CASE LAW UPDATE

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AOE/COE

- **Timely denial.** *Ramirez-Ramos, Ramirez v. Osteria Coppa*
  - The WCAB held that an employee's death was compensable when, under LC 5402(b), the employer failed to timely deny the claim within 90 days.
  - It was undisputed that the defendant received a claim form, and the defendant presented no evidence that it denied the claim during the 90-day period. But it attempted to rebut the presumption of compensability with a panel QME report finding the death nonindustrial obtained nearly two years after receiving the claim form.

PSYCHE

- **Good Faith Personnel.** *Joe v. County of Santa Clara-Probation Department*
  - ADJ8788887—WCJ David L. Lauerman (SJO); WCAB Panel: Commissioner Sweeney, Deputy Commissioner Gondak, Commissioner Lowe (participating, but not signing)
  - The WCAB held that an applicant's psychiatric claim was not barred when 75 percent of the psychiatric injury was caused by her increased workload and stressful working conditions — they were not a "personnel action" within the meaning of LC 3208.3(h).

6-month presumption

- *Dracco v. Anova Education and Behavioral*
  - ADJ8965413—WCJ Michael J. Hurley (SRO); WCAB Panel: Commissioners Lowe, Sweeney, Chairwoman Caplane (concurring and dissenting)
  - The WCAB held that an applicant's psychiatric claim was not barred by LC 3208.3(d) because she substantially complied with the statutory requirement of performing six months of actual employment for the employer.
  - The applicant was hired on Nov. 4, 2011, was injured on April 24, 2011, and missed work from that day until May 13, 2012. She returned to work for three days from May 14, 2012 until May 16, 2012, and did not work thereafter.

Sudden and Extraordinary

- *Travelers Casualty and Surety Co. v. WCAB (Dreher)*

Divided panel (Commissioner Sweeney and Deputy Commissioner Schmitz) found a worker's slip and fall on a rain-slicked walkway at the workplace was a sudden and extraordinary work condition, sufficient to overcome LC §3208.3(d)'s six-month time restriction

Sudden and Extraordinary

- *Lira v. Premium Packing*
  - ADJ8015423—WCAB Panel: Commissioner Sweeney, Deputy Commissioner Gondak, Commissioner Lowe (participating, but not signing)
  - The WCAB held that an applicant's post-termination claim for psychiatric injury was not barred by LC 3208.3(e)(1) when he established that the injury was caused by "sudden and extraordinary events of employment."

Violent Act

- *Larsen v. Securitas Security Services*
  - May 17, 2016 opinion and order denying petition for reconsideration
  - Applicant was a security guard who was struck from behind by a car while she was conducting a walking patrol with sufficient force to cause her to fall, hit her head and lose consciousness. Applicant argued that she was a victim of a "violent act" such that she was entitled to increased compensation; defendant argued that this section was meant to apply to either criminal or quasi-criminal conduct perpetrated against an applicant. The WCAB rejected defendant's position, concluding that there was no such limitation regarding criminal or quasi-criminal activity written into the statute.

Premise Line

- *Schultz v. WCAB*
  - Court of Appeal, second district, sided with the injured worker, ultimately determining that he was within the course and scope of his employment, when during morning commute to work, he sustained significant injuries in a car accident that occurred one mile within the boundary of an Air Force base, but miles from the actual office building he worked at within the base
  - Schultz's attorneys argued that the going and coming rule was not applicable, given that the injury had occurred not on route to the employer's premises, but within the employer's premises.

