valid SOL defense against claim filed 2 ½ years after last date of exposure

Sharareh v. WCAB (2007) 72 CCC 1371

Injury AOE/COE–Injury Assisting Peace Officers–In portion of opinion not certified for publication, in case in which applicant claimed compensable injury under Labor Code § 3366(a) for injury that occurred when applicant was shot on 12/24/99 while allegedly assisting city police officer as confidential police informant, Court of Appeal found that, for purpose of finding injury AOE/COE under Labor Code § 3366(a), statute did not require (1) finding that applicant had pure motives in assisting officer, (2) finding that applicant did not have criminal record, or (3) finding that police officer initiated request, if applicant initiated actions but police officer accepted offered actions and

assigned law enforcement tasks to applicant

Hernandez v. WCAB (2007) 72 CCC 1399 (writ denied)

Injury AOE/COE—Going and Coming Rule—WCAB held that applicant's injury on 8/13/99 was barred by going and coming rule and that none of three claimed exceptions applied, when WCAB found that applicant crane operator/pile driver was driving from his home in Los Angeles area to job site approximately 130 miles away when he was injured from automobile accident, that applicant went to fixed job site for each assignment, not multiple sites in one day, that applicant worked fixed hours at each job site, that (1) dual purpose exception did not apply, that (2) special mission exception did not apply, and that (3) remote job site exception did not apply

Securitas Security Services v. WCAB (Testa) (2007) 72 CCC 1411 (writ denied)

Injury AOE/COE—WCAB held that applicant sustained compensable injury AOE/COE on 10/3/2003, when WCAB found that applicant worked for defendant as private security guard, applicant completed his usual shift at his usual work site at 3:00 p.m. on 10/3/2003, applicant occasionally worked overtime for defendant at other work sites and drove his personal vehicle to these jobs, on 10/3/2003 defendant's dispatcher requested that applicant work overtime at another work site with shift to begin at 3:00 p.m. and end at 5:00 p.m., applicant drove his personal vehicle and was injured in automobile accident at approximately 3:03 p.m. while traveling between his usual job site and job site assigned that day, defendant had policy of sometimes paying for travel to overtime assignments and would sometimes pay for travel if it billed client for same period of time, it was likely here that defendant would bill client for applicant's travel time since time with client began at 3:00 p.m. and applicant's usual shift ended at 3:00 p.m., applicant was "on clock" at time of injury because defendant could have billed client for his time, and applicant's travel was, therefore, within scope of his employment and of benefit to defendant

Injury AOE/COE—Going and Coming Rule—Alternatively, if going and coming rule applied, WCAB held that this rule did not bar claim because special mission exception applied, when WCAB found that applicant was on special mission to work overtime shift at different job site, which was departure from his usual schedule and job site

Virginia Surety, Inc v. WCAB (Diaz) (2007) 72 CCC 1426 (writ denied)

Cumulative Trauma Injuries—Date of Injury—Heart Attacks—WCAB held that coronary artery disease/heart attack suffered by applicant at work on 7/7/2004 was cumulative trauma rather than specific injury for purposes of determining applicant's date of injury under Labor Code § 5412, when AME opined that physical activities applicant performed at work throughout day of 7/7/2004 were proximate cause of his heart attack; WCAB held that applicant's date of injury under Labor Code § 5412 was

7/9/2004, when applicant first had symptoms of his heart attack at work on 7/7/2004 but did not know that heart attack was industrially caused until he was hospitalized on 7/9/2004

Injury AOE/COE–Post-termination Claims–WCAB held that applicant’s claim for workers’ comp benefits stemming from heart attack suffered by applicant at work on 7/7/2004 was not barred by post-termination defense in Labor Code § 3600(a)(10) notwithstanding that applicant was laid off after he finished work on 7/7/2004, when WCAB found that applicant’s heart attack was cumulative trauma injury, based on AME’s opinion, that date of injury under Labor Code § 5412 was 7/9/2004, and that, since applicant’s date of injury was subsequent to his layoff, his claim was not barred pursuant to Labor Code § 3600(a)(10)(D)

City of Manteca v. WCAB (Morris) (2007) 72 CCC 1503 (writ denied)

Injury AOE/COE–Compensable Consequence Injury–WCAB reversed WCJ and held that applicant’s fall on 1/28/2006 was compensable consequence of medications applicant was taking for 7/14/97 industrial neck injury, when WCAB found that applicant had multiple cervical spine surgeries and multiple pain medication prescriptions for 7/14/97 injury and was taking large doses of Neurontin for that injury, applicant was at home on 1/28/2006 when she felt dizzy and fell, applicant’s treating physician gave opinion that there was clear causal connection between multiple medications applicant was taking for 7/14/97 injury, side effects of those medications, and applicant’s fall on 1/28/2006, and WCAB relied on that opinion, there was no evidence that applicant was taking reduced dose of Neurontin on 1/28/2006, and, even if it was reduced dose, there was evidence of other causes of her fall on that date, including alleged alcohol use, and it was probable that side-effects of Neurontin contributed to applicant’s fall

Los Angeles Community College District v. WCAB (McGowan) (2007) 72 CCC 1524 (writ denied)

Injury AOE/COE–Assault by Third Party–WCAB held that applicant/part time instructor presented sufficient evidence to prove that he sustained injury AOE/COE to his left upper extremity and psyche on 9/26/2005 when he was stabbed by unknown assailant while sitting in his car in defendant’s faculty parking lot, when evidence showed that (1) attack took place on defendant’s campus with limited public exposure, (2) assailant apparently knew applicant was instructor because assailant referred to applicant by Vietnamese term “dai uy,” which, according to applicant, meant master or instructor, and (3) applicant’s car was vandalized four days later on defendant’s campus and Vietnamese words were scratched in hood, indicating that someone within collect environment perpetrated attack on applicant

Yellow Cab Cooperative v. WCAB (Cotrim) (2007) 72 CCC 1533 (writ denied)

Injury AOE/COE—Going and Coming Rule—Special Risk Exception—WCAB held that claim for injuries suffered by applicant/taxicab driver on 3/26/2005 after being shot while walking from his car on public street at about 2:00 a.m. toward entrance of defendant/Yellow Cab's taxicab yard in Potrero Hill area of San Francisco was not barred by going and coming rule because applicant's regular arrival at work very late at night in notoriously dangerous neighborhood created situation that fell within special risk exception to going and coming rule since it caused applicant to be exposed to greater risk than members of the general public

California Highway Patrol v. WCAB (Hatley) (2007) 72 CCC 1651 (writ denied)

Psychiatric Injuries—Standards for Psychiatric Reports—WCAB held that psychiatric report obtained from QME by applicant following her husband/patrol officer's 4/24/2005 suicide complied with diagnostic criteria as mandated by Labor Code §§ 139.2(j)(4) and 3208.3(a) and constituted substantial evidence to support finding that suicide was compensable, when reporting psychiatrist diagnosed patrol officer with major depression, recurrent, with suicide, and, at his deposition, elaborated on his reasons for using diagnostic criteria for major depression and factors on which he relied to make diagnosis, and WCAB found that psychiatrist's diagnosis was covered by DSM IIR in full compliance with statutory requirements

PRESUMPTIONS/PUBLIC EMPLOYEES

Pellerin v. Kern County Employee's Retirement Association (2007) 72 CCC 60

Public Employees–Disability Retirement–Court of Appeal, reversing trial court judgment, held that, if public employee qualifies for service-connected disability retirement based on Gov C § 31720.5 presumption that employee's heart condition arose out of employment, and county employees' retirement association awards service-connected disability retirement because it cannot rebut presumption, association was required by law to grant employee's service-connected disability retirement pursuant to Gov C § 31720, when Court of Appeal found that retirement association had acknowledged that employee firefighter was entitled to service-connected disability retirement by virtue of presumption created by Gov C § 3172.5, that association nevertheless found that employee had failed to produce sufficient evidence that his heart problems were substantially related to his employment within meaning of Gov C § 31720, and that unrebutted applicability of Gov C § 31720.5 presumption by itself established conditions for retirement pursuant to Gov C § 31720

City of Oakland v. WCAB (Aisthorpe, Watson) (2007) 72 CCC 249 (writ denied)

Public Employees–Salary in Lieu of Benefits–Police Officers–WCAB held that salary continuation benefits paid under Labor Code § 4850 are not subject to two-year limitation period for payment of TD indemnity set forth in Labor Code § 4656, as amended by SB 899

Foster v. WCAB (2007) 72 CCC 672 (writ denied)

Presumption of Industrial Causation–Hepatitis C–Police Officers–WCAB held that presumption of industrial causation set forth in Labor Code § 3212.8 did not apply to applicant's claim for Hepatitis C, when applicant worked as teaching assistant for California Youth Authority, she was not police officer, and her job duties did not fall within scope of active law enforcement services

Nustad v. WCAB (2007) 72 CCC 687 (writ denied)

Salary in Lieu of Disability–Increased Compensation–WCAB held that mandatory increase in benefits required by Labor Code § 4661.5 does not apply to benefits paid pursuant to Labor Code § 4850, but rather applies to TD benefits only, and that applicant police officer was not entitled to increased compensation under Labor Code § 4661.5, when applicant missed multiple days of work due to 7/18/98 industrial injury

prior to applicant's promotion to rank of lieutenant, with accompanying wage increase, and payment of Labor Code § 4850 benefits occurred after applicant's promotion and more than two years after date of injury

County of Sacramento v. WCAB (Taylor) (2007) 72 CCC 854 (writ denied)

Public Employees—Salary in Lieu of Benefits—Police Officers—WCAB held that salary continuation benefits paid pursuant to Labor Code § 4850 were not subject to two-year limitation period for payment of TD indemnity set forth in Labor Code § 4656(c), as amended by SB 899

California Horse Racing Board v. WCAB (Snezek) (2007) 72 CCC 903

Presumption of Industrial Causation—Heart Trouble—Police Officers—Court of Appeal, granting defendant's petition for writ of review and vacating WCAB's order that adopted WCJ's finding that applicant qualified for heart trouble presumption, held that applicant was not entitled to this presumption because, even if WCAB was correct that applicant, investigator for defendant, was police officer of political subdivision, pursuant to Labor Code § 3212, only presumption that applied to that class of employees was hernia presumption, not heart trouble presumption, and Court of Appeal remanded cause to WCAB to determine, without giving applicant benefit of presumption, whether applicant's heart condition was work related

City and County of San Francisco v. WCAB (Bryant) (2007) 72 CCC 1013 (writ denied)

Public Employees—Salary in Lieu of Benefits—San Francisco Police Officers—WCAB held that salary continuation benefits paid under San Francisco City Charter § A8.516 are not subject to two-year limitation period for payment of TD indemnity set forth in Labor Code § 4656(c)(1), as amended by SB 899

DuFour v. WCAB (2007) 72 CCC 1081

Presumption of Industrial Causation—Blood-borne Infectious Disease—Police Officers—Court of Appeal held that WCAB properly declined to apply Labor Code § 3212.8 presumption, establishing presumed correlation between blood-borne infectious disease and police employment, and thereby properly declined to presume that decedent police officer's death arose out of and in course of his employment, when Court of Appeal found that presumption becomes operative at trial when basic facts giving rise to presumption are established by pleadings, by stipulation, by judicial notice, or by evidence, that applicant, decedent's widow, never established underlying basic facts necessary to invoke Labor Code § 3212.8 presumption, namely, that blood-borne infectious disease developed or manifested itself while decedent was employed by defendant as police officer, and that, in fact, there was no diagnosis of any type of blood-borne infectious disease process, no blood-borne pathogen was found at autopsy, and

there was not evidence of any exposure to any blood-borne pathogen

San Francisco Bay Area Rapid Transit District v. WCAB (Ennis) (2007) 72 CCC 1694 (writ denied)

Presumption of Industrial Causation—Cancer—Peace Officers—WCAB held that applicant Bay Area Rapid Transit District police officer, who alleged injury to his lymphatic system in form of cancer through 5/8/2003, was “peace officer” within meaning of Penal Code § 830.1 since he carried weapon, had duties of enforcing law in public areas, and was covered by Labor Code § 3212.1 presumption of industrial causation with regard to his cancer, and that Penal Code § 830.33 did not preclude inclusion of Bay Area Rapid Transit District police officers within definition of “peace officers” in Penal Code § 830.1

INSURANCE

Allstate Insurance Co v. WCAB (Diaz) (2007) 72 CCC 113 (writ denied)

Insurance—Homeowners' Policies—WCAB held that homeowner's insurance policy underwritten by petitioner Allstate Insurance Company provided workers' comp coverage for applicant's 11/20/2004 injury, based on terms of policy provisions that (1) defined residential employees as those performing duties to maintain or use homeowner's premises, and (2) defined premises to include dwelling and "other structures" to include new construction of detached garage/storage unit that applicant was working on when he fell from roof and was injured, and wCAB found that policy should be construed in favor of insured and against author of policy (petitioner)

Wright v. Issak (2007) 72 CCC 438

Workers' Comp Coverage—Contractors' Licenses—Suspension of License—Court of Appeal, affirming trial court's judgment, held that plaintiff, as unlicensed contractor, could not sue for payment for work that required license and that homeowner defendants properly recovered compensation paid to plaintiff for work that required license, when court found that, prior to plaintiff's work for defendants, plaintiff's contractor's license had been automatically suspended, pursuant to Labor Code § 7125.2(a)(2), for failure to *obtain* worker's comp insurance, not, pursuant to Labor Code § 7125.2(a)(1), for failure to *maintain* workers' comp insurance, that suspension of license for failure to obtain workers' comp insurance does not require notice from registrar of contractors that is required for suspension of license for failure to maintain workers' comp insurance, and that, in any event, court conclusively presumed that plaintiff failed to carry his burden in trial court to prove lack of notice

EMPLOYMENT RELATIONSHIP

Allstate Insurance Co v. WCAB (Diaz) (2007) 72 CCC 113 (writ denied)

Employment Status—Residential Employees—WCAB held that applicant was employee of residential property owner on date he was injured in fall from property owner's roof (11/20/2004), when WCAB found (1) property owner was constructing garage/storage unit and applicant's job duties on roof qualified him as residential employee under Labor Code § 3351 because garage storage unit was being built under county abatement order (to abate nuisance from automobiles and other materials on property) and applicant's job duties were thus incidental to ownership of property owner's dwelling, and (2) applicant was not excluded from coverage under Labor Code § 3352(h) because he had worked for homeowner for more than 52 hours and also received more than \$100 in wages in 90 calendar days before date of injury

Heiman v. WCAB (Aguilera) (2007) 72 CCC 314

Employment Relationships—Unlicensed Contractors—Court of Appeal, annulling in part and affirming in part WCAB's decision, held that unlicensed contractor and property management firm that hired unlicensed contractor were jointly and severally liable to injured employee of unlicensed contractor for workers' comp, and that homeowners' association was also liable for workers' comp, when Court of Appeal found that unlicensed contractor and property management firm that hired unlicensed contractor were dual employers of injured employee, and that homeowners' association and property management firm were in principal/agent relationship

PES Payroll v. WCAB (Harvey) (2007) 72 CCC 696 (writ denied)

Employment Relationships—WCAB held that applicant was employee of petitioner on 6/28/2005, date of applicant's claimed industrial injury, when WCAB found that applicant was hired by production company to work on film production as actor and/or stuntman, petition provided payroll services and workers' comp benefits to production company employees under contract between petitioner and production company, contract contained provision that if person was on payroll during pay period, that person was petitioner's employee, evidence included payroll check from petitioner to applicant, and based on contract, Labor Code § 3602(d), and finding that applicant was on petitioner's payroll on date of injury, applicant had employee status

Employment Relationships—Contracts—Misrepresentations—WCAB found that production company's possible misrepresentations about employee's duties, if proven, rendered contract between petitioner and production company voidable, not void, and that remedy for petitioner's breach of contract or rescission of contract claim based on alleged misrepresentations by production company lay with civil courts, not with WCAB

Trans Ocean Carriers, Inc v. WCAB (Estrada) (2007) 72 CCC 734 (writ denied)

Employment Relationships—Employees—WCAB analyzed factors set forth in *S.G. Borello & Sons, Inc. V. Department of Industrial Relations* and *State Compensation Insurance Fund v. Brown* to find that applicant trucker/hauler was employee of defendant hauling company, rather than independent contractor, when WCAB found several key factors indicating employment relationship, including that (1) defendant exerted some measure of control over applicant by prohibiting applicant from driving for other companies or persons while under contract with defendant, by paying applicant for cargo delivery only after defendant was paid by its customers for delivery, and by requiring applicant to carry accident/disability insurance through specific carrier and deducting at least some portion of cost of insurance from applicant's paycheck, (2) applicant was required to display defendant's company logo on his truck, with permit numbers, and (3) applicant did not possess all permits he required to haul cargo, but rather used permit numbers belonging to defendant for entry into and egress from Port of Los Angeles and for lawful highway travel

Yellow Cab Cooperative v. WCAB (Cotrim) (2007) 72 CCC 1533 (writ denied)

Employment Relationships—Employees—Taxicab Drivers—WCAB held that defendant failed to overcome presumption of employment set forth in Labor Code § 3357 and that applicant taxicab driver who sustained injuries to both knees on 3/26/2005 was employee of defendant/Yellow Cab rather than independent contractor, when applicant did not sign lease agreement with defendant but worked under verbal agreement with primary lessee of cab after obtaining defendant's approval, and WCAB relied on additional factors indicating that defendant exerted some level of control over applicant's work, as described in *S.G. Borello & Sons, Inc v. Department of Industrial Relations*

CIGA

Security Insurance Co of Hartford v. WCAB (Murillo) (2007) 72 CCC 159 (writ denied)

CIGA—Other Insurance—Successive Injuries—Reimbursement—WCAB found that solvent carrier that was jointly and severally liable for TD, medical treatment, and VR benefits, stemming from applicant's knee injuries on 8/28/2000 and cumulatively through 8/28/2001, that solvent carrier was obligated to reimburse CIGA for benefits paid during period of solvent carrier's coverage, since that coverage constituted "other insurance" under Ins C § 1063.1(c)(9)(i), and that, therefore, there was no "covered claim" under Ins C § 1063.2(b) for which CIGA could be held liable

Krause's Custom Crafted Furniture v. WCAB (Khodavandi) (2007) 72 CCC 262 (writ denied)

CIGA—Change of Administrators—WCAB granted CIGA's petition for change of administrators, when applicant sustained CT injury AOE/COE ending 7/4/2000, while her employer was insured by Fremont Insurance Co. (now in liquidation and represented by CIGA) and Fireman's Fund Insurance Co., WCAB originally approved stipulations with request for award that included division of liability for applicant's benefits between Fremont (58 percent) and Fireman' Fund (42 percent), and Fremont originally was to administer award with periodic reimbursement from Fireman's Fund, after Fremont's liquidation CIGA requested change of administrators to Fireman's Fund, and WCAB held that change of administration of award was "ministerial function", did not equate to altering, amending, or rescinding award, CIGA's request to change administrators was appropriate under Ins C § 1063.1, and Labor Code § 5804 did not bar request, even though request was filed more than five years after applicant's date of injury

San Diego County Water Authority v. WCAB (Curtis) (2007) 72 CCC 275 (writ denied)

CIGA—Reimbursement—Other Insurers—Self-Insured Employers—WCAB held that defendant, permissibly self-insured employer, was precluded by Ins C § 1063.1(c)(5) and (c)(9)(ii) from seeking reimbursement from CIGA for medical treatment/surgery expenses defendant had paid on behalf of applicant with 7/16/91 and 7/22/96 spine injuries, despite fact that expenses were related to 1996 injury only and that CIGA had assumed liability for benefits stemming from this injury

Anadite, Inc v. WCAB (Aceves) (2007) 72 CCC 648 (writ denied)

CIGA—Change of Administrators—Other Insurance—WCAB granted CIGA's petition for

change of administrators of applicant's medical treatment awards, when WCAB found that insurance with petitioner/solvent insurer constituted "other insurance" under Insurance Code § 1063.1 that excluded CIGA coverage when other insurance existed, when applicant sustained two successive injuries AOE/COE to same body part (right knee) while working for one employer, first injury occurred 4/4/86 while employer was insured by petitioner, second injury occurred in period ending 9/30/94 while employer was insured by Fremont Indemnity Insurance Co (now in liquidation with appearance by CIGA), WCAB approved two stipulations with request for award that included awards for future medical treatment, WCAB also approved stipulations and order between petitioner and Fremont to divide liability for applicant's medical treatment costs (32% petitioner, 68% Fremont), and under circumstances here previous formal appointment of administrator was not prerequisite to change of administrators.