Substantial evidence in death cases

- *Star Ins. Co. v. WCAB (Tavares)*
  - Court of Appeal, affirming WCAB decision, held that evidence was sufficient to show that decedent's employment contributed to his death,
  - Decedent tractor driver was pressure washing mud off tractor and disc when he told foreman that he was having chest pain
    - Foreman agreed to drive decedent to doctor
    - Decedent asked to use restroom before leaving workplace
    - Decedent died while in restroom
    - Forensic pathologist, who performed postmortem examination of decedent, stated that applicant had very severe coronary artery disease and his sudden death at work was the result of a cardiac event

Substantial evidence in death cases

- *Guerra v. WCAB*
- Previously unpublished, but **status changed to published on April 17, 2016**
- On March 18, 2012, Rodas, a restaurant dishwasher, placed a large rubber trashcan overflowing with waste on a dolly and pushed it toward a dumpster about 300 feet from the restaurant. He was later discovered unresponsive and bloody in the restaurant parking lot, having died from a massive pulmonary hemorrhage

Employee or independent contractor

- *Lexington Ins. Co. v. WCAB* (2015) 44 CWCR 3, 80 CCC 1383 **unpublished**
  - Court of Appeal found injured truck driver deemed employee of transportation company
  - *Borrelo* factors applied to find employment status

- *State Comp. Ins. Fund v. Urgent Nursing Resources, Inc.* (2016) 80 CCC 1454 **unpublished**
  - Court of Appeal (Supreme declined to hear) concluded that nurses assigned to hospitals by registry were independent contractors
  - Registry did not owe premiums to its compensation insurer to cover such nurses

Unlawful employment

- *Arnold v. Pingrey*
  - ADJ8746205—WCJ Deborah Ross (OAK); WCAB Panel: Commissioner Sweeney, Deputy Commissioner Schmitz, Commissioner Lowe (dissenting)
  - The WCAB majority held that an applicant was entitled to workers' compensation benefits for injuries from a gunshot wound resulting in T-4 paraplegia and bilateral lower extremity paralysis while working for an uninsured employer to learn about cultivating marijuana.
  - The UEBTF argued that because the applicant's injury arose out of his employment in a criminal enterprise, he was not entitled to compensation.

Causation

- *South Coast Framing*
  - The applicant died from a combination of four medications: Elavil, Neurontin, Xanax and Ambien. The first two were prescribed by a workers' compensation physician, and the other two were prescribed by his private physician
  - QME Dr. Bressler concluded that death was caused by all the medications, separately and in combination
  - AME Dr. Bruff opined that the death was caused by an additive interaction between Ambien and Xanax
  - WCJ Atcherley concluded that death resulted from medications taken for the industrial injury - recon denied

Disability Retirement

- *Flethez v. San Bernardino County Employees Retirement Ass'n*
    - Court of Appeal held no prejudgment interest on retroactive disability retirement benefits award is owed for period when right to receive benefits had not yet vested
    - Not citable because superseded by grant of review, unclear what happened after that

Supplemental Job Displacement Voucher

- *Silva v. Liberty Mutual Ins. Co./LSG Sky Chefs*
  - ADJ7812017, ADJ7813152—WCJ John Hernandez (LAO); WCAB Panel: Chairwoman Caplane, Deputy Commissioner Schmitz, Commissioner Sweeney
  - Unanimous Board panel has denied reconsideration of a trial judge's award of 2 supplemental job displacement vouchers under *Labor Code §4658.5* for two separate injuries, one specific and one cumulative, that had occurred in close temporary proximity

TD/PD Rates

- *Larkin v. WCAB*
  - California Supreme Court (Unanimous opinion prepared by Justice Cuell affirming court of appeal decision): Sworn, regularly employed peace officers not entitled to same maximum compensation as volunteers (temporary disability indemnity at maximum rates, regardless of actual earnings)
  - LC 3362 limits the peace officers entitled to benefit of LC 4458.2 to those who are "deemed ... employee[s]" by a "resolution" of the "governing body of the county, city, town or district so declaring." On the other hand, regularly sworn, salaried peace officers need not "register" to become active police officers; their "active" status stems from the very nature of their employment.

Medical Treatment or refusal thereof

- *Hanker v. Stockton*
- Unanimous panel affirmed WCJ's award of 0% PD to a police officer - for a presumptively compensable cardiac claim - because of her refusal to undergo an ablation procedure that, according to her treating physician (Dr. Walter Chien) and the QME (Dr. Samuel Sobol) was likely to have cured her condition and allowed her to resume work as a police officer without impairment, thereby reducing her 80% WPI to 0%

Self-Procured

- *Ribeiro v. Gus JR Restaurant*
    - The applicant sustained an industrial injury to her lower back and neck. When the defendant refused to authorize spinal surgery, the applicant traveled to Germany for a cervical spine disk replacement surgery.
    - The AME reported that the surgery was not medically necessary, and apportioned 25 percent of her disability to the industrial injury, and 75 percent to nonindustrial factors including the surgery.

Reinstatement

- *California Dept. of Justice v. Board of Administration of Calif. Public Employees' Retirement System (Resendez)*
- The Court of appeal has affirmed a superior court judgment that California's Department of Justice must reinstate an employee who had been on industrial disability retirement for a "spine condition" and cannot require physical or psychiatric evaluations before doing so.

EDD Duplicative Payments

- *Borbeck v. Ace Building Maintenance/Zurich North America*
    - Unanimous board (Razo, Lowe, Gondak) upheld a trial judge's determination that a defendant was subject to both its own and applicant's liability for an EDD lien for duplicative payments. Despite knowing of an EDD lien for an overlapping period of unemployment compensation disability benefits, defendant had entered into a C&R containing the phraise "defendant to pay, adjust or litigate liens."
    - The parties, including EDD, agreed that duplicative payments had been made, but disagreed as to which entity bore the risk for those payments.
    - The panel rejected the argument that, by informing EDD that it was making payments, defendant rid itself of liability for overpayments made by EDD during a period that defendant also paid benefits

Settlement Documents & Body Parts

- *Orellana v. United Care Services*
  - Defendant argued that since the parties had agreed to add this addendum to the C&R, that ALL claims of injury, even those not listed, such as the 9/22/2014 specific injury to the low back, had effectively been dismissed with prejudice, through this addendum language of the C&R.
    - However, applicant countered that Paragraph 3 overruled that addendum and that Paragraph 3 allowed applicant to pursue her specific injury claim of 9/22/2014.
    - The issue was brought to trial. It then became the duty of the trier of fact to determine what the intentions of the parties were when drafting the C&R. Did they intend to settle only the CT? Or did the parties intend to settle both the CT and any future claims such as the specific injury? Was there a "meeting of the minds" on this issue?

DFEC and Dahl implications

- *Contra Costa v. WCAB (Dahl)*
- *Mesanovic v. Specialty Termite*
- *Graham v. Ecolab*

MPN

- *Lescallett v. Wal-Mart*
  - The panel majority held that an applicant was entitled to select a pain management specialist as her primary treating physician outside of the MPN when the defendant's MPN had no pain management physicians within 30 minutes or 15 miles of her residence or workplace.
- *De Guevara v. La Golondrina, Inc.*
  - The WCAB held that an applicant's efforts to call five doctors from an MPN list who would not accept her as a patient did not constitute a denial of care and did not entitle her to treat outside of the defendant's MPN.
- *Soto v. Sambrailo Packaging*
  - The WCAB rescinded a WCJ's decision that an applicant was entitled to obtain medical treatment outside of a defendant's MPN just because it did not have three orthopedic specialists willing to treat her.

UR/IMR

- **Directive v. Mandate.**
- *Arrendondo v. State Comp. Ins. Fund*
- Divided Board panel held that failure to issue an IMR within the time limitations of Labor Code §4610(d) did not either invalidate the determination or give the Board jurisdiction to rule on a medical treatment dispute
- *Saunders v. Loma Linda University Medical Group*
- A divided Board panel has reversed its own previous decision in this case and has held that failure to issue an independent medical review decision with the §4610(d) limitations invalidates that determination and grants Board jurisdiction to decide the underlying medical treatment dispute based on substantial evidence

UR/IMR… continued

- **Directive v. Mandate.**
- *Southard v. Hallmark Cards*
- The majority explained that LC 4610.6(d) specifies that the IMR organization "shall complete its review and makes its determination ... within 30 days of the receipt of the request for review and supporting documentation, or within less time as prescribed by the administrative director," and that LC 4610.6(a) requires that the IMR organization "shall conduct the review in accordance with this article and any regulations or orders of the administrative director."
- *Avila v. University of California Irvine Medical Center*
- The WCAB held that per LC 4610.5(h)(1) and CCR 9792.10.1(b)(1), an IMR application must be received by the administrative director within 30 days of service of the written utilization review determination, and not merely mailed within that time period.