CIGA v. WCAB (Gill) (2007) 72 CCC 653 (writ denied)

CIGA—Other Insurance—Reimbursement—WCAB held that CIGA was not entitled to reimbursement from Denny's for medical and VR benefits paid to applicant, who sustained injuries to her lungs, internal organs, respiratory system, and sinus on 2/23/96 while working for Denny's, PSI, and on 5/26/96 while working for another employer whose insolvent carrier's covered claims were being handled by CIGA, when WCAB relied on portions of AME's opinion and found that applicant sustained two separate injuries with two separate employers, that each injury was litigated and ultimately settled separately, and that there was no joint and several liability as between two employers

Travelers Indemnity Co. of Illinois v. WCAB (Lopez) 72 CCC 940 (writ denied)

CIGA—Contribution—WCAB ordered petitioner Travelers Indemnity Company of Illinois to reimburse CIGA for TTD benefits paid to applicant from 7/8/2002 through 10/10/2003 for CT injury ending 7/8/2002, when WCAB found that Reliance Insurance Company insured employer through 7/30/2001 (with CIGA now appearing on behalf of Reliance), Travelers Indemnity Company of Illinois insured employer from 7/31/2001 through 7/3/2002, and applicant's need for TD was caused in part by CT during traveler's period of coverage and thus there was "other insurance" under Insurance Code § 1063.1(c)(9)(i) such that CIGA could be reimbursed for benefits paid to applicant

California Insurance Guarantee Association v. WCAB (Hernandez) (2007) 72 CCC 910

CIGA—Other Insurance—Court of Appeal, annulling WCAB decision, held that SCIF was jointly and severally liable to pay injured worker TD benefits, medical expenses, and VRMA, all of which had been paid to worker by CIGA, and so was obligated to fully reimburse CIGA for benefits paid, when Court of Appeal found that injured worker suffered both specific injury and cumulative trauma injury to left knee, that workers'

comp insurer covering specific injury became insolvent and was succeeded by CIGA, that SCIF had coverage of cumulative trauma injury, that CIGA had paid all TD benefits, medical expenses, and VRMA, for both injuries, in sum of \$43,505.53, and that, under Insurance Code § 1063.1(c)(9)(i), SCIF constituted “other insurance” and must reimburse CIGA in sum of \$45,505.53

California Insurance Guarantee Association v. WCAB (Faris) (2007) 72 CCC 1008 (writ denied)

CIGA–Covered Claims–EDD Liens–WCAB reversed WCJ’s decision and held that CIGA was liable to applicant for TD indemnity at rate of \$490 per week for period 3/26/2000 through 4/16/2001, less credit for \$8, 173.88 paid to EDD in settlement of its \$25,000 lien for benefits paid to applicant during period 4/2/2000 through 4/1/2001, and that CIGA was bound by its stipulation to period of applicant’s TD that it entered into with knowledge of prior settlement of EDD lien

Republic Indemnity Co of America v. WCAB (Winner) (2007) 72 CCC 1175 (writ denied)

California Insurance Guarantee Association–Other Insurance–Administration of Benefits–WCAB appointed jointly liable solvent carrier to administer PD and medical benefit award stemming from applicant’s 6/23/95 and 11/11/96 cumulative trauma injuries to her feet, when solvent carrier was liable for first cumulative trauma period and CIGA was liable for second cumulative trauma period and both periods of cumulative trauma involved same employer, same body parts, same injury, same need for treatment, and apportionment of same disability

Hewlett-Packard v. WCAB (Patapoff) (2007) 72 CCC 1674 (writ denied)

CIGA–Other Insurance–General-Special Employment Relationship–WCAB held that special employer’s self-insurance bond constituted “other insurance” under Ins Code §1063.1(c)(9), thereby relieving CIGA, on behalf of general employer, of liability for workers’ comp benefits owed to applicant

MEDICAL TREATMENT AND LEGAL EXPENSES

Smith v. WCAB; Amar v. WCAB (2007) 72 CCC 27

Medical Care—Attorney’s Fees—Court of Appeal, annulling WCAB decision, held that applicant’s attorney who succeeded in enforcing award for future medical care was entitled to receive attorney’s fees when insurance carrier refused to furnish some of that treatment but did not institute proceedings to terminate care pursuant to Labor Code § 4607, when Court of Appeal found that literal reading of Labor Code § 4607 defeated statute’s purpose, that WCAB acknowledged that, when carrier informally denied all care, applicant was entitled to attorney’s fees to enforce award, and that it saw no difference when carrier informally denied some of treatment that was necessary part of medical care previously awarded

Babbit v. Ow (2007) 72 CCC 70 (en banc)

Medical Treatment—MPN Statutes—Retroactive Application—WCAB en banc held that defendant may satisfy its obligation to provide reasonable medical treatment by transferring injured worker into authorized MPN in conformity with applicable statutes and regulations regardless of date of injury or date of award of future medical treatment, when WCAB en banc found that MPN statutes made only procedural change in law by allowing provision of reasonable medical treatment through MPN and did not affect any substantive rights, and that, therefore, MPN statutes may be applied retroactively

Lake Tahoe Unified School District v. WCAB (Kelly) (2007) 72 CCC 138 (writ denied)

Medical Treatment—ACOEM Guidelines—WCAB held that applicant with 5/22/96 industrial neck and back injuries was entitled to chiropractic treatment under Chapter 6 of ACOEM Guidelines even though treatments did not cure her condition, when chiropractic treatment temporarily relieved applicant’s pain and restored her functional capacity; WCAB found that, even if chiropractic treatment was not recommended under ACOEM Guidelines, Guidelines were rebutted by preponderance of evidence, including applicant’s testimony and QME’s opinion, that established that variance from Guidelines was reasonably required to cure and relieve from effects of applicant’s injury under Labor Code § 4604.5©

Brasher v. WCAB (2007) 72 CCC 229 (writ denied)

Medical Treatment—Spinal Surgery Disputes—Procedure—WCAB, in significant panel decision, reversed WCJ’s decision and 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 receiving treating physician's recommendation, (3) submitting recommendation to UR, or (4) pursuing options (2) and (3) simultaneously or by filing objection after UR denial, meeting time lines for each process, that, if defendant denies surgery pursuant to its UR, applicant must object within 10 days of receipt of defendant's denial, and that dispute will then be resolved under second opinion procedures set forth 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 UR had to be completed and treating physician had to appeal UR'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 UR denial

City of Hayward v. WCAB (Rushworth-McKee) (2007) 72 CCC 237 (writ denied)

Medical-Legal Procedure—UR—Expedited Hearings—WCAB held that defendant, who obtained UR medical report pursuant to Labor Code § 4610 approving surgery for applicant's 8/15/2005 ankle injury, was not entitled to obtain second opinion from QME under Labor Code § 4062 prior to expedited hearing, and that WCJ did not err in conducting expedited hearing over defendant's objection and did not violate defendant's due process rights by conducting hearing before defendant obtained second medical evaluation

Washington Mutual Card Services v. WCAB (Gaines-Hills) (2007) 72 CCC 278 (writ denied)

Medical Reports—AME's Report—WCAB relied on opinion of applicant's treating physician to find that applicant sustained injury AOE/COE to her neck, upper back, bilateral upper extremities, and wrists through 8/24/2004, rather than report of AME indicating that applicant's injuries were not industrial, when WCAB found that treating physician's reports overcame great weight accorded to AME's opinion, because treating physician's reports were comprehensive and based on thorough understanding of applicant's injury, symptoms, and limitations after having examined applicant on several occasions, whereas AME's report was conclusory on issue of causation, failed to address all issues, and was based on only single examination of applicant

Rea v. WCAB (Dabanian) (2007) 72 CCC 497 (writ denied)

Costs—Expert Witness Fees—WCAB awarded fees in amount of R1,260 to vocational expert, pursuant to Labor Code § 5811, when vocational expert made himself available to testify on applicant's behalf at trial regarding applicant's entitlement to Subsequent Injury Benefits Trust Fund benefits, WCAB found that it was not bound by Code of Civ Proc § 1033.5, that it had authority to interpret Labor Code § 5811 to include expert witness fees, that vocational expert's fees were not unreasonable, and that expert witness was entitled to fees for time he was "on call" even though witness was ultimately

not called to testify because parties settled case

Davenport v. WCAB (2007) 72 CCC 658 (writ denied)

Medical Treatment—WCAB held that medical treatment dispute for pro per applicant should be resolved using procedures set out in *Willette v. State Comp. Ins. Fund*, including Labor Code § 4061.1 examination of applicant, and Court of Appeal denied petition for writ of review in which applicant contended that she was now represented by counsel

Rea v. WCAB (2007) 72 CCC 705 (writ denied)

Award of Costs—Expert Witness Fees—WCAB awarded fees in amount of \$1,815 to vocational expert pursuant to Labor Code § 5811, when vocational expert testified at SIBTF trial regarding reasonableness of his fee and applicant's inability to compete in open labor market, WCAB found that it was not bound by CCP §1033.5, that vocational expert's testimony was relevant to SIBTF's liability, that allowing expert witness fees as costs under Labor Code § 5811 is in keeping with purpose and goals of Workers' Compensation Act, that vocational expert's fees were not unreasonable, and that it was proper to allow vocational expert to testify regarding reasonableness of his fees when SIBTF raised this issue

Laing v. WCAB (2007) 72 CCC 767

Medical-Legal Procedure—Spinal Surgery—ACOEM Guidelines—Court of Appeal, annulling WCAB's decision that spinal surgery was not reasonably required to cure or relieve from effects of applicant's industrial injury, held that WCAB improperly applied ACOEM Guidelines to conclude that surgery recommended by applicant's treating physician was unnecessary, when Court of Appeal found that Ch. 12 of ACOEM Guidelines expressly concerns "[r]ecommendations on assessing and treating adults with potentially work-related back problems (i.e., activity limitations due to symptoms in the low back *of less than three months duration*)" [*Emphasis by Court of Appeal*], that applicant's industrial injury was approximately 20 years old, and that WCAB, therefore, erred in applying ACOEM Guidelines' presumptive correctness on scope of medical treatment

Medical-Legal Procedure—Spinal Surgery—Second Opinions—Court of Appeal held that, on this record, WCAB was required to remand case for compliance with second opinion procedures mandated by Labor Code § 4062(b), when Court of Appeal found that parties selected AME, that applicant withdrew from agreement prior to examination by AME, that WCAB erred by failing to require Administrative Director to randomly select surgeon or neurosurgeon to render second opinion, and that language of Labor Code § 4062(b) requires Administrative Director to randomly select orthopedic surgeon or neurosurgeon for preparation of second opinion report when, as here, parties are unable

to reach agreement on selection of AME

Babbitt v. WCAB (2007) 72 CCC 830 (writ denied)

Medical Treatment–MPN Statutes–Retroactive Application–WCAB en banc held that defendant may satisfy its obligation to provide reasonable medical treatment by transferring injured worker into authorized MPN in conformity with applicable statutes and regulations regardless of date of injury or date of award of future medical treatment, when WCAB en banc found that MPN statutes made only procedural change in law by allowing provision of reasonable medical treatment through MPN and did not affect any substantive rights, and that, therefore, MPN statutes may be applied retroactively

Barrett Business Services, Inc v. WCAB (Sanchez) (2007) 72 CCC 834 (writ denied)

Medical-Legal Procedure–Disputed Injuries–WCAB found that reports of applicant’s treating physician were not rendered inadmissible for applicant’s failure to comply with procedures set forth in Labor Code § 4062.2 or 4062(a) or on ground that treating physician was not within defendant’s MPN, when defendant provided no evidence that it complied with Labor Code § 4062(a), did not serve applicant with any medical reports or afford her opportunity to object to opinion of prior treating physician, did not provide applicant with form to request assignment of panel QME, and did not provide applicant with notice of her rights under MPN

United States Fire Insurance Co v. WCAB (Love) (2007) 72 CCC 865 (writ denied)

Medical Treatment–WCAB held applicant was entitled to medical treatment for low back and thoracic spine, including thoracic spine surgery, based on opinions from two of applicant’s medical evaluators

Medical Reports–WCAB held reports from one of applicant’s medical evaluators complied with requirement of Labor Code § 4628 that physician sign report, when WCAB found this physician’s submitted reports were either personally or electronically signed

Sacramento County Office of Education v. WCAB (Burnett) (2007) 72 CCC 954

Medical Treatment–Spinal Surgery–Second Opinion–Court of Appeal, annulling WCAB’s decision, held that defendant was not liable for costs of applicant’s self-procured spinal surgery, when Court of Appeal found that surgery occurred before resolution of second-opinion process, and that WCAB’s interpretation of second opinion as grudging recommendation of surgery was so entirely at odds with plain test of report that it was irrational inference

Medical Treatment—Spinal Surgery—Second Opinion—Court of Appeal, annulling WCAB’s decision, held that applicant was not entitled to proceed with spinal surgery on grounds that defendant did not timely initiate WCAB proceedings after second-opinion physician issued contrary opinion, when Court of Appeal found that parties had agreed to abide by determination of second opinion, so that defendant, pursuant to 8 CCR § 9788.91(b), was relieved of this obligation

Glagola Construction Co v. WCAB (Larios) (2007) 72 CCC 1016 (writ denied)

Medical Treatment—ACOEM Guidelines—WCAB awarded applicant construction carpenter/laborer further medical treatment to cure or relieve effects of his 12/18/2004 injury AOE/COE to low back and spine, including, but not limited to, two-level arthroplasty disc surgery recommended by applicant’s treating physician and supported by AME, based on opinions from treating surgeon and AME and applicant’s offer of proof, when applicant previously underwent failed lumbar laminectomy and hemilaminectomy for his injury, his treating surgeon recommended either two-level arthroplasty disc surgery (using artificial discs) or arthrodesis/fusion but found arthroplasty disc surgery was also reasonable and supported choice of type of surgery made by applicant and treating surgeon, AME stated that treating surgeon was excellent surgeon, WCAB found that suggested surgery was outside ACOEM Guidelines, or, alternatively, that it was within Chapter 6 of Guidelines, which stated that treatment to increase function in chronic pain patients was appropriate, and there was not authority for defendant’s contentions that requested surgery should be denied because it was experimental or not supported by FDA

Sutton v. WCAB (2007) 72 CCC 1227

Medical Treatment—Applicability of ACOEM Guidelines—Court of Appeal, denying applicant’s petition for writ of review, held that WCAB correctly remanded matter to WCJ for further development of medical record to determine whether applicant was entitled to medical treatment and correctly instructed WCJ to consider presumptively correct ACOEM Guidelines, when Court of Appeal found that applicant sustained injury AOE/COE on 6/20/83, that on 5/9/85 parties entered into stipulated award providing that future medical care “may be” required, that no specific evidence existed in record that applicant required treatment falling within ACOEM Guidelines, and that Labor Code § 4604.5© provides that ACOEM Guidelines are presumptively correct on issue of extent and scope of medical treatment, “regardless of date of injury”

AME/QME PROCEDURES

SGL Carbon v. WCAB (Pace) (2007) 72 CCC 515 (writ denied)

Medical-Legal Procedure—QMEs—Subsequent Evaluations—WCAB held that defendant was not entitled to have applicant re-evaluated by panel QME with regard to applicant's need for repeat rotator cuff surgery, when there was already in evidence medical report prepared by panel QME that addressed issue, and that Labor Code § 4062.3(j) did not apply because defendant did not timely object to treating physician's recommendation for repeat surgery, as required by Labor Code § 4062(a)

Romero v. Costco Wholesale (2007) 72 CCC 824 (Significant Panel Decision)

Medical Treatment—Disputes—QME Panels—WCAB in significant panel decision denied defendant's petition to remove from WCJ's order to medical unit to issue new QME panel, comprised of three chiropractors, and held that, for purposes of Labor Code §§ 4062.1(d) and 4062.2(e), employee has "received" comprehensive medical-legal evaluation when employee attends and participates in medical evaluator's examination, when WCAB found that, although in present case

Alvarado v. WCAB (2007) 72 CCC 1142 (writ denied)

Medical-Legal Procedure—QMEs—WCAB held that time limits prescribed by Labor Code § 4062.2© for party to strike physician from QME panel run from date of assignment of three-member panel, not from service of panel on parties, and that CCP § 1013 did not extend time for party to strike physician from panel.

Fajardo v. WCAB (2007) 72 CCC 1158 (writ denied)

Medical-Legal Procedure—QMEs—Failure to Timely Submit Report—WCAB held that applicant, with 4/28/2005 brain injury, was not entitled to new panel QME evaluation pursuant to Labor Code § 4062.5, even though original panel QME failed to submit his report within 30-day time frame set forth in Labor Code § 139.2(j)(1) and 8 CCR § 38©, when applicant did not object to late report until after report was received and reviewed, report was unfavorable to applicant, and WCAB found that party should not be allowed to doctor-shop because of procedural technicality

Little v. WCAB (2007) 72 CCC 1478

Medical Treatment—Substantial Evidence—Court of Appeal, denying applicant's petition for writ of review, held that substantial evidence supported WCAB's decision that applicant failed to prove that he required erectile dysfunction medication on industrial basis, when Court of Appeal found that defendant's QME concluded that applicant's

industrially-caused back pain did not cause sexual dysfunction and that applicant's QME concluded that back pain may negatively influence erectile dysfunction but that underlying pain should be treated orthopedically rather than by providing Viagra on industrial basis

Giorgi v. WCAB (2007) 72 CCC 1513 (writ denied)

Medical Treatment—Spinal Surgery—Dispute Procedures—WCAB rescinded WCJ's finding that applicant with 3/9/87 right knee and low back injuries was entitled to lumbar fusion, as recommended by applicant's treating physician, on sole basis that defendant failed to object to treating physician's recommendation within 45 days pursuant to Labor Code § 4062(b), and remanded matter for parties to complete second opinion process, based on WCAB's reliance on dispute resolution procedure analyzed in *Brasher v. Nationwide Studio Fund* and its findings that (1) defendant was not required to file objection under Labor Code § 4062(b) to treating physician's recommendation since defendant instead chose to submit recommendation to utilization review pursuant to Labor Code § 4610(g)(3)(A), (2) although applicant did not file objection to defendant's utilization review denial within 10 days to Administrative Director as required under *Brasher* applicant's objection to claims administrator within 20 days of receiving denial, pursuant to defendant's instructions, was functional equivalent of objection under Labor Code §§ 4062 and 4610, and (3) because applicant did not actually file objection with Administrative Director, second opinion process did not formally commence and needs to be completed to determine whether applicant is entitled to recommended treatment

TEMPORARY DISABILITY

County of San Joaquin v. WCAB (Davis) (2007) 72 CCC 187

Disability Indemnity Benefits—Average Weekly Earnings—Court of Appeal affirmed WCAB's determination of applicant's average weekly earnings by applying Labor Code § 4453(c)(4), which is applicable when employment is for less than 30 hours per week or when for any reason other methods of calculating average weekly earnings set forth in Labor Code § 4453 cannot reasonably and fairly be applied, when Court of Appeal found that applicant's regular employment as attorney made him maximum wage earner for purposes of calculating his TD and PD indemnity benefits and that fact that applicant suffered injury AOE/COE while on jury duty, which employment paid nominal sum only, did not justify paying applicant benefits computed at less than maximum rate of pay

Brickman Group v. WCAB (Martinez) (2007) 72 CCC 357 (writ denied)

TD—Petition to Terminate Benefits—WCAB denied defendant's petition to terminate applicant's TD indemnity benefits, when applicant sustained injury AOE/COE 10/5/2004, parties agreed to stipulations with request for award that included continuing payment of TD, parties also agreed on designation of applicant's primary treating physician, applicant was subsequently incarcerated in county jail, treating physician refused to examine applicant in jail, defendant sought to terminate TD, and WCAB found that (1) Labor Code § 3370 did not apply because applicant was not incarcerated in state penal or correctional institution, (2) defendant could arrange for different physician to examine applicant for purpose of determining applicant's continuing TTD status, (3) applicant was not otherwise barred from receiving TD, and (4) applicant had at least one dependent (spouse) who was potentially eligible to receive applicant's TD benefits during applicant's incarceration

McCray v. WCAB (2007) 72 CCC 493 (writ denied)

TTD—WCAB reversed WCJ and held that applicant was not entitled to TTD from 2/24/2006 to present and continuing, for 7/28/95 admitted right knee and lumbar spine injury AOE/COE, when WCAB found that treatment for non-industrial obesity could be compensable as necessary precondition to treat industrial injury, but not under circumstances here, when applicant needed total knee replacement on industrial basis, AME indicated that applicant had to lose 125 to 150 pounds before undergoing this surgery, defense QME indicated his opinion that applicant would never lose necessary weight, applicant's weight had not changed significantly after 15 months, applicant's treating physician's opinion on TTD was not persuasive, and WCAB relied on opinions from AME and defense QME that applicant could work with restrictions to semi-sedentary work

Leprino Foods v. WCAB (Owens) 72 CCC 605

TD—Substantial Evidence—Court of Appeal held that WCAB’s determination that applicant was TD was supported by substantial evidence, when WCAB relied on opinions of EDD physician and QME

Hawkins v. Amberwood Products (2007) 72 CCC 807 (en banc)

TD—Maximum Duration of Payments—WCAB en banc held that statutorily allowable period of payments, 104 compensable weeks within two years from “date of commencement of temporary disability payment,” as set forth in Labor Code § 4656(c)(1), begins on date when TD is first *paid*, not on date when TD indemnity is first *owed*, when WCAB en banc found that applicant sustained admitted cumulative trauma injury to her spine while employed by defendant during period ending 7/16/2004, that defendant commenced payment of TD indemnity on 5/3/2005, that first payment covered period 7/17/2004 to 5/2/2005, that defendant paid TD indemnity through 7/14/2006, that, as of date of trial in present case, 8/14/2006, applicant had not reached maximum medical improvement and was still unable to return to her usual and customary occupation, and that applicant was entitled to additional TD indemnity from 7/15/2006 and continuing

City of Long Beach v. WCAB (Weber) (2007) 72 CCC 837 (writ denied)

TD—Duration—Two-Year Limitation on TD—WCAB held that two-year limitation period on TD set forth in Labor Code § 4656© does not apply to Labor Code § 4850 leave of absence benefits, because Labor Code § 4850 benefits are distinct from TD benefits in that they are not defined as TD, are payable after employee is P&S, entitle employee to his or her entire salary rather than merely portion of that salary, and are subject to their own one-year limitation period

Medeiros v. WCAB (2007) 72 CCC 857 (writ denied)

TD—Duration—Two-Year Limitation on TD Indemnity—WCAB held that applicant was limited under Labor Code § 4656(c)(1) to 104 weeks of TD indemnity, and that defendant was not equitably estopped from claiming limit on TD indemnity since defendant did not attempt to induce any conduct on part of applicant based on false premise

United States Fire Insurance Co v. WCAB (Love) (2007) 72 CCC 865 (writ denied)

TTD—WCAB held applicant was entitled to TTD benefits from 10/5/2006 to present and continuing, based on opinions from one of applicant’s medical evaluators

Salmon v. WCAB (2007) 72 CCC 1042 (writ denied)

TD—Limitations on Payments—Industrial Disability Leave—WCAB held that Labor Code § 4656(c)(1) was clear on its face that TD payments were limited to 104 weeks within period of two years of commencement of TD payment, and that payments for industrial disability leave, defined by Government Code § 19870(a) to mean TD as defined in workers' comp law, were included in time limitations for TD payments in Labor Code § 4656(c)(1)

Gunzenhauser v. WCAB (2007) 72 CCC 1087

TD—Maximum Duration of Payments—Court of Appeal, denying applicant's writ of review, held that Labor Code § 4656(c)(1), limiting payment of TD benefits to 104 weeks within two years from commencement of such payments, does not violate mandate of Cal. Cons., art. XIV, § 4, that legislature enact complete system of workers' comp that makes "adequate provisions for the comfort, health and safety and general welfare" of workers, when Court of Appeal found no constitutional requirement to provide TD payments for any specific period of time and no constitutional required to provide TD payments at all, and that injured employee who remains temporarily disabled after expiration of TD benefits may receive advance payment of future PD indemnity

Cruz v. Mercedes-Benz (2007) 72 CCC 1281 (en banc)

TD—Time Limit of Award—Amputations—WCAB en banc, amending WCJ's 4/4/2007 F&A, held that "amputations," as used in Labor Code § 4656(c)(2) ©, means severance or removal of limb, part of limb, or other body appendage, including both traumatic loss in industrial injury and surgical removal during treatment of industrial injury, when WCAB found that applicant sustained admitted industrial injury to his back on 1/4/2005, that applicant underwent back surgery whose procedures included anterior L5-S1 discectomy, partial L5-S1 laminotomy, and compression of L5 nerve roots bilaterally, that these procedures did not constitute amputation pursuant to Labor Code § 4656(c)(2) ©, and that applicant was not entitled to additional TD beyond that provided by Labor Code § 4656(c)(1)

Amerisource/Bergen Corp v. WCAB (Dupard) (2007) 72 CCC 1500 (writ denied)

TD—Two-Year Limitation on TD Payments—WCAB held that applicant's entitlement to TD payments for cumulative injury through 11/11/2004 had not been exhausted as of 4/19/2007 pursuant to 104-week limit on payments set forth in Labor Code § 4656(c)(1), when defendant first paid TD on 10/20/2006 for retroactive period beginning 4/26/2005, and WCAB found that *Hawkins v. Amberwood Products* counted statutory 104 weeks from commencement of TD payments rather than from first date of TD entitlement; WCAB held that state disability insurance benefits paid to applicant by EDD beginning 4/19/2005 could not be interpreted as commencement of TD payments

by defendant, since these benefits are not equivalent of TD payments by defendant, since these benefits are not equivalent of TD because they are paid for different reasons and often at different rate

Pacific Gas & Electric v. WCAB (Smith) (2007) 72 CCC 1257 (writ denied)

TD—Two-Year Limitation on TD Payments—WCAB denied defendant's petition to terminate TD payments to applicant with psyche injury through 11/10/2004, based on its decision in *Hawkins v. Amberwood Products*, when applicant had received UCD benefits from 12/7/2004 through 12/7/2005, applicant was subsequently awarded TD from 11/10/2004, defendant issued first check on 9/9/2006, which included all retroactive TD and sought to terminate liability on ground that no further TD was owed to applicant under Labor Code § 4656(c)(1) because it had paid aggregate of TD benefits in excess of 104 weeks from date payments commenced, but WCAB found that, under *Hawkins*, two-year limitation on TD payments set forth in Labor Code § 4656(c)(1) begins to run when TD is first paid (in this case 9/9/2006) and payment of UCD benefits does not count as TD payments to trigger two-year limitation period

Seidman v. WCAB (2007) 72 CCC 1530 (writ denied)

TD—Two-Year Limitation on TD Payments—Industrial Disability Leave—WCAB held that industrial disability leave paid to applicant with 8/23/2004 neck and back injuries, pursuant to Gov C § 19871, during period 9/7/2004 through 9/15/2005, was equivalent to TD payments for purpose of 104-week limitation in TD in Labor Code § 4656(c)(1), and that defendant's liability for TD terminated 104 weeks after commencement of industrial disability leave payments

Amberwood Products v. WCAB (Hawkins) (2007) 72 CCC 1644 (writ denied)

TD—Maximum Duration of Payments—WCAB en banc held that statutorily allowable period of payments, 104 compensable weeks within two years from “date of commencement of temporary disability payment,” as set forth in Labor Code § 4656(c)(1), begins on date when TD is first *paid* not on date when TD indemnity is first *owed*, when WCAB en banc found that applicant sustained admitted cumulative trauma injury to her spine while employed by defendant during period ending 7/16/2004, that defendant commenced payment of TD indemnity on 5/3/2005, that first payment covered period 7/17/2004 to 5/2/2005, that defendant paid TD through 7/14/2006, that, as of date of trial in present case, 8/14/2006, applicant had not reached maximum medical improvement and was still unable to return to her usual and customary occupation, and that applicant was entitled to additional TD payments from 7/15/2006 and continuing

Casazza v. WCAB (2007) 72 CCC 1657 (writ denied)

TD—Time Limit of Award—WCAB, granting defendant's petition for reconsideration,

held that, pursuant to *Hawkins v. Amberwood Products*, “date of commencement of temporary disability payment,” as used in Labor Code § 4656(c)(1), means date on which TD indemnity is first paid, not date for which TD disability indemnity is first owed, when WCAB found that applicant sustained injury AOE/COE to neck on 4/21/2004 and during cumulative trauma period from 11/2003 through 4/22/2004, and that defendant made its first payment of TD indemnity to applicant on 1/26/2006

TD–Consecutive Time Periods of Awards–WCAB held that applicant was not entitled to have two periods of TD indemnity run consecutively, when WCAB found that evidence did not show that applicant’s two injuries cause successive periods of TD, but rather that injuries were to same body part (neck), and both caused TD that began on 4/23/2004, so that Labor Code § 4656(c)(1) provision for 104 compensable weeks of TD indemnity within two years runs concurrently for both injuries from 1/26/2006, date on which TD indemnity was first paid

TD–Time Limit of Award–Equitable Estoppel–WCAB held that there was no basis for estoppel in counting Labor Code § 4656(c)(1)’s 104 compensable weeks because of delay in provision of medical treatment when defendant exercised its statutory rights to obtain utilization review and second opinion, when WCAB found that defendant’s exercise of rights granted by statute did not support imposition of equitable estoppel, that, alternatively, equitable estoppel did not apply because there was no evidence that defendant provided any erroneous information to applicant or that applicant relied on representations by defendant to her detriment, and that, again alternatively, Labor Code § 4656(c)(1)’s limit on TD indemnity does not require defendant to summarily approve request for medical treatment before that statute’s limiting provisions apply

Rent-A-Center v. WCAB (Herrera) (2007) 72 CCC 1691 (writ denied)

TD–Maximum Duration of Payments–WCAB relied on its decision in *Hawkins v. Amberwood Products* and held that statutorily allowable period of payments, 104 compensable weeks within two years from “date of commencement of temporary disability payment,” as set forth in Labor Code § 4656(c)(1), began on date when TD was first paid, not on date when TD indemnity was first owed, when WCAB found that applicant admittedly injured his low back on 7/22/2004, that defendant began paying TTD on 4/27/2005, retroactive from 10/2/2004, that date of commencement of TD under Labor Code § 4656(c)(1) was 4/27/2005, and that defendant should pay applicant TD until 4/27/2007 or until applicant’s condition became P&S, whichever occurred first

PERMANENT DISABILITY

Sierra Bible Church v. WCAB (Clink) (2007) 72 CCC 20

PD—Apportionment—Court of Appeal, denying defendant’s petition for writ of review, upheld WCAB’s award to applicant of 77-percent PD, without apportionment, based on AME’s initial medical reporting, when Court of Appeal found that AME’s trial testimony was subject to interpretation and was less than definitive on issue of establishing apportionment, that burden of proving apportionment rested on defendant, that WCAB concluded that defendant failed to prove via AME’s testimony that applicant suffered from apportionable underlying disease or condition that contributed to her disability, and that Court of Appeal is required to uphold factual determinations of WCAB reasonably supported by evidence

State Compensation Insurance Fund v. WCAB (Echeverria) 72 CCC 33

PD—Retroactive Application of 2005 PD Rating Schedule—Court of Appeal, annulling WCAB decision that applied 1997 PD rating schedule, held that WCAB’s decision was not supported by substantial evidence, when Court of Appeal found that 12/15/2004 single-sentence report by treating physician stated physician’s belief that PD was within reasonable medical probability as result of applicant’s 7/21/2004 industrial injury, that WCAB held this statement, read in light of treating physician’s other reports, constituted report by treating physician indicating existence of PD within meaning of Labor Code § 4660(d), that none of treating physician’s other reports provided any reasoning to support physician’s 12/15/2004 conclusion, and that medical opinion is not substantial evidence if it does not indicate reasoning behind physician’s opinion

Baglione v. Hertz Car Sales (2007) 72 CCC 86 (en banc)

PD—Retroactive Application of 2005 PD Rating Schedule—WCAB en banc, reversing WCJ, held that, because comprehensive medical-legal report issued in case prior to 1/1/2005, 1997 PD rating schedule applied pursuant to Labor Code § 4660(d), whether or not comprehensive medical-legal report indicated existence of PD, when WCAB en banc found that “last antecedent rule” of statutory construction applied, which hold that qualifying words, phrases, and clauses are to be applied to words or phrases immediately preceding and are not to be construed as extending to or including others more remote, so that phrase “indicating the existence of permanent disability” in Labor Code § 4660(d) applied only to report by treating physician, not to comprehensive medical-legal report

Pendergrass v. Duggan Plumbing (2007) 72 CCC 95 (en banc)

PD—Retroactive Application of 2005 PD Rating Schedule—WCAB en banc, amending

WCJ's findings, held that, for purposes of determining applicable PD rating schedule pursuant to Labor Code § 4660, employer's duty to provide notice required by Labor Code § 4061 arose with first payment of TD indemnity, so that, if first date of compensable TD occurred prior to 1/1/2005, 1997 PD rating schedule applied, when WCAB en banc distinguished between when duty to give notice required by Labor Code § 4061 arose and when that duty was required to be executed, and WCAB en banc found that duty, once it arose, was absolute and could not be avoided by employer, that execution of duty occurred when last payment of TD indemnity was made, and that in present case employer's duty arose on 6/30/2004, when first payment of TD indemnity was made

Erickson v. Southern California Permanente Medical Group/Kaiser Permanente (2007) 72 CCC 103 (significant panel decision)

PD—Apportionment—WCAB, in significant panel decision, granted defendant's petition for reconsideration and amended WCJ's decision to defer issue of calculation of amount of PD indemnity due to applicant, pending Supreme Court's decisions in *Brodie v. WCAB* and *Welcher v. WCAB* regarding proper method of calculating PD indemnity after apportionment, when WCAB found that, even though grants of review in *Brodie* and *Welcher* made those Court of Appeal opinions uncitable, conflict remains among published, citable Court of Appeal cases on issue, i.e., on one hand, *E&J Gallo Winery v. WCAB (Dykes)* and *Nabors v. WCAB*, and on the other hand, *Davis v. WCAB/Torres v. WCAB*, that, in view of uncertainty and conflict in current published appellate authority, strong public policies favoring judicial economy, uniformity in application of law, and prevention of inconsistent judgments that undermine integrity of judicial system provide compelling reasons for deferring issue, and that, even if Supreme Court were to grant review in *Davis/Torres*, thereby removing conflict among published authorities, WCAB would still conclude that it would be appropriate on policy grounds to defer issue

Fry's Electronics, Inc v. WCAB (Daryabeghi-Moghadam) (2007) 72 CCC 131 (writ denied)

PD—Apportionment—WCAB held that opinion of defendant's QME apportioning 25 percent of applicant's overall PD resulting from 5/2/2002 and 5/24/2002 orthopedic injuries to pre-existing condition did not constitute sufficient evidence to support finding of apportionment under Labor Code § 4663, when doctor stated that applicant had pre-existing pathology but failed to explain how pathology caused disability or how doctor determined apportionment of 25 percent

Mustafa v. WCAB (2007) 72 CCC 142 (writ denied)

PD—Rating—WCAB held that applicant was entitled to 86.5-percent PPD plus life pension, after apportionment, for CT injury AOE/COE ending 10/19/93, based on opinions from two AMEs, DEU rating, and testimony from applicant and VR counselor

PD–Apportionment–Calculation–WCAB deferred calculation of apportionment of PD and retained jurisdiction when issue was how to calculate apportionment of applicant’s current PD award to pre-existing factors (whether to subtract money value of pre-existing factors or PD percentage of pre-existing factors), when WCAB found split of authority in published court of appeal opinions and deferred issue pending resolution by Supreme Court, legislature, or WCAB

Owens v. WCAB (2007) 72 CCC 148 (writ denied)

PD–Application of 2005 Schedule for Rating PD–WCAB held that 2005 PDRS applied to rate applicant’s PD stemming from CT bilateral upper extremity injury ending on 1/10/2003, based on Labor Code § 4660(d), legislative intent behind this provision, holding in *Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn*, and finding that, although two comprehensive medical-legal reports were issued prior to 1/1/2005, neither report indicated existence of PD as required under Labor Code § 4660(d) for application of 1997 Schedule for Rating PD

PD–Application of 1997 Schedule for Rating PD–WCAB interpreted Labor Code § 4660(d) as requiring either comprehensive medical-legal report indicating existence of PD or treating physician’s report indicating existence of PD for application of 1997 Schedule

Trader Joe’s Co v. WCAB (Evets) (2007) 72 CCC 204

PD–Retroactive Application of 2005 PDRS–Court of Appeal, granting defendant’s petition for writ of review, vacated portion of WCAB’s award to applicant for 1/4/2004 hand injury, when Court of Appeal found that there had been no treating physician’s report prior to 1/1/2005 indicating existence of permanent disability, that WCJ’s observation that applicant’s injuries were of type describe in *AMA Guides* did not indicate that applicant’s injuries were necessarily permanent, that there was nothing in record that established that applicant’s nerve damage and reduced range of motion were necessarily permanent as of 12/31/2004, and that no pre-1/1/2005 report gave sign of, directed attention to, or pointed out any facts or conclusions indicating that applicant’s disability would be permanent

City of Los Angeles v. WCAB (Warren) (2007) 72 CCC 244 (writ denied)

PD–Rating–Apportionment–WCAB awarded applicant city police officer 27.75-percent PPD for CT injury AOE/COE ending 11/21/96 in form of cancer (hairy cell leukemia), after apportionment, based on applicant’s testimony, opinions from applicant’s QME, DEU rating, and rater’s testimony

Escutia v. WCAB (2007) 72 CCC 254 (writ denied)

PD–Application of 2005 PD Rating Schedule–WCAB held that 2005 PD Rating

Schedule applied to rate applicant's PD stemming from 9/21/2004 spinal injury based on Labor Code § 4660(d) and *Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn*, when WCAB found that report from applicant's treating physician stating that he was sending report to "indicate the existence of permanent disability" and checking off boxes indicating that applicant was not yet P&S but would have PD, did not constitute substantial evidence indicating existence of PD and, therefore, was insufficient under Labor Code § 4660(d) to require application of 1997 Schedule for Rating PD

Fidelity & Guaranty Insurance Co v. WCAB (Shayesteh) (2007) 72 CCC 258 (writ denied)

PD—Application of 1997 Schedule for Rating PD—WCAB affirmed WCJ's application of 1997 Schedule for Rating PD to rate PD from applicant's 7/29/2004 back and neck injuries, when defendant paid applicant TD benefits from 8/2/2004 through 6/12/2005 and WCAB concluded that defendant's duty to provide Labor Code § 4061(a) notice regarding payment of PD attached as soon as TD payments commenced in 8/2004, thereby triggering one of conditions in Labor Code § 4660(d) for application of 1997 Schedule

Markham v. WCAB (2007) 72 CCC 265 (writ denied)

PD—Apportionment—WCAB reversed WCJ's decision and held that AME's opinion supported finding of apportionment of PD stemming from applicant's CT right knee injury ending on 4/28/2002 under Labor Code § 4663, as enacted by SB 899, and *Escobedo v. Marshalls*, when AME opined that applicant's knee replacement surgery was necessitated by both industrial injury and by "other factors" in form of pre-existing pathology caused by prior injuries and surgeries, explained approximate percentage of disability caused by industrial injury and that caused by "other factors," and stated his opinion in terms of reasonable medical probability

Washington Mutual Card Services v. WCAB (Gaines-Hills) (2007) 72 CCC 278 (writ denied)

PD—Application of 1997 Schedule for Rating PD—WCAB held that 1997 Schedule for Rating PD applied to rate applicant's PD stemming from CT injuries through 8/24/2004, when treating physician's report issued on 11/23/2004, before applicant's condition became P&S, stated that applicant had PD, listed applicant's physical limitations, which were identical to physical limitations listed in treating physician's 8/30/2005 P&S report, and declared the applicant to be QIW, and WCAB found this report to sufficiently indicate existence of PD pursuant to Labor Code § 4660(d) for application of 1997 Schedule; WCAB found that defendant's duty to give applicant Labor Code § 4061 notice attached prior to 2005 when applicant began receiving EDD payments and defendant's obligation to pay TTD commenced, even though applicant did not become P&S until 8/2005, and that this gave rise to exception in Labor Code § 4660(d) to trigger application of 1997 Schedule

Linam v. WCAB (2007) 72 CCC 332

PD–Apportionment–Substantial Evidence–Court of Appeal, denying applicant’s petition for writ of review, affirmed WCAB’s decision that applicant was 88-percent PD, not 100-percent PD as opined by VR counselor, when Court of Appeal found that WCAB did not rely on VR counselor, and that applicant conceded that PD of 88 percent was supported by substantial medical evidence in form of medical reports

Marsh v. WCAB (2007) 72 CCC 336

PD–Apportionment–Substantial Evidence–Court of Appeal, denying applicant’s petition for writ of review, held that WCAB’s finding that 50 percent of applicant’s PD was caused by nonindustrial factors was supported by substantial evidence, when Court of Appeal found that AME’s opinion apportioning applicant’s disability was supported by sufficient reasons, pursuant to *Escobedo v. Marshalls*, as to how and why disability was 50-percent caused by osteopenia

PD–Apportionment–Deferring Calculation of Award–Court of Appeal, denying applicant’s petition for writ of review, held that it would not address question of WCAB’s power to defer calculation of applicant’s PD benefits pending potentially imminent guidance from Supreme Court, when Court of Appeal found that question was “nearly moot,” since issue of proper method of calculation is scheduled to be addressed by Supreme Court on 4/3/2007

Alvarado-Salas v. WCAB (2007) 72 CCC 350 (writ denied)

PD–2005 PD Rating Schedule–WCAB held that 2005 PD Rating Schedule should be used to rate PD for industrial injuries occurring before 1/1/2005 if none of exceptions in Labor Code § 4660(d) applied, based on *Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn*, and that 2005 schedule should be used here, when WCAB found that applicant sustained low back injury AOE/COE on 3/13/2004, that parties stipulated that applicant became P&S 2/24/2005, and that parties stipulated that none of Labor Code § 4660(d) exceptions applied

PD–Rating–WCAB awarded applicant 13-percent PPD, after adjustment for age and occupation and with credit for PD advances, based on opinions from applicant’s treating physician and 2005 PD Rating Schedule

Zurich American Insurance Co v. WCAB (Nunes) (2007) 72 CCC 368 (writ denied)

PD–Application of 1997 Schedule for Rating PD–WCAB held that 1997 Schedule for Rating PD (1997 Schedule) applied to rate PD resulting from applicant’s 2/9/2004 low back injury, when 2004 treating physician’s report, indicating that applicant had herniated disc, radiculopathy, and footdrop, and needed to use cane, was sufficient to

show existence of PD to require application of 1997 Schedule under Labor Code § 4660(d); WCAB also found that defendant's duty to provide Labor Code § 4061(a) notice regarding payment of PD attached as soon as TD payments commenced in 2/2004, thereby triggering one of conditions in Labor Code § 4660(d) for application of 1997 Schedule

Baglione v. Hertz Car Sales (2007) 72 CCC 444 (en banc)

PD—Retroactive Application of 2005 PD Rating Schedule—WCAB en banc, with three Commissioners dissenting, reversed its prior en banc decision in *Baglione v. Hertz Car Sales*, from which three Commissioners had also dissented, and held that, for compensable claims arising before 1/1/2005, in order for 1997 PD rating schedule to apply, pursuant to Labor Code § 4660(d), existence of PD must be indicated in either pre-2005 comprehensive medical-legal report or pre-2005 report from treating physician, and that, otherwise, 2006 PD rating schedule applied, when WCAB en banc majority found that legislature's denomination of SB 899, which amended Labor Code § 4660(d), as "urgency statute" that sought to provide relief from state's workers' comp crisis "at the earliest possible time" supported majority's view that 1997 schedule applied only when pre-1/1/2005 comprehensive medical-legal report indicated existence of PD, that, in light of Labor Code § 4660(d)'s declaration that schedule "shall promote consistency, uniformity and objectivity," no rationale existed for delaying use of 2005 schedule merely because comprehensive medical-legal report had issued, that although reference to "comprehensive medical -legal report" was not directly antecedent to phrase "indicating the existence of permanent disability" in Labor Code § 4660(d), language and need to consider obvious purpose of that statute required that WCAB look beyond mere order of words to underlying intent of the statute, and that fact that Labor Code § 4658(d)(4), in addressing same topic as relevant clause in Labor Code § 4660(d), had virtually identical language, except that it contained comma and Labor Code § 4660(d) did not, did not indicate different legislative intent, and, thus, did not defeat implementation of 2005 schedule