Dispute continues

- *Lee v. Quality Timber Falling* (Panel decision of December 4, 2015) 44 CWCR 12 → finding IMR timeframes not mandatory
- *Gomez v. David Reich Construction* (Panel decision of December 29, 2015) finding IMR timeframes mandatory
- *Southard* is awaiting a date for oral arguments before the Third District Court of Appeal
- *Baker v. WCAB* Court of Appeal, 3d App. Dist., Apr. 8, 2016, No. C080895 → Granted review to settle effect on IMR legitimacy if not timely

Timeliness of UR

- *Green v. Elle Placement dba Dolden Gate Staffing/Lumberman's Underwriting Alliance*
  - UR determination made on fifth working day after RFA received was timely even if communicated after 6:00 pm
  - Zalewski and Razo: UR timeliness for determining and for communicating operate separately
- *Zwicky v. NH Research, Inc.*
- The defendant mailed the UR decision to incorrect, nonexistent addresses for the applicant's attorney, and did not mail it to his address of record. So the WCAB awarded the applicant home health care, eight hours a day, five days per week, based on the opinion of two treating physicians, which the WCAB found constituted substantial evidence to support the need for the applicant's home health care

Timeliness of IMR Appeal

- *Matute v. LA Unified School District*
- Appeals Board issued an **en banc decision**, holding that where Lab. Code § 4610.6(h) provides that a verified appeal from an IMR determination must be filed with the Appeals Board within 30 days of the date of mailing of the determination to the aggrieved employee or employer, the term "mailing" is equivalent to and means "service by mail". Therefore, the 30-day period is extended by five days pursuant to Lab. Code § 531

UR, Exclusive Remedy and Civil Remedy

- *King v. Comppartners*
  - The injured worker was prescribed psychotropic medication, Klonopin, and due to the sudden cessation of the medication following a UR denial, the worker suffered four seizures, resulting in additional physical injuries.
  - He sued the UR organization and UR doctor for professional negligence, among other things.
  - The court found that to the extent the UR doctor was faulted for not communicating a warning of the possible consequences of abruptly ceasing Klonopin, the claims were not pre-empted by the Workers' Compensation Act (WCA) because the warning was beyond the medical necessity determination made by the doctor.

QME/AME

- **Discovery**
- *Batten v. WCAB*
  - WCJ Michael D. LeCover (SLO); W.C.A.B. Panel: Chairwoman Caplane, Commissioner Lowe, Acting Deputy Commissioner Rabine - **deemed noteworthy panel decision**
  - Court of Appeal affirmed the court of appeal decision rejecting reports other than those prepared by treating doctor, review denied
  - Privately obtained evaluation inadmissible to rebut agreed QME's opinion

Sub rosa

- *Cervantez v. Staffmark Transportation*
  - WCAB affirmed WCJ - Defendant could submit video evidence to a panel QME without first authenticating the video through an evidentiary hearing
  - Must be authenticated to be admitted into the evidence at trial, but not for purposes of a med-legal evaluation
- *Wan v. Community Health Network*
  - The WCAB held that a defendant violated LC 4062.3 and CCR 35 by providing *sub rosa* surveillance video at the deposition of the QME without having served the video previously on the applicant.
  - The WCAB noted that LC 4062.3(b) requires that information sought to be provided to the QME shall be served on the opposing party 20 days before the information is provided to the evaluator. It strongly admonished the defendant to avoid the employment of discovery practices that do not comport with the appeals board's policy against unfair surprise.

THE END

IF YOUR STILL AWAKE
IT'S TIME FOR Q&A

THIS IS CASE LAW
AFTER ALL!