Pendergrass v. Duggan Plumbing (2007) 72 CCC 456 (en banc)

PD—Retroactive Application of 2005 PD Rating Schedule—WCAB en banc, with three Commissioners dissenting, reversed its prior en banc decision in *Pendergrass v. Duggan Plumbing*, from which three Commissioners had also dissented, and held that, for compensable claims arising before 1/1/2005, only if last payment of TD indemnity was made for any period of TD ending before 1/1/2005 would 1997 PD rating schedule apply to determine extent of PD, pursuant to Labor Code § 4660(d), because Labor Code § 4061 required defendant to provide applicant with notice regarding PD "[t]ogether with the last payment of temporary disability indemnity," and that otherwise 2005 PD rating schedule applied, when WCAB en banc majority found that "plain language" of Labor Code §§ 4660(d) and 4061 state that defendant's obligation to provide notice did not arise until actual last payment of TD indemnity in 7/2005, and that legislature's denomination of SB 899, which amended Labor Code § 4660(d), as "urgency statute"

that sought to provide relief from state's workers' comp crisis "at the earliest possible time" supported majority's view

Act 1 Personnel Services v. WCAB (Denny) (2007) 72 CCC 469 (writ denied)

Credits—Overpayment of PD—WCAB reversed WCJ's decision and held that defendant was not entitled to credit for overpayment of PD indemnity against future medical expenses, when applicant's future medical expenses were potentially significant, so that allowing credit presented risk that applicant would forego necessary medical treatment, and allowing credit would unduly hinder goal of workers' comp law to provide applicant with medical treatment she needed for her industrial injury

Alameda County Social Services v. WCAB (Jackson) (2007) 72 CCC 472 (writ denied)

PD—Application of 1997 Schedule for Rating PD—Comprehensive Medical-Legal Reports—WCAB held that comprehensive medical-legal report issued prior to 1/1/2005 does not have to indicate existence of PD in order to trigger exception in Labor Code § 4660(d) requiring application of 1997 Schedule, and WCAB relied on 8 CCR § 9793(c) to find that 3/98/2004 medical report obtained by defendant pursuant to Labor Code § 4060 constituted "comprehensive medical-legal report" within meaning of Labor Code § 4660(d) for purposes of applying 1997 Schedule, when defendant obtained report to prove or disprove contested claim, physician who prepared report was QME, and physician wrote narrative medical report prepared and attested to in accordance with Labor Code § 4628

Combs v. WCAB (2007) 72 CCC 485 (writ denied)

PD—Application of 2005 PD Rating Schedule—WCAB held that 2005 Schedule applied to rate PD resulting from applicant's 8/25/2004 low back injury, when none of exceptions set forth in Labor Code § 4660(d) existed to trigger application of 1997 Schedule; WCAB held that duty to provide Labor Code § 4061 notice for purposes of triggering exception under Labor Code § 4660(d) arises when last payment of TD is made, not when TD payments commence

Solar Turbines, Inc. v. WCAB (Gurfinkel) (2007) 72 CCC 519 (writ denied)

PD—Cumulative Trauma—Date of Injury—WCAB held that applicant born on 6/3/36 who suffered cumulative respiratory injury was 76-percent PD, after age adjustment, based on finding that applicant was 62 years old on date of injury under Labor Code § 5412, rather than 61 years old as asserted by defendant, since applicant first had disability from his injury in 6/98

Brodie v. WCAB; Welcher v. WCAB; Strong v. WCAB; Lopez v. WCAB; Williams, Jr. v. WCAB (2007) 72 CCC 565 (Supreme Court)

PD–Apportionment–Supreme Court held that “Formula A” adopted by Court in *Fuentes v. WCAB*, pursuant to which percentage of disability attributable to new injury is calculated by subtracting old PD rating from new PD rating, then consulting table for award due this difference, remains proper method for calculating apportionment, when Court found that neither plain language of relevant portions of workers’ comp omnibus reform bill, SB 899, enacted in 2004, nor legislative history of that bill evidence any legislative intent to abandon “Formula A” in apportionment cases

Costco Wholesale Corp v. WCAB (Chavez) (2007) 72 CCC 582

PD–Retroactive Application of 2005 PD Rating Schedule–Comprehensive Medical-Legal Report–Court of Appeal, granting defendant’s petition for writ of review, annulled WCAB award of PD that applied 1997 schedule for rating PD and remanded case for recalculation of applicant’s PD rating under 2005 PD rating schedule, when Court of Appeal found that applicant was injured on 6/5/2004, that QME issued report on 9/24/2004, that report did not indicate existence of PD, and that, pursuant to Labor Code § 4660(d), pre-2005 comprehensive medical-legal report permitted use of 1997 schedule only if that report indicated existence of PD

PD–Retroactive Application of 2005 PD Rating Schedule–Notice under Labor Code § 4061–Court of Appeal, granting defendant’s petition for writ of review, annulled WCAB award of PD that applied 1997 schedule for rating PD and remanded case for recalculation of applicant’s PD rating under 2005 PD rating schedule, when Court of Appeal found that applicant received TD benefits from 10/20/2004 until 6/28/2005, that defendant was required to give applicant notice mandated by Labor Code § 4061 only in 6/2005 together with last payment of TD indemnity, and that, pursuant to Labor Code § 4660(d), such notice permitted use of 1997 schedule only if employer were required to give it prior to 2005

Davenport v. WCAB (2007) 72 CCC 658 (writ denied)

PD–2005 PD Rating Schedule–WCAB reversed WCJ and held that 2005 schedule applied to rate applicant’s PD from admitted 10/2/2003 low back injury AOE/COE, when WCAB found that 11/30/2004 report from applicant’s treating physician did not constitute report showing existence of PD prior to 1/1/2005, because physician’s description of applicant’s condition was not substantial evidence of any PD existing prior to 1/1/2005, no LABOR CODE § 4660(d) exceptions applied, and, therefore, WCJ should use 2005 schedule to rate applicant’s PD

Eskaton Properties, Inc v. WCAB (Ongsarte) (2007) 72 CCC 662 (writ denied)

PD–Application of 1997 Schedule for Rating PD–WCAB held that 1997 Schedule for Rating PD was applicable pursuant to exceptions in Labor Code § 4660(d) to rate PD stemming from applicant’s 12/2/2000 and 10/6/2002 shoulder injuries, when treating

physician issued report on 12/20/2004 declaring applicant P&S and setting forth factors of PD, thereby giving rise to defendant's duty to provide Labor Code § 4061 notice, and neither AME's subsequent determination that applicant was not P&S as described by the treating physician, and did not become P&S until 4/27/2006, nor parties 8/9/2005 stipulation that applicant was TD from 12/29/2004 negated defendant's obligation to provide Labor Code § 4061 notice based on treating physician's finding of P&S status

Gossett v. WCAB (2007) 72 CCC 675 (writ denied)

PD—Apportionment—WCAB reversed arbitrator's finding and held that 15 percent of applicant's PD stemming from 7/10/2003 specific right knee injury and cumulative right knee trauma ending on 1/31/2004 should be apportioned to underlying asymptomatic arthritis pursuant to medical evaluator's opinion, when WCAB found that QME's opinion met requirements set forth in *Escobedo v. Marshalls* to establish apportionment under Labor Code § 4663 as enacted by SB 899 since QME explained that his opinion was based on severity of applicant's arthritis noted on imaging studies, and that reference in QME's report indicating that his opinion on apportionment may be speculative was merely surplus language that did not undermine opinion

Paredes v. WCAB (2007) 72 CCC 690 (writ denied)

PD—Apportionment—WCAB reversed WCJ's finding and held that 10 percent of applicant's PTD stemming from successive injuries to his back, neck, and upper extremities should be apportioned to non-industrial degenerative changes pursuant to AME's opinion, when WCAB found that AME's opinion met requirements set forth in *Escobedo v. Marshalls* to establish apportionment under Labor Code § 4663(a), as enacted by SB 899, since opinion indicated that applicant's non-industrial pathology caused PD, and that neither AME's inability to state with medical probability that applicant would have sustained PD absent work injuries nor his approximation of PD caused by non-industrial factors made his opinion speculative

Phelps v. WCAB (2007) 72 CCC 701 (writ denied)

PD—Rating—Occupational Variants—WCAB held that applicant's PD should be rated using occupational variant 390 (teacher) instead of variant 590 (professional dancer/athlete), when WCAB found that applicant had worked for 23 years as high school teacher, including 14 years as full-time dance teacher, and that her duties were analogous to those of a physical education or aerobics teacher, not to those of professional dancer/athlete

Tokio Marine and Fire Insurance Company v. WCAB (Carmela Burnside) (2007) 72 CCC 731 (writ denied)

PD—Application of 1997 Schedule for Rating PD—WCAB held that 1997 Schedule for Rating PD applied to rate applicant's PD stemming from injuries to her neck, shoulders,

hands, left ankle, and bilateral upper extremities on 6/12/2002 and during period 2/28/91 through 11/11/2003, when WCAB found that form RU-90 prepared by applicant's treating physician on 7/1/2004 stating that applicant was QIW entitled to VR constituted report from applicant's treating physician indicating existence of PD sufficient to satisfy exception to application of 2005 PD Schedule pursuant to Labor Code § 4660(d) and *Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn*, despite fact that applicant underwent surgery for her industrial injuries one week after form RU-90 was prepared

Zenith Insurance v. WCAB (Azizi) (2007) 72 CCC 785

PD—Retroactive Application of 2005 PD Rating Schedule—Court of Appeal, annulling WCAB award of PD that applied 1997 schedule for rating PD, and agreeing with *Costco Wholesale Corp v. WCAB (Chavez)* and *Pendergrass v. Duggan Plumbing*, held that 2005 PD rating schedule should be applied to applicant's 10/21/2004 industrial injury, when Court of Appeal found that defendant paid applicant TD between 10/21/2004 and 8/5/2005, that defendant was required to provide notice under Labor Code § 4061 “together with the last payment of temporary disability indemnity,” i.e., in 8/2005, and that defendant was, therefore, “not required to provide the notice required by Section 4061 to the injured worker,” pursuant to Labor Code § 4660(d), prior to 1/1/2005

United States Fire Insurance Co v. WCAB (Urzua) (2007) 72 CCC 869 (writ denied)

PD—Apportionment—WCAB held that substantial evidence supported finding that applicant's injuries caused 63-percent PD, without apportionment to PD from prior injury under Labor Code § 4663 or 4664, when applicant's treating physician reported that apportionment under Labor Code § 4664 would be appropriate if applicant had received PD award for prior injury, but there was no evidence of prior award of PD and defendant failed to meet their burden of showing that applicant wilfully suppressed evidence that defendants needed to establish apportionment to other factors

Chang v. WCAB (2007) 72 CCC 921

PD—Retroactive Application of 2005 PD Rating Schedule—Court of Appeal held that WCAB correctly relied on 2005 PD rating schedule in determining applicant's level of PD from cumulative trauma injury ending 7/2004, since none of exceptions set forth in Labor Code § 4660(d) applied, when Court of Appeal, following *aldie v. Carr, McClellan Ingersoll, Thompson & Horn*, found that Administrative Director could have promulgated 2005 PD rating schedule prior to 1/1/2005 deadline mandated by Labor Code § 4660(e) did not mean that, only if new schedule had been promulgated between 4/19/2004 (effective date of SB 899) and 1/1/2005 would new schedule have applied to injuries sustained during 2004, nor did fact that new schedule did not become effective until 1/1/2005 mean that exceptions in Labor Code § 4660(d) became moot so that all injuries occurring before 1/1/2005 were to be rated under 1997 schedule for rating PD

City of Oakland v. WCAB (Baptista) (2007) 72 CCC 928

PD—Apportionment—Court of Appeal, having deferred consideration of defendant's petition for writ of error that had sought annulment of WCAB decision apportioning applicant's award of PD pursuant to *E & J Gallo Winder v. WCAB (Dykes)*, pending decision from California Supreme Court on apportionment issue, now annulled WCAB's decision and remanded matter to WCAB for recalculation of applicant's PD in accordance with Supreme Court's decision in *Brodie v. WCAB*

Energetic Painting and Drywall, Inc v. WCAB (Ramirez) (2007) 72 CCC 937

PD—Retroactive Application of 2005 PD Rating Schedule—Court of Appeal, annulling WCAB's order denying defendant's petition for reconsideration, held that WCAB incorrectly relied on 1997 schedule for rating PD in determining applicant's level of PD from 7/2004 industrial injury, when Court of Appeal found that defendant paid applicant TD benefits from 7/13/2004 through 3/24/2005, that, as held in *Pendergrass v. Duggan Plumbing* and *Costco Wholesale Corp v. WCAB (Chavez)*, plain language of Labor Code §§ 4061 and 4660(d) compelled conclusion that defendant was not required to provide applicant with Labor Code § 4061 notice until 3/2005, when applicant's TD benefits ended, and, therefore, that no exception listed in Labor Code § 4660(d) justified use of 1997 schedule

Joiner v. WCAB (2007) 72 CCC 943

PD—Retroactive Application of 2005 PD Rating Schedule—Court of Appeal, denying applicant's petition for writ of review, held that WCAB correctly relied on 2005 PD rating schedule in determining applicant's level of PD from 7/10/2002 industrial injury, despite applicant's contention that 1997 schedule for rating PD should have been used since second sentence of Labor Code § 4660(d) conflicts with third sentence, making these two sentences effectively negate each other, when Court of Appeal found that second sentence established general rule that PD rating schedule in effect on date of injury generally governs employee's PD rating determination, that third sentence creates exception for pre-2005 injuries in which 1997 schedule applies if any of three enumerated conditions exists, and that parties had stipulated that none of those conditions existed in present case

Minatta Transportation Co v. WCAB (Lanning) (2007) 72 CCC 950

PD—Retroactive Application of 2005 PD Rating Schedule—Notice Under Labor Code § 4061—Court of Appeal, annulling WCAB's award of PD indemnity, held that present case was indistinguishable from *Costco Wholesale Corp v. WCAB (Chavez)*, and that applicant's PD award should be calculated using 2005 PD rating schedule, when Court of Appeal found that defendant had complied with Labor Code § 4061 when it mailed required notice to applicant after last TD payment was made in 7/2005

Washington Mutual Bank v. WCAB (Helm) (2007) 72 CCC 962

PD—Retroactive Application of 2005 PD Rating Schedule—Court of Appeal, annulling WCAB's decision applying 1997 schedule for rating PD in determining applicant's level of PD from industrial injury sustained during period 2/29/2000 to 5/2/2000, held that WCAB should have used 2005 PD rating schedule, when Court of Appeal found that, although pre-2005 comprehensive medical-legal report existed, it did not indicate existence of PD, so that, pursuant to *Costco Wholesale Corp v. WCAB (Chavez)*, such report did not justify use of 1997 schedule, and that, although pre-2005 treating physician's reports existed, references in those reports to PD did not constitute substantial evidence since physician failed to support references with any reasoning

Xerox Corp v. WCAB (Blair) (2007) 72 CCC 1044 (writ denied)

PD—Applicability of 1997 Schedule for Rating PD—WCAB held that 1997 schedule for rating PD applied pursuant to Labor Code § 4660(d) to rate PD resulting from industrial injury to applicant's cervical spine and right upper extremity during period 2/19/2003 to 7/11/2003, when treating physician indicated existence of PD on 10/5/2004 report by reporting that after applicant's surgery her cervical spine lacked flexion and extension, applicant had TTD for over one year and was, therefore, assumed to be QIW, i.e., permanently disabled, and applicant was released to return to work prior to 1/1/2005, triggering defendant's duty to give Labor Code § 4061 notice to applicant

PD—Rating—WCAB found that injury to applicant's cervical spine and right upper extremity during period 2/19/2003 to 7/11/2003 caused 87-percent PD, based on factors of disability reported by applicant's treating physician

City of San Diego v. WCAB (Brooks) (2007) 72 CCC 1071

PD—Retroactive Application of 2005 PDRS—Court of Appeal affirmed WCAB decision that applied 2005 PDRS to rate applicant's disability due to Hepatitis C, when Court of Appeal found that applicant tested positive for Hepatitis C in 1999, received treatment for his condition, but continued his regular employment duties, that applicant filed application for adjudication in 1/2001, that QME's report dated 6/21/2001 indicated that applicant had no PD, that presence of Hepatitis C did not give rise to ratable PD under 1997 Schedule, that same QME issued supplemental report dated 7/18/2005 indicating that applicant had 25-percent impairment of whole person due to his chronic liver disease due to Hepatitis C, that sole cause for difference between two reports was promulgation of 2005 PDRS, that third sentence of Labor Code § 4660(d) applied to compensable claims arising before 1/1/2005, that applicant's claim arose before 1/1/2005, and that QME's 2001 report did not make 1997 Schedule applicable because, following *Costco Wholesale Corp v. WCAB (Chavez)* and *Baglione v. Hertz Car Sales*, for 1997 Schedule to apply, comprehensive medical-legal report must contain indication of PD

Health Net v. WCAB (Hansen) (2007) 72 CCC 1093

PD—Retroactive Application of 2005 PD Rating Schedule—Court of appeal, annulling WCAB award of PD that applied 1997 Schedule for Rating PD to rating applicant's cumulative trauma industrial injury ending 6/10/2004, held that, for 1997 schedule to apply, defendant must have been required to provide notice required by Labor Code § 4061 before 1/1/2005, when Court of Appeal found that applicant received TD benefits from 6/2004 to 4/2005, that, as held in *Costco Wholesale Corp. V. WCAB (Chavez)* and *Pendergrass v. Duggan Plumbing*, Labor Code § 4061 makes clear that employer must provide required notice "with the last payment of temporary disability indemnity," that defendant was not required to provide notice required by Labor Code § 4061 before 1/1/2005, and that 2005 PD Rating Schedule applied.

Lyngso Garden Materials, Inc v. WCAB (Ruiz) (2007) 72 CCC 1097

PD—Retroactive Application of 2005 PD Rating Schedule—Court of Appeal, annulling WCAB award of PD that applied 1997 Schedule for Rating PD to rating applicant's 2004 industrial injury, held that, for 1997 schedule to apply, defendant must have been required to provide notice required by Labor Code § 4061 before 1/1/2005, when Court of Appeal found that applicant received TD benefits from 12/17/2004 to 1/2/2006, that, as held in *Costco Wholesale Corp v. WCAB (Chavez)* and *Pendergrass v. Duggan Plumbing*, Labor Code § 4061 makes clear that employer must provide required notice "[t]ogether with the last payment of temporary disability indemnity," that defendant was not required to provide notice required by Labor Code § 4061 before 1/1/2005, and that 2005 PD Rating Schedule applied

Costs—Expert Witness Fees—Court of Appeal held that WCAB correctly assessed fees of applicant's expert witness on issue of applicant's diminished future earning capacity as cost against defendant, when Court of Appeal found that future earning capacity was relevant to determining percentage of applicant's PD under 2005 PD Rating Schedule, since Labor Code § 4660(a) now specifically provides that consideration is to be given to employee's diminished future earning capacity, and that future earning capacity was issue squarely presented as result of defendant's contention that 2005 schedule applied

San Francisco Marriott v. WCAB (Yamat) (2007) 72 CCC 1103

PD—Retroactive Application of 2005 PD Rating Schedule—Court of Appeal, granting defendant's petition for writ of review and annulling WCAB decision that rated applicant's PD under 1997 Schedule for Rating PD, followed *Costco Wholesale Corp v. WCAB (Chavez)* and *Pendergrass v. Duggan Plumbing* to hold that 2005 PD Rating Schedule should be applied, when Court of Appeal found that applicant received TD indemnity from 6/28/2004 through 10/2005, that defendant's duty to provide notice required by Labor Code § 4061 was not triggered simply by commencement of TD benefits, and that defendant was not required to provide applicant with such notice until 10/2005, so that no exception listed in Labor Code § 4660(d) justified use of 1997

schedule

University of California, San Francisco v. WCAB (Rand) (2007) 72 CCC 1108

PD–Retroactive Application of 2005 Rating Schedule–Court of Appeal, granting defendant’s petition for writ of review and annulling portion of WCAB decision that applied 1997 Schedule for Rating PD, held that 2005 PD Rating Schedule should be applied, when Court of Appeal, following *Costco Wholesale Corp v. WCAB (Chavez)* and *Baglione v. Hertz Car Sales*, found that, for 1997 schedule to apply, comprehensive medical-legal report must contain indication of PD, and no such indication was present in comprehensive medical-legal report in this case, that defendant paid applicant TD benefits from 10/18/2004 through 7/22/2005, that, as held in *Chavez* and *Pendergrass v. Duggan Plumbing*, plain language of Labor Code §§4061 and 4660(d) compelled conclusion that defendant was not required to provide applicant with Labor Code § 4061 notice until 7/2005, when applicant’s TD benefits ended, and, therefore, that no exception listed in Labor Code § 4660(d) justified use of 1997 schedule

Vera v. WCAB (2007) 72 CCC 1115

PD–Retroactive Application of 2005 PD Rating Schedule–Court of Appeal, affirming WCAB’s decision that applied 2005 PD Rating Schedule to rating applicant’s 3/14/2003 industrial injury to his neck, back, and right shoulder, held that, for 1997 Schedule for Rating PD to apply, pre-2005 treating physician’s report must indicate that applicant has ratable disability that has reached P&S status, when Court of Appeal found that applicant’s treating physician’s report dated 4/26/2004 stated that applicant had existence of PD but that applicant had not reached P&S status, that disability is not rateable if it has not reached P&S status, so that there was no pre-2005 treating physician report indicating existence of PD; Court of Appeal held that, for 1997 Schedule for Rating PD to apply, defendant must have been required to provide notice required by Labor Code § 4061 before 1/1/2005, when Court of Appeal, found that defendant paid applicant TD benefits from 3/17/2003 through 2/1/2005, that LABOR CODE § 4061 makes clear that employer must provide required notice [t]ogether with the last payment of temporary disability indemnity,” so that defendant was not required to provide notice required by Labor Code § 4061 before 1/1/2005

Zenith Insurance Co v. WCAB (Watts) (2007) 72 CCC 1135

PD–Retroactive Application of 2005 PD Rating Schedule–Court of Appeal, granting defendant’s petition for writ of review and annulling portion of WCAB award that applied 1997 Schedule for Rating PD, held that 2005 PD Rating Schedule should be applied, when Court of Appeal, following *Costco Wholesale Corp v. WCAB (Chavez)* and *Baglione v. Hertz Car Sales*, found that, for 1997 schedule to apply, comprehensive medical-legal report must contain indication of PD, and no such indication was present in comprehensive medical-legal report in this case, that defendant paid applicant TD benefits from 4/27/2004 through 8/16/2005, that, as held in *Chavez* and *Pendergrass*

v. Duggan Plumbing, Labor Code § 4061 required that defendant provide applicant with Labor Code § 4061 notice “[t]ogether with the last payment of temporary disability indemnity,” i.e., on 8/16/2005, when applicant’s TD benefits ended, and, therefore, that no exception listed in Labor Code § 4660(d) justified use of the 1997 schedule

North Monterey County School District v. WCAB (Leetch) (2007) 72 CCC 1165 (writ denied)

PD—Apportionment—WCAB applied *Wilkinson v. WCAB* to award applicant 76-percent PD plus life pension resulting from combined effects of specific back injury sustained on 3/15/89, when defendant was self-insured, and cumulative trauma to his back and bilateral wrists ending on 6/30/97, when defendant was insured by Allianz Insurance Co., and apportion 49.1 percent of PD to specific injury and 50.9 percent to cumulative trauma, when AME reported that applicant had preclusion from heavy work after specific injury and that, following cumulative trauma, applicant was limited to semi-sedentary work

Republic Indemnity Co of America v. WCAB (Winner) (2007) 72 CCC 1175 (writ denied)

PD—Rating—WCAB held that applicant’s bilateral foot injuries on 6/23/95 and 11/11/96 resulted in 100-percent PD, and opinion of initial AME coupled with applicant’s testimony indicated that applicant was in permanent need of wheelchair for mobility and overcame opinion of subsequent AME, when WCAB found that she would not be able to compete in open labor market without sheltered workshop that would allow her to work in wheelchair.

PD—Apportionment—WCAB found that 80 percent of applicant’s total PD stemming from 6/23/95 and 11/11/96 bilateral injuries to her feet was caused by industrial injury and 20 percent was related to non-industrial factors, based on range of evidence as between opinions of two AMEs, with range from zero to 50-percent non-industrial, when portions of both physicians’ opinions regarding apportionment were not substantial evidence, while other portions of their opinions constituted substantial evidence under Labor Code § 4663 as enacted by SB 899

City of Galt v. WCAB (Ramos) (2007) 72 CCC 1197

PD—Retroactive Application of 2005 PD Rating Schedule—Court of Appeal, granting defendant’s petition for writ of error, annulling WCAB order denying defendant’s petition for reconsideration, and remanding case, held that WCJ erred in using 1997 schedule for rating PD to calculate applicant’s PD award and that 2005 PD rating schedule should have been used, when Court of Appeal found that applicant sustained cumulative trauma injury AOE/COE to his feet between 8/2002 and 1/2003, that applicant received TD benefits beginning sometime before 1/1/2005 and continuing through 4/2005, that, pursuant to *Costco Wholesale Corp v. WCAB (Chavez)*, *Energetic*

Painting and Drywall, Inc v WCAB (Reyes Ramirez), and Pendergrass v. Duggan Plumbing, defendant was not required to give Labor Code § 4061 notice before 1/1/2005, and that no other exception to use of 2005 schedule set forth in Labor Code § 4660(d) applied

HSR, Inc v. WCAB (Mariscal) (2007) 72 CCC 1211

PD—Retroactive Application of 2005 PD Rating Schedule—Court of Appeal, granting defendant’s petition for writ of error, annulling WCAB order denying defendant’s petition for reconsideration, and remanding case, held that WCJ erred in using 1997 schedule for rating PD to calculate applicant’s PD award and that 2005 PD rating schedule should have been used, when Court of Appeal found that applicant sustained injury AOE/COE to his left leg on 10/21/2004, that on 12/22/2004 applicant’s treating physician issued “check the box” report in which he purported to indicate existence of PD, that treating physician’s report “indicating the existence of permanent disability,” pursuant to Labor Code § 4660(d), must constitute substantial evidence, that for report to constitute substantial evidence it must fulfill requirements of 8 CCR § 10606, that treating physician’s report in present case does not fulfill those requirements, and that WCAB’s decision to apply 1997 schedule is, therefore, not supported by substantial evidence

Travelers Indemnity Co of Illinois v. WCAB (Bryer) (2007) 72 CCC 1233

PD—Retroactive Application of 2005 PDRS—Court of Appeal, granting defendant’s petition for writ of error, annulling WCAB order granting applicant’s petition for reconsideration, and directing WCAB to reinstate WCJ’s decision, held that WCJ correctly used 2005 PDRS to calculate applicant’s PD award, when Court of Appeal found that applicant sustained injury AOE/COE to her back in 5/2004, that applicant received TD benefits from 7/2004 through 4/2005, that, pursuant to *Costco Wholesale Corp v. WCAB (Chavez), Energetic Painting and Drywall, Inc v. WCAB (Reyes Ramirez), and Pendergrass v. Duggan Plumbing*, defendant was not required to give Labor Code § 4061 notice before 1/1/2005, so that no exception to use of 2005 schedule set forth in Labor Code § 4660(d) applied

Diaz v. WCAB (2007) 72 CCC 1295 (writ denied)

PD—Subsequent Injuries Benefits Trust Fund—WCAB reversed WCJ’s decision and held that applicant, who sustained industrial injuries to her hands and wrists on 10/21/88, 2/25/91, and during cumulative period through 10/27/98 and received stipulated award for 60-percent PPD, was not entitled to Subsequent Injuries Benefits Trust Fund benefits, when there was no evidence that applicant’s pre-existing CREST syndrome was labor disabling prior to her subsequent industrial injuries, as required under Labor Code § 4751

Santa Rosa School District v. WCAB (Hagle) (2007) 72 CCC 1312 (writ denied)

PD–Applicability of 1997 Schedule for Rating PD–WCAB found that 1997 schedule for rating PD applied under Labor Code § 4660(d) to rate PD stemming from applicant’s 5/18/2004 right hip injury, when applicant was diagnosed with hip fracture and underwent hip replacement surgery on date of her injury, as documented in medical treatment records prepared prior to 1/1/2005, and WCAB relied on AMA *Guides*, which assigns permanent impairment to all total hip replacements, to infer that PD existed at time hip replacement surgery was performed

Simpson v. WCAB (2007) 72 CCC 1315 (writ denied)

PD–Apportionment–WCAB awarded applicant sawmill worker 70-percent PPD for 6/4/2001 injury AOE/COE to her back from shoveling wet sawdust, bending, and twisting, before apportionment, based on opinions from AME and applicant’s credible testimony, and WCAB held that 20 percent of applicant’s PD should be apportioned to non-industrial causes, when WCAB found AME gave opinion that 20 percent of applicant’s overall disability was due to pre-existing severe multi-level involvement and degenerative scoliosis of the lumbar spine, and AME’s opinion was substantial evidence on apportionment because of AME’s consideration of applicant’s medical records and tests and AME’s analysis of mechanism of 6/4/2001 industrial injury

Tenet/Doctors Medical Center v. WCAB (Reddrick) (2007) 72 CCC 1319 (writ denied)

PD–Applicability of 1997 Schedule for Rating PD–WCAB held that comprehensive medical-legal report issued by panel QME on 10/9/2004 was sufficient to indicate existence of PD under Labor Code § 4660(d) for purpose of applying 1997 schedule for rating PD to rate PD stemming from applicant’s 3/24/2003 right upper extremity injury, even though applicant’s condition did not become P&S until 5/21/2005, following her surgery, when report (1) stated that, if applicant elected to undergo recommended surgery, her condition would be P&S at that time, (2) state that, if applicant did undergo surgery, she would be P&S four to six weeks later, and (3) listed factors of disability

Virginia Surety, Inc v. WCAB (Wragg) (2007) 72 CCC 1322 (writ denied)

PD–Application of 1997 Schedule for Rating PD–WCAB relied on original en banc decisions in *Baglione v. Hertz Car Sales* and *Pendergrass v. Duggan Plumbing*, which were in effect at time of WCAB’s Order Denying Reconsideration in present case, to hold that 1997 schedule for rating PD applied, pursuant to Labor Code § 4660(d), to rate PD stemming from applicant’s 6/1/6/2003 back injury, when there was comprehensive medical-legal report issued before 1/1/2005, 12/22/2004 treating physician’s report that indicated existence of PD notwithstanding that applicant was not yet P&S, and TD

was first paid on 6/17/2003, giving rise to defendant's duty to provide Labor Code § 4061 notice

County of San Bernardino v. WCAB (Schroeder) (2007) 72 CCC 1365

PD—Rating—Court of Appeal held that WCAB erred in determining that all of applicant's disabilities could be rated together because they all shared at least one common date of injury, when Court of Appeal found that, pursuant to *Wilkinson v. WCAB*, successive injuries that become P&S at same time are entitled to PD award based on combined disability only when such injuries are to same part of body, and that, when injured employee sustained successive, specific industrial injuries to different parts of body, as in present case, *Wilkinson* was not applicable

Valadez v. WCAB (2007) 72 CCC 1379

PD—Retroactive Application of 2005 PD Rating Schedule—Court of Appeal affirmed WCAB's decision and held that WCAB correctly applied 2005 PD Rating Schedule to rating applicant's 3/15/2004 industrial injury to his left knee, when Court of Appeal, following *Costco Wholesale Corp v. WCAB (Chavez)*, *Baglione v. Hertz Car Sales*, and *Pendergrass v. Duggan Plumbing*, found that no exception listed in Labor Code § 4660(d) justified use of 1997 Schedule for Rating PD

University of California, Berkeley v. WCAB (Barraza) (2007) 72 CCC 1421 (writ denied)

PD—Apportionment—WCAB held that opinions of applicant's QME and VR expert constituted substantial evidence to support finding that applicant's injuries to her back, right leg, right ankle, and right hip during cumulative period 1974 to 2/28/2003, resulted in 100-percent PD without justification for apportionment, and that apportionment of PD to applicant's limited education and poor English language skills was not justified under Labor Code § 4663

Wilson-Marshall v. WCAB (2007) 72 CCC 1431 (writ denied)

PD—Apportionment—WCAB held that substantial evidence supported finding that applicant with cumulative injuries to both upper extremities, hips, knees, right wrist, neck, heart, brain, and psyche during period 6/4/82 through 10/21/99 and specific injury on 10/21/99 consisting of ruptured brain aneurysm, who received Stipulated Award of 71-percent PD, without apportionment, suffered new and further disability amounting to 99 percent, after apportionment of increased disability under Labor Code § 4663, when parties stipulated to 100-percent PD, and psychiatric AME found that 10 percent of new and further disability was due to applicant's pre-existing Guillain-Barre syndrome, based on fact that Guillain-Barre syndrome was symptomatic and labor disabling prior to applicant's industrial injury and impacted applicant's ability to communicate with co-workers; WCAB found that apportionment applied only to

increase in applicant's PD, pursuant to *Vargas v. Atascadero State Hospital*

Costa v. Hardy Diagnostic (2007) 72 CCC 1492 (en banc)

PD–Rating Under 2005 PD Rating Schedule–Costs–WCAB en banc held that VR consultant may be appropriate expert witness on topic of diminished future earning capacity to present evidence on and/or in rebuttal to PD rating under 2005 PD Rating Schedule, that costs of VR consultant may be allowable under Labor Code § 5811, and that standards for allowing such costs will be by analogy to medical-legal costs, that is, whether they are reasonable and necessary at time they are incurred, when WCAB en banc found that qualifications of each purported expert VR consultant witness must be determined on case by case basis, that expert evidence offered by applicant does not necessarily have to successfully affect PD rating to be reimbursable, but that reports and testimony of VR expert must at least have potential to affect PD rating in order for costs to be recoverable

County of Inyo v. WCAB (Douthitt) (2007) 72 CCC 1507 (writ denied)

PD–1997 Schedule for Rating PD–WCAB held that applicant's PD from 2/4/99 admitted industrial spine/low back injury should be rated using 1997 Schedule for Rating PD, when WCAB found that treating physician's report dated 10/7/2004 was reliable and indicated that applicant was P&S and had factors of PD, thus satisfying Labor Code § 4660(d) exception to use of 2005 schedule when pre-2005 treating physician's report indicates existence of PD

Bed, Bath & Beyond v. WCAB (Costa) (2007) 72 CCC 1565

PD–Retroactive Application of 2005 Schedule–Court of Appeal held that WCAB improperly applied 1997 Schedule to applicant's cumulative trauma industrial injury through 10/7/2004, when applicant received TD benefits from 11/28/2004 through 9/21/2005, that, as held in *Costco, Vera, Energetic Painting and Drywall*, and *Pendergrass*, Labor Code § 4061 requires that employer provide required notice with last payment of TD indemnity, that defendant was not required to provide notice mandated by Labor Code § 4061 before 1/1/2005, and that third exception in Labor Code § 4660(d), therefore, did not apply to warrant use of 1997 schedule

Serrano v. WCAB (2007) 72 CCC 1574

PD–Retroactive Application of 2005 Schedule–Court of Appeal held that WCAB properly applied 2005 Schedule to applicant's 8/27/2004 admitted industrial injury to his left knee, when applicant received TD benefits from 8/27/2004 until 1/1/2006, that, as held in *Costco, Vera* and *Pendergrass*, Labor Code § 4061 requires that employer provide required notice with last payment of TD indemnity, that defendant was not required to provide notice mandated by Labor Code § 4061 before 1/1/2005, and that no exception in Labor Code § 4660(d) applied to warrant use of 1997 Schedule

Tanimura & Antle v. WCAB (Lopez) (2007) 72 CCC 1579

PD—Retroactive Application of 2005 Schedule—Court of Appeal, granting defendant’s petition for writ of review and annulling WCAB decision that rated applicant’s PD under 1997 Schedule, followed *Costco, Vera, Chang, Energetic Painting and Drywall*, and *Zenith Insurance Co.*, to hold that 2005 Schedule should be applied, when applicant received TD indemnity from 9/2/2004 through 3/8/2006, that defendant’s duty to provide notice required by Labor Code § 4061 was not triggered simply by commencement of TD benefits, and that defendant was not required to provide applicant with such notice until 3/8/2006, so that no exception listed in Labor Code § 4660(d) justified use of 1997 Schedule

Vaira v. WCAB (2007) 72 CCC 1586

PD—Apportionment—Lighting Up—Court of Appeal, annulling WCAB decision and remanding case, held that apportionment of disability to prior non-industrial condition that was lighted up, accelerated, or aggravated by current industrial injury was appropriate, when Court of Appeal relied on changes in law made by SB 899 as explained by *Brodie*

PD—Apportionment—Substantial Evidence—Court of Appeal held that, although substantial evidence supported apportionment of applicant’s disability to pre-existing conditions, AME’s opinion that 40 percent of applicant’s disability should be apportioned to those conditions was *not* supported by substantial evidence because his reports were phrased in terms of both causation of disability and causation of injury, and WCAB may not use risk factors of *injury* in apportioning disability

PD—Apportionment—Gender Discrimination—Court of Appeal held that reducing PD benefits based on applicant’s pre-existing condition that is contributing factor of disability is not gender discrimination in violation of Gov Code § 11136, so long as WCAB does not apportion disability to condition peculiar to women while failing to give equal treatment to condition peculiar to men

PD—Apportionment—Age Discrimination—Court of Appeal held that apportioning disability based on applicant’s age constitutes discrimination in violation of Gov Code § 11135, but that, to extent that osteoporosis or other physical or mental condition that might contribute to work-related disability arises or becomes more acute with age, disability may be apportioned to that condition

PD—Apportionment—Overlap—Court of Appeal held that parties’ stipulation as to applicant’s overall level of disability, “not considering apportionment,” did not preclude reduction in overall disability for award due to overlap, since apportionment concerns allocation of disability among various causes whereas overlap is concerned with whether two or more injuries or conditions cause some or all of same disability, so that reservation of issue of apportionment necessarily included any corresponding

determination of overlap

Benson v. Permanente Medical Group (2007) 72 CCC 1620 (en banc)

PD–Apportionment–*Wilkinson* Rule–WCAB en banc, amending WCJ’s Findings of Fact, rescinding WCJ’s Award, and substituting new F&A, held that rule established by *Wilkinson v. WCAB*, which provided that injured worker, while employed by same employer, who sustained two separate injuries to same part of body, which became P&S at same time, was entitled to receive combined award of PD, is no longer generally applicable because inconsistent with post-SB 899 requirement that apportionment be based on causation, and that, in light of current versions of Labor Code §§ 4663(a) and (c) and 4664(a), as explained by *Brodie v. WCAB*, WCAB must now determine and apportion to cause of disability for each industrial injury, meaning that all potential causes of disability, whether from current industrial injury, prior or subsequent industrial injury, or prior or subsequent non-industrial injury or condition, must be taken into consideration

Chavez v. WCAB (2007) 72 CCC 1661 (writ denied)

PD–Apportionment–Waiver–WCAB rescinded WCJ’s finding that applicant’s injuries to her wrist, neck, shoulder, and knee through 4/14/97 caused PD of 72 percent and that defendant waived its right to apportionment of PD under Labor Code §§ 4663 and 4664 by stipulating to 72-percent PD, when applicant had received prior PD award of 36 percent for 6/25/92 injury to her upper extremities, and WCAB found that defendant stipulated to 72-percent PD for applicant’s *overall* level of PD but disputed extent of PD caused by 4/14/97 injury, as indicated by fact that PD was issue at trial

Compton v. WCAB (2007) 72 CCC 1665 (writ denied)

PD–Application of 2005 PD Rating Schedule–WCAB rescinded WCJ’s finding that 1997 Schedule for Rating PD applied to rate PD stemming from applicant’s 4/25/2004 low back injury, and found instead that 2005 PD Rating Schedule applied, pursuant to holding in *Vera v. WCAB*, since there were no medical reports establishing that applicant was P&S or that he had ratable PD prior to 1/1/2005 and, therefore, no medical evidence in record sufficient to trigger application of 1997 schedule under Labor Code § 4660(d)

New United Motor Manufacturing, Inc v. WCAB (Maricich) (2007) 72 CCC 1678 (writ denied)

PD–Application of 1997 Schedule for Rating PD–WCAB held that 1997 Schedule for Rating PD applied to rate PD stemming from applicant’s cumulative injuries to his spine, bilateral upper extremities, shoulders, and in the form of hearing loss, during period 11/23/2003 to 11/23/2004, when WCAB amended applicant’s alleged date of injury for all body parts to conform to proof pursuant to AME’s opinion, and found that

treating physician's report issued in 4/2004 describing factors of PD to applicant's back was sufficient to trigger exception to application of 2005 PD Rating Schedule under Labor Code § 4660(d), regardless of whether injuries to applicant's other body parts became P&S simultaneously

DEATH BENEFITS

State Compensation Insurance Fund v. WCAB (McMahon) (2007) 72 CCC 37

Death Benefits—Decedent's Estate—Court of Appeal, granting insurer's petition for writ of review, annulled WCAB decision that, pursuant to Labor Code § 4702(a)(6)(B), had awarded death benefits to decedent worker's estate, when Court of Appeal held that Labor Code § 4702(a)(6)(B) was unconstitutional because Calif Const, art XIV, § 4, authorized payment of death benefits to only worker's dependents or State of California

Toshi v. WCAB (2007) 72 CCC 420

Death Benefits—Suicide—Irresistible Impulse—Court of Appeal, affirming WCAB decision, held that substantial evidence, in light of entire record, supported WCAB's finding that decedent's suicide was not product of irresistible impulse, and, thus, not compensable, when court relied on expert medical opinion that decedent's three-year-old stable industrial back injury and its consequences were not chief cause of suicide, but that decedent's suicide was chiefly caused by unraveling of his relationship with his wife, which included domestic violence, his brother's cancer, his alienation from his children, his problems with his daughter in Germany, protracted periods of unemployment, and alcoholism

City of Los Angeles v. WCAB (DeLeon) (2007) 72 CCC 1463

Death Benefits—Injury AOE/COE—Decedent's death was not result of industrial injury, when decedent, accountant with CPA license employed by defendant, died from injuries received from fall while attending convention in NJ, neither commercial traveler doctrine nor special mission exception applied, defendant did not require decedent to have CPA license, traveling to attend convention for CPA credit was not expressly or impliedly authorized by decedent's employment contract, defendant did not benefit from CPA licensure, defendant provided training it considered necessary for its accountants, and defendant motivated or encourage CPA licensure as personal achievement by bonus salary only, not as incentive to improve accountant's ability to do job

VOCATIONAL DISABILITY

City of Santa Rosa v. WCAB (Osborn) (2007) 72 CCC 122 (writ denied)

VRMA–WCAB held that former Labor Code § 4642 and 8 CCR § 10125.1 applied to applicant's 7/6/2001 back injury, and that defendant was obligated to pay VRMA at delay rate from 6/9/2003, when WCAB found that 6/9/2003 doctor's report sufficiently put defendant on notice of applicant's QIW status by describing PD factors that would preclude applicant from performing his usual job duties despite doctor's statement that VR was not indicated, that defendant's duty to notify applicant of his potential VR rights under former Labor Code § 4637 was triggered on date of doctor's report, that defendant was aware that applicant was unable to perform his regular job duties, because he had previously been put on temporary modified work, that defendant did not notify applicant of his potential VR rights or offer him permanent modified or alternative work pursuant to former Labor Code § 4644, and that applicant's retirement from his job with defendant due to his injury did not preclude him from receiving VRMA since he continued to work in open labor market

Engelhard Sensor Corp v. WCAB (Lopez) (2007) 72 CCC 127 (writ denied)

VR–Statute of Limitations–Termination of Services–WCAB reversed WCJ's decision and held that applicant's request for additional VR services after completion of VR plan was not barred by statute of limitations set forth in Labor Code § 5410 even though request was made more than five years after applicant's 9/1/98 and 4/13/99 dates of injury, when initial request for services was timely under former Labor Code § 5605.5, and when defendant failed to file and serve notice of termination of VR pursuant to former Labor Code § 4644 and 8 CCR § 10131, thereby depriving applicant of due process

Anderson v. WCAB (2007) 72 CCC 354 (writ denied)

VR–Time to File Request–WCAB held that it had no jurisdiction, pursuant to *Youngblood v. WCAB*, and Labor Code §§ 5410 and 5804, to entertain applicant's request for VR made more than five years after date of injury, when applicant's entitlement to VR had previously been adjudicated, and that alleged lack of notice to applicant's counsel regarding applicant's prior interruption of services did not give WCAB jurisdiction to award benefits, since five-year statutory period is jurisdictional

VR–Interruption of Services–Notice of Interruption–Due Process–WCAB held that failure to serve applicant's counsel with notice of interruption of VR benefits did not violate applicant's due process, when evidence indicated that counsel had notice prior to interruption despite allegation that notice was not timely served.

Rea v. WCAB (Rasmussen) (2007) 72 CCC 1035 (writ denied)

SIBTF–Labor Disabling Injury–WCAB reversed WCJ’s decision and found that applicant, who suffered industrial injuries to his right upper extremity and right thumb on 6/10/2003 and during period 6/8/2003 through 6/8/2004, and had at age nine suffered non-industrial amputation to his left arm two inches below shoulder, was entitled to SIBTF benefits pursuant to CL 4751, when applicant’s amputation rated at 70 percent under 1997 schedule for rating PD, rating was not rebutted by showing that applicant had long career as pharmacist since this did not establish that applicant had rehabilitated from amputation, WCAB found that amputation was not susceptible to rehabilitation, applicant testified that he performed his job as pharmacist with great effort and some difficulty, and applicant’s VR expert testified that applicant was excluded from 68 percent of jobs in labor market due to his amputation and was precluded from 97.5 percent of all jobs when amputation disability combined with his industrially-related disability

Costs–Expert Witness Fees–WCAB held that SIBTF was liable for cost of applicant’s VR expert witness fees pursuant to Labor Code § 5811, when WCAB found that vocational expert’s testimony was necessary to show whether applicant’s amputation was labor disabling prior to his industrial injuries and to rebut SIBTF’s contention that applicant was not entitled to SIBTF benefits.

PENALTIES

Alpha Connection Group Homes for Children, Inc v. WCAB (Gonzalez) (2007) 72 CCC 225 (writ denied)

Penalties—Delay in Payment of Labor Code § 132a Award—WCAB held defendant unreasonably delayed paying 2005 Labor Code § 132a discrimination award related to applicant's 11/4/2000 industrial injury, held Labor Code § 5814 penalties apply to increase in compensation awarded under Labor Code § 132a, in spite of defendant's contention that *Moorpark v. Superior Court*, had impliedly overruled this interpretation that Labor Code § 5814 penalties applied to Labor Code § 132a awards, and ordered defendant to pay Labor Code § 5814 penalty on delayed Labor Code § 132a award

Attorney's Fees—WCAB awarded applicant's attorney's fees under Labor Code § 5814.4 for attorney's work in obtaining Labor Code § 132a award

Mackey v. WCAB (2007) 72 CCC 365 (writ denied)

Penalties—Delay in Payment of Benefits—Retroactive Application of SB 899—Due Process—WCAB held that Labor Code § 5814 as amended by SB 899, effective 6/1/2004, applied to calculate penalties owing to applicant who filed his seventh penalty petition on 1/23/2001, and that such application was not violation of applicant's due process rights, even though penalty issue was originally scheduled for trial on 8/6/2001, prior to amendment of Labor Code § 5814, but was ordered off calendar by WCJ for purposes of judicial economy and was not ultimately heard until 4/24/2006

Andersen v. WCAB (2007) 72 CCC 389

Discrimination—Labor Code § 132a—Court of Appeal, annulling WCAB decision, held that defendant discriminated against applicant, in violation of Labor Code § 132a, by requiring applicant, who had returned to work following industrial injuries, to use earned vacation time rather than sick leave to attend medical appointments needed to care for those industrial injuries, while permitting workers with non-industrial injuries to use their sick leave for medical appointments, when Court of Appeal found that local government entities and unions may not create policies that discriminate against their industrially injured employees to their detriment

Elk Grove Unified School District v. WCAB (Stroth) (2007) 72 CCC 399

S&W Misconduct by Employer—Court of Appeal, annulling WCAB award for defendant's S&W misconduct, held that defendant had not deliberately failed to take corrective action for applicant's safety, when Court of Appeal found that, while defendant knew of existing danger to applicant's safety (student with long history of aggressive and violent

behavior) and knew that probable consequences of its continuance would involve injury to applicant (student's teacher), defendant had made repeated attempts to have student placed in special education setting, attempts that were thwarted by student's parents, and was in process of making another such attempt at time of student's attack on applicant, so that final element of "serious and willful misconduct" by employer, deliberately failing to take corrective action, was not present

Nustad v. WCAB (2007) 72 CCC 687 (writ denied)

Attorney's Fees—Delay in Payment of Compensation—WCAB found that defendant was not obligated to pay attorney's fees pursuant to Labor Code § 5814.5, when there was no prior award of compensation that was unreasonably delayed, as required for award of attorney's fees under Labor Code § 5814.5

San Diego Transit Corporation v. WCAB (Mayer) (2007) 72 CCC 720 (writ denied)

Discrimination—Labor Code § 132a—WCAB held that defendant violated Labor Code § 132a when it refused to return applicant/bus driver to work following her 12/9/2002 industrial neck and shoulder injuries despite treating physician's 9/24/2003 medical release, when WCAB found that defendant unreasonably relied on lay opinion of its chief of risk management department that applicant could not physically perform her job, did not clarify applicant's status despite inquiries by applicant's treating physician, and terminated applicant without reviewing her job description or medical records or attempting to find modified/alternative work for applicant

Discrimination—Labor Code § 132a Petition—Contents—WCAB held that applicant's Labor Code § 132a petition was sufficiently specific to allege discrimination and that defendant was not denied due process, despite fact that petition stated that defendant's workers' comp administrator refused to permit applicant to return to work, when petition plainly alleged that defendant refused to allow applicant to return to work after she was released by her treating physician, and defendant had sufficient notice that applicant was claiming that defendant violated Labor Code § 132a by failing to return her to work and then terminating her employment

City of Los Angeles v. WCAB (Benavidez) (2007) 72 CCC 842 (writ denied)

Penalties—Delay in Payment of Compensation—WCAB found that defendant was liable for penalties under Labor Code § 5814 for its unreasonable delay in payment of PD benefits and attorney's fees awarded under 3/30/2004 Stipulated Award, when defendant terminated PD payments after WCJ had rescinded Stipulated Award by way of 7/1/2005 F&O on basis that it had not been signed by applicant's attorney, WCAB granted applicant's petition for reconsideration and rescinded 7/1/2005 F&O, and since 7/1/2005 F&O was invalidated, 3/30/2004 Stipulated Award remained in full force and defendant could have no reasonable doubt as to its obligation to pay PD in accordance

with Stipulated Award; WCAB found that defendant had no reasonable basis to rely on its assertion that its attorney mistakenly believed he had authority to enter 3/30/2004 Stipulated Award, because this issue was not raised by defendant in timely petition for reconsideration of 3/30/2004 Stipulated Award

Correa v. WCAB (2007) 72 CCC 847 (writ denied)

Discrimination—Labor Code § 132a—WCAB reversed WCJ’s decision and held that applicant failed to set forth prima facie showing that defendant terminated him in violation of Labor Code § 132a, when evidence indicated that defendant had been informed two years prior to terminating applicant that applicant had cardiovascular condition that applicant believed to be industrial, but that defendant had taken no adverse action against applicant, that applicant did not file workers’ comp claim until after his termination, that defendant offered evidence that applicant was terminated as result of “zero tolerance” policy toward stealing, that one of applicant’s co-workers who did not sustain industrial injury was terminated for same reason as applicant was, and that there was insufficient evidence that applicant was terminated as result of his industrial injury

Pantazis v. WCAB (2007) 72 CCC 1170 (writ denied)

Discrimination—Labor Code § 132a—Successor Entity Liability—WCAB reversed WCJ’ decision and held that defendant corporation that became incorporated in 1999 had no successor liability for Labor Code § 132a awards made to applicant on 2/19/98 and 2/26/2003 against 1979 corporation that employed applicant with 11/20/93 injury, when purposes of 1999 and 1979 corporations were not the same, there was insufficient showing of commonality of interest, goals, mission, and membership between two corporations, identity of officers between two corporations was different, and evidence indicated that 1999 corporation was new organization different from 1979 corporation

Hodgman v. WCAB (2007) 72 CCC 1202

Guardian ad Litem—Conservator—Payment for Services—Court of Appeal, annulling WCAB decision, held that WCAB had no basis for restricting compensation of guardian ad litem and conservator of incompetent injured worker to nonduplicative care and that employer, not estate of injured worker, should bear expense, when Court of Appeal found that parties had agreed in C&R agreement that guardian was entitled to compensation for duplicative care, that decisional law interpreting Labor Code § 4600 encompassed care provided by lay person that might have been done by professional, including licensed vocational nurse, that care for which guardian requested compensation from injured worker’s employer did not fall under duties of conservator but were rather equivalent to medical treatment, that WCAB should leave it to superior court to ensure guardian was not compensated for same care in conservatorship, and that guardian was entitled to penalty assessment under Labor Code § 5814, for unreasonable delay in payment of compensation, and attorney’s fees pursuant to Labor

Code § 5814.5, for efforts to obtain penalty

County of Orange v. WCAB (Ortega) (2007) 72 CCC 1291 (writ denied)

Penalties—Delay in Payment of Attorney’s Fees—WCAB awarded 10-percent penalty pursuant to Labor Code § 5814 and additional attorney’s fees under Labor Code § 5814.5, based on its finding that defendant unreasonably delayed payment of 15-percent attorney’s fees originally awarded when applicant was found to be 100-percent PD due to lung cancer sustained during period 10/26/83 through 10/12/2001, such attorney’s fees to be commuted from applicant’s PD award and paid in lump sum, defendant did not pay attorney’s fees, based on its assertion that it did not know how to commute award because of terminal nature of applicant’s condition, and defendant made no attempt to determine applicant’s life expectancy to commute award, to request clarification of attorney’s fees award, or to timely petition for reconsideration of award.

Grant Joint Union High School District v. WCAB (Butler) (2007) 72 CCC 1518 (writ denied)

S&W Misconduct by Employee—WCAB held that applicant sustained injury AOE/COE on 5/1/2006 to left lower extremity and that injury was not caused by applicant’s S&W misconduct within meaning of Labor Code § 4551 and case law, when WCAB found that applicant school custodian was on school roof on 5/1/2006 at direction of his supervisor, that he had used ladder that was too short, that his supervisor left to get taller ladder, that applicant either fell or jumped from roof, that jump was negligent or grossly negligent, that applicant showed extremely poor judgment, but that applicant’s conduct was not sufficient to be S&W misconduct because applicant’s conduct lacked quasi-criminal, intentional, or wanton quality needed for finding of S&W misconduct

California Highway Patrol v. WCAB (Hatley) (2007) 72 CCC 1651 (writ denied)

Penalties—Delay in Payment of Compensation—WCAB imposed 25-percent penalty under Labor Code § 5814 for defendant’s delay in paying death benefits to applicant whose husband/patrol officer committed suicide on 4/24/2005, based on its findings that defendant could have had no genuine medical or legal doubt as to its liability for benefits following QME’s deposition in which evaluator clearly opined that suicide was work-related, and that defendant’s claims administrator unreasonably substituted his own medical judgement for that of QME in refusing to pay benefits

TIME LIMITATIONS

State of California/Department of Corrections & Rehabilitation v. WCAB (Underwood) (2007) 72 CCC 162 (writ denied)

Statute of Limitations–Death Benefits–WCAB held that statute of limitations of Labor Code § 5406 did not bar widow’s claim for dependent death benefits related to her deceased husband’s death, when WCAB found that (1) deceased husband worked for defendant as correctional sergeant, retired on 6/1/90, and died from cardiac causes 5/21/95, (2) for purposes of determining date of injury under Labor Code § 5412, disability occurred 5/21/95 or shortly before that date, knowledge occurred on 8/5/2003 (from widow’s meeting with workers’ comp attorney, which was widow’s first knowledge that husband’s death was industrial and that she could apply for dependent’s death benefits), and earliest concurrence of disability and knowledge was 8/5/2003, which was, therefore, date of injury, (3) applicant widow’s attorney sent DWC-1 claim form to employer and copy to insurer with letter dated 11/9/2003, within one year of date of injury and, therefore, timely under Labor Code § 5406, and (4) application for adjudication of claim filed 12/10/2004 was filed within 240 weeks of date of injury and was, therefore, timely under Labor Code § 5406

City of Lompoc v. WCAB (Medina) (2007) 72 CCC 241 (writ denied)

Statute of Limitations–WCAB held that statute of limitations did not bar applicant’s claim filed 3/11/2005 for 11/6/86 date of injury, when applicant testified that defendant did not give applicant notices of his workers’ comp rights as required by *Reynolds v. Workers’ Comp. Appeals Bd.*, and defendant failed to rebut applicant’s testimony

Scott Pontiac GMC v. WCAB (Olsen) (2007) 72 CCC 346

Petitions for Reconsideration–Time to File–Place to File–Court of Appeal, annulling WCAB’s order dismissing as untimely filed defendant’s petition for reconsideration of WCAB’s previous order dismissing as untimely filed defendant’s previous petition for reconsideration, held that WCAB should deem present petition for reconsideration as timely filed on its own motion, pursuant to Labor Code § 5911, when Court of Appeal found that messenger service, on last day to make timely filing, incorrectly filed defendant’s present petition in San Francisco District Office of Division of Workers’ Compensation, located on first floor of same building in which WCAB is located on ninth floor, where petition should have been filed, but where petition was not received until seven days after filing deadline

Save Mart Supermarkets v. WCAB (Hixson) (2007) 72 CCC 509 (writ denied)

Statute of Limitations–Notice of Injury–WCAB held that employee who sustained

industrial injury to his wrists on 5/16/2001 but did not timely report injury to defendant, as required by Labor Code § 5400, was not barred from recovering compensation, when there was no showing that defendant was prejudiced or misled by applicant's failure to give timely notice, as required by Labor Code § 5403

Statute of Limitations—Time to File Claim—WCAB held that applicant, who filed claim dated 1/29/2003 alleging industrial injury to his wrists on 5/16/2001, was not barred from recovering compensation by one-year statute of limitations set forth in Labor Code § 5405, when WCAB found that it was not until applicant needed medical treatment and became temporarily disabled late 2002 that he incurred compensable injury under Labor Code §§ 3201.1 and 5411

Fisher Farms v. WCAB (Paniagua) (2007) 72 CCC 666 (writ denied)

Petitions to Reopen—Time to File—WCAB held that applicant was not barred by statute of limitations set forth in Labor Code §§ 5410 and 5804 from amending her Petition to Reopen claims for specific neck injury occurring on 7/19/90 and cumulative neck injury ending on 7/19/90, when applicant's two injuries combined to cause PD, applicant timely sought to reopen specific injury claim on 5/11/98 but inadvertently failed to include cumulative injury claim in her Petition, applicant later sought to amend Petition to include cumulative injury claim, and WCAB found that defendant knew of applicant's intent to reopen both claims and that filing date of amendment related back to 5/11/98 filing of Petition to Reopen

Tillery v. WCAB (2007) 72 CCC 727 (writ denied)

Reconsideration—Time to Raise Issues—Waiver—WCAB held that defendant did not waive right to raise issues of whether applicants' increased benefits awarded pursuant to Labor Code § 4553 were subject to limitation under *Ferguson v. WCAB* or whether applicants, sons of deceased employee, were dependents, personal representatives, or heirs and, therefore, qualified to receive accrued S&W misconduct benefits under Labor Code § 4700, after WCAB previously found that defendant's S&W misconduct led to deceased employee's injury on 4/24/98 and death on 5/3/98

Ramallah, Inc . V. WCAB (McKinley) (2007) 72 CCC 772

Petitions for Reconsideration—Time to File—Court of Appeal, denying defendant's petition for writ of review, held that defendant's second petition for reconsideration, dismissed by WCAB, was not timely filed, when Court of Appeal found that second petition was incorrectly filed in Fresno district office of WCAB, that petition was forwarded to WCAB office in San Francisco, where it should have been filed, but where it arrived after date on which WCAB's jurisdiction to reconsider its decision on first petition for reconsideration expired, that fact that defendant attempted to characterize second petition as attack on WCJ's original decision on grounds that decision has been procured by fraud was irrelevant, that, since second petition was untimely filed,

defendant had no legal grounds to file third petition, which sought reconsideration of WCAB's dismissal of second petition, and that there was no reviewable order before Court of Appeal

Pizza Hut v. WCAB (Babayants) (2007) 72 CCC 1025 (writ denied)

Statute of Limitations—WCAB held that five-year statute of limitation did not bar applicant's claim for 4/21/2000 industrial back injury, when defendant accepted injury and provided benefits until 2/23/2001, applicant submitted Application for Adjudication of Claim as well as other documents to WCAB by mail on 3/14/2002, with service on all parties, defendant submitted Application for Adjudication of Claim and other documents to WCAB on 5/4/2004, with service on all parties, matter proceeded to conference on 3/29/2005, with applicant present, and, although documents submitted to WCAB were not date stamped/conformed by WCAB and matter was not assigned case number, WCAB found that application was timely filed because failure to conform documents was due to clerical error, documents were presumed to be served since they were placed in U.S. mail with proof of service, 3/29/2005 conference served to toll five-year statute of limitations, and rule of liberal construction applied so as not to deprive applicant of benefits due to WCAB's clerical error

Gallo v. WCAB (2007) 72 CCC 1474

Petitions for Writ of Review—Time to File—Court of Appeal denied applicant's pro per petition for writ of review as untimely filed, which meant that Court of Appeal was without jurisdiction to review petition on merits, when Court of Appeal found that applicant's petition for writ of review was filed either 125 or 133 days after date of WCAB's denial of reconsideration of WCJ's first decision in case, rather than within 45 days required by Labor Code § 5950, and that applicant cannot seek writ of review from WCJ's subsequent supplemental findings and award since no petition for reconsideration was filed from that award and Labor Code § 5901 provides that no petition for writ of review of any WCJ award may be filed unless petition for reconsideration of that award has been filed and decided by WCAB

GATHERING EVIDENCE

City of Hayward v. WCAB (Rushworth-McKee) (2007) 72 CCC 237 (writ denied)

Evidence—Newly Discovered Evidence—WCAB held that defendant was not entitled to new decision regarding applicant's entitlement to ankle surgery and Labor Code § 4850 benefits based on newly discovered evidence in form of sub rosa surveillance video of applicant, when there was no showing that video could not have been obtained prior to expedited hearing and closure of discovery in this matter

Agredano v. WCAB (2007) 72 CCC 381

Evidence—Substantial Evidence—Court of Appeal, denying applicant's petition for writ of review, held that WCAB's decision that applicant's injured hand was P&S was supported by substantial evidence, when court found that WCAB relied on treating physician's 11/13/2004 P&S report and on AME's 10/19/2005 report that also found applicant's condition to be P&S

San Diego Gas & Electric v. WCAB (Williams) (2007) 72 CCC 501 (writ denied)

Cumulative Trauma—Medical Evidence—Substantial Evidence—WCAB found that opinion of applicant's QME constituted substantial evidence to support finding that applicant suffered industrial cumulative trauma to his back and neck during period 8/25/2002 through 8/25/2003, resulting in 31-percent PD after apportionment, when QME's opinion was based on accurate work history, was persuasive, and appropriately addressed apportionment to pre-existing degenerative condition, unlike opinion of defendant's QME, which did not address effects of applicant's heavy work history on his condition or MRI results and did not constitute substantial evidence

SGL Carbon v. WCAB (Pace) (2007) 72 CCC 515 (writ denied)

Discovery—Depositions—Due Process—WCAB held that due process did not entitle defendant to depose applicant regarding right shoulder injury on day prior to expedited hearing regarding causation of applicant's need for repeat rotator cuff surgery, when applicant did not want to give deposition testimony on day before hearing, which WCAB found was reasonable, and applicant provided testimony at hearing with respect to causation issue

Phelps v. WCAB (2007) 72 CCC 701 (writ denied)

Evidence—In deciding occupational variant issue, WCAB relied on job descriptions from United States Department of Labor's *Dictionary of Occupational Titles*, and Court of

Appeal denied petition for writ of review disputing WCAB's reliance on this publication without giving notice to parties, when Court of Appeal found that applicant did not show what rebuttal evidence she might have offered and did not show prejudice from WCAB's reliance on this publication

United States Fire Insurance Co v. WCAB (Urzua) (2007) 72 CCC 869 (writ denied)

Evidence—Willful Suppression—WCAB held that defendants failed to prove that applicant violated 8 CCR §10622 by willfully suppressing evidence necessary for defendants to establish Labor Code § 4663 apportionment of PD, when applicant initially failed to disclose that he had used alias in prior workers' comp claim but later admitted to using alias, and WCAB found that there was no evidence regarding whether applicant was in possession of any documents regarding prior claim, there was no showing that applicant willfully suppressed any documents relating to prior claim, and there was no showing that defendants made effort to obtain relevant documents from applicant's prior employer or attorney

California Highway Patrol v. WCAB (Hatley) (2007) 72 CCC 1651 (writ denied)

Psychiatric Injuries—Standards for Psychiatric Reports—WCAB held that psychiatric report obtained from QME by applicant following her husband/patrol officer's 4/24/2005 suicide complied with diagnostic criteria as mandated by Labor Code §§ 139.2(j)(4) and 3208.3(a) and constituted substantial evidence to support finding that suicide was compensable, when reporting psychiatrist diagnosed patrol officer with major depression, recurrent, with suicide, and, at his deposition, elaborated on his reasons for using diagnostic criteria for major depression and factors on which he relied to make diagnosis, and WCAB found that psychiatrist's diagnosis was covered by DSM IIIR in full compliance with statutory requirements

LIEN CLAIMS

Utrans LLC v. WCAB (Reveles) (2007) 72 CCC 165 (writ denied)

Liens—Medical Treatment Transportation Expenses—WCAB denied lien claimant full reimbursement of its transportation lien in amount of \$62,550.95 for transporting applicant when he attended medical appointments necessitated by his 6/17/2003 industrial injury, and awarded reimbursement at rate of 34 cents per mile pursuant to Labor Code § 4600(e)(2), when medical reports relied on by lien claimant to support its claim were insufficient to establish that medical transportation was reasonably required to permit applicant to receive medical treatment for his injury.

Rancho Los Amigos County Medical Rehabilitation Center v. WCAB (Wilkerson) (2007) 72 CCC 270 (writ denied)

Liens—Medical Treatment—Medi-Cal—UEBTF—WCAB held that UEBTF was not liable for reimbursement of lien filed by county medical center for treatment rendered to applicant as result of catastrophic injuries sustained on 2/15/2001 while applicant was working for uninsured employer, when Medi-Cal paid for treatment rendered to applicant by county, evidence indicated that county did not fully reimburse Medi-Cal for payments, and pursuant to Labor Code § 3716© UEBTF was not liable for reimbursement of county's medical treatment lien since Medi-Cal paid for treatment

Stokes v. Patton State Hospital (2007) 72 CCC 996 (Significant Panel Decision)

Medical Liens—Outpatient Surgery Centers—Burden of Proof—WCAB, in Significant Panel decision, rescinding WCJ's F&O and returning matter to trial level for further proceedings, held that it was lien claimant's burden to prove that it was properly licensed or accredited, and that WCAB could not determine from present record whether lien claimant was claiming (1) that it was merely properly accredited "outpatient setting" where surgeries were performed, as allowed by Health & Safety Code § 1248© and Business & Professions Code § 2285, such that fictitious-name permit from California Medical Board was not required, or (2) that it provided medical treatment as "clinic," within definition of Health & Safety Code §§ 1200 and 1204(b)(1), such that it was required to possess both license and fictitious-name permit from Medical Board, when Court of Appeal found that lien claimant claimed that fictitious-name permit issued by Medical Board was not required because lien claimant was accredited "outpatient setting," but lien claimant also stated in its petition for reconsideration that it "provided medical treatment to the applicant"

Garcia v. WCAB (Lugo-Aviles) (2007) 72 CCC 1161 (writ denied)

Lien Claims—Nurse Case Manager Services—WCAB disallowed lien of nurse case

manager for services after 10/2003, when WCAB found that applicant sustained admitted injury AOE/COE 6/7/98 to multiple body parts, that defendant assigned lien claimant to be applicant's nurse case manager, that defendant paid for lien claimant's services through 10/2003 and at that time notified lien claimant that these services were no longer authorized, and that lien claimant continued to provide services at applicant's request, including assessing medical needs, traveling to medical appointments with applicant, and being advocate and interpreter for applicant, and WCAB found that services were provided after 10/2003 on voluntary basis and disallowed \$55,160.79 lien for services from 6/2004 through 5/2006

Sacramento City Unified School District v. WCAB (Moralez) (2007) 72 CCC 1408 (writ denied)

Liens—Medical Treatment—WCAB allowed full amount of lien claimant's medical treatment lien, totaling \$99,462, for treatment provided to applicant with 4/21/2001 back injuries, when defendant presented no evidence regarding application of OMFS or showing that lien claimant's billing was excessive

Ocean View School District v. WCAB (Holm) (2007) 72 CCC 1683 (writ denied)

Lien Claims—Medical Treatment—WCAB ordered defendant to reimburse applicant for costs of lien for medical treatment from equipment provider under 8 CCR § 9789.60, when applicant sustained injury AOE/COE in period ending 11/9/99 to both upper extremities, neck, back, and right lower extremity, she received stipulated award that included provision for further medical treatment, including replacement rechargeable IPG battery (durable medical equipment) for spinal cord stimulator, outpatient surgery center replaced battery, and defendant paid surgery center's bill that did not include item for durable medical equipment, equipment provider submitted separate bill for equipment and filed lien, defendant disputed paying for equipment, 8 CCR § 9789.38 did not shield defendant from liability for equipment, and WCAB ordered reduced payment of lien, as 120 percent of rate in CMS' Durable Medical Equipment, Prosthetics/Orthotics, and Supplies Fee Schedule

Vallandingham v. WCAB (2007) 72 CCC 1697 (writ denied)

Medical Treatment Liens—Res Judicata—Collateral Estoppel—WCAB held that doctrines of res judicata and collateral estoppel did not apply to bar litigation and final decision on issue of reasonableness and necessity of work conditioning/hardening sessions provided to applicant with 4/16/2002 back injury, and associated lien, notwithstanding prior arbitration and decision that applicant did not require chiropractic treatment after 4/16/2003 except for traditional physical therapy for work conditioning/hardening, according to proof, when arbitrator had previously found that there was insufficient evidence to decide whether lien claimant reasonably and necessarily provided work conditioning/hardening beyond 4/16/2003 and had given parties opportunity to

provide additional evidence, arbitrator had reserved jurisdiction over lien issues and penalties, parties were unable to adjust lien, and arbitrator found that work conditioning/hardening issue was never fully resolved

Medical Treatment Liens—Reasonableness and Necessity—WCAB denied lien claimant full reimbursement of lien for work conditioning/hardening sessions provided to applicant with 4/16/2002 back injury, when it found that, with exception of sessions provided during period 9/30/2003 through 1/16/2004, work conditioning/hardening sessions provided after 4/16/2003 were not reasonable or necessary, based on goals shown in definition of “work conditioning” in Official Medical Fee Schedule as compared to applicant’s VR plan, fact that lien claimant never provided work-related objectives or progress evaluations during two-year period of work conditioning, fact that applicant reported no benefit from any of multiple modalities of treatment billed, fact that actual VR effort covered only three and one-half months, and fact that VR effort combined with concurrent period of work conditioning failed to return applicant to work of any type

SETTLEMENT

Phillips v. WCAB (2007) 72 CCC 406

C&R—Petition to Reopen—Good Cause—Court of Appeal, annulling decision of WCAB, found good cause to reopen pro per applicant's case, pursuant to Labor Code § 5803, that had been settled by &R, when court held that circumstances surrounding settlement contributed to misunderstanding by applicant regarding disputed earnings or rate of TD indemnity and that applicant's misunderstanding and his mistake or inadvertence were excusable, that procedural irregularities including pre-trial conversation between WCJ and information and assistance officer, in which officer indicated at least part of her intended testimony, and "off-the-record" discussion between WCJ and applicant and defendant, in which WCJ disclosed conversation with information and assistance officer, may have interfered with pro per applicant's due process rights, that at time of C&R WCJ may have been unaware of applicant's disputed earnings or rate of TD indemnity, and that "exceptional circumstances" also provided good cause to reopen even though pro per applicant had not filed petition for reconsideration of C&R

Edgington v. WCAB (2007) 72 CCC 1153 (writ denied)

Stipulations—Good Cause to Set Aside—WCAB reversed WCJ and held that there was good cause to set aside 6/6/2003 stipulations between defendant and applicant in which defendant accepted claimed 11/25/97 injury AOE/COE to applicant's head, neck, and right shoulder from applicant/laborer's claimed accidental fall off rail car, when WCAB found that applicant was drinking and jumped off rail car to imitate stunt, that applicant, his wife, and co-worker conspired to conceal true facts of his injury to obtain workers' comp benefits, that at time defendant entered into stipulations defendant relied on material false statements of applicant and eyewitnesses and was not aware of conspiracy to conceal true facts, that, as matter of public policy and substantial justice, applicant should not profit from his fraudulent conduct, and that defendant proved all five elements of extrinsic fraud and should be relieved of its stipulation to injury AOE/COE

Republic Indemnity Co of America v. WCAB (Winner) (2007) 72 CCC 1175 (writ denied)

Stipulations—Setting Aside—WCAB held that it had authority to relieve CIGA of MSC and hearing stipulation that applicant sustained industrial right foot injury during period 2/1/97 through 6/5/95 and, determining that this period of injury was erroneous, make finding of fact in conformance with proof that applicant sustained cumulative injury during period ending on 6/23/95

Gonzalez v. WCAB (2007) 72 CCC 1669 (writ denied)

C&R—Payment—WCAB reversed WCJ and held that defendant's obligation to pay proceeds of C&R was discharged by sending check in applicant's name to address listed on C&R, even though address was incorrect and applicant did not receive check, when WCAB found that applicant claimed injury AOE/COE 1/22/99, parties resolved case-in-chief by C&R for \$13,000 to applicant, defendant sent \$13,000 check to Maria Gonzalez at address in El Monte, CA, which was address shown on C&R, applicant's address was in Baldwin Park, CA, applicant's attorney had two client's named Maria Gonzalez and mistakenly put address of wrong Maria Gonzalez on C&R, other Maria Gonzalez apparently received and cashed check, defendant acted innocently in sending check to address on C&R, party causing error should bear burden and here it was applicant's attorney who solely caused error, and burden was on applicant's attorney to make applicant whole and obtain reimbursement from other client

ARBITRATION

DECISIONS, AWARDS AND JUDGMENTS

Baglione v. Hertz Car Sales (2007) 72 CCC 444 (en banc)

WCAB En Banc Decisions—WCAB’s Power to Rescind—WCAB en banc held that Labor Code expressly granted WCAB authority to affirm, rescind, alter, or amend its prior decisions and that no statute, rule, or case law precluded WCAB en banc from revisiting and reversing prior WCAB en banc decision

WCAB En Banc Decisions—WCAB’s Power to Rescind—Change in Membership of WCAB—WCAB en banc held that change in membership of WCAB since prior en banc decision did not affect WCAB’s ability to reconsider prior en banc decision and that Commissioner appointed since that prior en banc decision, who had reviewed entire record in case and all arguments previously made, was duly-appointed and could properly participate in deliberations and decision in present matter

Pendergrass v. Duggan Plumbing (2007) 72 CCC 456 (en banc)

WCAB En Banc Decisions—WCAB’s Power to Rescind—WCAB en banc held that Labor Code expressly granted WCAB authority to affirm, rescind, alter, or amend its prior decisions and that no statute, rule, or case law precluded WCAB en banc from revisiting and reversing prior WCAB en banc decision

WCAB En Banc Decisions—WCAB’s Power to Rescind—Change in Membership of WCAB—WCAB en banc held that change in membership of WCAB since prior en banc decision did not affect WCAB’s ability to reconsider prior en banc decision and that Commissioner appointed since that prior en banc decision, who had reviewed entire record in case and all arguments previously made, was duly-appointed and could properly participate in deliberations and decision in present matter

Sharareh v. WCAB (2007) 72 CCC 1371

Workers’ Comp Judges—Summary of Evidence—In portion of opinion certified for publication, Court of Appeal held that it was mandatory for WCJ to provide summary of trial evidence under Labor Code § 5313 and 8 CCR § 10566 and that failure to submit summary of evidence mandated that matter be returned to WCJ to prepare and submit summary of evidence, when Court of Appeal found that arbitrator here did not prepare summary of evidence, that arbitrators had same duties and responsibilities as WCJs, that WCJ’s summary of evidence was required document to accompany petitions for writ of review under California Rules of Court, rule 8.494(a)(1)(B), that Court of Appeal needed summary of evidence to evaluate whether substantial evidence supported WCAB’s decision, that failure of arbitrator to include summary of evidence here required (1) annulment of WCAB decision that affirmed arbitrator’s findings on Labor Code § 3366(a) issues, even absent arbitrator’s summary of evidence, and (2) remand of

matter to arbitrator to prepare summary of evidence, and WCAB's consideration of existing evidence, absent summary of evidence, was not justified, using any of three standards (demurrer standard, state of decision standard, or substantial compliance standard)

RECONSIDERATION/REMOVAL

Nestle Ice Cream Co., LLC v. WCAB (Ryerson) (2007) 72 CCC 13

Petitions for Reconsideration—Time to File—Amended Award—Court of Appeal, annulling WCAB's decision, held that defendant's petition for reconsideration, timely filed as to WCJ's amended award, but untimely as to WCJ's original award, was timely filed, since WCJ's amended award effected substantial and material change in award and involved exercise of judicial function, when Court of Appeal found that WCJ amended award before petition for reconsideration was filed, that amendments of award included increase in amount of retroactive TD payments and VRMA, that these amendments effected substantial and material change in award and involved judicial act, so that time for filing petition for reconsideration ran from date of service of amended award.

Alvarado v. WCAB (2007) 72 CCC 1142 (writ denied)

Petitions for Reconsideration—Final Orders—WCAB held that WCJ's F&O, finding that applicant's request to strike physician from panel pursuant to Labor Code § 4062.2© was untimely, was not final order subject to reconsideration under Labor Code § 5900 since order did not affect substantive rights of parties

Removal to WCAB—WCAB denied applicant's request for removal pursuant to 8 CCR § 10843, when WCAB found that applicant did not show that he would suffer substantial prejudice or irreparable harm as result of WCJ's finding that applicant did not timely strike physician from panel under Labor Code § 4062.2©

Huff v. WCAB (2007) 72 CCC 1522 (writ denied)

Petitions for Writ of Review—Required Exhibits—Court of Appeal denied petition for writ of review of WCAB decision because petition did not contain exhibits required by Cal. Rules of Court, Rule 8.494(a)(1) and (2) or certificate of interested entities or persons required by Cal. Rules of Court, Rule 8.494©

SUPPLEMENTAL PROCEEDINGS

Brown v. WCAB (2007) 72 CCC 118 (writ denied)

Petitions to Reopen—New and Further Disability—Stipulated Awards—WCAB found no good cause to reopen applicant's claim for new and further disability to his neck/cervical spine following issuance of stipulated award under which parties stipulated to 12/29/90 industrial low back and shoulder injuries but made no mention of alleged industrial neck/cervical spine injury, based on AME's opinion that neck/cervical spine disability was non-industrial, when applicant's petition to reopen was based on opinions of three subsequent AMEs who, relying on same facts and evidence as original examiner, found that applicant's neck/cervical spine injury was industrially related, WCAB found that applicant's claim was not grounded on newly discovered facts or evidence but rather that applicant was aware of facts and evidence before entering stipulated award, applicant chose not to litigate issue of industrial causation as to his neck/cervical spine injury and stipulated only to back and shoulder injuries, and applicant was not now allowed to litigate issue of industrial causation based on information known at time of stipulated award

Wal-Mart Stores, Inc v. WCAB (Collier) (2007) 72 CCC 210

Petitions to Reopen—Good Cause—Court of Appeal, denying defendant's petition for writ of review, held that defendant made no showing of good cause to reopen prior stipulated award, when Court of Appeal found that only evidence offered by defendant was report from vocational counselor that suggested applicant might be able to perform limited work with voice activation software and job announcement with signed checkmark from physician expressing his opinion that applicant could perform specified duties, and that defendant failed to explain why such evidence was unavailable prior to entering into stipulated award

Petitions to Reopen—PD—Substantial Evidence—Court of Appeal held that applicant's physical ailments had not changed since date of stipulated award and that defendant did not present any authority that existence of new job prospect warranted change in applicant's level of PD once award had issued

Petitions to Reopen—Medical Treatment—Further Medical Treatment—Disputes—Court of Appeal held that burden of demonstrating that care recommended by treating physician, pursuant to stipulated award for further medical treatment, was no longer appropriate rested on defendant and that, regardless of which party had responsibility of requesting AME pursuant to Labor Code § 4062 following UR denial of treating physician's recommended treatment, failure to obtain such AME did not deprive WCAB of ability to enforce prior award for medical treatment based on medical evidence presented for its review

Allied Domecq/Clos du Bois Wines v. WCAB (Rodriguez) (2007) 72 CCC 477 (writ denied)

Petitions to Reopen—New and Further Disability—WCAB found good cause to reopen applicant's 67-percent PD award for new and further disability and award 80-percent PD based on range of evidence regarding applicant's cumulative back injury, including medical evidence, functional capacity test, vocational expert testimony, applicant's testimony, and applicant's demonstrated ability, even though applicant presented conflicting testimony as to change in his back condition and had initially indicated that there was no change, when WCAB opined that conflicting testimony was due to applicant's misinterpretation of concepts, that his conflicting statements affected expert opinions rendered in this case, and that, on balance, applicant's demonstrated ability was most persuasive evidence on issue of his current level of PD; WCAB found that it was not necessary for applicant to show additional period of TD to receive award for new and further PD

Fisher Farms v. WCAB (Paniagua) (2007) 72 CCC 666 (writ denied)

Petitions to Reopen—New and Further Disability—WCAB held that applicant showed good cause to reopen her prior PD award of 58 percent, based on combined effects of two neck injuries, and awarded applicant 100-percent PD without apportionment to non-industrial factors, based on opinions of four rehabilitation experts that applicant was unable to compete in open labor market and was limited to part-time in-home work

Sarabi v. WCAB (2007) 72 CCC 778

Petitions to Reopen—New and Further Disability—TD Benefits—Court of Appeal, granting applicant's petition for writ of review and annulling WCAB's order, held that WCAB had jurisdiction to order additional TD benefits more than five years after date of injury because applicant filed timely petition to reopen and his new and further disability commenced within five years of date of his injury, when Court of Appeal found that applicant's petition to reopen alleged change in his condition and requested further TD benefits, and that it was not error for WCJ to award TD benefits commencing more than five years after date of injury because there was no need to award benefits earlier since defendant was making voluntary TD payments until then

County of San Bernardino v. WCAB (Schroeder) (2007) 72 CCC 1365

Judicial Review—WCAB Decisions—Petition to Reopen—Court of Appeal held that it was inappropriate for it to review issues regarding applicant's petition to reopen, when court found that WCAB had failed to comply with Labor Code § 5908.5, requiring it to state evidence relied upon and specify in detail reasons for decision, when court found that WCJ's Report did not directly address this issue and that WCAB's decision merely adopted and incorporated that report

Colton Joint Unified School District v. WCAB (Webster) (2007) 72 CCC 1393 (writ denied)

WCAB Orders—Good Cause to Set Aside—WCAB held there was good cause under Labor Code § 5803 and case law to set aside WCJ's 4/3/2007 order dismissing applicant's claim with prejudice, when applicant claimed cumulative trauma injury AOE/COE ending 5/2006, after firing her attorneys and representing herself, applicant missed deposition and WCAB status conference, WCJ issued notice of intention to dismiss claim within 30 days, WCJ dismissed claim in 4/3/2007 order, WCJ later found facts that were unknown to WCJ at time of 4/3/2007 order, i.d., that applicant had retained new counsel and prior to expiration of 30-day period new counsel had contacted defendant, objected to notice of intention to dismiss case, and indicated applicant's willingness to resume discovery, and good cause to set aside and vacate 4/3/2007 order was shown that made dismissal inequitable

Briggs v. WCAB (2007) 72 CCC 1647 (writ denied)

WCAB Jurisdiction—New and Further Disability—Petitions to Reopen—WCAB held that it had no jurisdiction under Labor Code § 5410 to award TD for period of new and further TD commencing more than five years after applicant's 8/5/98 back injury, notwithstanding that incident causing new and further TD occurred within five-year period and that applicant filed timely petition to reopen for new and further disability within five-year period

THIRD PARTY ACTIONS

CSAC Excess Insurance Authority v. Commission on State Mandates (2007) 72 CCC 42

Civil Actions—Standing—Court of Appeal held that plaintiff, association providing primary and excess workers' comp insurance to 54 member counties, had standing to bring civil action under Gov C § 17518 to test whether three workers' comp statutes required state to reimburse counties for state mandated costs under Calif Const, art XIII B, § 6, when Court of Appeal found that counties had standing under Gov C §§ 17500, 17511(a), 17514, and 17518, and that plaintiff, as joint powers authority under Gov C § 6508, could exercise all powers common to counties, including suing in its own name

Civil Actions—Reimbursement for State Mandated Costs—Court of Appeal held that plaintiff was not entitled to reimbursement of state mandated costs under Calif Cons, art XIII B, § 6, when Legislature enacted three new workers' comp statutes stating rebuttable presumptions that injuries to certain peace officers, firefighters, and lifeguards were injuries AOE/COE (Labor Code §§ 3212.1, 3212.11, and 3213.2), plaintiff contended that its 54 member counties were subject to increased state mandated costs because of these statutes and were therefore entitled to reimbursement of costs, Court of Appeal found that, even though these new statutes might result in increased costs to counties for paying workers' comp benefits for their peace officer, firefighter, and lifeguard employees, these statutes did not mandate new program or higher level of services of existing program but instead affected administration of workers' comp program, that services provided by counties here were not administration of workers' comp program but were providing workers' comp benefits to its employees, and that workers' comp program was not program administered by local agencies (here counties) but was instead administered by state

Garcia v. Helmsman Management Services, Inc. (2007) 72 CCC 53

Civil Actions Against Third Party Administrators—WCAB's Exclusive Jurisdiction—Enforcement of Awards—Court of Appeal held that WCAB had exclusive jurisdiction to enforce its own award to plaintiff, when plaintiff resolved two industrial injury claims with stipulated award approved by WCAB in 1985 that included lifetime medial treatment related to industrial injuries, plaintiff filed civil action against permissibly self-insured employer and its third party administrator pleading causes of action for breach of contract and bad faith due to defendants' alleged refusal to pay for plaintiff's continuing medical treatment as awarded, trial court sustained administrator's demurrer on grounds that WCAB had exclusive jurisdiction to enforce its 1985 award, and Court of Appeal affirmed trial court, based on Labor Code §§ 3602(a), 3850(b), and 5300(a), (b) and California Supreme Court case law

Lewis v. County of Riverside (2007) 72 CCC 218

Civil Actions Against Employers–Disability Retirement–Employer’s Duty to File Application–Court of Appeal held defendant was obligated to file application for disability retirement on plaintiff’s behalf under Gov C § 21153, when plaintiff county correctional officer sustained industrial injury to her wrists, upper and lower extremities, and in form of generalized pain syndrome, plaintiff stopped working for defendant 7/2001, plaintiff’s application for disability retirement was turned down, and defendant refused to file disability retirement application because it believed plaintiff was not disabled from performing her usual duties, and when Court of Appeal found that, in spite of its stated belief, defendant in effect acted as if it believed plaintiff was disabled, thus triggering its obligation to file application for disability retirement, and that defendant indicated its belief that plaintiff was disabled by finding of it workers’ comp department that plaintiff could not return to her usual duties and was QIW for purpose of offering her VR services and by refusing to allow plaintiff to return to work at old position or equivalent modified position

McKinnon v. Otis Elevator (2007) 72 CCC 427

Third-Party Actions–Settlement–Notice and Consent–Court of Appeal, reversing trial court’s summary judgment in favor of alleged third-party tortfeasor, held that, pursuant to Labor Code §§ 3853, 3859, and 3860(a), when employer fails to adequately notify its employee of its subrogation lawsuit and proposed settlement involving alleged third-party tortfeasor and fails to obtain employee’s consent to settlement of that suit, and when settling alleged third-party tortfeasor, prior to settlement, was or reasonably should have been aware of possibility of employee’s claim for damages against tortfeasor, alleged tortfeasor cannot use mere settlement and dismissal of employer’s subrogation action to bar employee from maintaining action for damages against alleged tortfeasor, but that employee’s action for damages against alleged tortfeasor must account for any workers’ comp benefits paid to employee, or to be paid, so as to preclude double recovery for employee and double liability for tortfeasor, when Court of Appeal found that employer did not serve by personal service or certified mail statutorily-required copy of employer’s complaint against alleged tortfeasor, that employee never gave statutorily-required consent to employer’s settlement of action against alleged tortfeasor, and that alleged tortfeasor, prior to settlement, was or reasonably should have been aware of possibility of employee’s claim for damages

A.C. Transit District v. WCAB (Kyle) (2007) 72 CCC 465 (writ denied)

Third-Party Actions–Credit–WCAB held that defendant was not entitled to credit for applicant’s third-party recovery against applicant’s TD award despite stipulation, when language of stipulation regarding credit clearly limited its application to workers’ comp benefits arising out of applicant’s 7/13/2001 industrial accident, and award of TD was based on TD resulting from both 7/13/2001 injury and 9/3/98 injury

Squaglia v. Mascitto (2007) 72 CCC 623

Exclusive Remedy Doctrine—Assault by Co-worker—Court of Appeal affirmed trial court's decision granting defendant/co-worker's motion for summary judgment and held that plaintiff's action against his co-worker for assault was barred by exclusive remedy doctrine and that Labor Code § 3601(a)(1) exception to application of this doctrine did not apply, when alleged assault occurred within scope of plaintiff's employment when co-worker yelled at plaintiff, co-worker made no attempt or threat to touch plaintiff, there was no evidence that co-worker attempted to injure plaintiff, and court found that co-worker's fit of yelling did not constitute willful and unprovoked physical act of aggression conducted with intent to harm

Exclusive Remedy Doctrine—Intentional Infliction of Emotional Distress—Court of Appeal affirmed trial court's decision granting defendant/co-worker's motion for summary judgment and held that plaintiff's action against co-worker for intentional infliction of emotional distress was barred by exclusive remedy doctrine, when evidence indicated that plaintiff was shocked by co-worker's conduct towards him on day of confrontation but said nothing back to co-worker after co-worker yelled at him, plaintiff went out to normal lunch and completed his workday after confrontation, plaintiff did not begin to suffer any stress from incident until approximately one year after he was terminated, and court concluded that this evidence was insufficient to indicate that co-worker acted with extreme or outrageous conduct towards plaintiff, or to establish impact of co-worker's conduct on plaintiff

Zavala v. Jones (2007) 72 CCC 633

Exclusive Remedy Doctrine—Employment Relationships—Special Employees—Court of Appeal affirmed trial court's decision granting defendant's motion for summary judgment and held that there was no triable issue of fact as to whether plaintiff was defendant's special employee and that his negligence action against defendant was barred by workers' compensation exclusive remedy doctrine, when there was evidence that defendant hired plaintiff, possessed sole authority to discipline or fire plaintiff, set plaintiff's pay rate, supervised and controlled plaintiff's work, treated plaintiff as employee, trained plaintiff, and provided him with significant tools, and that plaintiff acted as employee and performed unskilled labor that was part of defendant's regular business

Rodriguez v. WCAB (2007) 72 CCC 714 (writ denied)

Third-Party Settlement Agreements—Binding Effect—WCAB held that paragraphs in applicant's civil settlement agreement with third-party defendants indicating that applicant's employer was not cause of his injuries and that issue of employer negligence would not be raised in any subsequent proceeding were binding even though agreement was not review or approved by WCAB, when both applicant's civil attorney and his workers' compensation attorney signed settlement agreement, applicant was not

coerced into signing agreement, and applicant testified that he understood settlement agreement when he signed it and freely and knowingly settled his civil case; WCAB found that, since settlement agreement was binding on issue of employer liability, applicant had no right to independent determination of employer's liability or partial liability for his injuries

Kinsman v. Unocal Corp. (2007) 72 CCC 790

Civil Actions—Hirer's Exercise of Retained Control—Landowner's Duties About Hidden Hazardous Conditions—After remand from California Supreme Court, Court of Appeal remanded to Superior Court for new trial to include jury instructions on concealed hazard issue under analysis set out by Supreme Court, which held that landowner who hires independent contractor may be liable to contractor's employee injured by undisclosed hazard on hirer's land, even if hirer does not retain control over work, if following conditions are present: (1) landowner knew, or should have known, of latent or concealed preexisting hazardous condition on its property, (2) contractor did not know, and could not have reasonably discovered, this hazardous condition, and (3) landowner failed to warn contractor about this condition

Civil Actions—Landowner's Premises Liability—Court of Appeal held that substantial evidence supported jury's verdict in favor of contractor's employee (negligence of landowner on premises liability theory related to employee's asbestos exposure at landowner's job site), and Court of Appeal affirmed trial court's denial of landowner's motion for judgment notwithstanding verdict

People v. Corea (2007) 72 CCC 799

Insurance—Anti-Fraud Provisions—Material Misrepresentations—Court of Appeal reversed applicant's conviction on two counts of violation of Ins. Code § 1871(a)(1) for making false material statements to treating physician and insurer's investigator to obtain workers' comp benefits for 7/2001 industrial right arm injury, when Court of Appeal found instructions to jury contained erroneous definition of "material" statements, and that finding of material statement was essential element of crime specified under Ins. Code § 1871(a)(1)

Insurance—Anti-Fraud Provisions—Material Misrepresentations—Court of Appeal, in addition to reversal for erroneous jury instruction, reversed applicant's conviction on one count of violation of Ins. Code § 1871(a) for making false material statement to treating physician because there was insufficient evidence that applicant's false statement to treating physician that he had not played handball since 2002 was "material" statement to obtain workers' comp benefits within meaning of that statute

Lopez v. MVP Hydratech, Inc. (2007) 72 CCC 967

Third Party Actions—Exclusive Remedy—Special Employment—Court of Appeal held that

workers' comp was plaintiff's exclusive remedy against special employer/defendant, when defendant manufactured hydraulic cylinders and related components, plaintiff worked for company that supplied temporary labor to defendant, plaintiff's employer assigned plaintiff to work for defendant as machine repair and maintenance mechanic, plaintiff worked on this assignment for two months before injury, which occurred 4/16/2004 while plaintiff was repairing defendant's manufacturing equipment (milling machine), plaintiff brought civil action for negligence against defendant, Superior Court granted summary judgment in defendant's favor on grounds that defendant was plaintiff's special employer and workers' comp was plaintiff's exclusive remedy against defendant, Court of Appeal found that at time of accident plaintiff was providing service to defendant and was under control of defendant's employees, found no triable issue on defendant's special employer status, found special employer status as matter of law, and affirmed Superior Courts' judgment

People v. Pacini (2007) 72 CCC 978

Insurance—Anti-Fraud Provisions—Restitution—Court of Appeal affirmed Superior Court's order for applicant to pay \$81,449.47 in restitution for violation of Insurance Code § 1871.4(a)(10), when applicant county bus driver was injured on 12/27/2000 from attack by passenger, received workers' comp benefits, and received jury conviction for violation of Insurance Code §1871.4(a)(1) for making material false statements to two evaluating physicians, and in its restitution order Superior Court considered pleading plus attachments, information from probation department, documents from employer, and arguments of counsel, computed restitution from 10/2/2003, date applicant was physically able to return to work, and awarded restitution based on employer's costs, \$81,449.47, after that date

Insurance—Anti-Fraud Provisions—Jury Instructions—Court of Appeal affirmed Superior Court's exclusion of jury instruction to effect that out-of-court statements were to be considered with caution, when Court of Appeal found that applicant agreed to withdraw this instruction, and, alternatively, on merits, that instruction was not appropriate because it applied to admissions only, and statements identified by applicant were not admissions

Insurance—Anti-Fraud Provisions—Evidence—Court of Appeal affirmed Superior Court's admission of evidence on malingering from expert witness (physician who evaluated applicant for his worker's comp claim), when Court of Appeal found that this evidence was related to recognized condition in Diagnostic and Statistical Manual and was thus admissible

SoftEx, Inc v. American International Group, Inc. (2007) 72 CCC 987

Insurance Policies—Cancellation—Court of Appeal affirmed Superior Court's grant of summary judgment in favor of defendants on breach of contract cause of action, when Court of Appeal found that plaintiff SoftEx, Inc., was professional employer organization

supplying employees to other businesses, that plaintiff paid employees' workers' comp benefits, that plaintiff's brokers obtained workers' comp insurance policy for plaintiff from defendants, that brokers indicated that plaintiff's employees were all computer programmers, that some of plaintiff's employees were in fact computer programmers but rest (45-50 percent) were domestic workers who cleaned houses, thereby affecting cost of premiums, that defendants learned of status of plaintiff's employees and canceled and rescinded plaintiff's workers' comp insurance policy, and that concealment and misrepresentations by plaintiff's brokers in application for insurance justified summary judgment

Insurance Policies—Cancellation—Court of Appeal affirmed Superior Court's grant of summary judgment in favor of defendants on plaintiff's cause of action for tortious interference with contract and economic advantage, when Court of Appeal found that this cause of action was based on policy that had been rescinded by defendants and policy was extinguished as if it had never existed

Insurance Policies—Cancellation—Court of Appeal affirmed Superior Court's grant of demurrer in favor of defendants on cause of action by plaintiff business owner for intentional infliction of emotional distress, which was based on defendants' referral of business and its owner to California Insurance Commissioner and district attorney for possible fraud, when Court of Appeal found that absolute privilege of Civil Code § 47(b), privilege to report crime even if report was made with malice, applied

Prachasaisoradej v. Ralphs Grocery Company, Inc. (2007) 72 CCC 1238

Civil Actions—Employer Incentive Bonus Calculations—California Supreme Court, reversing judgment of court of appeal, held that defendant's employee bonus plan based on profit figure reduced by store's expenses, including cost of workers' comp insurance, cash and inventory losses, and third-party tort claims, did not violate B& P Code § 17200, Labor Code §§ 221, 400-410, or 3751, 8 CCR § 11070, or cases decided under those authorities, when Court found that nothing in these statutes, regulation, or cases suggested that defendant violated California wage-protection laws by providing compensation designed to reward employees, over and above their regular wages, if and when their collective efforts produced positive financial result for store where they worked, that defendant's employee bonus plan did not create expectation or entitlement in specified wage, then take deductions or contributions from that wage to reimburse defendant for its business costs, that all employees participating in defendant's bonus plan received, regardless of store's performance, their guaranteed normal rate of pay, that, over and above this regular wage, participants in defendant's bonus plan understood that their collective entitlement to incentive compensation payments, and amounts thereof, arose only under formula that compared store's actual plan-defined profit, and that, once amount of employee's bonus-plan compensation was calculated under this formula, defendant did not reduce it by taking unauthorized deductions, contributions or charges

Jones v. California Department of Corrections and Rehabilitation (2007) 72 CCC 1268

Summary Judgment–FEHA–Workers’ Comp Statutes’ Exclusive Remedy Provisions–Court of Appeal held that defendants met their burden on summary judgment and that plaintiff failed to establish existence of triable issues of material fact that could lead reasonable trier of fact to find that she experienced harassment, discrimination, and retaliation within meaning of FEHA, that plaintiff’s causes of action for assault and battery and emotional distress were, as matter of law, barred by workers’ comp exclusivity rule, and that negligent supervision cause of action failed because it was based on plaintiff’s claims of discrimination and assault and battery, when Court of Appeal found that (1) plaintiff failed to produce evidence that conditions she complained of amounted to severe and pervasive hostile work environment that constituted harassment or that they were based on her gender, (2) no nexus existed between plaintiff’s gender and race and defendants’ alleged adverse actions that would allow plaintiff to make out claim for discrimination, and (3) plaintiff failed to provide any evidence that she suffered adverse change in terms and conditions of her employment within meaning of statute and, thus, could not make out claim for retaliation

Astudillo v. Duggleby (2007) 72 CCC 1384

Third Party Actions–Judgments–Common Fund Distributions–Applicant’s Attorney’s Fees and Costs–Court of Appeal affirmed trial court’s Labor Code § 3856 allocation of applicant’s attorney’s fees and costs in pursuing third party action before assertion of insurer’s lien for workers’ comp benefits paid to applicant, when applicant was injured while working at landscape job sometime before 7/8/2005 when struck by car driven by Duggleby, applicant received workers’ comp benefits from his employer’s insurer, Zurich American Insurance Company, Zurich brought third party action against Duggleby to recover workers’ comp benefits paid to applicant, applicant and his wife filed civil personal injury action against Duggleby, both civil cases were consolidated for trial, Zurich settled third party case with Duggleby for \$70,000, which included assignment of Zurich’s lien for \$92,787.56 for benefits Zurich paid for applicant’s industrial injury, after jury verdict in applicant’s civil action in applicant’s favor for \$32,519.96, Superior Court judge found that applicant received jury verdict without employer’s or insurer’s participation and, therefore, created common fund under Labor Code § 3856(b) and that insurer was passive beneficiary of common fund, because of settlement between Zurich and Duggleby, Duggleby stood in Zurich’s shoes for purpose of asserting lien for benefits Zurich paid, and Superior Court judge ordered Duggleby to pay applicant’s attorney’s fees and costs in pursuing third party action (\$16,965.13) before Duggleby could take credit for settled amount of insurer’s lien (\$70,000)

Sacramento City Unified School District v. WCAB (Moralez) (2007) 72 CCC 1408 (writ denied)

Third-Party Actions–Credits–WCAB held that defendant/employer was entitled, pursuant to

Labor Code § 3861, to credit of \$88,834.84 only for net amount of third-party recovery actually received by applicant with 4/21/2001 back injuries after she sold annuity purchased by third-party defendant for less than \$90,000 purchase price, and was not entitled to credit of \$143,834.84, which reflected applicant's lump sum payment of \$53,834.84 plus purchase price of annuity; WCAB held that defendant's credit was to be applied towards award of \$99,462 medical treatment lien, when defendant did not assert credit against any other workers' comp benefit at time of trial

Koski v. Herbert (2007) 72 CCC 1484

Exclusive Remedy—Exceptions—Civil Actions Against Co-Workers—Court of Appeal reversed trial court and held that plaintiff should be allowed leave to amend her complaint under CCP § 438(h)(2) to allege facts that might prove exception to provisions that workers' comp was her exclusive remedy against co-worker for 8/4/2002 injury, when plaintiff and co-worker both worked for co-defendant as truck drivers, on 8/4/2002 co-worker was driving and rolled truck, causing serious injuries to plaintiff, plaintiff sought workers' comp benefits and also brought civil action against co-worker and employer of both plaintiff and co-worker, trial court granted judgment on pleadings in favor of co-worker and denied plaintiff's request to amend complaint, and court of appeal found that it was probable that plaintiff could plead facts sufficient to prove exception to exclusive remedy of workers' compensation under **Labor Code § 3601(a)(1),(2)**

Exclusive Remedy—Exceptions—Civil Actions Against Employers—Court of Appeal reversed trial court's judgment in favor of employer, when Court of Appeal found that employer had not answered plaintiff's complaint, that plaintiff was not given notice or opportunity to oppose judgement in favor of employer, and that there was a possibility that plaintiff could state facts allowing exception to exclusive remedy of workers' compensation against her employer under **Labor Code §§ 3602(b)(1)-(3), 3706, and 4558**

Gaeta v. WCAB (2007) 72 CCC 1510 (writ denied)

Third-Party Actions—Credits—Employer Negligence—WCAB held that applicant failed to prove that defendant/bridge construction contractor was negligent or contributorily negligent in causing applicant's 5/22/2002 injuries to his back, hips, right elbow, left lower extremity, spleen, and pubic ramus, thereby entitling defendant to credit for full amount of applicant's third-party recovery against its liability for workers' comp benefits, when evidence indicated that applicant's injuries were proximately caused when third-party truck driver of big rig with oversized load struck bridge falsework, truck drive was cited by Cal-OSHA and CHP for deviating from his approved route at time he drove through construction site and for causing accident that injured applicant, and there was no evidence that defendant breached its standard of care by failing to place low-clearance signs at construction site

Millard v. Biosources, Inc (2007) 72 CCC 1600

Civil Actions—Hirer's Negligent Exercise of Retained Control—Court of Appeal held that general

contractor was not liable to injured employee of subcontractor, when Court of Appeal followed *Hooker v. Department of Transportation* and found that, even if it could be shown that general contractor retained control over safety conditions at worksite, there was no triable issue of fact that general contractor affirmatively contributed to subcontractor's employee's injuries

Civil Actions–Statutes–Applicability–Court of Appeal held that neither 1999 amendments to **Labor Code § 6304.5** nor California Supreme Court's analysis of those amendments in *Elsner v. Uveges* abrogated liability rules established by *Privette v. Superior Court* and its progeny

Civil Actions–Negligence Per Se–Court of Appeal held that safety statutes such as **Labor Code § 6304.5** were admissible to support presumption of negligence under doctrine of negligence per se only if defendant owed duty of care to plaintiff, and in present case defendant owed no such duty

Richardson-Tunnell v. School Insurance Program for Employees (2007) 72 CCC 1612

Invasion of Privacy–Governmental Immunity–Court of Appeal, affirming trial court's judgment of dismissal, held that plaintiff's claims were barred by governmental investigatory immunity, pursuant to Gov Code § 821.6, which provides that public employee is not liable for injury caused by instituting or prosecuting judicial or administrative proceeding within scope of his or her employment, even if he or she acts maliciously and without probable cause, when Court of Appeal found that defendants, who were plaintiff's employer and its workers' comp insurer, were both public entities, that defendants, while investigating plaintiff's workers' comp claim, videotaped her at her wedding, at her wedding reception, and during her honeymoon, that investigations are considered to be part of judicial and administrative proceedings for purposes of Gov Code § 821.6 immunity, that Civ Code § 1708.8, so-call "anti-paparazzi" statute, does not provide exception to Gov Code § 821.6 immunity, and that right-to-privacy clause of Cal. Const. Art.I, § 1, does not limit scope of pre-existing immunity in Gov Code § 821.6